THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5546 (S.C. Ct. App. filed March 28, 2018)
Appellate Case No. 2018-001240

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

v.

Paul Boehm, ...Respondent.

REPLY BRIEF OF PETITIONERS

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December 17, 2018
Charleston, South Carolina

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I. Respondent's argument that nonconforming uses can be legally expanded under the Town Ordinances, provided there is no change in use, is contrary to law and should be rejected.

Respondent asserts the structure at issue that houses a nonconforming residential use can be expanded *ad infinitum*, provided the use is not changed to a multifamily use. See **(App. Br., p. 7)** ("Mr. Boehm's proposed renovations and repairs do not expand the nonconforming use as he is not adding an additional residence to the lot"). Respondent's argument demonstrates the dangerousness of the Court of Appeal's departure from the established law in South Carolina, and the Town of Sullivan's Island's Ordinances, restricting and gradually eliminating nonconforming uses. See Christy v. Harleston, 266 S.C. 439, 223 S.E.2d 861 (1976); see also generally, Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994) (recognizing, as stated in Christy, that "the intention of all zoning laws, as regards a nonconforming use of property, is to restrict and gradually eliminate the nonconforming use."); see also, TOSI Ordinance § 21-150(B) **(App. pp. 605-606)** (stating that ("[a] Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects."); TOSI Ordinance § 21-149 (B) **(App. p. 604).**

Under Respondent's argument, a nonconforming, 500 square-foot tattoo parlor could be expanded to a 5000 square foot facility, provided it did not become two tattoo parlors or exceed the size restrictions on buildings in the zoning district. A nonconforming, 15 room hotel could be expanded to 50 rooms, provided it did not become two hotels or violate the size restrictions on buildings in the zoning district. A nonconforming restaurant could double its size and seating capacity, provided it did not become two restaurants or violate the size restrictions on buildings in the zoning district. The illustrations above are not alarmist, slippery slope examples. The Court of Appeal's opinion arguably allows this type of wholesale expansion. As fully explained in

Petitioners' opening brief, this Court should reverse the Court of Appeals decision and restore the law and policy of curtailing the expansion of nonconformities in South Carolina and on Sullivan's Island.

Petitioners' opening brief includes an expansive discussion of the legal issues in the case including: (1) the plain language of the Town Ordinances prohibited the expansion of nonconforming uses that do not have the effect of reducing or eliminating the nonconforming use; (2) our state's established law curtailing nonconformities; and (3) the Court of Appeal's improper reliance on out-of-state cases applying dissimilar zoning ordinances to establish a new test in South Carolina that is inconsistent with the Town Zoning Ordinances and state law. **(Pet. Br., pp. 5-12).** Respondent's primary legal argument in response is that, according to Respondent, "there is nothing in the Zoning Ordinance that seeks to restrict or gradually eliminate the nonconforming use of a second dwelling on a single family lot." **(Res. Br., p. 9)**. Respondent cites to the general ordinance on nonconformities, but that same ordinance directly contradicts his position: ". . . it is the general policy of the Town to allow uses, structures, signs, lots and other situations that came into existence legally, in conformance with then-applicable requirements, to continue to exist and be put to productive use, ***but to bring as many aspects of such situations into compliance with existing regulations as is reasonably possible***. TOSI Ordinance § 21-149 (B) **(App. p. 604).** The more specific Town Ordinances similarly contradict Respondent's position. See TOSI Ordinance § 21-150(B) **(App. pp. 605-606)** (discussing the Town policy of seeking to reduce any nonconforming use); TOSI Ordinance § 21-150(F) **(App. pp. 605-606)** (providing that the second

dwelling on a lot is a nonconforming use). Therefore, Respondent's argument should be rejected, and the Court of Appeals reversed.[1]

II. The BZA ruled that the structure at issue could not be expanded because the proposed expansions would constitute the expansion of a nonconforming use.

Respondent asserts that the only determination made by the Town of Sullivan's Island Board of Zoning Appeals ("BZA") was that the structure at issue was an accessory structure. In other words, Respondent asserts that the BZA has not considered whether the proposed expansions constitute an expansion of a nonconforming residential use of that structure. The record, and Respondent's own positions on appeal, contradict Respondent's newly asserted position.

The BZA decision issued April 10, 2014 cited section 21-150, prohibiting the expansion of nonconforming uses several times in concluding the proposed expansions were prohibited. **(App. p. 143);** see also, TOSI Ordinance § 21-150(B) **(App. pp. 605-605)** (stating that ("[a] Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects."). The BZA order issued February 12, 2015 was also explicit in stating the structure was nonconforming by virtue of its residential use. See **(App. p 13-14)** (stating several times "that the structure is an accessory structure with a non-conforming, but approved, apartment use on the second floor"). Additionally, while the Town Zoning Administrator and the BZA both ruled the structure was a garage with a nonconforming residential use (as opposed to a second principal building with a nonconforming residential use), the transcript of the BZA includes several references to staff's position that the proposed expansions constituted illegal expansions of a

[1] Respondent also asserts that the Town recognizes the right to expand a nonconforming residential unit. As discussed below, the BZA transcript and order, as well as the proceedings on appeal in this case, illustrate that the Town has never agreed that structures housing nonconforming uses can be expanded when the expansion will not have the effect of reducing or eliminating the nonconforming use.

nonconforming residential use. **(App. p. 145, p. 5:l. 5-6)** (Town Zoning Administrator stating ". . . we have a legal but nonconforming apartment unit . . . ") **(App. p. 145, p. 6:l.5-10)**; **(App. p. 145, p. 7:l.20-25)** (Town Zoning Administrator stating ". . . What Mr. Boehm has asked to do is to modify a nonconforming use . . .").

The Circuit Court disagreed with both of the BZA's conclusions and found that the proposed expansions of the structure did not constitute an illegal expansion of the nonconforming residential use of the structure. See **(App. p. 11)** ("None of Mr. Boehm's requests will increase the extent of nonconformity, because they are merely improvements to the existing one dwelling and will not increase the extent of the nonconformity."). Similarly, the Court of Appels adopted Respondent's argument that the proposed expansions did not constitute expansions of the nonconforming residential use. **(App. pp. 705-709);**[2] see also, **(App. p 666)** (Appellant's brief to the Court of Appeals arguing the proposed expansions ". . . **WILL NOT EXPAND THE NONCONFORMING RESIDENTIAL USE OF THE PROPERTY** . . .").

To the extent Respondent argues that the Circuit Court and the Court of Appeals should have remanded the matter to the BZA for a more specific finding as to whether the proposed expansions constituted illegal expansions of a nonconforming use, Respondent failed to appeal the decisions of the Circuit Court or the Court of Appeals and has waived any challenge on that basis. See generally, Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

[2] As a second principal building, the structure is designated by ordinance as nonconforming. See **(App. pp. 690-709)** and TOSI Ordinance § 21-150(F) **(App. pp. 605-606).**

CONCLUSION

Therefore, for the above reasons and the reasons stated in Petitioners' opening brief, the Court of Appeals' decision should be **REVERSED** and the BZA's denial of Boehm's appeal from the Town Zoning Administrator **REINSTATED.**

Respectfully Submitted,

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PROOF OF SERVICE

I hereby certify that I have served a true and accurate copy of the **REPLY RIEF OF PETITIONER** by U.S. Mail on December 17, 2018, to counsel of record for Respondent as shown below:

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