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.

Reply Brief of Appellants

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Sadie Molony, now deceased.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

Appellants incorporate the Statement of Issues on Appeal as set out in their Brief.

STATEMENT OF THE CASE

Appellants incorporate the Statement of the Case as set out in their Brief.

STATEMENT OF FACTS

Appellants incorporate the Statement of Facts as set out in their Brief.

ARGUMENT
RESPONDENTS' INTRODUCTION

The premise of Respondents' Introduction is that Charleston City Council had in mind only a limited area of the Peninsula when enacting a zoning ordinance governing the establishment of a stable in a General Business zoning district, and because that area is "densely-built" and building space there is "at a premium", Council must have contemplated stables being within buildings put to multiple uses, and consequently, its intent was to measure, for separating stables from residential zones, from the place within a building where animals are kept, as opposed from the building itself. This premise is flawed.

The zoning regulations that apply to stables are not restricted to the Market District of the Peninsula. [1]They apply to any stable in a General Business zone, whether downtown, in the West Ashley area, or on John's Island or Cainhoy Peninsula. The requirements of Sec. 54-206 (p) apply City-wide, as indeed they must, in order to meet the uniformity requirements State law.

[1] The reference in Sec. 54-206 (p) to a stable securing a Certificate of Appropriateness from the Tourism Commission is readily explainable. Stables used in the horse carriage industry must meet requirements that other stables do not. As the Tourism Commission oversees the horse carriage industry and its approvals are by way of Certificates of Appropriateness, this provision of the ordinance was designed to cover that square.

See S. C. Code Ann. § 6-29-720 (A) and (B) *((A) ...The zoning ordinance shall create zoning districts of such number, shape, and size as the goberning authority determines to be best suited to carry out the purposes of this chapter....(B)...all of these regulations must be uniform for each class or kind of building, structure or use throughout each district, but the regulations in one district may differ than those in other districts*).

The Order of the Circuit Court placed great emphasis on the likelihood of stables being located in the Market District to justify its finding that the dense condition there evinced legislative intent that stables would necessarily be part of multi-use buildings, and thus the separation from residential districts was to be measured from a place within such building. Because the stable regulations apply City-wide, this emphasis on an area downtown was undue, and resulted in a construction of the ordinance that was grammatically and contextually incorrect.

RESPONDENTS' ARGUMENT I

The issue before this Court is whether the Charleston City Council, when requiring "the stable...not [be] located within 100 feet of any residential zone district", intended for the measurement to be made from the building used for this purpose or the place within the building where animals are kept. Respondents place great weight on the circumstance of there being multi-use buildings, particularly in the Market District, to support their position that this circumstance justifies measuring from a point other than the building wall. But simply because there are uses other than a stable within a building does not change the fact that the building is used for a stable. By way of example, the zoning ordinance requires a church in a Conservation zone to be 25 feet from the property line. It is not uncommon for church grounds or for buildings that house sanctuaries to include non-secular uses, as offices space or meeting areas.

To accept the logic of Respondents would allow the requirements of the church setback to be skirted by how the interior of the church building is arranged. Such could hardly have been the intent of the setback for a building used as a church, and likewise for a building used as a stable. The plain meaning of the word "stable" when used as a noun, which Respondents concede to be the case for purposes of the separation requirement (Respondents' Brief, p.12), contemplates a building, and the building at 45 Pinckney Street does not meet the 100 foot separation requirement of Sec. 54-206 (p) (1).

As for the tourism regulations applicable to stables, if anything, they support the interpretation of the Board that a stable is a building. These regulations define "stable" and "stall". A stable is the "barn where animals are kept." A stall is "the individual space within barn where the animals are kept." (R. Vol. I, Tourism Ord. Sec. 29- 212 (b) (12) and (13), p. 245) These definitions leave no room for interpretation. Under them, a stable is a building. A stall is an area within that building. Under them, the building at 45 Pinckney is the stable; Unit A is the stall. And ironically, these definitions apply in the Market District, the dense nature of which Respondents contend supports their position that City Council knew buildings in this area are put to multiple uses, and thus intended for the separation measurement to be made from a place within the building. If that were the case, it begs the question of why Council would have defined a stable as a barn, and not a place within it.

Respondents' reliance on Sec. 29-212 (e) (1) (a) of the Tourism regulations that requires the certification of a veterinarian of the "stable" to support the contention that at stable is not a building is misplaced. This subsection of Sec. 29-212 addresses the care of animals. It is subsection (i) that addresses stable requirements.

On the one hand, Respondents direct the Court to Tourism regulations and their description of the Market District to discern legislative intent of zoning regulations applicable to stables, but on the other, would have the Court disregard how those very regulations define what a stable is. Respectfully, Respondents cannot have it both ways.

That City Council used the term "Buildings", as opposed to "Stables", in subpart 7 of Sec. 54-206 is of no moment to the issue at hand. This is so because the definition of "building" includes a stable, and specifically says that it is a structure. Sec. 54-120 of the Zoning Ordinance provides:

> **Building**. Any structure built for the support, shelter, housing or enclosure of persons, animals or property of any kind...
>
> ***
>
> **Structure**. ...The word "structure" shall include the word "building".

(R. Vol. I, Zoning Ord., Definitions, Sec. 54-120, p. 217, 234)

Thus, a stable being a building, the use of the term "buildings" in subpart 7 is perfectly consistent and is only further evidence that City Council deemed a stable to be a physical structure, and not, as found by the Circuit Court, an activity within a structure.

While this is a case of statutory construction where the Court has broader purview, the Board's interpretation of the ordinance it administers, and not that of staff, is entitled to respectful consideration and should be adopted, absent a compelling reason. Neal v. Brown, 383 S.C. 619, 626, 682 S.E.2d 268, 270 (2009) *(... as we have previously held, an agency's Appellate Panel, not its staff, it typically entitled to deference in interpreting agency regulations)*; Vulcan Materials Co. v. Greenville County 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 charges with its administration should be accorded great deference and will not be overturned absent a compelling reason)*

There is no compelling reason to reverse the Board.

RESPONDENTS' ARGUMENT II

Appellants' point with respect to Respondents' offer to create a horizontal property regime at 45 Pinckney Street is this: if Respondents' theory of measurement is in keeping with legislative intent, there would be no reason to proffer a HPR. Respondents could as easily have committed to the Board that the horses would only be stored in the back half of the building, and the Board could have conditioned the special exception on this circumstance. Respondents aver the HPR establishes enforceable covenants. That is true. But what also is true is that the same result is as achievable without going through the gyrations of establishing a HPR. Vanilla restrictive covenants accomplish the same results. Respondents acknowledge there was no necessity to create a HPR. (Respondents' Brief p. 18) Appellants do not disagree. Appellants merely pose for consideration why, if Respondents' interpretation of the ordinance is so readily apparent, they felt compelled to tie its request for a special exception to a HPR.

As for the appurtenant easement, Respondents asserted Unit A, where the horses would be kept, was over 100 feet from residential zones. Appellants contend it was error for the "stable use" in Unit A to be considered without reference to its only access (which fell within the 100 foot proscription), when the law of HPR requires Unit A to have access to a public street.

RESPONDENTS' ARGUMENT III

In its argument to this Court, Respondents stress that the ordinance at issue is a zoning ordinance, and not a tourism ordinance. Such is true, but there can be little doubt but that the Circuit Court was invited to, and did in fact, rely heavily on Tourism ordinances to support its construction of Sec. 54-206 (p) (1) of the Zoning Ordinance. (R. Vol. I, Memorandum of

Petitioner on Appeal, pp. 135-139; Corrective Order, pp. 9-11) Not only did the Circuit Court find that the zoning ordinance incorporated the provisions of the tourism chapter (R. Vol. I, Corrective Order, p. 9, ¶ 3), it also found the tourism chapter "relevant to a contextual perspective of the zoning ordinance" (R. Vol. I, Corrective Order, p. 10, ¶ 2), that it was in the "urban context" of the Market District that Council adopted the zoning regulations relating to stables (R. Vol. I, Corrective Order, p. 11, ¶ 1), and that the special exception requirements for a stable were "uniquely focused on stables in the horse carriage business" (R. Vol. I, Corrective Order, p. 7, ¶ 4) The Circuit Court affirmatively concluded "it appropriate to consider the definition from the tourism code" (R. Vol. I, Corrective Order, p. 12, ¶ 1). Yet notwithstanding the definition in the tourism regulations that a stable is "the barn where the animals are kept", the Circuit Court ignored the portion of the definition specifying that a stable was a barn (or structure), inexplicably concluding the operative phrase to be "where the animals are kept". This construction of the definition does violence to the rule of statutory construction that all words in a statute must be given effect, rather than adopting an interpretation that renders a portion meaningless. Hinton v. S. C. Dep't of Probation, Parole and Pardon Servs, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004).

Contrary to what Respondents argue, the Appellants are not contending that the zoning ordinance must yield to the tourism ordinances, or vice versa. Appellants are simply pointing out that the tourism ordinances, which the Circuit Court found inextricably linked to the zoning ordinance, defines stable as a structure, and thus the Circuit Court's holding that a stable is not a structure poses inconsistent reasoning.[2]

[2] The Circuit Court did, in fact, find a stable was not a structure. See R. Vol. I, Corrective Order, p. 9, ¶ 1 (*...I find and conclude it was the intent of City Council to describe "stable" as a "use" and not as a physical structure from which the one hundred foot measurement to a residential structure should be made.)*

Respondents' "stable/building" distinction has been addressed in the response to Argument I. A building is a structure that houses animals per the definitions of the Zoning Ordinance. A structure includes buildings per the definitions of the Zoning Ordinance. Thus, the use of the term "buildings" is tantamount to the use of the word structure.

Reading the provisions of Sec. 54-206 (p) (1), in their plain and ordinary sense and grammatical context, demonstrates that City Council deemed a stable to be a structure, not a use within a structure. Reading provisions of the Tourism regulations, in there plain and ordinary sense and grammatical context, demonstrates that City Council deemed a stable to be a barn, or structure. Thus, whether focused on the zoning ordinance or tourism ordinance, or both, the result is the same: a stable is a structure. It was error for the Circuit Court to hold otherwise.

CONCLUSION

For the reasons set forth in this Reply and in their Brief, it submitted that the Order of the Circuit Court should be reversed.

Respectfully submitted,

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

Feb 20, 2015

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 24th day of February, 2015 a true and correct copy of the Reply Brief of Appellants was hand delivered to:

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