THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes III, Master-In-Equity

Appellate Case No. 2023-000891

Eric and Tracy Sherrier, ... *Appellants*,

v.

The Town of Hilton Head Island Construction Board
of Adjustment and Appeals, and
The Town of Hilton Head Island, ... *Respondents.*

REPLY BRIEF OF APPELLANTS

James P. Sullivan, Esquire
South Carolina Bar No. 77436
215 East Bay Street, Suite 303
Charleston, SC 29401
(843) 216-6940 (telephone)
(877) 216-6970 (toll-free)
(843) 216-6942 (facsimile)
jsullivan@hnblaw.com
Attorney for Appellants

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REPLY ARGUMENT

I. RESPONDENT'S INITIAL BRIEF FAILS TO ADDRESS APPELLANTS' ARGUMENT REGARDING THE LOWER COURT'S IMPROPER CONSTRUCTION OF SECTION 15-9-312(A).

To summarize, Appellants argue the CBAA committed an error of law by basing its affirmance of the Town's Notice of Violation on the finding that the subject rear structure was converted to a "habitable space" sometime after 1985, thus violating Section 15-9-312(a). (Appellant Br. pp. 6–14). The lower court not only failed to correct the CBAA's error of law, it also committed its own error of law by finding that the Sherriers violated Section 15-9-312(a) because the rear structure had been converted to a "residential living space." While the Sherriers articulated their argument clearly by reading the Town's municipal code as a whole and by discussing how more specific sections of the municipal code informed the more general Section 15-9-312(a), the lower court failed to follow clearly established caselaw by finding, in purely conclusory terms, the following:

> The Sherriers argue that the accessory structure does not qualify as a "dwelling unit" under the Town's Land Management Ordinance [§ 16-10-105, *Municipal Code of the Town of Hilton Head Island, South Carolina* (1983)]. This argument misses the point for two reasons:
>
> (a) § 15-9-312(a), *Municipal Code of the Town of Hilton Head Island, South Carolina* (1983), in a different chapter of the municipal code (Title 15 as opposed to Title 16).

(Circuit Court Order p. 6.)

Importantly, the lower court failed to cite any caselaw supporting its position that two sections of the same code cannot be used to inform one another. Not only did the lower court fail to cite any authority for its conclusion, it also ignored appellate law in direct contravention to the lower court's reasoning. (Appellant Br. p. 14, n.3).

Respondent's Brief fails in any meaningful way to address the asserted errors of law summarized above; nor does Respondent address the caselaw analyzing the issue as raised by Appellant. (Resp't Br. pp. 11–16). Rather, Respondent continues the erroneous reference to terms neither contained in nor defined in Section 15-9-312(a) or other relevant Ordinance in the Town's municipal code: "habitable living space" and "residential living space." (Resp't Br. pp. 11–16). Respondent ineffectively attempts to refute Appellants' argument by citing Appellants' reference to the subject structure before the CBAA "as a bedroom and rec room." (Resp't Br. p. 15 n.48). Respondent claims this reference constitutes an admission of Appellants' use of the subject structure as "residential." Id. First, the terms "bedroom" and "rec room" do not equate "residential structure" as defined by the Town's municipal code. (Appellant Br. p. 10); second, to characterize Appellant's statement as an admission is disingenuous at best. As the record makes clear, Appellant used the terms "bedroom" and "rec room" for the sake of simplicity as those were the terms used by the Town. (Resp't Br. p. 15 n.48). In essence, Appellant was using terms with which the CCBA would be familiar; Appellants were not adopting those terms as their own.

In its inadequate attempt to counter Appellant's assertion that the lower committed an error of law, Respondent ignores the correct standard of review as cited by Appellants: i.e., appellate courts may pursue "a broader and more independent review . . . when the issue concerns the construction of an ordinance." (Appellant's Br. pp. 5–6). While cited in its Standard of Review section, Respondent's Brief only acknowledges the "any evidence" standard when arguing the lower court did not commit an error of law. (Resp't Br. pp. 7, 11–16). No matter the amount factual evidence Respondent claims supports the lower court's decision, a lower court's decision must be reversed when a lower court improperly reconstrues a clear and unambiguous ordinance, as the lower court did in this instance.

Not only does Appellant's argument as to the lower court's improper alteration of the subject ordinances carry the day on its own merits, Respondent's failure to address Appellant's argument constitutes a concession. See, e.g., Turner v. S.C. Dep't of Health & Envtl. Control, 111 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008); First Union Nat'I Bank v. FCVS Comm's, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (when a respondent's brief fails to respond to an issue raised in an appellant's brief, the appellate court may treat the failure to respond as a concession that the appellant's position is correct), rev'd on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997).

Finally, and perhaps most persuasively, the Town itself adopted the same interpretation as Appellants continually throughout its dealings with Appellants. The Town's legal consultants reached the following conclusion:

> Dwelling Unit (DU) "building or a portion of a building providing complete and independent living facilities for a family, including permanent provisions for living, sleeping, eating, cooking and sanitation." The definition for complete and independent living facilities includes a list of qualifiers as follows "permanent provisions for living, sleeping, eating, cooking, and sanitation." Provisions for eating and sleeping can easily be removed thus not "permanent." Sanitation, such as a shower or latrine, while permanent, are not a good measure as they show up in many limited use spaces: media rooms, offices, man caves, home gyms, and the like. Conversely, a stove is a permanent appliance and requires 220v, rather than standard 110v. So, years ago, the interpretation of "complete and independent living facilities" hinged on the existence of a stove. I regret we don't have another way mechanism to stop Mr. Sherrier from using that unit to expand his rental capabilities.

(Record on Appeal to Circuit Court pp. 18–19, p. 84, line 14–18, p. 150). Conceding that Appellants had not violated Section 15-9-312, Deputy Community Development Director, Teri Lewis stated the following: "We do recognize that the current definition of a dwelling unit is problematic and will work to revise it during the first set of 2021 LMO amendments." (Record on Appeal to Circuit Court p. 18). Opposing counsel for the Town was privy to and did not disagree

with this assertion. In communication with opposing counsel, the Town stated the following: "He and I spoke about 12 Park Road and my interpretation relating to dwelling units. He thinks the existing definition of dwelling units is problematic but worries about nonconformities that will be created if we just change it." (Record on Appeal to Circuit Court pp. 20, p. 94, line 7–14, p. 148). Stated differently, perhaps due to political pressure from a vocal minority of constituents, despite recognizing the correct reading and resulting inapplicability of Section 15-9-312, a result that could only be changed by legislative action, the Town reversed course and began prosecuting Appellants in January 2022. Unfortunately, the lower court followed in lockstep, thus committing its own reversible error of law.

Based on the above, the lower court clearly erred in its review of Section 15-9-312, and its erroneous ruling must be reversed.

II. RESPONDENT FAILS TO ADDRESS HOW SIGNIFICANTLY APPELLANTS CHANGED THEIR POSITION TO THEIR DETRIMENT BASED ON THEIR REASONABLE RELIANCE ON THE TOWN'S CONDUCT AND COMMUNICATIONS.

Respondent's Brief misconstrues Appellants' anguish when stating the following: "The Sherriers' claim is that they changed their position to their detriment by resolving the zoning violations." (Resp't Br. at p. 24). The record before this Court contains a multitude of references to Appellants' position when purchasing the residence at 12 Park Road. Appellants have clearly stated one of their motivations for purchasing 12 Park Road: "Our rental arrangements are for a single tenant who rents both the main house and the rear structure." (Record on Appeal to Circuit Court p. 12). The Town acknowledged this purpose when Town officials confirmed Appellants' use of the subject structure was not in violation of any town ordinances. In early 2021, the Town's legal consultants arrived at the following conclusion:

> Mr. Sherrier is now compliant with the LMO. He remedied the violations by removing the mini-splits out of the buffer and removing the stove. Dwelling Unit (DU) "building or a portion of a building providing complete and independent living facilities for a family, including permanent provisions for living, sleeping, eating, cooking and sanitation." The definition for complete and independent living facilities includes a list of qualifiers as follows "permanent provisions for living, sleeping, eating, cooking, and sanitation." Provisions for eating and sleeping can easily be removed thus not "permanent." Sanitation, such as a shower or latrine, while permanent, are not a good measure as they show up in many limited use spaces: media rooms, offices, man caves, home gyms, and the like. Conversely, a stove is a permanent appliance and requires 220v, rather than standard 110v. So, years ago, the interpretation of "complete and independent living facilities" hinged on the existence of a stove. I regret we don't have another way mechanism to stop Mr. Sherrier from using that unit to expand his rental capabilities.

(Record on Appeal to Circuit Court pp. 18–19, p. 84, line 14, p. 150).

Appellants originally purchased 12 Park Road partly as a rental investment property. At the time they had no reason to believe their investment would be devalued by ordinances that had never been applied despite enactment of the subject ordinances several decades prior to the Appellants' purchase. Further, as Appellants began to further expend resources in realizing their investment, the Town continually indicated the subject structure could be used as Appellants originally intended. Thus, Appellants' resolution of the zoning violations is not their basis for showing a "prejudicial change in position"; instead, Appellants initial purchase of 12 Park Road partially as an investment in rental opportunities was the initial change in position, a change based substantially on the Town's initial position that Section 15-9-312 could not be used to thwart their plans for the financial stability of their family. The Town's continuous assurances from initial purchase to January 7, 2022, when the Town caved to pressure by a vocal minority of residents and reversed its legal analysis and prosecutorial posture, simply compounded the prejudice against Appellants who had undergone a significant change in their financial and familial situation.

There is little room for argument that due to the inordinate and unreasonable delay, the Town's initially favorable representations, and in absence of any reasonable explanation from the

Town of Hilton Head Island, fairness and equity dictate that the Town of Hilton Head Island is estopped from asserting a violation of 15-9-312 as to the rear structure on 12 Park Road.

For the above reasons, this Court should reverse the lower court's ruling that the Town is not estopped from issuing a violation against the Appellants pursuant to Section 15-9-312(a).

III. THE CBAA COMMITTED AN ERROR OF LAW BECAUSE ITS DECISION WAS ARBITRARY, RESULTED FROM AN ABUSE OF DISCRETION, WAS WITHOUT A RATIONAL BASIS, WAS NOT BASED ON ANY COURSE OF REASONING AND THE LOWER COURT FAILED TO CORRECT THE ERROR OF LAW.

During the CBAA hearing, the CBAA demonstrated its reliance on Ms. Jackson's written statement. (Record on Appeal to Circuit Court pp. 72, Line 10–15; 103, Line 16–25). In its report to the CBAA, the Town stated that it "had received a signed and notarized affidavit from a previous owner of 12 Park Road stating that the structure at the rear of the property was previously a concrete slab with a roof but no walls. (Attachment 1 Affidavit of MaryAnn Perri Jackson)." (Record on Appeal to Circuit Court pp. 52–53). In its Notice of Action, the CBAA states that the Sherriers' rear structure "was illegally improved sometime after September 30, 1977." (Notice of Action p. 1.) As noted by Appellant, the statement at issue is not an affidavit according to South Carolina law. (Appellant Br. p. 16).

As a brief recap, the Jackson statement is a type-written document simply stating that a structure in the backyard of 12 Park Road "was a shed . . . in which we stored outdoor equipment, such as garden tools and a lawn mower. . . . [I]t had a roof but no walls." (Record on Appeal to Circuit Court p. 55). Characterizing the Jackson statement as "evidence" defies any legitimate definition of the word, especially when used in the context of legal proceedings at any level. While the Town claims the South Carolina Rules of Evidence do not apply in hearings before the CBAA, the CBAA, the lower court, and this Court should be guided by the basic premise that only relevant

evidence should be considered in making a ruling. "Relevant Evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." S.C. R. Evid. 401. The Jackson statement was produced to the Town by the Uratos, long-time neighbors of 12 Park Road. (See Record on Appeal to Circuit Court p. 49). Beyond the serious questions as to its authenticity, the very proponents of the statement admitted its inaccuracy. Mr. Urato testified before the CBAA, stating the following:

> I have one other fact, I was and still am friends with the prior owners (Jacksons) to Mr. Piper. They bought the home in '83, sold in '85. We were business neighbors in Coligny Plaza, just three doors away for at least three years, four years until he sold his home in 1985.
> . . . .
>
> We weren't just neighbors, we were closer than that.
> . . . .
>
> When they moved, myself and my brother helped them move back to New Jersey. I drove the moving van for them. They had a little baby at the time, I don't think was a year old, the four of us -- the four adults in that group, my brother, Maryanne, her husband, and myself and the two little kids slept in the same room in the hotel, that's how close we were.
> . . . .
>
> My point to this is, in 1985 when they moved, that was -- that building in the back was partially a shed and partially a little enclosed office with only electricity.

(Record on Appeal p. 117, Line 25–p. 119, Line 18).

Additionally, the Beaufort County tax records confirm that the "shed" referred to by Jackson is not the rear structure at issue in this case. The county records indicate the house, since its 1969 construction, is comprised of 1,392 square feet and the subject rear structure, also constructed in 1969, is 816 square feet. (Record on Appeal to Circuit Court p. 43). As demonstrated in the county records, another third structure existed on the property in 1969: a "UTILROOM" at 48 square feet. Id. Therefore, if the Jackson letter is "evidence" of anything, it is evidence that a

smaller structure, of zero consequence to the subject rear structure, existed on the 12 Park Road property in addition to the 816 square foot structure that has existed substantially unchanged at 12 Park Road since 1969. For the above reasons, the CBAA and the lower court had no rational basis to rely on the irrelevant Jackson statement to find that the subject rear structure underwent any substantial change after 1985.

Appellants raised the issue of the statement's reliability and irrelevance both in their Summons and Notice of Appeal (p. 11) and before the lower court. (Circuit Court Hearing Transcript p. 9, Line 10–14).[1] Despite the serious questions as to the authenticity, relevance, and accuracy of the Jackson statement, and despite all other evidence demonstrating the rear structure on 12 Park Road had undergone, at most, cosmetic adjustments since 1969, a position taken by the Town for decades until a complete about-face on January 7, 2022, the CBAA upheld the Town's Notice of Violation. The lower court continued the improper reliance on the Jackson statement, failing to correct the CBAA's error of law, and thus, committing its own error of law.

Respondent claims that even without the Jackson statement, "there is still evidence in the record that supports the decision of the CBAA and Judge Dukes." (Resp't Br. p. 22). However, as discussed at length previously and above, the evidence to which Respondent refers is tainted by a misreading of Section 15-9-312. Stated differently, the CBAA and lower court found that evidence beyond the Jackson statement indicated the subject structure was converted into "residential living space," a term not contained or defined in Section 15-9-312. (Circuit Court Order pp. 6–10).

By relying solely on the unauthenticated, inaccurate, and irrelevant Jackson statement to determine that the subject structure had been substantially changed after 1985, the CBAA abused

[1] "A party is not required to use the exact name of a legal doctrine in order to preserve the issue." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (citing State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict)).

its discretion, reaching an arbitrary decision without any rational basis. The lower court committed its own error by adopting the CBAA's erroneous ruling.

CONCLUSION

For the reasons discussed previously and above, as well as for any other ground appearing in the record, Appellants Eric and Tracy Sherrier respectfully request this Court reverse the circuit court's denial of its appeal of the CBAA's decision.

Respectfully submitted,

s/James P. Sullivan
James P. Sullivan, Esquire
South Carolina Bar No. 77436
215 East Bay Street, Suite 303
Charleston, SC 29401
(843) 216-6940 (telephone)
(877) 216-6970 (toll-free)
(843) 216-6942 (facsimile)
jsullivan@hnblaw.com
Attorney for Appellants

September 25, 2023

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes III, Master-In-Equity

Case No. 2022-CP-07-01274

Eric and Tracy Sherrier,

Appellants,

vs,

The Town of Hilton Head Island Construction Board of Adjustment and Appeals, and The Town of Hilton Head Island,

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on September 25, 2023, copies of **Appellants Reply Brief** were served on all counsel of record via electronic mail to counsels' individual AIS electronic mail address:

Attorney for the Respondents:
Curtis L. Coltrane, Esquire
COLTRANE & WILKINS, LLC
P.O. Box 1344
Hilton Head Island, South Carolina 29938
(843) 785-5551
curtis@coltraneandwilkins.com
Attorney for the Respondents

[signature block on following page]

HOWSER, NEWMAN & BESLEY, L.L.C.

BY: _____

James P. Sullivan, Esquire
South Carolina Bar No. 77436
215 East Bay Street, Suite 303
Charleston, SC 29401
(843) 216-6940 (telephone)
(877) 216-6970 (toll-free)
(843) 216-6942 (facsimile)
jsullivan@hnblaw.com
Attorney for Appellants

September 25, 2023

From: James Sullivan
To: Curtis Coltrane
Subject: RE: Eric Sherrier v. The Town of Hilton Head Island- 2023-000891
Date: Monday, September 25, 2023 6:47:21 PM
Attachments: Reply Brief Package.pdf
image001.png
image003.png
image002.png
image004.png

Curtis,

Please see attached Reply Brief being filed with the Court of Appeals today.

Thank you.

Jim

James P. Sullivan
Member
South Carolina Certified Mediator
Howser, Newman & Besley, L.L.C.
215 East Bay St., Suite 303
Charleston, SC 29401
Phone: 843.216.6940; Toll Free: 877.216.6970
Facsimile: 843.216.6942
Email: jsullivan@hnblaw.com

From: Curtis Coltrane <curtis@coltraneandwilkins.com>

Sent: Friday, August 4, 2023 10:56 AM
To: James Sullivan <jsullivan@hnblaw.com>
Subject: RE: Eric Sherrier v. The Town of Hilton Head Island- 2023-000891

Jim:

Thank you. I am,

Sincerely

Curtis L. Coltrane
COLTRANE & WILKINS, LLC

Mailing Address:
Post Office Box 6808
Hilton Head Island, SC 29938

Street Address:
2 Park Lane, Suite 301
Hilton Head Island, SC 29928

(843) 785-5551
(843) 785-5552 (Facsimile)
curtis@coltraneandwilkins.com

From: James Sullivan <jsullivan@hnblaw.com>
Sent: Friday, August 4, 2023 10:28 AM

To: Curtis Coltrane <curtis@coltraneandwilkins.com>
Subject: Re: Eric Sherrier v. The Town of Hilton Head Island- 2023-000891

No objection.

Jim

From: Curtis Coltrane <curtis@coltraneandwilkins.com>
Sent: Friday, August 4, 2023 8:36 AM
To: James Sullivan <jsullivan@hnblaw.com>
Subject: Eric Sherrier v. The Town of Hilton Head Island- 2023-000891

Jim:

I am running into some scheduling issues over the next couple of weeks. Do you have any objection if I seek a thirty day extension to file the Town's initial brief and designation of matter in this case?

Thank you. I am,

Sincerely

Curtis L. Coltrane
COLTRANE & WILKINS, LLC

Mailing Address:
Post Office Box 6808
Hilton Head Island, SC 29938

Street Address:
2 Park Lane, Suite 301
Hilton Head Island, SC 29928

(843) 785-5551
(843) 785-5552 (Facsimile)
curtis@coltraneandwilkins.com

R. Davis Howser
James P. Newman, Jr.<
Benjamin D. McCoy^
Kelley Shull Cannon^
Andrew E. Haselden<
George V. Hanna, IV*
Michal Cooper Jones
Kyliene L. Keesley^
Albert Richard Pierce, Jr.*
James P. Sullivan
Andrew L. Hethington

William G. Besley (1964–2018)

< Certified Circuit Court Mediator
^ Certified Circuit Court Mediator and Arbitrator
* Also Admitted in North Carolina

HNB
HOWSER, NEWMAN & BESLEY, LLC
Attorneys and Counselors at Law
215 East Bay Street
Suite 203
Charleston, SC 29401
www.hnblaw.com

Columbia Office
1508 Washington Street
Columbia, SC 29201
Telephone 803.758.6000
Fax 803.758.4445
Toll Free 866.207.6209

Charleston Office
215 East Bay Street
Suite 303
Charleston, SC 29401
Telephone 843.216.6940
Fax 843.216.6942
Toll Free 877.216.6970

September 25, 2023

VIA ELECTRONIC MAIL ONLY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
ctappfilings@sccourts.org
1220 Senate Street
Columbia, South Carolina 29201

RE: ***Eric and Tracy Sherrier v. The Town of Hilton Head Island, et al.***
Appellate Case No.: 2023-000891
Our File No.: 587-006

Dear Ms. Kitchings,

Enclosed for filing please find **Appellants Reply Brief** and **Proof of Service**. By copy of this correspondence, we are serving opposing counsel of record with a copy of the **Appellants Reply Brief**. Should you have any questions regarding this matter, please do not hesitate to contact me.

With kind regards, I remain

Respectfully yours,

James P. Sullivan

JPS
Enclosures – as stated

cc: Curtis L. Coltrane, Esq. (*via electronic mail only*)