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

Paul Boehm,.....Respondent,

v.

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

BRIEF OF RESPONDENT

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December 6, 2018
Charleston, South Carolina

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a. Contrary to Petitioner's assertions in Petitioners' Brief that the BZA found that Mr. Boehm's requested improvements constituted expansions of the nonconforming use, the only determination made by the BZA at its hearing on Mr. Boehm's appeal from the decisions of the Zoning Administrator was that the structure in question was a garage, an accessory structure, even though it contained a dwelling. 4

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QUESTION PRESENTED

I. **Did both the Court of Appeals, and the Circuit Court, commit an error of law in finding that raising the roof of a second dwelling and making certain other improvements to a structure housing a nonconforming use as a second single family dwelling on a single family lot would not intensify or expand the nonconforming use when, after the requested changes, the building would remain a single family residential building?**

STATEMENT OF THE CASE AND FACTS

Early in 2013, Mr. Boehm asked Randy Robinson, the Acting Zoning Administrator for the Town of Sullivan's Island (TOSI), if he could raise the roof on his nonconforming dwelling unit located at 2720 B Goldbug Avenue, Sullivan's Island, South Carolina ("2720 B"). Mr. Robinson replied that the Zoning Ordinance did allow him to raise the roof so long as it did not violate the height restriction for a principal building. Subsequently, Mr. Boehm submitted plans along with his request to the new Zoning Administrator, Joe Henderson. Mr. Henderson erroneously denied the request stating that, in his opinion, the building was a garage, an accessory use, and the existing height violated the maximum height allowed for garages, so it could not be raised.[1]

Also in 2013, Mr. Boehm received approval to enlarge the existing roof of 2720 B to cover the walkways around the structure. He began doing the work and had the initial ten (10) piers to support the roof installed when Mr. Henderson issued a Stop Work Order, because, in his erroneous opinion, the piers for the roof were outside of the structure's "footprint." [2] At that

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[1] The TOSI Zoning Ordinance clearly states that a "principal building" is "a building or buildings in which the principal use of the lot is conducted." Secs. 21-25 and 21-203. App., pp. 593 and 606. 2720 B is zoned residential. The ordinance further defines a "garage" as "[a]n accessory building or portion of a Principal Building used only for storage of motor vehicles, campers, boats, boat trailers and lawn mowers, as an accessory use." Because 2720 B contained a residence or dwelling, it was a Principal Building which contained a garage.

[2] TOSI Zoning Ordinance defines "principal building coverage area" as "[t]he Lot Area covered by the Principal Building measured vertically downward from the Principal Building's exterior walls to the

same time, the Town erroneously cited Mr. Boehm for having furniture on the roof of the slat house, an accessory structure to the dwelling, and for removing a hand railing allowing access to the slat house roof.[3]

Mr. Boehm appealed the three erroneous decisions of the Zoning Administrator to the BZA in accordance with the TOSI Zoning Ordinance. On March 13, 2014, the BZA heard Mr. Boehm's appeals and, instead of complying with the terms of the Zoning Ordinance, agreed with Mr. Henderson that the structure located at 2720 B looked like a "garage" and not a principal building and, based on that sole finding, affirmed the decisions of the Zoning Administrator. The BZA never discussed an expansion of a nonconforming use.

The BZA Order contained no findings of facts or conclusions of law and merely referred to the transcript of the public hearing as being accurate and that the motion "to deny the appeal to overturn the Zoning Administrator's decision carried unanimously." App, p. 1. Mr. Boehm appealed that decision to the Circuit Court.

The Honorable R. Markley Dennis, Jr., heard Mr. Boehm's appeal on September 2, 2014, and issued an Order, dated November 19, 2014, that remanded the matter to the BZA "to make findings of fact based on evidence in the record to support their conclusion that the structure at issue is a garage under the terms of the Zoning Ordinance."

On remand, the BZA received no new evidence and made "findings of fact" in an Order, dated February 12, 2015. App., pp. 11-12. None of these findings stated that Mr. Boehm's requests to improve his property were expansions of a structure or a nonconforming use. Instead, the BZA ignored the provisions of the Zoning Ordinance that a structure containing a

---

ground (also known as the building footprint area, but excludes areas covered only by: (a) accessory structures not readily useable as living space; (b) exterior porches and decks; and, (c) exterior stairs." Thus, the roof piers were not part of the "footprint."

[3] No provisions of the TOSI Zoning Ordinance prohibit either of Mr. Boehm's actions.

residence was a principal building and based its entire decision to deny Mr. Boehm's appeal on its finding that the structure was a garage.

Judge Dennis heard the matter again on issued an Order, dated April 29, 2015 and filed on May 4, 2015. Judge Dennis summed up the BZA's six findings as all determining that "2720 B contained an apartment which is a residence or a dwelling under the Zoning Ordinance" and that "[n]one of these findings supported the BZA's decision that the building containing a residence was a 'garage' or an 'accessory structure' as defined by the Zoning Ordinance." The Court found that 2720 B was a principal building under the ordinance and that:

> Under Sec. 21-151 of the Zoning Ordinance, "structural alterations, including enlargements, are permitted if the structural alteration does not increase the extent of the nonconformity." The nonconformity of 2720 B is that it is a second residence on the lot. 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."

App., p. 6.

TOSI appealed Judge Dennis's Order to the Court of Appeals and continued to argue that a structure containing a residence was a garage, an accessory structure. In addition, TOSI argued that, even if the building is a principal building, it cannot be enlarged or expanded in any way. The Court of Appeals affirmed the Order of Judge Dennis, finding that the intent and terms of the Zoning Ordinance allowed Mr. Boehm to make the requested changes, because there was no expansion or extension of the nonconforming use.

TOSI filed a Petition for a Writ of Certiorari to the Court of Appeals, and this Court granted that petition.

STANDARD OF REVIEW

Section 6-29-840 of the South Carolina Code prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board. Austin v. Bd. of

Zoning Appeals, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004). That section provides "[t]he findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A) (Supp. 2017). 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. Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 9-10, 776 S.E.2d 753, 757 (Ct. App. 2015). The construction of an ordinance—which is a legal conclusion—does not warrant the same deference as a finding of fact. Id.

LEGAL ARGUMENTS

I. The Court of Appeals and the Circuit Court ruled correctly in, first, determining that the structure in question is a nonconforming principal building and not an accessory structure as found by the TOSI BZA, and, second, that Mr. Boehm was allowed under the TOSI Zoning Ordinance to improve the structure even if said improvements would not have the effect of reducing or eliminating the nonconforming uses.

a. Contrary to Petitioner's assertions in Petitioners' Brief that the BZA found that Mr. Boehm's requested improvements constituted expansions of the nonconforming use, the only determination made by the BZA at its hearing on Mr. Boehm's appeal from the decisions of the Zoning Administrator was that the structure in question was a garage, an accessory structure, and not a principal building.

In Brief of Petitioner, Petitioner makes numerous statements that are not supported in the record. Petitioner asserts on page 3 that "the BZA found all the work planned for the nonconforming second principal building impermissibly expanded a nonconforming residential use, citing to App., p. 143, which page only contains the testimony of the Zoning Administrator, not a finding by the BZA, which only found that the structure in question was not a principal building under the Zoning Ordinance. Interestingly, the Zoning Administrator's argument was

that a garage could not be higher than 18 feet, and the structure was already over 18 feet so the roof could not be raised without violating the height ordinance. His argument about the roof piers was based on his determination that the piers were outside the existing building's footprint, which was also not supported by any term of the Zoning Ordinance. See Sec. 21-25.A.1, App., p. 593.[4] Petitioner has finally dropped its argument that a building containing a residence is not a principal building and appears to concede for the first time that the structure is a principal building and not a "garage."

However, the BZA never made one factual finding that any of Mr. Boehm's requests were not allowed because the request was for an expansion of the nonconforming use. The BZA never admitted that the second building was a nonconforming principal building. Thus, Petitioner's arguments to the contrary are not supported by any evidence and should be disregarded.

b. Respondent Boehm's requests for improvements to the nonconforming principal building did not request that the nonconforming use be expanded and, instead, were allowed under the TOSI Zoning Ordinance.

Petitioner has set forth a selective rendition of the provisions of the TOSI Zoning Ordinance as it applies to what are "expansions" to a nonconforming use. Sec. 21-151 discusses "Nonconforming Structures" and defines a Nonconforming Structure as "any building or structure that was legally established but no longer complies with the density, lot coverage, floor area, height and dimensional standards of this Zoning Ordinance." App., p. 602. Sec. 21-203 has the same definition. App., p. 609. Mr. Boehm's structure is not a nonconforming structure

[4] TOSI Zoning Ordinance defines "principal building coverage area" as "[t]he Lot Area covered by the Principal Building measured vertically downward from the Principal Building's exterior walls to the ground (also known as the building footprint area, but excludes areas covered only by: (a) accessory structures not readily useable as living space; (b) exterior porches and decks; and, (c) exterior stairs."

under the terms of those ordinances, because it is a nonconformity only because it is a second principal building on the lot and not because it does not comply with "density, lot coverage, floor area, height and dimensional standards of this Zoning Ordinance." Thus, Sec. 21-151 does not apply to the structure at issue in this matter.[5]

Sec. 21-149 discusses "Nonconformities" in general. The Ordinance defines "Nonconformities" as "[u]ses, structures, lots, signs and other situations that came into existence legally and continued to exist as a legal nonconforming use until the time of the adoption of this ordinance but that do not conform to one or more requirements of this Zoning Ordinance." App., p. 609. For some reason, Sec. 21-149 defines "Nonconformities" a little differently:

> **A. Scope.** The regulations of this Article govern "nonconformities" which are uses, structures, lots, signs and other situations that came into existence legally but that do not conform to one or more requirements of this Zoning Ordinance. These are referred to in this Zoning Ordinance as "nonconformities." Nonconformities are legal situations and have legal status under this Zoning Ordinance.

App., p. 599. As Sec. 21-149 continues, it states the "general policy" of the Town is "to allow uses ... that came into existence legally ... to continue to exist and be put to productive use, but to bring as many aspects of such situations into compliance as is reasonably possible" and provides the intent of the Town concerning nonconformities, including Mr. Boehm's structure:

> The regulations of this article are intended to:
> (1) Recognize the interests of landowners in continuing to use their property;
> (2) Promote reuse and rehabilitation of existing buildings; and
> (3) Place reasonable limits on the expansion and alteration of nonconformities that have the potential to adversely affect surrounding properties or the Town as a whole.

Id. This section authorizes a nonconforming use to continue "in accordance with the provisions of this Article and allow repairs and maintenance to structures that are nonconformities. *Id.*

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[5] However, Sec. 21-151.B states that "[s]tructural alterations, including enlargements, are permitted if the structural alteration does not increase the extent of nonconformity." That section is in accord with the definition in 21-151 and 21-203.

Sec. 21-150 is the specific section of the ordinance that applies to "nonconforming uses." It defines a "Nonconforming Use [a]s a land use that was legally established but that is no longer allowed by the use regulations of the Zoning District in which it is located." App., p. 600. It goes on to say that "[a] Nonconforming ***Use*** shall not be expanded except to eliminate or reduce the nonconforming aspects." [Emphasis added.] Mr. Boehm's proposed renovations and repairs do not expand the nonconforming use as he is not adding an additional residence to the lot. Heilker v. Zoning Bd. of Appeals for the City of Beaufort, 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001) ("A 'use' in the zoning context is the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.") (internal quotations omitted). There is no provision of the Zoning Ordinance that prohibits a property owner from renovating and/or rehabilitating, including adding on to, a building that houses a nonconforming use, so long as the use is not expanded. Mr. Boehm's use is single family residential and he has no plans to add an additional residence, so there is no expansion of the use. See Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (Ct. App. 1986) ("Generally, in American jurisdictions a landowner who uses his property for a lawful purpose before the enactment of zoning which subsequently prohibits that use may continue the nonconforming use after the enactment of zoning unless the use clearly constitutes a public nuisance. Otherwise, the landowner would be deprived of a constitutionally protected right.").

Sec. 21-150.F applies to this situation: "Two or more Principal Buildings on one lot." It provides that "[a] Building Permit for improvements to the designated conforming Principal Building may be considered favorably" and "[t]he non-conforming structure(s) shall be regulated

in accordance with Subsections A-E." Subsections A-E only prohibit changes that expand a nonconforming use. App., pp. 600-601.

In fact, the Town of Sullivan's Island has recognized on numerous occasions the right of the owner of a legal second dwelling on a single family lot to add on to their structures. Even the Zoning Administrator, Mr. Henderson, admitted that, if 2720B was a principal building, which the Town now concedes to be a fact, Mr. Boehm was entitled to expand the structure by raising the roof "provided [the enlargements] don't increase the degree of nonconformity...." App., pp. 147 and 214-215. In addition, Mr. Boehm presented unrebutted evidence and testimony of numerous occasions when the Town allowed the owners of structures housing a nonconforming use, a dwelling, to increase the size of these structures, to increase the size of accessory uses to the structures and to add additional bedrooms to the structures. App., pp. 148-152 and 219-337. The Town repeatedly interpreted the Zoning Ordinance to allow property owners to increase the size of, and to raise the roof to allow an additional floor on, a second dwelling on a single family lot. By denying Mr. Boehm's request, the Town violated a long history of interpreting the ordinance in favor of allowing additions so long as they did not expand the use to more residences.

The Circuit Court and the Court of Appeals interpreted the plain language of the Zoning Ordinance and held that Boehm should be allowed to make the requested alterations to the second principal dwelling on a lot, because it does not expand or intensify or, in any way, change the nonconforming use of being a second single family dwelling. See Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals, 423 S.C. 169, 190-191, 813 S.E.2d 874, 884-85 (Ct. App. 2018), reh'g denied (June 5, 2018), cert. granted (Sept. 21, 2018) (analyzing various expansion of use tests from around the country). Petitioner is asking this Court to take a tortured

and twisted view of its own Zoning Ordinance instead of applying the plain language set forth therein. Contrary to Petitioner's position, 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. See Brief of Petitioners, p. 10. The intent of the Zoning Ordinance at issue here is set forth in Sec. 20-149: to "[r]ecognize the interests of landowners continuing to use their property; [to] promote reuse and rehabilitation of existing buildings; and [to] place reasonable limits on the expansion and alteration of nonconformities that have the potential to adversely affect surrounding properties or the Town as a whole." There is no evidence in the record to suggest that Mr. Boehm's planned alterations "had the potential to adversely affect surrounding properties or the Town as a whole."[6]

Mr. Boehm is entitled to reuse and rehabilitate his second dwelling on a single family lot so long as he does not expand the use. His proposed changes do not expand the use and must be allowed. The decision of the Court of Appeals should be affirmed.

CONCLUSION

For the reasons set forth herein, the Court of Appeals' decision should be affirmed and the BZA's denial of Mr. Boehm's appeal should be reversed.

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[6] A member of the BZA is an adjoining landowner to 2720B and did speak against Mr. Boehm's request closing with his statement that "any expansion of 2720B would be of substantial detriment to our adjacent property" without providing any support for this assertion. App., p. 162.

Respectfully submitted,

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PROOF OF SERVICE

I do hereby certify that on December 6, 2018 I have served all counsel of record in this action with a copy of the **Brief of Respondent** by mailing a copy of the same by United States mail, postage prepaid, to the following addresses:

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