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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Honorable Marvin H. Dukes, III, Circuit Court Judge

APPELLATE CASE NO. 2020-000617

Beachwalk Hotel & Condominium Association, Inc.
and Beachwalk Hilton Head, LLC

Appellants,

vs.

The Town of Hilton Head Island and/or The Town
of Hilton Head Island Board of Zoning Appeals and
SDC Properties, Inc.

Respondents.

FINAL BRIEF OF RESPONDENT SDC PROPERTIES, INC.

/s/ S. Harrison Williams
Barry L. Johnson, Attorney at Law
S. Harrison Williams, Attorney at Law
William Lamar Johnson, II, Attorney at Law
JOHNSON & DAVIS, PA
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
Barry@jd-pa.com
Harrison@jd-pa.com
Lamar@jd-pa.com

Attorneys for Respondent
SDC Properties, Inc.

Bluffton, SC
February 12, 2021

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STATEMENT OF ISSUE ON APPEAL

Respondent SDC Properties, Inc. (hereinafter "Respondent SDC") agrees with and herein incorporates by reference Appellants Beachwalk Hotel & Condominium Association, Inc. and Beachwalk Hilton Head, LLC's (hereinafter "Appellants") Statement of Issue on Appeal in this matter.

STATEMENT OF THE CASE

Respondent agrees with and herein incorporates by reference Appellants' Statement of the Case, including Appellants' Statement of Facts contained in Appellants' Initial Brief, with the following additions:

As to the procedural history of this case, this appeal is the Appellants' eighth attempt to overturn the determination of the Town of Hilton Head Island's LMO Official, Nicole Dixon ("LMO Official"), approving the Respondent SDC's development of its Welcome Center on Parcel E (hereinafter sometimes referred as "Welcome Center"). The various hearings and motions in which Appellants' have argued to overturn the LMO Official's determination can be summarized as follows:

1. Appellants' objection to LMO Official's Determination Letter, which was denied by the LMO Official. (R. pp. 1553-1555).
2. Appellants appeal of the LMO Official's Determination Letter to the Town of Hilton Head Island Board of Zoning Appeals ("BZA"), which was denied. (R. p. 1516).
3. Appellants moved the BZA to reconsider its decision on Appellants' appeal. Appellants' motion was denied by the BZA. (R. p. 551).
4. Appellants appealed the BZA's decisions to the circuit court. During the course of the circuit court appeal, the judge remanded the case to the BZA to answer three questions. The BZA held a hearing to answer the three questions, and the BZA, essentially, reheard the entire matter. At the end of the BZA hearing, the BZA, again, denied the appeal of the Appellants. (R. pp. 1133-1139).
5. The case was then returned to the circuit court, wherein the circuit court held a final hearing on the merits of the case. The circuit court issued an order on September 11,

2019, affirming the LMO Official's determination and upholding the BZA's decisions. (R. pp. 4-12).

6. Additionally, Appellants filed a motion for summary judgment in the circuit court, which was heard during the final merits hearing. The circuit court denied Appellants' motion. (R. pp. 4-12).
7. Finally, the Appellants moved the circuit court to reconsider its decision affirming the LMO Official's determination and upholding the BZA's decisions. The circuit court denied Appellants' motion to reconsider. (R. pp. 1-3).

Appellants own the Beachwalk Hotel as they assert in their brief. The Beachwalk Hotel was formerly operated as a hotel and/or residential condominiums, but now is, and for many years has been, out of operation, dilapidated, and in poor repair and disuse. (R. p. 5). Additionally, there was extensive discussion of the condition of the Beachwalk Hotel during the BZA hearing in this matter, in which the condition of the Beachwalk Hotel was described as vacant for years, boarded up, an eyesore, and in terrible disrepair. (R. p. 654, line 21-p. 655, line 21).

There remain at least nine acres of open space in the Waterside PD-2 District, not including any use of Parcel E. (R. p. 683, line 16).

After the circuit court received the BZA's answers to the three questions that the circuit court remanded to the BZA, the circuit court held a hearing in which the trial judge considered the BZA's answers to the three questions, along with the arguments of counsel and the voluminous record on appeal from the BZA. The circuit court then ruled that

> in addition to the substantial supporting evidence found, I have concluded as a matter of law that the Town's Staff Planner (Nicole Dixon) and the BZA properly considered every aspect of the matter, through extensive considerations and deliberations in the original reviews and proceedings, and in the BZA's remand hearing, and committed no error of law, no arbitrariness or unreasonableness, and

no abuse of discretion.

(R. p. 11).

STANDARD OF REVIEW

In South Carolina, boards of zoning appeals, in the exercise of their duties, have the powers, *inter alia*, (1) to hear and decide appeals wherein it is alleged there is an error in a determination made by an administrative official in the enforcement of the zoning ordinance; and (2) in appropriate circumstances, to determine if the application of the ordinance to the particular piece of property would effectively prohibit or unreasonably restrict the utilization of the property. S.C. Code Ann. § 6-29-800(1) & (2)(c).

"In determining the question presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law." *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) (citing *Wyndham Enters., LLC v. City of N. Augusta*, 401 S.C. 144, 147–48, 735 S.E.2d 659, 661 (Ct. App. 2012)). "Furthermore, '[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.'" *Id.* "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.*

In making such determinations, the court must give a zoning ordinance a "'practical, reasonable, and fair interpretation consonant with the purposes, design, and policy of the lawmakers.'" *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 466, 602 S.E.2d 76, 80 (Ct. App. 2004) (quoting *Charleston Cnty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)). Therein, the Court of Appeals also held that "[f]ew restrictions encumber the scope of the Board's authority." *Id*. at 465, 602 S.E.2d at 79. A local zoning board's "construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor." *Purdy v.*

Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953).

"The 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). A court will uphold the decisions of a reviewing body if there is evidence in the record to support its decision. *Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 505–06, 443 S.E.2d 401, 405 (Ct. App. 1994) (stating an appellate court should not reverse the circuit court's affirmance of a Board unless the Board's findings have no evidentiary support or the Board commits an error of law).

ARGUMENT

I. The Town of Hilton Head Island Board of Zoning Appeals and the circuit court's multiple decisions to affirm the LMO Official's determination approving the development of the Spinnaker Welcome Center were correct as a matter of law.

A. The Appellants' argument regarding zoning density fails to acknowledge the definition of density in the Town of Hilton Head Island's Land Management Ordinance and the Appellants' argument incorrectly calculates the applicable zoning district's remaining density for development of the subject parcel.

This appeal at its core is based on one question: whether the LMO Official followed the law when she approved the proposed development of the Spinnaker Welcome Center, and the simple answer to that question is: yes.

The Appellants' argument in their brief is missing two crucial elements, which are the definition of density in The Town of Hilton Head Island's Land Management Ordinance ("LMO"), and the distinction between residential and nonresidential development when calculating the remaining available density as mandated by the LMO. When the definition of density is read in conjunction with all of the LMO sections cited by the Appellants in their brief, it is clear that the LMO Official's determination to approve the Welcome Center development was not based on an

error of law. *Charleston Cnty. Parks & Recreation Comm'n*, 319 S.C. at 68, 459 S.E.2d at 843 (reasoning that when interpreting a zoning ordinance, the ordinance must be read as a whole, and determinations regarding the meaning in one section of the ordinance "cannot be made in a vacuum."). Further, the Appellants do not claim a lack of evidence in the record for the LMO Official's determination, the BZA's decisions, nor the circuit court's decisions, which, under the standard that this Court is bound, should be fatal to the Appellants' argument from the start.

The Appellants have ignored the definition of density to argue their conclusion that no available density is left for the development of the Welcome Center, and, by itself, the omission of this definition in their analysis is fatal to their argument, and ultimately to their appeal in this matter.

The LMO defines density in LMO § 16-10-105 as "See Sec. 16-10-102.B.1, Density." LMO § 16-10-102.B.1 states the following, as to the definition of density:

> A measurement of intensity of the *development* of a *parcel* of *land*, calculated by dividing total number of *dwelling units* by the *net acreage* of the *parcel* for residential development; by dividing the total number of guest rooms by the net acreage of the *parcel* for *hotel development*; and by dividing the total number of square feet of *gross floor area* by the *net acreage* of the parcel for other nonresidential *development*. In *mixed-use* developments, acreage allocated to residential *use* shall not be used to calculate nonresidential *density*, and acreage allocated for nonresidential *uses* shall not be used to calculate residential *density*; and acreage allocated to *hotel use* shall not be used to calculate other nonresidential *density*, and acreage used for other nonresidential *uses* shall not be used to calculate *hotel density*. Where residential and nonresidential *uses* are combined in a single *building*, the *density* of each *use* within the *building* shall be calculated separately. When computation of the *density* results in a fraction, the result shall not be rounded up to the nearest whole number.

(emphasis in original).[1]

Additionally, the very first sentence of LMO § 16-10-101, that is entitled "General Rules for Interpretation" and which contains the measurements and definitions sections referenced above, states that "the following rules shall apply for construing or interpreting the terms and provisions of this *Ordinance*." (emphasis in original). Therefore, when the LMO Official was applying the LMO to the Welcome Center development plan she was bound by the definition of density and its corresponding distinctions and formulas. *Charleston Cnty. Parks & Recreation Comm'n*, 319 S.C. at 68, 459 S.E.2d at 843. It is undisputed in this case that the Welcome Center is a nonresidential development.

As stated by the Appellants in their brief, the subject parcel for the Welcome Center consists of 1.068 acres and is designated as "Parcel E" on the relevant recorded plat. Also, as stated in the Appellants' brief, Parcel E is located in the base zoning district Resort Development ("RD") and in the PD-2 Waterside (Town Center) Overlay District ("Waterside PD-2 District") per the LMO. After the Appellants note the applicable zoning districts, and their respective density requirements, the Appellants analyze and conclude that after averaging the existing density of the Spinnaker Project, a residential development,[2] and the Beachwalk Hotel, Appellants' abandoned and dilapidated condominium building, no available nonresidential density remains for the development of Parcel E. Appellants' analysis is incorrect, as their analysis does not take into consideration the definition of density nor does it distinguish between residential and nonresidential development. Instead, the Appellants calculate the density in the 15.10 acres of the

[1] The version of the Town of Hilton Head Island's Land Management Ordinance cited throughout this brief is the Town of Hilton Head Island's official online version of the LMO, *available at* https://library.municode.com/sc/hilton_head_island/codes/land_management_ordinance.

[2] Appellant is referring to the Waterside by Spinnaker Timeshare Development, which is an existing development in the RD and Waterside PD-2 Districts.

Waterside PUD Tract by combining the totals of both residential dwelling units and the total amount of square feet of nonresidential development now existing in the Waterside PD-2 District. Appellants' calculation and formula is plainly incorrect, because according to LMO § 16-10-102.B.1 when calculating density, one must distinguish between residential density and nonresidential density.

Therefore, the evidence in the record, and the standards of the LMO itself, demonstrate that the LMO Official's approval of the development of the Welcome Center was correct. (R. p. 677, lines 1-10; p. 687, lines 20-23; p. 690, line 24-p. 691, line 7). When the LMO Official calculated the existing density in the Waterside PD-2 District in regard to the Welcome Center, the LMO Official only needed to consider the existing nonresidential development based on the plain meaning of the LMO. The LMO Official could not also consider the existing residential density because it is undisputed that the Welcome Center is a nonresidential development. LMO § 16-10-102.B.1; *Charleston Cnty. Parks & Recreation Comm'n*, 319 S.C. at 68, 459 S.E.2d at 843 (citations omitted) ("An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. In construing ordinances, the terms used must be taken in their ordinary and popular meaning.").

Accordingly, when calculating the available density for the Welcome Center, the LMO Official and the BZA, properly, could only consider the existing 5,262 square feet of nonresidential development located on the Spinnaker Project property out of the entire 15.01 acres of the Waterside PD-2 District.[3] The existing 198 dwelling units on the Spinnaker Project tract and the 91 hotel rooms on the Beachwalk Hotel tract, properly, should not be taken into consideration by

[3] Respondents assert that during the BZA hearing it was shown that this 5,262 square feet is sometimes called "nonresidential" but is in fact space used as an accessory to residential space, and; thus, for the purposes of the calculation of remaining nonresidential density that the Welcome Center site should be considered the only nonresidential development in the Waterside PD-2 District. (R. p. 665, lines 13-22).

the LMO Official nor the BZA when considering the remaining density available for nonresidential development. This is because the Spinnaker Project units and the Beachwalk Hotel rooms, as now converted to condominium units, are considered residential under the LMO. LMO § 16-10-102.B.1. Appellants' argument to the contrary simply ignores the plain meaning of the definition of density in the LMO, the clear LMO distinction between residential and nonresidential development, and the obvious applications thereof by the LMO Official and the BZA to the Welcome Center development application. *See Charleston Cnty. Parks & Recreation Comm'n*, 319 S.C. at 68, 459 S.E.2d at 843.

Thus, the correct formula for determining the available density for Parcel E is, first, to ensure that the density for the Welcome Canter development does not exceed the maximum density as permitted in the RD district—8,000 square feet per acre for nonresidential development. LMO § 16-3-105.L.3. Without dispute the record shows the request and approval was for the construction of a 7,500 square foot nonresidential building on Parcel E, which is 1.068 acres, and the development was less than the 8,000 square foot maximum. (R. pp. 1607-1618; pp. 1553-1555).

Second, the LMO Official correctly determined whether "the average density for the PD-2 Overlay District [does] not exceed the maximum [nonresidential] density permitted in the base zoning district."[4] LMO § 16-3-106.G.4.a. This calculation is accomplished by taking the total square feet of the proposed Welcome Center development—7,500 square feet—and comparing it to the total size of Parcel E—1.068 acres. (R. pp. 1553-1555). Because the 7,500 square feet of the proposed Welcome Center development does not exceed the 8,000 square feet per acre maximum in the RD district, the analysis is complete and the Welcome Center development on

[4] The word "nonresidential" should be inserted into the previous quote, because of the LMO's definition of density, because the Welcome Center is a nonresidential development.

Parcel E was lawfully approved.

There was no need to make an overall calculation of all nonresidential development in the Waterside PD-2 District because the existing nonresidential development, 5,262 square feet, did not exceed the maximum standard of 8,000 square feet per acre. Therefore, the LMO Official did not need to calculate the remaining nonresidential density left in the Waterside PD-2 District for an offset of nonresidential density. Accordingly, the LMO Official's determination, affirmed by the BZA and the circuit court, accomplished the stated purpose of the Waterside PD-2 District, in proper application of LMO § 16-3-106.G.4.a, which states:

> [a] section or phase of the planned development may be built at a density which is greater than the site-specific density allowed by the underlying base zoning district, provided that any such concentration of density is offset by an area of lower density in another section or phase of the planned development or by an appropriate reservation of common open space.[5]

Thus, the correct analysis and determination was made by the LMO Official, the BZA, and the circuit court and, respectfully, their decisions should be affirmed by this Court, all resulting in confirming the approval of the Welcome Center development.

The above analysis is fully supported by the testimony of the LMO Official who initially approved the Welcome Center development. The LMO Official was questioned extensively on matters pertaining to the approval of the Welcome Center development and she stated multiple times that the Welcome Center development, *i.e.* Parcel E, complied with the LMO and the density requirements for the RD and Waterside PD-2 District. (R. p. 677, lines 1-10; p. 687, lines 20-23; p. 690, line 24-p. 691, line 7). Clearly, the LMO Official's determination, and the BZA's ultimate ratification of her decision, is based on a lawful interpretation of the LMO, and not on an error of

[5] There remains at least nine acres of open space in the Waterside PD-2 District, not including any use of Parcel E. (R. p. 683, line 16).

law as argued by Appellants. Clearly, the record contains substantial evidence for the LMO Official's determination, and the decisions of the BZA and circuit court as the issues were heard, briefed, argued, and extensively considered during each of the Appellants' prior seven, and unsuccessful, attempts to overturn the LMO Official's determination approving the Welcome Center development. Thus, the determination and decisions below should not be disturbed by this appeal. *Historic Charleston Found,* 313 S.C. at 505–06, 443 S.E.2d at 405 (stating an appellate court should not reverse the circuit court's affirmance of a Board unless the Board's findings have no evidentiary support or the Board commits an error of law).

The Appellants' argument is based on their position that LMO sections should be read in a vacuum, and without regard to the LMO's General Rules of Interpretation in section 16-10-101. This is incorrect. *Charleston Cnty. Parks & Recreation Comm'n*, 319 S.C. at 68, 459 S.E.2d at 843 (quoting *City of Columbia v. Niagara Fire Ins. Co.*, 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose."). The LMO, per its own terms, must be read while adhering to the definitions and general rules for interpretation as stated therein, which is exactly what the LMO Official, the BZA, and the circuit court have done in this matter. LMO § 16-10-101. Appellants want this Court to usurp the authority of the LMO Official and the BZA, and impose upon this matter an incorrect, unlawful, and distorted interpretation of the LMO, in direct contradiction to the standard of review to which this Court is bound. *See Charleston Cnty. Parks & Recreation Comm'n*, 319 S.C. at 68, 459 S.E.2d at 843; *Helicopter Solutions, Inc.*, 414 S.C. at 9, 776 S.E.2d at 757; *Clear Channel Outdoor*, 360 S.C. at 466, 602 S.E.2d at 80; *Historic Charleston Found.*, 313 S.C. at 505–06, 443 S.E.2d at 405. Respondents have clearly shown there is an abundance of evidence in the record to

support the determination of the LMO Official, and the decisions of the BZA and the circuit court, and, thus, these rulings should be affirmed. *Clear Channel Outdoor*, 360 S.C. at 466, 602 S.E.2d at 80 ("a court will uphold the decisions of a reviewing body if there is any evidence in the record to support its decision.").

B. The circuit court acted within its authority in considering the economic utility of the property when deciding to uphold the decision of the Town of Hilton Head Board of Zoning Appeals.

The Appellants mistakenly argue that the circuit court and, by implication, the BZA, improperly injected into this matter the issue of a regulatory taking. This argument by the Appellants is incorrect because it ignores the common law of this state that ambiguities concerning restrictions on the use of real property should be resolved in favor of the free use of the subject property. *Davey v. Artistic Builders, Inc.*, 263 S.C.431, 436, 211 S.E.2d 235, 237 (1975) ("restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of the property."). Further, the circuit court and the BZA had the authority, the right, and the responsibility to consider the impact of their decisions on Parcel E and whether any restriction on the use of Parcel E would be considered a regulatory taking. S.C. Code Ann. § 6-29-800(2)(c) (authorizing the BZA to make findings when the applicable conditions and the application of the ordinance "would effectively prohibit or unreasonably restrict the utilization of the property.").

It is well-settled law that "a restriction on the use of property must be created in express terms or by plain and unmistakable implication, . . . and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citing *Edwards v. Surratt*, 228 S.C. 512, 90 S.E.2d 906 (1956); *Davey*, 263 S.C.at 436, 211 S.E.2d at 237 (1975)). Also, as decided by the

United States Supreme Court, from a case which was appealed from this State's courts, when a governmental body enacts a restriction on the use of real property that destroys any economically viable use of an owner's land, the land owner has suffered a taking and is due just compensation. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

Clearly, the BZA had the authority to consider the hardships imposed upon real property by the various ordinances that the BZA is tasked with enforcing and interpreting. S.C. Code Ann. § 6-29-800 (granting powers to review boards, such as the BZA). Thus, it is logical and appropriate that the BZA, and the circuit court, in reviewing the BZA's decision, would consider the impact on the economic utility of Parcel E by their respective decisions and whether that decision may be construed to be a regulatory taking.

Under Appellants' interpretation of the LMO, no lawful economic use may be made of Parcel E, clearly invoking the specter of *Lucas*, and mandating a fair and reasonable interpretation of the LMO to facilitate the economic utility of Parcel E.

Appellants distort these considerations in their argument to claim that Respondents were somehow asking the BZA and the circuit court to determine whether their decisions were in fact a regulatory taking and to award Respondent SDC just compensation. This is not the case. Instead, it was within the authority and responsibility of the BZA and the circuit court to consider, and within the right of Respondents to argue, whether the decisions of the BZA and the circuit court would implicate the economic utility of Parcel E, without turning this matter into an inverse condemnation case, which is all in accordance with the lawful application of the LMO and existing law to Parcel E. *Id.*

However, assuming *arguendo*, that the circuit court did err by considering the economic utility of the property, and by implication a possible regulatory taking if the circuit court ruled in

favor of Appellants—which it did not, the error is not a reversible error. The circuit court based its decision to uphold the BZA's ruling approving the Welcome Center development on a list of twelve factors, only one of which even mentioned the economic utility of Parcel E. (R. pp. 9-11).

As this is Appellants' eighth "bite at the apple" in this case, clearly the decisions of the BZA and the circuit court are based on a voluminous record, which document many more than just an argument over the economic utility of Parcel E, for example, the arguments raised above regarding density. Thus, it is not reversible error that the circuit court considered the impact to the property's economic utility when affirming the BZA, and this Court should reject Appellants' argument to the contrary.

CONCLUSION

It is apparent in this matter that all parties received multiple, full, detailed, and fair hearings of their arguments before both the BZA and the circuit court. It is clear from the record on appeal that all of the members of the BZA were fully engaged in asking questions, making comments, discussing the issues, and deciding the case pursuant to their lawful authority during the multiple hearings that were conducted before the BZA. S.C. Code Ann. § 6-29-800. The LMO Official well explained and supported her interpretation of the LMO in making her determination to allow Parcel E's development as Respondent SDC's Welcome Center. Then, the BZA denied Appellants' appeal of the LMO Official's determination, and in so doing upheld the LMO Official's interpretation of the LMO, and as affirmed by the circuit court.

Application of the foregoing standard of review to the record on appeal demonstrates that the decisions of the BZA and the circuit court, in denying the Appellant's multiple appeals of this matter, were made with an extensive factual review and basis, and an extensive inquiry into the applicable law. The record clearly shows that the BZA's decision was not controlled by the lack

of evidence, nor any error of law, nor could it possibly be characterized as arbitrary or capricious, nor can it be fairly stated that the BZA and the circuit court's decisions had no reasonable relation to a lawful purpose. *Helicopter Solutions, Inc.*, 414 S.C. at 9, 776 S.E.2d at 757. This Court must uphold the decisions of the BZA and the circuit court in this case, because there is evidence, indeed more than ample evidence, in the record to support the decisions of the LMO Official, the BZA, and the circuit court. *Clear Channel Outdoor*, 360 S.C. at 466, 602 S.E.2d at 80 ("a court will uphold the decisions of a reviewing body if there is any evidence in the record to support its decision."). Moreover, it is clearly apparent that the BZA gave a practical, reasonable, and fair interpretation of the LMO, consonant with the purposes, design, and policy of the Town's lawmakers, including the LMO's General Rules of Interpretation and the definition of density. *Charleston Cnty. Parks & Recreation Comm'n*, 319 S.C. at 68, 459 S.E.2d at 843; *Clear Channel Outdoor*, 360 S.C. at 466, 602 S.E.2d at 80–81.

Therefore, Respondent SDC respectfully request that this Court affirm the decision of the circuit court.

/s/ S. Harrison Williams
Barry L. Johnson, Attorney at Law
S. Harrison Williams, Attorney at Law
William Lamar Johnson, II, Attorney at Law
JOHNSON & DAVIS, PA
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
Barry@jd-pa.com
Harrison@jd-pa.com
Lamar@jd-pa.com

Attorneys for Respondent
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Final Brief has been served on the Appellant and that the Respondent's Final Brief complies with Rule 211(b), SCACR.

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/s/ S. Harrison Williams
Barry L. Johnson, Attorney at Law
S. Harrison Williams, Attorney at Law
William Lamar Johnson, II, Attorney at Law
JOHNSON & DAVIS, PA
The Victoria Building, Suite 200
10 Pinckney Colony Road
Bluffton, SC 29909
(843) 815-7121
Barry@jd-pa.com
Harrison@jd-pa.com
Lamar@jd-pa.com

Attorneys for Respondent
SDC Properties, Inc.

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