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)

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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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.

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STATEMENT OF THE CASE

This matter arises from an appeal of a decision of the City of Charleston Board of Zoning Appeals – Zoning (herein "Board") denying Arkay, LLC a special exception to install a horse stable at its property located at 45 Pinckney Street, in downtown Charleston.

Under the City of Charleston Zoning Ordinance, a stable cannot be located in a General Business zoning district unless the Board grants a special exception, after finding the proposed stable meets the special exception criteria set forth in the ordinance. One of the criteria for a stable is that it not be located within one hundred (100') feet of a residentially zoned district.

Arkay, LLC owns 45 Pinckney Street. In March, 2013, it applied for a special exception to locate a stable in the building at 45 Pinckney Street to house horses used by an affiliate carriage tour company. The matter came before the Board on April 16, 2013. After hearing from the applicant, the zoning administrator and other interested parties, the Board denied the application, finding the stable did not meet the separation requirement of the special exception

criterion, the Board determining the stable would be within one hundred (100') feet on a residentially zoned district.

Arkay, LLC appealed the decision of the Board to the circuit court. Named as Respondents were 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. The appeal was heard by the Honorable J. C. Nicholson, Jr. on April 11, 2014. Judge Nicholson overturned the decision of the Board by Order entered on May 30, 2014. Judge Nicholson entered a Corrective Order on June 25, 2014. A motion to reconsider, alter or amend the judgment was denied by Order entered on June 26, 2014. On July 3, 2014, this appeal was filed.

STATEMENT OF FACTS

No. 45 Pinckney Street is located in downtown Charleston and is owned by Arkay, LLC (herein "Arkay"). One building covers the entire site, that is to say, all walls of the building touch the property lines. The building's only access is from Pinckney Street.

To the east of 45 Pinckney is the Andrew Pinckney Inn. To the west is a parking garage, and to the south are Nos. 14 and 16 Hayne Street. Across Pinckney Street to the north, are single family homes.

No. 45 Pinckney Street and all properties abutting it are zoned General Business (GB). The properties immediately across Pinckney Street are zoned Commercial Transitional (CT). The CT zoning district changes to Single, Two Family Residential (STR) at the northern property lines of properties zoned CT. No. 45 Pinckney Street is within 100 feet of this STR zoning district.

(R.Vol. II, Cir. Ct .ROA, Tab 2, Tr. p.264, lines 3-19; Tab 6, pp. 376- 377; Tab 8, pp. 381-383; Tab 9-5, Arkay Ex.5, pp. 419-420).

Arkay purchased 45 Pinckney Street with the intention of establishing a stable to house horses for an affiliate carriage tour business. A stable in a GB district is not allowed as a matter of right. The use of property for a stable in this district requires that the Board grant a special exception, after finding that certain criteria have been met. The Ordinance provides:

"p. Stables shall be permitted in the GB and UC districts 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 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 demonstrates that the cleaning/loading and tacking area will not impede traffic flow in the public right-of-way;
5. A written explanation of how refuse will be handled in accordance with city, county, state and federal regulations has been reviewed by the Department of Public Service;
6. A plan showing how drainage is to be collected in accordance with city, county, state and federal regulations has been reviewed by the Commissioners of Public Works and the Department of Public Service; and
7. Buildings are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted."

(R. Vol. II, Cir. Ct. ROA, Tab 2, Tr. p. 272, line 18 – p. 273, line 2; Tab 13, p. 484).

In March, 2013, Arkay applied to the Board for a special exception to allow a stable at the site.[1] To meet the special exception criterion mandating separation from a residential zone, Arkay proposed to subject 45 Pinckney to a horizontal property regime (herein "HPR"). The first 11.5 linear feet of the building, measured from Pinckney Street, would become Unit B. This unit would contain 435 square feet, and would be used for the offices of the horse carriage business and another business that sanitizes streets where carriage tours are conducted. Unit B would be burdened by an easement to provide access from Pinckney Street to the remainder of the HPR.

The rear 69.51 linear feet of the building would become Unit A. This unit would contain 1639 square feet and have 6 stalls. This is the unit in which horses would be fed, groomed and stored overnight.

Units A and B would be separated by 14 linear feet of General Common and Limited Common areas. The General Common area, measuring 137 square feet, would contain restroom facilities. The Limited Common area, measuring 360 square feet, would be used solely in conjunction with Unit A, as a waiting area for carriage business patrons. The only access from Unit A to Pinckney Street is through this Limited Common area and across Unit B, by way of easement. Per Arkay's proposal, animals would be housed in over sixty (60%) of the building, exclusive of limited and general common areas.

(R. Vol. II, Cir. Ct. ROA, Tab 2, Tr. p. 283, line 25 – p. 284, line 19; Tab 5, pp. 374-375).

The Board held a hearing on the application on April 16, 2013. Owners of property to the west of the site (owner of Andrew Pinckney Inn) and to the north of the site (owner and/or

[1] No. 45 Pinckney Street was previously used as a stable, including by an affiliate of Arkay. An amendment to the zoning ordinance pertaining to stables was enacted so that now, to establish a stable at this location, a special exception is required. There is no issue of legal nonconforming use in this appeal, as the parties acknowledge that the use of 45 Pinckney as a stable has been discontinued for more than 3 years, and thus any prior nonconforming use of the premises as a stable has lapsed.

personal representative of owner of single family homes) appeared at the hearing in opposition to the application. 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. There was a particular concern raised by the owner of the inn regarding the potential for odor wafting through its cinder block wall, the only wall separating it from the proposed stable. Issues were also raised regarding the legality of the proposed HPR. These property owners 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. 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 the STR residentially zoned district.

The Preservation Society of Charleston and the Historic Ansonborough Neighborhood Association also opposed the application, and other interested persons submitted letters in opposition as well.

(R. Vol. II, Cir. Ct. ROA, Tab 2, Tr. p. 310, line 20 – p. 333, line 10).

Arkay argued the separation requirement of the ordinance was to be measured from the area within the building where the horses would be stored, and that area was over 100 feet from a residential district. The Board rejected this argument. It reasoned that 45 Pinckney Street contained but one building, a circumstance not altered by the establishment of a HPR, and that this building was, by Arkay's own evidence, within 100 feet of a residentially zoned district. The Board further noted that access from the Unit where animals were to be housed to Pinckney Street was by way of an easement that was appurtenant to, or part of, that Unit, which easement was within 100 feet of a residential area. The Board issued a written Order on June 4, 2013 denying the application.

(R. Vol. II, Cir. Ct. ROA, Tab 1, Order of the Board, pp. 253-257).

APPLICABLE LEGAL PRINCIPLES

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the lawmaking body. Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 504, 443 S.E. 2d 401,404 (Ct. App. 1994).

Legislative intent should be ascertained primarily from the plain language of the statute. A primary rule of statutory construction is that words must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands its operation. Abraham v. Palmetto Unified School District No. 1, 343 S.C. 36, 49, 538 S.E. 2d 656, 663 (Ct. App. 2000).

A statute as a whole must receive a practical, reasonable and fair interpretation, consonant with the purpose, design and policy of the lawmakers. Words should be given their plain and ordinary meaning, and courts should not look to impose another meaning. State v. Johnson, 343 S.C. 693, 695, 541 S.E. 2d 855, 857 (Ct. App. 2001).

Deference is given to the decisions of those charged with interpreting and applying local zoning ordinances. Historic Charleston Foundation v. Krawcheck, 313 S.C. at 505, 443 S.E. 2d at 405.

The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled absent a compelling reason. Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 496, 536 S.E. 2d 892, 900 (Ct. App. 2000).

In construing a statute, it is proper to consider other legislation dealing with the same subject matter. Fidelity & Casualty Ins. Co. v. Nationwide Ins. Co., 278 S.C. 332, 335, 295 S.E. 2d 783, 785 (1982).

ARGUMENT

INTRODUCTION

This case concerns the construction of a zoning ordinance. Under the City of Charleston Zoning Ordinance, to establish a stable in a General Business (GB) zoning district, it is necessary for an applicant to secure a special exception from the Board. The Board is charged with making specific findings before a special exception can be granted. One criterion of the special exception is that the stable must be separated from a residentially zoned district by at least 100 feet.

As to this case, these facts are not disputed: No. 45 Pinckney Street, where a stable is proposed to be sited, is located in a GB zone. No. 45 Pinckney Street, where a stable is proposed to be sited, is wholly covered by a single building, none of its walls being set back from any property line. No. 45 Pinckney Street, where a stable is proposed to be sited, is within 100 feet of a residentially zoned district.

The Board refused to grant a special exception to allow a stable to be located at 45 Pinckney Street because a stable there could not meet the separation requirement of the special exception criteria. The circuit court reversed the decision of the Board. A review of the court's reasoning reveals it artificially dissected the building, dividing where the activity of stabling is to occur from the remainder of the building. The circuit court reasoned that, because the animals would be housed in the back of the building at 45 Pinckney Street, and because that portion of

the building was more than 100 feet from a residentially zoned district, the separation requirement of the special exception criteria had been met.

The Order of the circuit court must be reversed because it misapplies principles of statutory construction by failing to accord the term "stable" its plain and ordinary meaning, instead attributing to the term a construction not in keeping with the grammatical context in which it was used. The Order of the circuit court must be reversed because the creation of a horizontal property regime does not result in subdivided land or buildings. It is but a form of ownership. The Order of the circuit court must be reversed because it is inconsistent. On the one hand, the court found the requirements for a stable in the zoning ordinance were "uniquely focused" on stables in the carriage tour business, but then on the other, disregarded the definition of "stable" in the tourism regulations that says a stable is the barn where animals are kept, not the place within the barn where the animals are kept.

I. THE CIRCUIT COURT ERRED IN ITS CONSTRUCTION OF SEC. 54-206 (p) OF THE CITY OF CHARLESTON ZONING ORDINANCE, THE ERROR BEING THE COURT'S ORDER IS PREMISED ON THE TERM "STABLE" BEING LIMITED TO THE ACT OF STABLING, WHEN THE TERM, WHEN READ IN CONTEXT, ENCOMPASSES NOT JUST THE ACTIVITY OF STABLING, BUT ALSO THE BUILDING WHERE THAT ACTIVITY IS TO OCCUR. (Issue 1)

At issue in this case is the legislative intent of the Charleston City Council in its use of the term "stables" and "stable" in Sec. 54-206 (p) of the zoning ordinance. The term "stable" can be used as both a noun and a verb. The circuit court held the term, as used in Sec. 54-206 (p), was intended to be construed only as a verb, to the activity of stabling: "...I conclude it was the intent of City Council to describe 'stable' as a 'use' and not as a physical structure..." (R. Vol. I, Corrective Order, p. 9, ¶ 1) This conclusion is erroneous, as it disregards the grammatical

context in which the word was used, and disregards the fundamental underpinning of zoning, that it not just regulates "use", but that it regulates use as it relates to land, building or structures.

In each instance where the word "stable" is used in Sec. 54-206(p), the word is used as a noun. The introductory phrase of the special exception uses the term "Stables": "Stables shall be permitted..." (*underline original*) In subsections (1), (2) and (3), when the term "stable" is used, the term is always qualified by the article "the". The article "the" is used to qualify or mark a noun, adjective or adverb. See Webster's Encyclopedic Unabridged Dictionary of the English Language, New Revised Edition 1996, p. 1470. Here, City Council used the word as a noun, and when so used, a stable is a building. Id. at 1382: "Stable: a building for the lodging and feeding of horses, cattle, etc." City Council did not use the term in its active tense. To accept the circuit court's construction of the term "stable" would require either ignoring the article preceding the term that City Council chose to insert, or by adding after the term the word "use" or "activity", when City Council chose not to. Either scenario violates principles of statutory construction, as it is not within the purview of the court to add or delete words from statutes. Hartford Accident and Indemnity Company v. Lindsay, 248 S.C. 307, 149 S.E. 2d 647 (1979). When reading the ordinance in its entirety and its words in context, as a court is required to do. S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n., 303 S.C. 339, 343, 412 S.E. 2d 377, 379 (1991) (*Clearly, words in a statute must be read in context),* the legislative intent is apparent. City Council did not say "the stable use" or "the stable activity"; it said "the stable".

That City Council meant a building or structure put to use as a stable is further substantiated by its use of the term "buildings" in subpart 7 of the special exception criteria. Buildings used as stables, as 45 Pinckney Street, must be properly ventilated. (R. Vol. II, Cir. Ct. ROA, Tab 13, p. 484) The circuit court's holding that by its use of the term "buildings" in subpart 7, Council

intended a differentiation within a building when it housed a stable and other uses is a leap, at best, requiring a strained, if not tortured, construction of a common word.

The circuit court's reference to other special exception uses, such as cemeteries, churches and gas stations as justification for the term "stable" being intended as a form of activity misses the mark. This becomes patently clear when a criterion of a special exception includes a separation requirement, as with a stable. By way of example, a cemetery is a use permitted by special exception if no "building or parking lot thereof" is located within 100 feet of an adjoining lot. (R. Vol. II, Cir. Ct. ROA, Tab 13, p. 482) As with a stable, City Council contemplated a cemetery as including more than the places where remains are interred, but also its buildings and parking areas. The same holds true for a church. The church, not the activity of worship within it, must be at least 25 feet from an adjoining property line. (R. Vol. II, Cir. Ct. ROA, Tab 13, p. 482) As for a gas station, the special exception criteria encompass far more than the act of supplying or pumping gas. All buildings associated with it must meet separations requirements. (R. Vol. II, Cir. Ct. ROA, Tab 13, p. 483). To follow the reasoning of the circuit court would mean that so long as the place within the building used to support a gas station meets the separation requirements, the building satisfies the special exception criteria. But more to the point, when Council did want to regulate a use in its active form by way of special exception, it specifically did so. Sec. 54-206 (m) governs logging camps and forestry *activities*. Sec. 54-206 (v) governs *mining*, specifically *mining operations*. (R. Vol. II, Cir. Ct. ROA, Tab 13, pp. 483; 485) Had Council intended for a stable to be limited to stabling *activities*, it clearly knew how to do so, and surely would have done so.

Moreover, sight must not be lost of the fact that before the circuit court was the construction of a zoning ordinance. Zoning does not regulate uses in isolation. Zoning regulates uses as they

relate to land, buildings or structures. See S.C. Code Ann. § 6-29-720 (Rev. 2004) (*...within each district, the governing may regulate: (1) the use of buildings, structures and land.*) Because the building at 45 Pinckney Street occupies the entire lot, the lot and building, for purposes of zoning, are one and the same. And the evidence is undisputed but that the lot/ building at 45 Pinckney is within 100 feet of a residentially zoned district. As a result, 45 Pinckney Street does not qualify as a site for a stable, and it was error for the circuit court to hold otherwise.

II. THE CIRCUIT COURT ERRED IN ITS CONSTRUCTION OF, AND RELIANCE ON, THE LAW HORIZONTAL PROPERTY REGIME AS A MEANS OF SATISFYING THE SEPARATION REQUIREMENT OF SEC. 54-206 (p) OF THE CITY OF CHARLESTON ZONING ORDINANCE, THE ERROR BEING THAT A HORIZONTAL PROPERTY REGIME DOES NOT RESULT IN A SUDBIVISION OF LAND OR THE CREATION OF A LOT, AND THE CREATION OF A HORIZONTAL PROPERTY REGIME HAS NO RELEVANCY TO THE COURT'S CONSTRUCTION OF THE ORDIANANCE. (Issues 2 and 3)

That Arkay intends to subject the land and building at 45 Pinckney Street to a horizontal property regime (herein "HPR") is of no moment. A HPR is but a form of ownership within a shared premise.

> ...we agree with the master that...conversion to a condominium divides an *ownership interest* in the *property* but does not subdivide the land itself. 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 area remain intact and the owner merely grants a share of his ownership interest in the property to purchasers. Thus, the owners of individual units share ownership of the property/common areas as tenants in common. The property itself is not subdivided or replatted, nor does the "footprint" of the property change *(emphasis original)*. Penny Creek Associates, LLC v. Fenwick Tarragon Apartments, LLC, 375 S.C. 267,274 651 S.E. 2d 617, 621 (2007).

Thus, both before and after the creation of a HPR, the building at 45 Pinckney remains but one building. The HPR would merely allocate ownership interests within the building. The building

envelope remains unchanged. The building envelope, where the stable and stabling activities will occur, remains within 100 feet of a residential area.

Even if a HPR could somehow be construed to move the unit where the stable is to be located beyond the 100 foot separation requirement, Arkay still falls short because the access, or doorway, to the stable unit is within the proscribed distance. State law mandates that any apartment created by a HPR have direct access to a public street or to a common area leading to a public street. S.C. Code Ann. § 27-31-20 (a). The unit where animals will be kept (Unit A) will not have direct access to Pinckney Street. Its proposed access to Pinckney Street is by easement, which by law must be appurtenant, or part of, the Unit, and this easement is within 100 feet of a residential zoned district. Even if the easement were to be made common area, the result would be the same. That area is essential to effectuate use of Unit A and is appurtenant to it. It was error for the circuit court to dissect Unit A from its access to justify a holding that the "stable use" met the separation requirement of the ordinance.

This error becomes more patent when consideration is given to the various components of a HPR. Under HPR law, a building is a "structure containing two or more apartments." S.C. Code Ann. § 27-31-20 (b). Under HPR law, the roof and walls of 45 Pinckney Street are areas common to all units. S.C. Code Ann. § 27-31-20 (f). By logic, these elements are essential to the use of the building or any activity in it. This unit, then, where the stable is proposed to be sited, is part of a building that is undeniably within 100 feet of a residentially zoned area. To adopt the circuit court's construction of the effect of a HPR would require that the front part of the building at 45 Pinckney be ignored, despite the fact that its use is essential to access and service the stable in the back half of the building. HPR law provides no safe haven for Arkay.

Arkay's argument, as adopted by the circuit court, is bottomed on the contention that, when measuring the distance of the stable from the residential zone, one starts from where the "use" occurs, and here, that use would be confined to an area of the building beyond 100 feet from the residential district. But if this premise for the measurement is correct, there would be no need to even propose a HPR. Arkay could merely house its horses in the rear of the building. Arkay and the circuit court apparently recognized that such a proposition would run afoul of the intent of the ordinance. A HPR which produces the same effect does so as well.

III. THE CIRCUIT COURT ERRED IN ITS CONSTRUCTION OF THE CITY OF CHARLESTON ZONING ORDINANCE AND TOURISM ORDINANCE BY FAILING TO RECONCILE AND CONSTRUE THEM IN A CONSISTENT MANNER.

A review of the circuit court's order reveals that it heavily relies on regulations applicable to stables used in the horse carriage tour industry to support its conclusion that a stable is a "use", and not the building in which it is located. The court found that Sec. 54-206 (p), the zoning regulations, were "uniquely focused on stables in the horse carriage tour business", and that it was "in this urban context that City Council adopted the Zoning Ordinance relating to stables." (R. Vol. I, Corrective Order, p.7, ¶ 4; p. 11, ¶ 1) If such is the case, the circuit court's error in holding that a stable is not a physical structure is even further compounded.

The Tourism Ordinance leaves no room for interpretation as to what is meant by a stable. The ordinance defines a stable in unequivocal terms. It defines "stable" as the "barn where animals are kept". (R. Vol. I, Tourism Ord. Sec. 29-212 (b) (12), p. 245). The Tourism Ordinance also defines "stall", that being the "individual space within the barn where the animals are kept". (R. Vol. I, Tourism Ord. Sec. 29-212 (13), p. 245). Thus, there is no doubt but that, under the Tourism Ordinance, a stable is a structure that includes stalls where the animals are

kept. As applied to 45 Pinckney Street, the building there would be the stable (the barn where animals are kept), and Unit A would be the stalls (the place within the barn where the animals are kept). And, reference to other provisions of the Tourism Ordinance specific to stables brings home the point that a stable is a structure: stables must be lighted, ventilated and protected from the weather; stables must be free of leaks, including from roofs or plumbing; the interior and exterior of the stable must be kept clean; and there can be no smoking "in" stables. (R. Vol. I, Tourism Ord. Sec. 29-212 (i) (1) (a), (e), (i) and (j), pp. 248-249) None of these provisions makes sense outside the context of a stable being a structure. The Court's reference to Sec. 29-212 (e) (1) (a) of the Tourism Ordinance for the proposition that the term stable in the Ordinance is not always to be construed as a structure is unavailing because subsection (e) of the ordinance addresses how animals are cared for. It is subsection (i) that defines and addresses what a stable is. In construing statutes, specific statutes are given preference over general ones. Atlas Food Sys & Services v. Crane Nat'l Vendor Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E. 2d 858, 859 (1995) (*The general rule of statutory construction is that a specific statute prevails over a more general one).*

The reasoning of the circuit court is inconsistent. On the one hand, the tourism stable regulations are deemed to be the driving force behind the zoning stable regulations; on the other, the very definition of stable in the tourism regulations is to be ignored for purposes of zoning. Such reasoning does not comport with a standard principle of statutory construction that statutes dealing with the same subject are in *pari materia*, and must be construed together, if possible, to produce a harmonious result. Howell v. United Stated Fid. & Guar. Ins. Co., 370 S.C. 505, 510, 636 S.E. 2d 626, 628 (2006). Such reasoning is inconsistent a standard principle of statutory construction that consideration of legislation dealing with the same subject matter is helpful in

discerning legislative intent. Fidelity Casualty Ins. Co. v Nationwide Ins. Co, *supra*, 278 S.C. at 335, 295 S.E. 2d at 785.

The zoning and tourism stable regulations are complimentary and readily reconcilable. Every stable in a GB district must comply with the zoning criteria of Sec. 54-206 (p). Every stable used in the carriage tour business must comply with the zoning criteria of Sec. 54-206 (p) and the tourism criteria of Sec. 29-212 (i). Compliance with both can be had. Neither is mutually exclusive of the other. And because the ordinances must be harmonized, the definition of stable in the tourism regulations is cogent, if not conclusive, evidence of legislative intent that a stable is a structure.

CONCLUSION

It is submitted that the circuit court erred in its construction of Sec. 54-206 (p) of the Charleston Zoning Ordinance, requiring that its Corrective Order be reversed and the decision of the Board reinstated.

Respectfully submitted,

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

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FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in its construction of the term "stable" as used in Section 54-206p of the City of Charleston Zoning Ordinance, to mean the physical space where animals are kept in a building, where the building contains multiple uses?

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.)

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).*

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.

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CERTIFICATE OF COUNSEL

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

February 24, 2015

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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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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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CERTIFICATE OF COUNSEL

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

Feb 20, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Arkay, LLC and Robert R. Knoth, Respondents,

v.

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

Appellate Case No. 2014-001466

Appeal From Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5419
Heard January 13, 2016 – Filed June 29, 2016

REVERSED

Charlton de Saussure, Jr., of Haynsworth Sinkler Boyd, P.A., and Frances Isaac Cantwell, both of Charleston, for Appellants City of Charleston and City of Charleston Board of Zoning Appeals; Wilbur E. Johnson, of Young Clement Rivers, LLP, of Charleston, for Appellant Andrew Pinckney Inn; and Thomas S. Tisdale, Jr., of Hellman Yates & Tisdale, P.A., of Charleston, for Appellant Michael A. Molony.

Capers G. Barr, III, of Barr, Unger & McIntosh, LLC, of Charleston, for Respondents.

WILLIAMS, J.: In this zoning case, the City of Charleston (the City), the City of Charleston Board of Zoning Appeals (the Board), the Andrew Pinckney Inn, and Michael A. Molony (collectively "Appellants") appeal the circuit court's reversal of the Board's denial of Arkay, LLC's (Arkay) application for a special use exception to operate a carriage horse stable. Appellants contend the court erred in (1) finding the special use exception ordinance described a stable as a "use" rather than a physical structure, (2) relying upon the law of horizontal property regime (HPR) as a means of satisfying the separation requirement, and (3) failing to reconcile and construe the zoning and tourism ordinances in a consistent manner. We reverse.

FACTS/PROCEDURAL HISTORY

Robert R. Knoth owns and operates Carolina Polo & Carriage Company (Carolina Polo), one of five franchised horse carriage tour businesses in Charleston, South Carolina. From 1990 to 1996, Carolina Polo's stable was located at 45 Pinckney Street in the historic City Market District. After losing its lease, Carolina Polo relocated to a building on the other side of the same block at 16 Hayne Street. From 1996 to 2009, another horse carriage company ran its business out of the 45 Pinckney Street location. In 2013, Carolina Polo lost its lease at 16 Hayne Street, but Knoth was able to purchase the prior location at 45 Pinckney Street. Knoth placed the property title in the name of Arkay, of which he is the sole member.

In the mid-1990s, the Charleston City Council (the Council) enacted legislation under its zoning code to regulate the horse carriage tour business in the city. Pursuant to section 54-206(p) of the City of Charleston Code of Ordinances (2015), horse stables are permitted in general business and urban commercial zoning districts if they are granted a special use exception by the Board. The Board must grant a special use exception if it finds an applicant has met seven criteria, including when a stable is not located within 100 feet of a residentially zoned district. From the adoption of this legislation until 2009, 45 Pinckney Street—located within 100 feet of a residential district—operated as a nonconforming use under the City's zoning ordinances.

At the time of Arkay's purchase, the 45 Pinckney Street building no longer qualified as a nonconforming use because it was not used as a horse stable for more than three years between 2009 and 2013. Accordingly, in March 2013, Arkay applied for a special use exception to operate a stable at 45 Pinckney Street—a property zoned for general business—to house Carolina Polo's carriage horses. The Preservation Society of Charleston, the Historic Ansonborough

Neighborhood Association, and several neighbors opposed the application. At the evidentiary hearing, Arkay conceded the frontage of the building at 45 Pinckney Street was within 93.5 feet of the closest residential district to the north. Arkay argued, however, that the separation requirement only applied to the use of stabling, not the physical structure.

To separate the "stabling activity" from the residential district, Arkay proposed an HPR to divide the building at 45 Pinckney Street into two units. In the southern rear portion of the building, Unit A would consist of six stalls in which the horses would be fed, groomed, and stored. In the northern front portion of the building, Unit B would contain two offices and be subject to an appurtenant easement for the benefit of Unit A for ingress and egress to Pinckney Street. Unit B would also be subject to a recorded covenant prohibiting the use of that space as a stable. Additionally, Units A and B would be separated in the middle of the building by a common area consisting of two tack rooms, two restrooms, an area for customer waiting, and an area for customer loading and unloading. Because its horse stalls would be located 119 feet from the nearest residential zone, Arkay contended the stabling activity complied with the zoning ordinance's separation requirement. Alternatively, Arkay applied for a *de minimis* variance of 6.5%, arguing only half of the frontage of the building failed to meet the 100-foot requirement by 6.5 feet.

After hearing from Arkay, the zoning administrator, and other interested parties, the Board denied the application on June 4, 2013, finding the stable did not meet the 100-foot separation requirement. In reaching its decision, the Board rejected Arkay's argument that the ordinance described "stable" as a use and not a physical structure. The Board noted only one building occupies 45 Pinckney Street and the proposed HPR did not alter that circumstance. The east, west, and south sides of the building share common walls with neighbors, and the front of the building is flush with the sidewalk. While Arkay would store the horses in Unit A, the Board found the building contained only one access to a public street and the horses would have to pass through Unit B to reach Pinckney Street. Because Unit B and the proposed appurtenant easement were areas within 100 feet of a residentially zoned district, the Board held 45 Pinckney Street did not qualify as a site for a stable under the zoning ordinance. The Board also denied Arkay's application for a variance in a separate order on June 4, 2013.

Arkay subsequently appealed the Board's orders to the circuit court. The court issued an order on May 30, 2014,[1] and Appellants filed a Rule 59(e), SCRCP, motion to alter or amend judgment. In response, the court issued a corrected order dated June 19, 2014, reversing the Board's order denying Arkay's application for a special use exception. Through a plain reading analysis of section 54-206, the court held the zoning ordinance's separation requirement applied only to the use of stabling, not the physical structure. The court first noted section 54-206 is titled "[s]pecial exception *uses*" and regulates nineteen different uses of property that can qualify for special zoning exceptions. Accordingly, the court found that, with few exceptions, the special uses set forth in section 54-206 describe specific forms of activity.

Additionally, the court stated the requirements for a stable in section 54-206(p) focus on the use of the property as a horse carriage tour business, not the physical building. Noting section 54-206(p)(2) requires that "[t]he City of Charleston Tourism Commission has issued a Certificate of Appropriateness for the stable," the court reasoned the certificate described in the City's tourism chapter is not issued for a stable, but rather for a horse carriage vehicle. Thus, the court found the certificate is an aspect of the "use" of the property in general. Similarly, the court found section 54-206(p)(4) prohibits the cleaning, loading, and tacking areas from impeding traffic flow in a public right of way and, therefore, is another regulation on the use of the property.

Most noteworthy, the court found section 54-206(p)(7) requires that "[*b*]*uildings* [be] designed utilizing appropriate ventilation to prevent objectionable odors from being emitted." In contrast, the court noted section 54-206(p)(1) only prohibits the "stable" from being located within 100 feet of any residentially zoned district, not the "buildings." Thus, the court found the Council only intended that the stabling activity and potentially obnoxious characteristics of housing horses be subject to the separation requirement.

The court also noted the city tourism chapter defines *stable* as "the barn where the animals are kept." In the urban context of downtown Charleston, the court reasoned the word *kept* means "preserved or maintained," which would be accomplished by Arkay's proposed HPR. Lastly, the court held the Board erred in measuring the distance of separation from the nearest residential district to the easement, instead of measuring it to the "use" as a stable. The court explained "the

[1] This order was not included in the record on appeal.

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." Because its reversal on the special use exception was dispositive, the court found it unnecessary to address the Board's order denying Arkay's application for a variance. This appeal followed.

STANDARD OF REVIEW

The appellate court gives "great deference to the decisions of those charged with interpreting and applying local zoning ordinances." *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). This court will not reverse a zoning board's decision unless the board's findings of fact have no evidentiary support or the board commits an error of law. *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). "[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009). "The determination of legislative intent is a matter of law." *Somers*, 319 S.C. at 67, 459 S.E.2d at 843.

LAW/ANALYSIS

Appellants argue the circuit court erred in finding the special use exception ordinance described a stable as a use rather than a physical structure. According to Appellants, in doing so, the court failed to reconcile and construe the zoning and tourism ordinances in a consistent manner. Moreover, Appellants contend the court erred in relying upon the law of HPR as a means of satisfying the separation requirement. We agree.

A governing body's "intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 466, 360 S.E.2d 76, 79 (Ct. App. 2004) (quoting *Somers*, 319 S.C. at 67, 459 S.E.2d at 843). "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Somers*, 319 S.C. at 68, 459 S.E.2d at 843. "In construing ordinances, the terms used must be taken in their ordinary and popular meaning." *Id.* "Moreover, 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." *Beaufort Cty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011).

The ordinance at issue in this case, section 54-206(p), provides the following requirements a stable must meet to receive a special use exception:

> 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 a 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.

At the outset, we note the ordinance's seven requirements do not describe "uses" of the property, but rather establish firm prerequisites on how the stable must be configured and how it must operate to receive a special use exception from the Board. Additionally, we disagree with the circuit court's finding that the Council made a relevant distinction between a stable and a building in section 54-206(p)(7) because a stable already comes under the definition of a building in the zoning code. *See* Charleston, S.C., Code of Ordinances § 54-120 (2015) (defining a *building* as "[a]ny structure built for the support, shelter, housing[,] or enclosure of

persons, *animals*[,] or property of any kind" (emphasis added)). Thus, we find—and it seems all parties agree—that section 54-206(p)(1) applies the 100-foot separation requirement to a physical location. Consequently, our focus turns to whether the Council intended such physical location to mean a structure or the exact place where horses are kept.

"Stable" is not defined in the City's zoning code. *See* § 54-120. Section 54-206(p)(3), however, requires that stable operators abide by city regulations for stables. Thus, to further gauge legislative intent on what constitutes a stable, we must examine the City's tourism chapter, which provides for substantial regulation of horse carriage businesses operating in Charleston.[2] *See Beaufort Cty.*, 395 S.C. at 371, 718 S.E.2d at 435 (holding 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").

Enacted in 2007, section 29-212 of the City of Charleston Code of Ordinances (2015) specifically focuses on the management of carriage horse businesses and differentiates between stables and stalls. Subsection 29-212(b)(12) defines *stable* as "the barn where the animals are kept." On the other hand, section 29-212(b)(13) defines *stall* as the "individual space within the barn where each animal is kept." Thus, stalls are a smaller component of the larger entity that is the stable.

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—and would be separated from the street by areas for customers, tack rooms, restrooms, and offices—this does not change the building's status as a barn. Moreover, we find these areas and rooms in the front portion 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

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[2] On appeal, Arkay contends it is not appropriate to consider definitions in the tourism code as a part of the analysis because section 29-212(b) precludes their application to the zoning code providing that, "[e]xcept where the context clearly indicates otherwise, the following terms and phrases as used in this section shall have the following meanings." We disagree because the context of the relevant zoning and tourism sections is the regulation of horse carriage businesses in Charleston.

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

Additionally, Arkay's proposed definition of *stable* as meaning only where the horses are kept essentially undermines a number of important provisions regulating stables. *See, e.g.*, Charleston, S.C., Code of Ordinances § 29-212(i)(1)(j) ("There shall be no smoking at any time in stables."); § 29-212(i)(3) ("All stables shall have a yearly inspection by the fire department."); § 29-212(i)(1)(i) ("Interior and exterior areas of the stable shall be kept clean, properly drained[,] and free of nuisances including, but not limited to, unreasonable and excessive odors and unreasonable accumulation of refuse and excreta."). Arkay's construction of *stable* would not prohibit smoking in 45 Pinckney Street's customer waiting, loading, and unloading areas that are directly adjacent to the horse stalls. Further, the fire department would only have to annually inspect the horse stalls instead of the entire building for fire hazards. Likewise, Arkay would only have to clean the horse stalls and the areas surrounding them, but not the sidewalk area on Pinckney Street. Accordingly, we find Arkay's interpretation leads to absurd results. *See Lancaster Cty. Bar Ass'n v. S.C. Comm'n on Indigent Def.*, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (holding a court will reject an interpretation when it would lead to an absurd result that could not have been intended by the legislative body).

Based upon our review of the language of the relevant ordinances, we find the 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. 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 noise, odors, waste, drainage, and pests from residential areas. The circuit court's finding that the ordinance describes the stable in subsection 54-206(p)(1) as a use, rather than a physical structure, runs afoul of the purpose for which the ordinance was enacted. Therefore, mindful of our deferential standard of review, we hold the circuit court erred in reversing the Board's denial of Arkay's application for a special use exception. *See Gurganious*, 317 S.C. at 487, 454 S.E.2d at 916 (noting the appellate court gives "great deference to the decisions of those charged with interpreting and applying local zoning ordinances").

Likewise, we find the circuit court erred in relying upon the law of HPR in holding Arkay satisfied the separation requirement.[3]

Under the South Carolina Horizontal Property Act,[4] an owner of real property may establish an HPR through the recordation of a master deed. *See* S.C. Code. Ann. § 27-31-30 (2007). A property's conversion to an HPR divides the ownership interest in the property but does not subdivide the land itself. *Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC*, 375 S.C. 267, 274, 651 S.E.2d 617, 621 (Ct. App. 2007).

In our view, 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. *See Penny Creek*, 375 S.C. at 274, 651 S.E.2d at 621 (concluding that, under an HPR, "the property and common areas remain intact and the owner merely grants a share of his ownership interest in these areas to purchasers"). Unit B, the easement, the tack rooms, the restrooms, and the customer areas would all be underneath the roof of the building, and the building is within 100 feet of a residentially zoned district. Therefore, we find the court erred in considering Arkay's proposed HPR for 45 Pinckney Street in reaching its decision.

CONCLUSION

Based on the foregoing, because we find Arkay's proposed stable at 45 Pinckney Street failed to meet the separation requirement of subsection 54-206(p)(1), we hold the circuit court erred in reversing the Board's denial of Arkay's application

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[3] Arkay argues the circuit court did not rely upon its proposed HPR in holding that Arkay satisfied the 100-foot separation requirement. Arkay contends the proposed HPR was simply a showing of good faith to the Board, as well as the public, that no horse stalls would be located in Unit B on the north end of the building within 100 feet of a residential district. We disagree, however, because the circuit court specifically mentioned the HPR in holding the Board erred in measuring the separation distance from the access easement instead of the stabling use. The court also acknowledged the proposed restrictive covenant for Unit B—which could only be accomplished through the proposed HPR—would prohibit horses from being kept in Unit B.

[4] S.C. Code Ann. §§ 27-31-10 through -440 (2007 & Supp. 2015).

for a special use exception to operate a carriage horse stable. Accordingly, the circuit court's order is

REVERSED.

HUFF, J., concurs.

THOMAS, J., dissenting: I respectfully dissent. I agree with the circuit court that the City of Charleston Board of Zoning Appeals erred in denying Arkay a special exception use permit.

This appeal involves the interpretation of section 54-206(p) of the City of Charleston Code of Ordinances (2015). The majority holds the circuit court erred in reversing the Board's denial of Arkay's application for a special use exception and bases this holding on (1) a deferential standard of review in deciding how to apply subsection 54-206(p)(1), under which a stable may operate as a special exception use in certain zoning districts if, among other criteria, "[t]he stable is not located within 100 feet of any residential zone district"; and (2) an examination of ordinances from the City of Charleston Tourism Ordinances. In reaching its decision, the majority finds the City Council intended to apply the 100-foot separation requirement to the building at 45 Pinckney Street, which, as the circuit court observed, is built on the "zero lot line" with its northern façade constructed flush with the sidewalk, rather than to the specific part of the building that would be used for Arkay's stable.

I agree with the majority that, as appellate tribunals, this court and the circuit court must "give great deference to the decisions of those charged with interpreting and applying local zoning ordinances." *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). However, "[i]ssues 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." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015); *see also Mikell v. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009) ("Although great deference is accorded the decisions of those charged with interpreting and applying zoning ordinances, 'a broader and more independent review is permitted when the issue concerns the construction of an ordinance.'" (quoting *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008))).

I would interpret section 54-206(p) solely through common sense scrutiny of its plain language and would not resort to subordinate rules concerning the construction of statutes. *See McClanahan v. Richland Cty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can reasonably be discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 584 (2000) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)); *Rabon v. S.C. State Highway Dep't*, 258 S.C. 154, 157, 187 S.E.2d 652, 654 (1972) (stating the rule that statutes are to be construed in pari materia "may be applied where there is an ambiguity to be resolved and not where . . . the meaning of the statute is clear and unambiguous").

Although buildings where horses are kept are commonly referred to as stables, a stable is different from other buildings because of the activities that take place within it, namely, the feeding, sheltering, and care of domestic animals. To include other uses such office space, restrooms, or a customer waiting area as part of a stable merely because they are housed within the same physical structure is not supported by any grammatical analysis or by any construction of any provision of the Charleston City Code.

Particularly significant in the present case is the final requirement in section 54-206(p) to obtain special exception approval for a stable. This requirement reads as follows: "*Buildings* are designed utilizing appropriate ventilation to prevent objectionable odors from being emitted." Charleston, S.C. Code of Ordinances § 54-206(p)(7) (2015) (emphasis added). As the circuit court observed, the City Council, in using the word "building" when referring to a physical structure, "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.'" *See Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("It is never to be supposed that a single word was inserted in the law of this [S]tate without the intention of thereby conveying some meaning."); *Nexsen v. Ward*, 96 S.C. 313, 321, 80 S.E. 599, 601 (1914) ("The rule sustained by all the courts requires that every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction." (*quoted in*

Breeden v. TCW, Inc./Tenn. Express, 355 S.C. 112, 120 n.7, 584 S.E.2d 379, 383 n.7 (2003))).

Furthermore, the specific requirement in subsection 54-206(p)(7) that "[b]uildings [be] designed using appropriate ventilation to prevent objectionable odors from being emitted" shows a recognition that stables are likely to be located in buildings that are also used for other purposes. To impose such sanitation measures on an entire building in which a stable is located shows prudent consideration of the need to avoid undesirable consequences that could not be avoided if such measures were required only within the stable itself.

The majority correctly notes that subsection 29-212(b)(12) of the City of Charleston Code of Ordinances (2015) defines "stable" as "the barn where the animals are kept." As I have previously noted, it is not necessary to construe this ordinance together with section 54-206(p) with the objective of producing "a single, harmonious result." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 470, 636 S.E.2d 598, 607 (2006). Nevertheless, in response to the majority's reliance on parts of the City of Charleston Tourism Ordinances to support its holding, I note the definitions provided in section 29-212(b) apply only "as used in this section" and, even within this limitation, do not apply "where the context clearly indicates otherwise." Charleston, S.C. Code of Ordinances § 29-212(b) (2015).

Finally, notwithstanding the reference in the appealed order to the proposed horizontal property regime and the finding based on the regime plot plan that the 100-foot separation requirement was satisfied, I agree with the respondents that there was no need to create a horizontal property regime in order to obtain a special exception use permit. Rather, the purpose of the regime is to provide assurance to the City and the public that the physical space where the horses would be kept, i.e., the stable in Unit A, will be at least 100 feet from the nearest residential district and in compliance with section 54-206(p).

I would therefore affirm the appealed order.

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
Appellate Case No: 2014-001466
Opinion No: 5419, filed June 29, 2016

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.

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING *EN BANC*

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Respondents Arkay, LLC and Robert R. Knoth, its member, Petitioners herein, ("Petitioners") hereby petition for a rehearing pursuant to SCACR Rule 221(a) and suggest the desirability of a rehearing, *en banc*, pursuant to SCACR Rule 219(b).

Introduction and Overview:

This case presents a question of statutory construction.

Petitioners are one of five horse tour carriage businesses licensed to operate in the City of Charleston. They seek to locate their stable for the keeping of horses to the property at 45 Pinckney Street. Stables are permitted in the zoning district including 45 Pinckney Street as a Special Exception Use, provided that they meet seven factual criteria set forth in City Ordinance 54-206(p).

The parties agree that Petitioners meet six of the seven criteria. At issue here is whether 54-206(p)(1) has been met. It provides: "Stables shall be permitted with in 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 zoned district...".

The property at 45 Pinckney Street consists of a large, open warehouse, used in previous times as an automobile garage and at one time as a horse carriage stable. The building is constructed to the zero lot line on all four sides.

The surveyed distance from the closest point of 45 Pinkney Street to the nearest residential zone district is 93.5 feet, 6.5 feet short of the required 100 feet. In fact, the entire façade of the building does not run parallel with the lines of the residential zoned district, so that the farthest point between the residential district and the building façade is greater than 100 feet.

Petitioners propose to locate their horse stable in the rear-most part of the building, 25.5 feet from the building façade. The front of the building on Pinkney Street will consist of two business offices (and one is in existence today), separated by an open, arched entrance way between the two business offices, permitting access to the areas of the building, to the rear. The stable comprises the width of the building, 37.26 feet, and 69.5 feet deep. The offices in the front of the building are each approximately 12 feet wide by 12 feet deep. Between the offices, and the stable in the rear, is a 14-foot deep common area which will house restrooms and a waiting area for tour carriage customers. (See R.p. 375 for a depiction of the plot plan).

Accordingly, the nearest distance from the Residential Zone District to the stable in the rear of 45 Pinckney Street where horses will be kept, is 119 feet at its closest point.

Petitioner argued to the Board of Zoning Appeals that the 100-foot separation should be measured to the stables in the rear of the building. The BZA found, however, that the distance should be measured from the façade of the building, itself. The Special Use Application was denied.

The Circuit Court reversed the Board of Zoning Appeals, holding the measurement should be taken from the point 119 feet away from the residential zoned district, to the place where the horses are kept. This court reversed the Circuit Court in a 2 to 1 opinion filed June 29, 2016, Opinion No. 5419.

Discussion:

Petitioners seek re-hearing, and respectfully suggest a rehearing, *en banc*.

The majority opinion in this case found that the business offices in the front section of 45 Pinkney Street, and the customer waiting area and restrooms in the center of

the building, are "commonly associated with horse stables". Respectfully, there is no basis to support that finding, either in the record of this case or as a matter of common knowledge. The finding is an important one because, as discussed in the dissent, and as found by the Circuit Court, and as argued by Petitioners, to include such areas in any definition of "stable" merely because they are housed in the same structure is not supported by any grammatical analysis or by any construction of any provision in the Charleston City Code.

The context of the legislation at issue is that it was enacted to regulate stables in an urban setting, and more specifically in the horse tour carriage business. No other stable in the City, for example, would have need to obtain a Certificate of Appropriateness from the City Tourism Commission other than a tour carriage stable (See 54-206(p)(2)), and few other stables would require policing to ensure that cleaning/loading/tacking would not impede traffic flow in a public right of way. (See 54-206(p)(4)).

And horse tour carriage stables must be located in the Market District in the City of Charleston, where building space is at a premium.

These facts were known to City Council when it enacted 54-206(p). It is therefore more than fair to conclude that Council contemplated that "stables" would be located in buildings along with other uses. This fact is acknowledged in the record of this case. The zoning administrator, Mr. Batchelder, told the BZA: "Could be that, for instance if the—if the First Baptist gymnasium located a half 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 is appropriate to do that in this case...". (R.p. 268, line 141 to R.p. 270, line 24).

The majority opinion in this case also found: "The obnoxious elements – no matter how minimal in scope Arkay claims they will be – are still likely to accumulate in these areas (referring to the offices, customer waiting area, and restrooms) and escape through the front gate abutting Pinckney Street, the building's only point of access." Respectfully, there is no support in the record for this finding, either. Moreover, the 6.5 feet at issue in this case would make absolutely no difference even if the finding were supported by facts. Any propensity to accumulate obnoxious elements would exist. In fact, in the proposal made by Petitioners, the possibility of those occurrences is pushed back, at least by 25 feet.

Importantly, the office spaces to the front of the building are to be enclosed, separated by partition walls from the remainder of the building. It seems equally an absurd result, therefore, to suggest that no person may smoke in those offices, because the building is a "stable". Or that no animal excrement may be accumulated in those offices; not that any such circumstance could possibly occur—thus, another absurdity.

The plain language construction of 54-206(p) should prevail, without the need for any rules of statutory construction. The plain language construction supports the conclusion that City Council contemplated a "stable" to be included in this concentrated urban setting, as a use in a larger building consisting of multiple uses. There is no need to resort to an *in pari materia* analysis as to this question because the construction may be made from the words of the statute itself. Whereas 54-206(p)(1) requires "stables" to be

100 feet distant from neighborhoods, 54-206(p)(7) provides that "buildings" be designed utilizing appropriate ventilation to prevent objectionable odors from being emitted.

Here, Petitioners respectfully ask the majority of the Court to reconsider their position. The Circuit Court, the Dissent, and Petitioners in their briefs, have argued that City Council used the term "buildings" in 54-206(p)(7) advisedly, for a reason, and to distinguish "buildings" from "stables". The majority of this Court has rejected the argument because "building" can also mean a "stable". But the terms are synonymous still does not address the point. Even if a "stable" can be a "building", why did City Council use the term "building", at all? To say that the terms are synonymous does not answer the question.

It is never to be supposed that a single word was inserted in the law of this State without the intention of thereby conveying some meaning. *Davenport vs. City of Rock Hill, 315 S.C. 114, 117, 432 S.E.2d 451,453 (1993).*

Respectfully, this Court must not conclude that City Council wrote the statute in a casual fashion, but rather that "building" in 54-206(p)(7) was used deliberately, and as concluded by the Trial Court, was intended to encompass the circumstance presented here, where a "stable" is merely part of a larger "building".

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, and further ignoring the clear principle of statutory interpretation that no word should be deemed meaningless. See *FRE, LLC vs. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (SCt 2001); Hembree vs. $1,847.00, 404 S.C. 241, 743 S.E.2d 864 (Ct.App. 2013).*

Conclusion.

For the reasons set forth, it is submitted that a second look at Opinion No: 5419 is warranted, and this Petition for a Rehearing be granted. Further, and because of the split decision of the Court, the suggestion for a rehearing *en banc* should be given due consideration by this Court.

Petitioners suggest that the Court must conclude the term "building" was used for a reason, to distinguish from a "stable" and, further, that City Council wrote the statute in a deliberate fashion and not casually. The use of "building" 54-206(p)(7) was intended to encompass the circumstances presented here, where a "stable" is merely a part of a larger "building". To conclude otherwise would render one term or the other, meaningless.

Respectfully submitted,

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Charleston, South Carolina
July 13, 2016

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
Appellate Case No: 2014-001466
Opinion No: 5419, filed June 29, 2016

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 Respondent's Petition for Rehearing and Suggestion for Rehearing *en banc* on Appellants, by depositing a copy of same in the United States Mail, postage prepaid, on July 13th, 2016, addressed to the following:

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Charleston, South Carolina
July 13, 2016

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.

Return to Petition for Rehearing
And
Suggestion for Rehearing *En Banc*

The City of Charleston, City of Charleston Board of Zoning Appeals – Zoning, Andrew Pinckney Inn and Michael Molony (the "Respondents") submit this Return to Petitioners' Petition for rehearing and suggestion for rehearing *en banc*. Respondents oppose the petition.

INTRODUCTION

This case poses a question of statutory construction. The specific question posed is the intent of the Charleston City Council in enacting an ordinance requiring that a stable be at least 100 feet from a residential zoning district.

Petitioners operate a horse carriage tour business in downtown Charleston. They seek to locate a stable at 45 Pinckney Street. No. 45 Pinckney Street is in the Market Area of downtown and is zoned General Business (GB).

The City's Zoning Ordinance allows stables in a GB zone if the Board of Zoning Appeals grants a special exception, after determining the stable meets certain criteria. One criterion is that the stable cannot be located within 100 feet of a residentially zoned district.

No 45 Pinckney Street is occupied by one building, the walls of which are flush with all lot lines. The building has one means of ingress and egress to Pinckney Street. A survey commissioned by Petitioners demonstrated that the front façade of the building was within 100 feet of a residentially zoned district.

When the Petitioners appeared before the Board, they sought to satisfy the 100 foot separation requirement by proposing to house their horses in the rear of the building, arguing that, for purposes of determining the separation requirement, the measurement was to be taken from the location within the building where the animals were stored, not from the building itself. Petitioners further proposed subjecting 45 Pinckney Street to a horizontal property regime,

allocating 79% of the square footage of the building to Unit A, where horses would be stored, and 21% of the building to Unit B, where carriage offices, customer waiting areas and restrooms would be located. The statutorily prescribed access from Unit A to Pinckney Street was by way of easement and/or common area through Unit B.

The Board of Zoning Appeals denied the special exception on the basis of the stable being located within 100 feet of a residentially zoned district. The Board rejected Petitioners' argument that a stable was only the area in a building in which the animals were stored, and it was from that area that the separation measurement was to be made. The circuit court reversed the Board's decision, holding that the use of the term "buildings" instead of "stable" in one of the special exception criteria was evidence of an intent by Council that buildings used as stables would have multiple uses, and thus the separation requirement was to be measured from the place within the building where the stabling "use" occurred. This Court reversed the decision of the circuit court in Opinion 5419, filed June 29, 2016.

STANDARD OF REVIEW

This petition is governed by Rule 221 (a), SCACR, which requires Petitioners to identify points that were overlooked or misapprehended by the Court.

DISCUSSION

The issue in this case boils down to discerning the intent of City Council in requiring that a stable in a GB zone be at least 100 feet from a residentially zoned district. The Opinion of this Court addressed this issue head-on and thoroughly. The foundation of Petitioners' case rests on whether, in the use of the term "buildings" in one of the seven special exception criteria, Council

intended to create a distinction that a stable was not a building, but a place within a building. The Board and this Court held otherwise. This holding is correct, not just from common experience which tells us a stable is a building, but also from the City's zoning ordinance itself. As noted in this Court's Opinion, while the zoning ordinance does not define the term "stable", it does define the term "building". A building, per the zoning ordinance, is "any structure built for the support, shelter, housing or enclosure of persons, animals or property of any kind". (R. Vol. I, p. 217) Thus, per the zoning ordinance, the term "building" encompasses a stable. The very definition of "building" undermines the Petitioners' contention that Council's use of the term when addressing stables was intended to draw a distinction between a building and a stable. As applied here, there is but one building on 45 Pinckney Street. That building is proposed to be used as a stable, and that building is within the proscribed distance of a residentially zoned neighborhood.

Nor can issue be taken with this Court considering how Council defined stable in its tourism management ordinance. Petitioners themselves contend that the purpose of the zoning regulations pertaining to stables were designed to address stables used in the horse carriage business. (Pet., p.4, ¶ 2) If that is the case, then how Council defined "stable" in the tourism ordinance is cogently relevant. Council's intent could not have been clearer in this regard: per the tourism ordinance, a stable is the "barn where the animals are kept"; a stall is the "individual place within the barn where the animals are kept". (R. Vol. I, p. 245) It is illogical to contend that a stable means one thing per the tourism ordinance, and another per the zoning ordinance if Petitioners' contention that the zoning regulations were designed for stables used in the carriage tour business is to be taken as true. As applied here, the building at 45 Pinckney Street is the barn

where animals are kept. Unit A of the proposed horizontal property regime is a stall, that being the place within the barn where the animals are kept.

Petitioners' challenge to this Court's observation that areas and rooms in the front portion of 45 Pinckney Street is an effort to create an issue where there is none. Common experience supports this finding. Stables house animals. They also commonly include areas for storage, caretaker quarters, running water, restroom facilities and work space. Moreover, this finding by the Court is in lockstep with the facts of this case. Petitioners were proposing to establish a stable for use in a horse carriage business. In light of this circumstance, it is gainsaid but that restrooms, waiting areas and an office would be associated with a stable used for that purpose. And sight must not be lost of the fact that Petitioners were proposing to dedicate 1639 square feet of the 2074 square foot building, or 79% of the building, to what it contends is the "stable", with the remaining 435 square feet being dedicated to what it contends are non-stable uses. (R. Vol. I, p. 106) To accept Petitioners' proffered construction of the term "stable" would mean the inclusion of any use in a stable that does not include space where animals are kept would transform the nature of the building to something other than a stable, no matter what. As applied here, the 21% of the building that Petitioners contend is not used for stable purposes would require ignoring that the overwhelming area of the building is used for that purpose, presenting a classic case of the tail wagging the dog.

That City Council requires stables used in the horse carriage business to be located in the Market Area of the City has no bearing on its intent of what constitutes a stable. This becomes abundantly clear that when enacting that very requirement, it also enacted provisions that defined a stable as the barn where the animals are kept, and defined stall as a place within the barn where the animals are kept. Moreover, the requirement for horse carriage stables being in the Market

Area is wholly logical. Carriage tours start and end in the Market. Requiring stables used in that business to be located nearby is a legitimate means of organizing the operation of that business and mitigating the impact that slow moving carriages have on the flow of traffic.

Petitioners' protests to the contrary notwithstanding, this Court's noting that the obnoxious elements associated with the operation of a stable would accumulate in the front of the building and escape through its only entrance out onto Pinckney Street are spot on and supported by the Record. The site plan of the stable demonstrates as much. (R. Vol. I, pp. 106, 107) The door to the building would have to be open to accommodate the comings and goings of the carriages and their patrons. And the fact that the front offices have doors is of no moment. Enclosing a room within a building does not result in a new or separate building.

That the building at 45 Pinckney is 6.5 feet short of the required separation, while unfortunate, nonetheless renders the building ineligible for use as a stable. As held in Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 171, 72 S.E.2d 66, 70 (1952), zoning lines have to be drawn somewhere, and that determination rests with the governing body.

Petitioners' argument regarding the use by Council of the term "buildings" in the zoning ordinance when enacting stable regulations has been addressed. Suffice it to say, these terms, per the zoning ordinance, are interchangeable, as the definition of building includes a stable. Indeed, Petitioners do not argue otherwise. Nor does their being used interchangeably render either meaningless. This is so because a stable is a building. The effort to attribute great significance to the use of a term that has the same meaning as stable should not be countenanced.

CONCLUSION

Rule 221(a), SCACR requires a showing that this Court overlooked or misapprehended a point of law or fact. While the petition before the Court embodies argument disagreeing with the Opinion of this Court, there has been no showing that a fact or point of law was overlooked or misapprehended. There is no need for this Court to take a second look at its Opinion or to reconsider this matter *en banc*. This petition should be denied.

Respectfully submitted,

Charleston, South Carolina
July 22, 2016

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The South Carolina Court of Appeals

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.

Appellate Case No. 2014-001466

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff J.

H. B. Dee J.

Paul D. Thomas J.

Columbia, South Carolina

FILED
10-27-16

cc:
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The Honorable J. C. Nicholson, Jr.