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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Mikell R. Scarborough, Master-in-Equity

Case No. 2021-CP-10-05211

CKC Properties, LLC,

Respondent (Appellant Below),

v.

The Town of Mount Pleasant, South Carolina;
The Town of Mount Pleasant Board of Zoning Appeals;
Michael Robertson, in his official capacity as Zoning Administrator;
Justin O'Toole Lucey; 415 Mill St., Inc; and 69 Scott Street, LLC,

Respondents Below.

Of which The Town of Mount Pleasant, South Carolina, and
The Town of Mount Pleasant Board of Zoning Appeals are the

Appellants.

APPELLANTS' MOTION TO CONFIRM AUTOMATIC STAY

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NOW COME Appellants, The Town of Mount Pleasant, South Carolina (the "Town"), and The Town of Mount Pleasant Board of Zoning Appeals ("BOZA") (collectively, "Appellants"), by and through their undersigned counsel, and, on the grounds set forth below, hereby move this Honorable Court to confirm that the appealed orders in this matter are subject to the automatic stay under Rule 241(a), SCACR.

BACKGROUND

On September 27, 2021, BOZA held a public hearing on a zoning appeal filed by Justin O'Toole Lucey, 415 Mill St., Inc., and 69 Scott Street, LLC (collectively, "Lucey") concerning a proposed hotel (the "Proposed Hotel") that CKC Properties, LLC ("CKC") wished to build in the Town.

By Final Order signed October 25, 2021, which was mailed to the parties in interest on October 26, 2021 (the "BOZA Decision"), BOZA granted Lucey's appeal on the sole ground that the Proposed Hotel lacked sufficient off-street parking to comply with the applicable zoning code (the "Parking Issue"). Besides the Parking Issue, Lucey had raised a number of other grounds for appeal, but BOZA denied the appeal as to all those grounds.

On November 16, 2021, CKC appealed the BOZA Decision to the Charleston County Court of Common Pleas pursuant to S.C. Code Ann. § 6-29-820. Following a consent order of reference to the Charleston County Master-in-

Equity, the Honorable Mikell R. Scarborough, CKC's appeal was heard on May 26, 2023, and decided in CKC's favor by order filed July 14, 2023 (the "Primary Appealed Order"), whereby the master reversed the BOZA Decision as to the Parking Issue and affirmed it as to the denial of all of Lucey's other grounds for appeal. (A copy of the Primary Appealed Order is attached hereto as **Exhibit 1**.)

On July 24, 2023, Appellants timely moved the master for reconsideration of the Primary Appealed Order pursuant to Rule 59(e), SCRCP. (A copy of Appellants' motion to reconsider is attached hereto as **Exhibit 2**.) The master denied the motion by order filed September 21, 2023 (the "Secondary Appealed Order") (collectively, the Primary Appealed Order and the Secondary Appealed Order are the "Appealed Orders"). (A copy of the Secondary Appealed Order is attached hereto as **Exhibit 3**.)

This appeal timely followed by notice of appeal served and filed earlier today, October 13, 2023. (Copies of Appellants' Notice of Appeal and Proof of Service (omitting copies of the Appealed Orders, which are already otherwise attached hereto) are attached hereto as **Exhibit 4**.)

In anticipation of this appeal, on October 6, 2023, CKC filed a motion in the lower court asking the master to confirm that the Appealed Orders are not subject to the automatic stay under Rule 241(a) or, alternatively, if the automatic stay does apply, asking the master to lift it ("CKC's Stay-Related Motion"). (A copy of

CKC's Stay-Related Motion is attached hereto as **Exhibit 5**.) While, as explained below, Appellants contend CKC's Stay-Related Motion is improper, as of the date of the instant motion, it is pending before the master.

Again, the instant motion asks this Court to confirm that the Appealed Orders are subject to the automatic stay under Rule 241(a).

ARGUMENT

I. The Court should confirm that the Appealed Orders are subject to the automatic stay under Rule 241(a).

As an initial matter, CKC's Stay-Related Motion is improper, because the authority to resolve a dispute over whether the automatic stay applies is vested in this Court, not the circuit court. *See Kearney v. Allen*, 287 S.C. 324, 327–28, 338 S.E.2d 335, 337–38 (1985) (interpreting former Supreme Court Rule 41 and holding that, when no procedure is specified, authority to resolve disputes over whether the automatic stay applies is vested in the Supreme Court, not the circuit court); *State v. Cooper*, 342 S.C. 389, 398, 536 S.E.2d 870, 875–76 (2000) (modifying *Kearney* to hold that the Court of Appeals has the power and authority to rule upon issues arising under the South Carolina Appellate Court Rules, including those arising under Rule 241). Accordingly, this Court, not the master, should resolve the dispute over whether the automatic stay applies here—and, as

explained below, it should resolve the dispute by confirming that the automatic stay applies.

Subsection (a) of Rule 241 establishes the following general rule that the service of a notice of appeal acts to automatically stay the appealed order(s):

> **(a) General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Subsection (b) of Rule 241, quoted in pertinent part as follows, addresses the existence (and lists some, but not all) of the various specific exceptions to subsection (a)'s general rule that "are found in statutes, court rules, and case law":

> **(b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. . . . A list of some, but not all, of the exceptions to the general rule is:
>
> ***
>
> **(8)** An appeal from an order granting an injunction or temporary restraining order.
>
> ***

As set forth in CKC's Stay-Related Motion, CKC takes the position that the Appealed Orders are not subject to the automatic stay under Rule 241(a). Specifically, it offers the following three reasons why, in its view, the Appealed Orders fall outside of Rule 241(a)'s general rule imposing an automatic stay: (1) S.C. Code Ann. § 6-29-830(B), (2) subsection (b)(8) of Rule 241, and (3) equity. (*See* **Ex. 5**.) Respectfully, CKC is mistaken on all counts.

Section 6-29-830(B) reads as follows: "The filing of an appeal in the *circuit court* from any decision of the board does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper." § 6-29-830(B) (emphasis added).

By its express terms, § 6-29-830(B) applies only to appeals *from* zoning boards *to* the circuit court, not to the next level of appeal, i.e., it does not apply to appeals *from* the circuit court *to* this Court. Indeed, just two codes sections down from § 6-29-830(B) is S.C. Code Ann. § 6-29-850, which provides, "A party in interest who is aggrieved by the judgment rendered by the circuit court upon the appeal may appeal *in the manner provided by the South Carolina Appellate Court Rules*." § 6-29-850 (emphasis added). Thus, the statutory scheme not only expressly limits the applicability of § 6-29-830(B) to appeals *to* the circuit court but also expressly states, in § 6-29-850, that appeals *from* the circuit court are to

proceed according to the South Carolina Appellate Court Rules, which, of course, under Rule 241, call for an automatic stay upon the service of the notice of appeal absent an applicable exception—of which, again, § 6-29-830(B) plainly is not one.

Subjection (b)(8) of Rule 241 provides for an exception to the automatic stay in the case of "[a]n appeal from an order granting an injunction . . . ." Rule 241(b)(8). Without citing any supporting authority, CKC asserts that "[t]he ultimate relief in [the Primary Appealed Order] was in the nature of an injunction because it directs the Town to, among other things, allow CKC to 'proceed to the DRB for Preliminary Approval of Site, Landscape, and Architecture' . . . ." (**Ex. 5** p. 5.)

"Injunction" is a term or art. An injunction is a particular form of equitable remedy, "available only where no remedy at law exists or where the legal remedy would fail to make the party whole." *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 369–70, 588 S.E.2d 635, 639 (Ct. App. 2003) ("An injunction is an equitable remedy; as such, it is available only where no remedy at law exists or where the legal remedy would fail to make the party whole."); *see also Hipp v. S.C. Dep't of Motor Vehicles*, 381 S.C. 323, 324, 673 S.E.2d 416, 416 (2009) ("'Actions for injunctive relief are equitable in nature.'") (quoting *Shaw v. Coleman*, 373 S.C. 485, 492, 645 S.E.2d 252, 256 (Ct. App. 2007)); 12 S.C. Jur. *Equity* § 19 ("An injunction is peculiarly an equitable remedy . . . .");

Besides the fact that the plain language of Rule 241(b)(8) speaks specifically in terms of "an order granting an injunction," not merely of an order "in the nature of" an injunction, CKC's argument is unavailing, because the relief granted by the Primary Appealed Order was neither an injunction nor anything reasonably akin thereto. By its express terms, the Primary Appealed Order was issued by the master sitting in an appellate capacity pursuant to the statutorily prescribed standard of review under S.C. Code Ann. § 6-29-840(A). (**Ex. 1** p. 10.) The relief granted by the Primary Appealed Order, and likewise the Secondary Appealed Order denying reconsideration thereof, was not an "injunction" or anything of the sort.

Lastly, CKC's equity argument is, in effect, no argument at all, because "equity follows the law." *Smith v. Barr*, 375 S.C. 157, 164, 650 S.E.2d 486, 490 (Ct. App. 2007) ("It is well known that equity follows the law."). The law is that the general rule of an automatic stay under Rule 241(a) applies absent the applicability of a particular exception to the general rule recognized in our "statutes, court rules, [or] case law." Rule 241(b). Appellants are not aware of any "equity" exception to the general rule under Rule 241(a) that is recognized in any South Carolina statute, court rule, or case law, and indeed CKC cites none. (**Ex. 5** p. 5.) Moreover, it does not make sense that such an exception would be recognized, because to subject the general rule under Rule 241(a) to something so

vague and uncertain (and subjective) as an "equity" exception would be to recognize an exception that devours the rule.

CONCLUSION

WHEREFORE, Appellants ask that the Court resolve the dispute over the applicability of the automatic stay in this matter and confirm that the automatic stay applies.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

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October 13, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-05211
CKC Properties, LLC,	)	
	)	
Appellant,	)	
	)	
vs.	)	**ORDER**
	)	**REVERSING BOZA ORDER**
The Town of Mount Pleasant, South Carolina; The Town of Mount Pleasant Board of Zoning Appeals; Michael Robertson, in his official capacity as Zoning Administrator; Justin O'Toole Lucey; 415 Mill St., Inc.; and 69 Scott Street, LLC,	)	**IN PART AND AFFIRMING IN PART**
	)	
Respondents.	)	

EXHIBIT

1

This matter comes before the Court by way of a Consent Order of Reference entered on October 19, 2022 (the "Consent Order"). The Consent Order referred the above-captioned case (the "BOZA Appeal") and Case No. 2021-CP-10-04416 (the "DRB Appeal"), a related quasi-judicial zoning appeal involving the same development project.

On May 26, 2023, the Court conducted a hearing on the BOZA Appeal. Ross Appel appeared on behalf of Appellant CKC Properties, LLC ("CKC"). Brian Quisenberry, David Pagliarini, and James Ward appeared on behalf of Respondents the Town of Mount Pleasant, South Carolina (the "Town") and the Town of Mount Pleasant Board of Zoning Appeals (the "BOZA").[1] Respondent Justin O'Toole Lucey, Esquire, appeared on behalf of himself and Respondents 415 Mill St., Inc. and 69 Scott Street, LLC (collectively, "Lucey"), each of which own property adjoining or nearby to the subject development.

[1] By order dated May 4, 2023, the Court dismissed Michael Robertson, in his official capacity as Zoning Administrator finding that he was not a necessary party to this action.

The Court has fully considered CKC's Appeal Petition, the parties' respective memoranda of law, the arguments of counsel at the hearing, the record on appeal pursuant to S.C. Code Ann. § 6-29-830(A), and the applicable law.

This appeal consists of two issues. On the procedural issue, the court concludes Lucey's appeal was timely filed. On the substantive issue, Court finds the BOZA Order granting the appeal on the issue of off-street parking should be reversed as the BOZA committed legal error in reversing the Zoning Administrator's interpretation of "Guest Room."

RECORD ON APPEAL

On August 24, 2022, the BOZA filed the Record on Appeal in the instant BOZA Appeal pursuant to S.C. Code Ann. § 6-29-830(A). This filing included the following documents:

- Exhibit A - BOZA's Final Order;
- Exhibit B - September 27, 2021 Revised BOZA Meeting Agenda;
- Exhibit C - September 27, 2021 Staff Report;
- Exhibit D - September 27, 2021 BOZA Meeting Minutes;
- Exhibit E - September 27, 2021 Staff Brief 1;
- Exhibit F - September 27, 2021 Staff Brief 2;
- Exhibit G - September 27, 2021 BOZA Meeting Correspondence;
- Exhibit H - August 12, 2021 Letter from Mr. Lucey appealing to BOZA; and
- Exhibit I - Town's August 23, 2021 response letter confirming receipt of Mr. Lucey's August 12, 2021 appeal.

On September 27, 2022, CKC filed a Motion to Supplement the Record. On March 3, 2023, prior to the hearing on CKC's Motion to Supplement the Record, the BOZA filed a Supplement to the Record. The documents therein include the following:

- Exhibit J - September 24, 2021 Letter from Ross Appel;
- Exhibit K - September 27, 2021 Letter/Outline from Justin Lucey;
- Exhibit L - September 27, 2021 Letter/Memorandum from Colin Colbert;
- Exhibit M - September 27, 2021 Letter from Gabe Joseph; and
- Exhibit N - Processing Form for Lucey's Appeal.

On March 6, 2023, this Court held a hearing on CKC's Motion to Supplement the Record. By Order dated March 8, 2023, the Court granted CKC's request to transcribe the record from the BOZA hearing at its expense, but denied the Motion to Supplement the Record in all other respects.

On April 20, 2023, the BOZA filed a "Respondents' Supplement of the Record," which included the following documents:

- Exhibit O - BOZA Rules of Procedure;
- Exhibit P - Mt. Pleasant Code of Ordinances, § 156.410 – 413, as of September 27, 2021;
- Exhibit Q - Mt. Pleasant Code of Ordinances, § 156.007, as of September 27, 2021;
- Exhibit R - Mt. Pleasant Code of Ordinances, § 156.170-176, as of September 27, 2021; and
- Exhibit S- Transcript of BOZA September 27, 2021 Hearing.

Exhibit A through Exhibit S constitute the "BOZA Record" and are referenced below.

BACKGROUND ON APPEAL

The Shem Creek Boutique Hotel and Final Zoning Approval

This case involves a proposed twenty-seven (27) room "boutique hotel" located along Mill Street in Mt. Pleasant at TMS Nos. 517-16-00-058, -057, -034, and -035 (the "Properties"). (BOZA Record, Exhibit A, p. 3). Shem Creek Boutique, LLC, an affiliate of CKC, is the owner of the Properties. CKC is the developer of the "Shem Creek Boutique Hotel" (the "Project"). (BOZA Record, Exhibit J, p. 1).

The Properties are base-zoned Neighborhood Commercial ("NC") and located in the Boulevard Overlay District (BOD). (BOZA Record, Exhibit F, p. 1). There is no dispute that "Boutique Hotel or Inn" is a use permitted by-right under this zoning designation. (BOZA Record, Exhibit F, p. 1). The BOZA Order confirms this finding:

> We find that the proposed development of a Boutique Hotel is generally a permissible use for these parcels, and we find that the proposed development satisfies the definition of "Boutique Hotel."

(BOZA Record, Exhibit A, p. 4). Neither Lucey nor the Town appealed this aspect of the BOZA Order.

CKC contracted to purchase the Properties in October 2020. Shortly thereafter, CKC and its engineers and architects began working with the Town's then long-time Zoning Administrator Kent Prause[2] to evaluate whether the Project complied with the Town's Zoning Ordinance. The BOZA Staff Report confirms the chronology as follows:

- "The Zoning Administrator discussed off-street parking requirements with the developer of the Shem Creek Boutique Hotel on or around February and March 2021."
- "The developer proceeded with project design and site-specific development plans based on the determination made by the Zoning Administrator."
- CKC "submitted plans to determine feasibility of the project on March 19, 2021."
- CKC subsequently "filed an application and submitted plans for pre-application review (Conceptual Design Review Team) of the project on May 13, 2021. Conceptual DRT reviews projects for zoning compliance."
- CKC "filed an application and submittal for Preliminary Design Review Board review on July 15, 2021. The submittal was hyperlinked to the Commercial Design Review Board July 2[8] (sic), 2021, meeting agenda."
- "The [DRB] agenda [including the Project] was posted to the Town website on July 19th, 2021, at 11:35 am."

(BOZA Record, Exhibit C, p. 5).

On or about June 9, 2021, the Design Review Team ("DRT"), which includes the Zoning Administrator, confirmed the site-specific development plan for the Project, including its off-street parking plan, complied with the Town's Zoning Code. This reaffirmed the Zoning Administrator's confirmation of zoning compliance from March 2021. After obtaining DRT approval, CKC

[2] Mike Robertson became the Town's Zoning Administrator on August 2, 2021, after Kent Prause retired.

applied for "Preliminary Approval of Site, Landscape, and Architecture" before the Commercial Design Review Board (the "DRB"). DRB approval is the only quasi-judicial entitlement necessary for the Project prior to securing construction and building permits. This appeal is pending.

Justin Lucey's Appeal

On August 12, 2021, Lucey[3] sent a letter to the Town's corporation counsel objecting to the Project (the "Lucey Letter"). (BOZA Record, Exhibit H). The Lucey Letter challenged, among other things, numerous zoning, design, and policy decisions pertaining to the Project. (*Id*.). The Lucey Letter stated it was an appeal of the Zoning Administrator's approval of the Project. (*Id*.).

On August 23, 2021, the Town's assistant corporation counsel replied to the Lucey Letter (BOZA Record, Exhibit I) stating that some, but not all, of the matters raised in the Letter are appealable to the BOZA. (*Id*.) The Town's assistant corporation counsel highlighted the parts of the Lucey Letter he believed were appropriately appealable to the BOZA and concluded:

> While the Town acknowledges August 12, 2021, as the date of your appeal to BOZA for the applicable issues highlighted in green in Exhibit A, we ask that you complete the BOZA appeal application found on our website at www.tompsc.com/157/Applications-Forms. A $200 fee is required for all BOZA appeals. (*Id*.).

Later that day, on August 23, 2021, Lucey completed and submitted the Town's official BOZA appeal application through the Town's online portal (the "Lucey Appeal"). (BOZA Record, Exhibit N). The Lucey Appeal included, as an exhibit, both the Lucey Letter (as highlighted by the Town's assistant corporation counsel) along with the Town's August 23, 2021 response letter. (*Id*., pp. 3-8.). It also included an executed "Property Owner Acknowledgement Form" and a map of the area showing Lucey's parcels in relation to the Properties. (*Id*., pp. 9-10).

[3] 415 Mill St., Inc. and 69 Scott Street, LLC are Lucey controlled and affiliated entities.

The Lucey Appeal claims the Zoning Administrator erred when he concluded that the specific plans for the Project satisfied the applicable use, off-street parking, height, and curb-cut regulations in the Town's Zoning Ordinance.

The BOZA Hearing on the Zoning Administrator Appeal

The BOZA heard the Lucey Appeal at its September 27, 2021 meeting. (BOZA Record, Exhibits A and D).

Prior to the meeting, the Town's new Zoning Administrator Michael Robertson filed two briefs for the BOZA's consideration. The briefs contain detailed analysis supporting the Project's final zoning approvals. (BOZA Record, Exhibits E and F). Exhibit E focuses entirely on the off-street parking requirements and approval for the Project, and Exhibit F focuses on all other zoning matters raised by the Lucey Appeal. (*Id*.).

Exhibit E summarizes the rationale behind Kent Prause's and Michael Robertson's approval of the Project's off-street parking plan as follows:

> The boutique hotel project is comprised of three buildings: Building A, Building B, and Building C. Building A contains 19 guest rooms or lodging units as defined above. Buildings B and C contain 4 guest rooms or lodging units each. The total number of guest rooms in all three buildings is 27. Using the standards established in §156.171 [Table], the minimum off-street parking space requirement for the boutique hotel is a range of 27 to 54 parking spaces. Plans for the boutique hotel indicate that the project provides 35 total parking spaces: 1 parking space for each guest room or lodging unit in Building A (19) and two parking spaces for each guest room or lodging unit in Buildings B and C (16). The 35 parking spaces are in the range of 27-54 minimum parking spaces established in 156.171 [Table]. **The parking standards meet the minimum parking off-street parking standards established by Town Council in the ordinance.**

(BOZA Record, Exhibit E, p. 4) (Emphasis added).

Prior to the BOZA meeting, counsel for CKC submitted a letter with various exhibits opposing the Lucey Appeal. (BOZA Record, Exhibit J). The letter argued that the Lucey Appeal should be dismissed because it was untimely, Lucey lacked standing, and the Zoning Administrator

correctly determined the Project complied with all relevant regulations in the Town's Zoning Ordinance, including off-street parking. (*Id*.) CKC's principal, Colin Colbert, and counsel for the owners of the Properties also submitted letters in opposition to the Lucey Appeal. (BOZA Record, Exhibits L and M).

At the September 27, 2021 BOZA hearing, the Zoning Administrator stated that the Project satisfied all applicable zoning regulations, including off-street parking requirements. (BOZA Record, Exhibit S, 12:17–15:9; Exhibit D). The Zoning Administrator acknowledged the term "Guest Room" was undefined in the Zoning Code. He explained his interpretative process and how he arrived at the interpretation that a "Guest Room" meant an individually keyed unit – and not a bedroom. He concluded his remarks on off-street parking by stating, "Council does not give any discretion to the staff to determinate (sic) what would constitute the required parking. It is a range in the parking requirement, and we must approve it." (BOZA Record, Exhibit S, 13:19-23).

After the Zoning Administrator's presentation, Lucey offered arguments in support of the Appeal. He did not discuss the issue of off-street parking. Instead, he focused on tree issues, floor area ratios, the definition of "boutique hotel," and various other topics. (BOZA Record, Exhibit S, 7:21–12:14; 35:17–39:23; Exhibit D). Lucey also remarked as follows: "this board is here to judge the suitability of this project for this neighborhood … and you have complete discretion on that." (BOZA Record, Exhibit S, 9:1-4).[4]

The BOZA then allowed for public comment. CKC's counsel and representatives spoke in favor of the Zoning Administrator's approval and against the Lucey Appeal. Counsel for the owner of the Properties commented further on standing and mentioned prior attempts by Lucey to

[4] As stated below, the BOZA is not a policy making body. Rather, its scope of review is confined to evaluating whether the Zoning Administrator's determinations were correct as a matter of law based on the text of the Zoning Ordinance and the facts in the record before the BOZA.

purchase the Properties. Finally, CKC's engineering and architecture team testified about their close collaboration with Town staff for nearly a year on the project and offered further support to the Zoning Administrator's application of the Zoning Code. Particularly compelling to this court was the testimony of Kevin Berry, the engineer for CKC, who illustrated the impact of the off-street parking calculations by showing the definition and purpose of the 1-2 parking range for projects such as this hotel. He argued that the Ordinance allowed for a 20% deviation from the actual number of spaces required that CKC was not utilizing while, at the same time, stating CKC was going to pave seven on-street parking spaces for the benefit of the area which do not count in favor of the developer. (Exhibit S, transcript of BOZA hearing, pp. 27-29. Emphasis added.)

After several public comments, the BOZA immediately moved to go into executive session to obtain legal advice. No specific purpose was mentioned. The BOZA met behind closed doors for approximately thirty (30) minutes. When the BOZA returned to the meeting, without any public discussion, a motion was immediately made to reverse the Zoning Administrator only as to the off-street parking calculation and to affirm the Zoning Administrator on all other matters.

The basis of the BOZA's motion was that the Zoning Administrator erred by interpreting the phrase "Guest Room," as used in the off-street parking calculations table. The BOZA concluded "Guest Room" means the number of rooms within each lodging unit (or beds). This overturned the Zoning Administrator's determination that a "Guest Room" means an individually keyed lodging unit. The motion passed unanimously without any public discussion by the members of the BOZA. (BOZA Record, Exhibit S, 40:8–41:21; Exhibit D).

BOZA Order and CKC's Appeal

The final order of the BOZA, memorializing its September 27, 2021 vote, was signed on October 25, 2021 (the "BOZA Order"). (BOZA Record, Exhibit A). The BOZA Order was mailed to the parties in interest on October 26, 2021. (*Id*.).

The BOZA Order found, among other things, that the Lucey Appeal was "timely filed and that [Lucey] has standing as an aggrieved party." (BOZA Record, Exhibit A, p. 2). Reversing the Zoning Administrator's interpretation of "Guest Room" as it appears in Section 156.171 of the Town's Zoning Ordinance, the BOZA Order found "it was an error for the Town Administrator to find that 'Guest Room' and 'Lodging Unit' are identical." (BOZA Record, Exhibit A, p. 4). "We find that Town Council's use of the phrase "Guest Room" references the number of bed rooms in a proposed accommodation and lodging development, rather than simply the number of keyed lodging units." (*Id*.).

On November 16, 2021, CKC filed a "Notice of Appeal, Demand for Pre-Litigation Mediation, and Appeal Petition" pursuant to S.C. Code Ann. §§ 6-29-820, and -825(A). The parties participated in a mediation session on January 27, 2022. The mediation was kept open after that date, and the parties continued settlement discussions. On June 24, 2022, the mediator filed an ADR Report declaring an impasse. On June 28, 2022, CKC filed an amended Appeal Petition (the "BOZA Appeal").

According to its Appeal Petition, CKC appeals the BOZA Order **only** with respect to the reversal of the Zoning Administrator's approval of the Project's off-street parking plan and interpretation of "Guest Room." CKC also challenged the timeliness of the Lucey Appeal and Lucey's statutory standing.

STANDARD OF REVIEW

"The findings of fact by the board of [zoning] 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). The court "must determine only whether the decision of the board is correct as a matter of law." *Id*.

"A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007). "However, a decision of a city 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*. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *County of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).

ISSUE

This appeal concerns the interpretation and application of the definition of a Guest Room for parking purposes of a Boutique Hotel situated in the Neighborhood Commercial zoning category of the Boulevard Overlay District within the Town.

CONCLUSIONS OF LAW

I. The BOZA erred by reversing the Zoning Administrator's interpretation of "Guest Room" and the approval of the Project's off-street parking plan.

CKC does not challenge the BOZA's authority to review the Zoning Administrator's interpretation of "Guest Room." Rather, CKC argues the BOZA erred by reversing the Zoning Administrator's and his predecessor's interpretation that a "Guest Room" means a "Lodging Unit." Essentially this appeal comes down to whether "Guest Room," as it appears in the Town's off-

street parking table found in Section 156.171, is an individually keyed lodging unit (the Zoning Administrator's interpretation) or each bedroom within an individually keyed lodging unit (the BOZA's interpretation). (emphasis added)

As an initial matter, the Court finds that the interpretation of "Guest Room" presents a *legal question* for this Court's review. "Issues 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). 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." *Id*. at 568, 666 S.E.2d at 894 *citing Charleston County Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). The determination of legislative intent is also a question of law. *Id*.

Since the interpretation of "Guest Room" presents a pure question of law, the Court need not defer to the interpretation expressed in the BOZA Order. S.C. Code Ann. § 6-29-840(A). Instead, the Court must conduct a *de novo* review of this ordinance interpretation dispute.

The Court's analysis starts with the observation that "Guest Room" is undefined in the Zoning Ordinance. (BOZA Record, Exhibit Q). This is significant for the purposes of this appeal because undefined terms in zoning ordinances must be liberally construed for the benefit of the property owner and in favor of the free exercise of property rights – *as a matter of law*.

"It is a well-founded principle of law that 'statutes or ordinances in derogation of natural rights of persons over their property are to be **strictly construed** as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that **the terms**

limiting the use of the property must be liberally construed for the benefit of the property owner.'" *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 13, 776 S.E.2d 753 (Ct. App. 2015) (citing *Purdy v. Moise,* 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953)) (emphasis added). "Local governments have wide latitude to enact ordinances regulating what people can do with their property," but they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility." *Keane v. Hodge,* 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct. App. 1987).

The Court finds the Zoning Administrator's five-page brief presented to the BOZA, defending his and his predecessor's interpretation of "Guest Room" (BOZA Record, Exhibit E), to be well-reasoned and consistent with the applicable rules of statutory interpretation in the zoning context. In applying the 35 parking spaces to the range of 27-54 minimum established in the Ordinance Table at 156.171, the Administrator stated, "The parking standards meet the minimum …off-street parking standards established … in the ordinance" and further, "Town Council has determined … the appropriate number of parking spaces and staff has no authority to require additional parking spaces beyond the minimum required." (Ex. E, Application and Analysis).

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). In doing so, we must give the words found in the statute their "plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id*. at 499, 640 S.E.2d at 459.

Acknowledging "Guest Room" was undefined in the Zoning Ordinance, the Zoning Administrator performed an ordinary meaning analysis. (BOZA Record, Exhibit E). He concluded "[t]he term in common usage most closely associated with a *guest room* in a hotel … is the term

hotel room." (*Id*.) (emphasis in original).[5] The Zoning Administrator went on to observe, in his professional judgment, that suite-style lodging units are commonly understood to be one of many different types of hotel rooms, all of which are considered individual lodging units.

Section 156.171 requires "1-2" off-street parking spaces per "Guest Room." The Court finds that expressing the number of required spaces in terms of a *range* supports the Zoning Administrator's ordinary meaning analysis and recognition that lodging units come in different configurations (single rooms, suites, etc.). It further reveals Town Council's intent that some types of lodging units require more parking than others, as determined by the Zoning Administrator.

The BOZA's narrow interpretation of "Guest Room" renders the "1-2" range irrelevant and superfluous. Under the BOZA's definition, each bedroom, at a minimum, requires at least 1 off-street parking space. If that were indeed the meaning of "Guest Room," there would be no reason to express the parking requirements in terms of a "1-2" discretionary range for the Zoning Administrator to apply in case-by-case applications. Had that been Town Council's intent, Section 156.171 would simply have required only one off-street parking space per "Guest Room."

Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention. *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995).

[5] While the Town and the BOZA present various dictionary definitions of "guest room" to the Court (none of which are in the BOZA Record), the Court finds the dictionary definitions advanced by the Town and the BOZA are in the context of a single-family residence (a guest room within a home) – not in the accommodations context. For that reason, the court concludes these proffered definitions are inconsistent with the ordinary meaning of the term "guest room" in the accommodations context, as explained by the Zoning Administrator in Exhibit E.

Here, the Zoning Administrator applied the "1-2" space discretion granted by Town Council to require the larger suite-style units in the Project to have two off-street parking spaces while the smaller units only required one off-street parking space each.[6] This interpretation and application is faithful to the range of parking spaces set forth in Section 156.171 for each "Guest Room," is consistent with the term's ordinary meaning, and honors the legislative intent.

The Court further finds the following excerpt from the Zoning Administrator's brief to be especially persuasive on the issue of legislative intent:

> The 2014 Parking Schedule revision changed the method of calculating parking for hotels and lodging from *sleeping room* to *guest room*. Following the rules of statutory construction, one must presume that the change in terminology by Town Council was intentional. (BOZA Record, Exhibit E, p. 3) (Emphasis in Original).

The BOZA Order concluded the term refers to "the number of bed rooms in a proposed accommodation and lodging development, rather than simply the number of keyed lodging units." (BOZA Record, Exhibit A, p. 4). This fails to appreciate the 2014 amendment to the off-street parking table discussed in the Zoning Administrator's Staff Report (Exhibit E). The BOZA's interpretation is more in line with the term "sleeping room" as opposed to "Guest Room" which would comport with the prior Ordinance definition. Town Council's amendment of the off-street parking table from "sleeping room" to "Guest Room" reveals the clear intent to calculate accommodations parking not on the basis of bed rooms within a unit. There is no evidence in the BOZA Record challenging the Zoning Administrator's legislative history analysis.

[6] Specifically, "Plans for the boutique hotel indicate that the project provides 35 total parking spaces: 1 parking space for each guest room or lodging unit in Building A (19) and two parking spaces for each guest room or lodging unit in Buildings B and C (16)." (BOZA Record, Exhibit E, p. 4) The math is simple: 19+16=35 parking spaces. Under the BOZA interpretation of the ordinance, the Inn would have 0.54 parking spaces per bedroom. Under the staff interpretation, the Inn would have 1.3 parking spaces per unit. This falls within the range of 1-2 spaces required by the ordinance.

Given the foregoing, the Court finds the BOZA committed an error of law and an abuse of discretion by reversing the Zoning Administrator's interpretation of "Guest Room." While the BOZA surely has the authority to review the Zoning Administrator's interpretation and application of the Zoning Ordinance, the BOZA is a quasi-judicial body – not a legislative one. Contrary to Lucey's suggestion at the hearing, *the BOZA is not a policy making body*. The BOZA's sole role is to interpret the Zoning Ordinance, as written, and review final decisions of the Town's professional staff. Town Council is the appropriate body for making policy decisions.

This Court's analysis and conclusion are guided by the special rules of statutory construction in the zoning context outlined in *Helicopter Solutions, Inc. v. Hinde* and *Keane v. Hodge.* Zoning ordinances, especially undefined terms such as "Guest Room," must be "strictly construed" and "terms limiting the use of the property must be liberally construed for the benefit of the property owner."

The Zoning Administrator's interpretation is well-reasoned and consistent with the ordinary meaning of the undefined term "Guest Room" in the applicable ordinance. To the extent there are alternative interpretations of the term "Guest Room," they do not appear in the express language of the Zoning Ordinance, as they must to be enforceable. This court concludes the Zoning Administrator's interpretation therefore trumps the BOZA's interpretation.

A narrower definition of "Guest Room" may have been a preferred policy by Lucey, BOZA members, and some members of the public. The Court does not express a position on the pros and cons of these policy arguments. However, the BOZA – as a quasi-judicial body – lacks the authority to reach this policy outcome when it is not clearly and unambiguously compelled by the plain meaning of the ordinance. *South Carolina Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C.

14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989) ("Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.")

The *exclusive* way for the Town to address the parking concerns raised by Lucey is by prospectively amending the Zoning Ordinance to define "Guest Room." The South Carolina Supreme Court has long maintained that zoning amendments are legislative acts. *See Conway v. City of Greenville*, 254 S.C. 96, 104, 173 S.E. (2d) 648, 652 (1970) (action by landowner to have municipality rezone a portion of landowner's property in which the Supreme Court stated that it "recognize[d] that the adoption of zoning ordinances is a legislative function.").

While not affecting this court's decision, the Town enacted legislative policy after this appeal when the Town adopted Ordinance No. 21071 which, among other things, defined "Guest Room" for the first time and added a new definition for "Guest Suite."[7] The new definitions are consistent with the BOZA Order; however, Ordinance No. 21071 was enacted on December 15, 2021[8] and so was not the law in effect at the time of the September 27, 2021 BOZA hearing. As "Guest Room" at that time was undefined, the BOZA was limited to reviewing and applying the law in effect when CKC's Project was reviewed by staff and appealed to the BOZA.

For these reasons, the Court finds the BOZA abused its discretion and reinstates the Zoning Administrator's interpretation of the term, which is consistent with the approved plans for the Project.

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[7] Ordinance No. 21071 reads, in relevant part, as follows:

GUEST ROOM (includes BEDROOM). Any room in a HOTEL or BOUTIQUE HOTEL containing one or more beds (excluding pull-out beds) provided for transient guests.

GUEST SUITE. Two or more GUEST ROOMS grouped together within a single rentable or leasable unit in any HOTEL or BOUTIQUE HOTEL.

[8] The Court takes judicial notice of Ordinance No. 21071 pursuant to Rule 201, SCRE. *See*, *Martin v. Bay*, 400 S.C. 140, 732 S.E.2d 667 (Ct. App. 2012) (upholding the Charleston Master-In-Equity's taking judicial notice of Charleston County's zoning ordinances and their application).

II. The BOZA did not err in concluding the Lucey Appeal was timely.

In addition to challenging the interpretation of "Guest Room," CKC argues the BOZA erred by finding the Lucey Appeal was timely filed. The procedure governing zoning administrator appeals, like the Lucey Appeal, is governed by the Zoning Ordinance and the BOZA's Rules of Procedure. Section 156.411(A)(5)(a) governs timeliness as follows:

> The appeal must be taken within **30 days** from the date the appealing party has received **actual notice** of the action from which the appeal is taken, by filing with the officer from whom the appeal is taken and with the Board of Zoning Appeals notice of appeal specifying the grounds for appeal. (Emphasis added).

Accordingly, for purposes of compliance with Section 156.410 this Court must analyze the date Lucey received actual notice of the staff's determinations, and the date he filed his appeal.

The Zoning Administrator presented to BOZA during the September 27, 2021 hearing that Lucey's appeal was timely filed. (*See* Exhibit, C, September 27, 2021 Staff Report). On August 12, 2021, Mr. Lucey served an appeal to the Town Attorney via letter detailing his numerous zoning concerns regarding the proposed Hotel. (*See* Exhibit H, August 12, 2021 Letter from Mr. Lucey Appealing to BOZA). Mr. Lucey's letter states "Please ***accept this letter as an appeal*** of the following errors relating to the Mill Street Boutiuqe Hotel project currently pending before the Design Review Committee." (*See* Exhibit H, August 12, 2021 Letter from Mr. Lucey Appealing to BOZA) (Emphasis Added).

The Zoning Administrator noted that staff first published on July 19, 2021 determinations regarding the proposed Hotel development in their staff report for the July Design Review Board meeting. The Zoning Administrator concluded that July 19, 2021 was the earliest date Lucey could have received actual notice of staff determinations because that was the first date staff published

the determinations.[9] Based on the August 12, 2021 date of Mr. Lucey's appeal letter, which Lucey submitted within thirty days of staff's July 19, 2021 posting, the Zoning Administrator concluded Mr. Lucey timely filed his appeal. BOZA accepted this analysis when they decided to hear Mr. Lucey's appeal. (*See* Exhibit A, October 26, 2021 Final Order).

Appellant first argues that this court should impute notice to Lucey as far back as April of 2021. Specifically, Appellant relies on an April 26, 2021 letter Lucey submitted to the Town complaining generally about the proposed development in opposition to an April 2021 height variance hearing. At the variance hearing Appellant sought to add an additional floor to the development. At that time, however, design plans showing the number of rooms and number of parking spaces had not yet been completed and staff had not yet made final determinations. **Appellant did not apply for preliminary approval with completed plans until July 15, 2021. (*See* Exhibit, C, September 27, 2021 Staff Report).** Lucey's April 26, 2021 letter submitted in opposition to the height variance hearing thus cannot show he had actual notice of staff's final determinations regarding parking calculations because staff had not yet made its final determinations at that time.

Appellant also argues that even if Lucey's actual notice date is July 19, 2021, Lucey's appeal is still untimely because Lucey submitted his appeal on August 12, 2021 in the form of a letter to counsel for the Town instead of using the form prescribed by BOZA. Appellant argues that Lucey did not submit his processing form and pay his appeal fee until August 23, 2021 (*See*

[9] At the hearing on this appeal, Mr. Lucey argued to this Court that he received actual notice on July 25, 2021 after reading a Post and Courier news article on the proposed development that cited to the July 19, 2021 staff report. This Court is unable to find any evidence in the record showing Mr. Lucey received actual notice on that date, and therefore the court uses July 19, 2021 as the actual notice date for purposes of the timeliness analysis.

Exhibit N, Processing Form for Lucey's Appeal), which Appellant points out is more than thirty days after staff's July 19, 2021 posting.

To support this argument, Appellant cites to BOZA's Rules of Procedure, which state in relevant part: "Requests to be heard before a Board shall be made by submitting the appropriate application form(s) approved by the Department of Planning and Development in accordance with the submittal deadline…", and "Applications may require a submittal and review fee in an amount specified by the schedule of fees established by the Town", "Failure to submit required information or forms and applicable fees may be grounds for rejection of the application." (*See* Exhibit O, BOZA Rules of Procedure). Appellant further relies on Ordinance Section 156.413(D), which states that "complete applications" are required, and that "incomplete applications will be returned to the applicant." (*See* Exhibit P, Mt. Pleasant Code of Ordinances Sec. 156.410 – 413, as of September 27, 2021).

This Court disagrees that BOZA's Rules of Procedure and Ordinance §156.413(D) strip BOZA of the ability to accept Lucey's August 12, 2021 appeal letter as the date of his appeal submission. Appellant misreads Mt. Pleasant Code of Ordinances §156.413(D). The section states that an incomplete application will be returned if it remains incomplete "prior to consideration by the Board." (*See* Exhibit P, Mt. Pleasant Code of Ordinances Sec. 156.410 – 413, as of September 27, 2021). BOZA received Lucey's processing form and fee long before consideration by BOZA on September 27, 2021. After receiving Lucey's appeal letter, **the Town Attorney informed Lucey that BOZA accepted his August 12, 2021 letter as his appeal, but requested that he prepare the form and pay the $200 fee.** (*See* Exhibit I, Town's August 23, 2021 Response Letter Confirming Receipt of Mr. Lucey's August 12, 2021 Appeal). On August 23, 2021, Mr. Lucey

submitted his fee and processing form – well before the September 27, 2021 BOZA hearing. Thus, Section 156.413(D) does not render Lucey's Appeal untimely.

CKC offers no authority holding that failure to file a processing form with a BOZA appeal letter constitutes an ineffective appeal for purposes of timeliness. The governing statute S.C. Code Ann. § 6-29-800(B) contains no reference to a processing form requirement in order to perfect a zoning appeal. "[A] regulation has the force of law, [but] it must fall when it alters or adds to a statute." *Chapman* at 190-91; *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 429 (2010); *see Goodman v. City of Columbia*, 318 S.C. 488, 490 (1995) (finding a regulation that required a particular form for review of a hearing commissioner's decision added to the statute, which only required the filing of notice of intent to appeal within fourteen days).

This Court will not disturb BOZA's determination on timeliness. BOZA determination that Mr. Lucey timely filed his appeal is affirmed.

III. The BOZA did not err in concluding Lucey possessed statutory standing as an adjacent property owner.

CKC argues Lucey lacked statutory standing to appeal the Zoning Administrator's approval of the Project. In so doing, CKC maintains mere adjacency, in and of itself, does not render an appellant an "aggrieved" party under S.C. Code Ann. § 6-29-800(B) and Section 156.411(A)(5). The Court disagrees and concludes that neighboring property owners have statutory standing to appeal final zoning approvals. The Court further finds that Lucey is not a business competitor of CKC; therefore, *ATC South, Inc. v. Charleston Cty*., 380 S.C. 191, 669 S.E.2d 337 (2008) does not apply.

FINAL ORDER AND JUDGMENT

IT IS THEREFORE ORDERED that the Lucey appeal was timely made and that Lucey has standing to challenge the actions of the Town and assert his appeal.

IT IS FURTHER ORDERED that the BOZA Order is reversed *only* with respect to its findings and conclusions regarding the interpretation of "Guest Room" and the Project's compliance with the ordinance. The Court hereby affirms the Zoning Administrator's interpretation of "Guest Room," and reinstates the Zoning Administrator's final planning approval of the Project's off-street parking plan and site-specific development plan for the Project as approved by the Zoning Administrator.

IT IS FURTHER ORDERED that the BOZA Order affirming the Zoning Administrator's approval of the Project, in all other respects, was not not appealed and are final decisions binding on all parties.

IT IS FURTHER ORDERED that the Project shall proceed through the development review process under the ordinances and regulations which existed at the time CKC submitted its applications to the Town and DRB and the Lucey Appeal was filed. The Project shall proceed to the DRB for Preliminary Approval of Site, Landscape, and Architecture.

IT IS FURTHER ORDERED that the Project is vested against the application of Ordinance No. 21071 and any other ordinance in conflict with the Project adopted after CKC submitted its applications to the Town and DRB.

IT IS SO ORDERED!

Signature page to follow

Charleston Common Pleas

Case Caption: Ckc Properties Llc VS Mount Pleasant South Carolina Town Of The , defendant, et al

Case Number: 2021CP1005211

Type: Order/Other

So Ordered

s/Mikell R. Scarborough 3062

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF CHARLESTON)	NINTH JUDICIAL CIRCUIT
)	
CKC PROPERTIES, LLC,)	CASE NO. 2021-CP-10-05211
)	
)	
APPELLANT,)	
)	
vs.)	
)	
THE TOWN OF MOUNT PLEASANT, SOUTH CAROLINA, THE TOWN OF MOUNT PLEASANT BOARD OF ZONING APPEALS; MICHAEL ROBERTSON IN HIS CAPACITY AS ZONING ADMINISTRATOR; JUSTIN O'TOOLE LUCEY; 415 MILL ST., INC.; AND 69 SCOTT STREET, LLC)	**THE TOWN OF MOUNT PLEASANT AND TOWN OF MOUNT PLEASANT BOARD OF ZONING APPEALS' MOTION TO RECONSIDER**
)	
RESPONDENTS.)	
)	

EXHIBIT

2

Respondents Town of Mount Pleasant, South Carolina and Town of Mount Pleasant, South Carolina Board of Zoning Appeals (hereinafter "Respondents", "Town" or "BOZA") hereby move this Court pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to reconsider, alter, and amend its Order reversing BOZA's ruling on Appellant's compliance with off-street parking requirements in the Town's then-applicable Ordinance.

PROCEDURAL HISTORY

On September 27, 2021, BOZA held a public hearing on a zoning appeal filed by Justin Lucey ("Lucey") concerning Appellant CKC Properties, LLC's ("Appellant") proposed boutique hotel in the Town of Mount Pleasant. On October 26, 2021, BOZA granted Lucey's appeal on the ground that Appellant's proposed hotel lacked sufficient off-street parking to comply with the Town's then-applicable Ordinance and denied Lucey's appeal on all other grounds. On November 16, 2021, Appellant appealed BOZA's decision to this Court.

On May 26, 2023, this Court held a hearing on Appellant's appeal. On July 14, 2023, this Court entered an Order reversing in part and affirming in part BOZA's decision. This Court found that BOZA's erred in reversing the Zoning Administrator's interpretation of "Guest Room" and by finding that Appellant's proposed hotel lacked sufficient off-street parking under the then-applicable Ordinance. This Court affirmed BOZA's determination that Lucey had standing to challenge Appellant's compliance with the then-applicable Ordinance and that Lucey's appeal was timely. Respondents respectfully request that this Court withdraw the portion of its Order reversing BOZA, and remove the errors identified below and issue a new Order affirming BOZA in full.

A. This Court's Order misinterprets the "1-2" parking space requirement as a "discretionary range," and erroneously reasons that the "discretionary range" supports the reversal of BOZA's Order.

The Court's Order errs in two critical ways interpreting the "1-2" parking space requirement as providing a discretionary range in the then applicable ordinance:[1]

i. **The Court description of the Zoning Administrator's determination is factually incorrect**.

The Court's Order states that the Zoning Administrator required that the smaller "units" in Appellant's proposed hotel provide one (1) off-street parking space and the larger "units" provide two (2). (Order, p. 14). This is a factually incorrect description of the Zoning Administrator's determination. For support of this factually erroneous holding, the Order cites to the Staff Brief as follows: "***Plans for the boutique hotel indicate*** that the project provides 35 total parking spaces: 1 parking space for each guest room or lodging unit in Building A (19) and two parking spaces for each guest room or lodging unit in Building B and C (16)." (Order p. 14,

[1] Appellant did not raise this argument in its Petition nor in its Memorandum of Law in Support, but did so in its proposed order adopted by this Court. As such, Respondents take this opportunity to dispose of the factually incorrect argument here, for the first time.

n. 6, citing to BOZA Record, Exhibit E, p. 4). The Order does not cite any other support. The Staff Report cited by the Order is describing a ***summary of the developer's presentation*** concerning the plans with this break down (one space for units in Building A, and two spaces for units in Building B and C). Nothing in the record supports a holding that the Zoning Administrator required certain number of parking spots by building or size of the various units. He did not do so.

In fact, the Zoning Administrator argued before BOZA that the 1-2 range did not provide him any discretion. In his appeal to BOZA, Lucey argued that the Zoning Administrator had discretion and should allot two spaces as the minimum per unit in this development instead of one space as the minimum per unit. The Zoning Administrator's Staff Brief ***rejects*** that the "1-2" provides him with discretion to require one or two spots per "Guest Room" on a case by case basis. (BOZA Record, Exhibit E, p. 4 ("Staff is granted no authority by Town Council to set the minimum ratio")).

Accordingly, the description in the Order that the Zoning Administrator required Appellant to provide one spot for certain units and two spots for other units is not factually correct, and should be removed from the Order.

ii. **The Court's Order misinterprets the "1-2" parking space requirement as providing the Zoning Administrator discretion to require either one or two parking spaces on a case by case basis, and erroneously concludes that the "1-2" parking space requirement has no meaning otherwise**.

The Court's Order cites to the "1-2" parking space requirement as follows:

> The Court finds that expressing the number of required spaces in terms of a *range* supports the Zoning Administrator's ordinary meaning analysis and recognition that lodging units come in different configurations (single rooms, suites, etc.). It further reveals Town Council's intent that some types of lodging units require more parking that others as determined by the Zoning Administrator.

> The BOZA's narrow interpretation of "Guest Room" renders the "1-2" range irrelevant and superfluous. Under the BOZA's definition, each bedroom, at a minimum, requires at least 1 off street parking space. If that were indeed the meaning of "Guest Room" there would be no reason to express the parking requirements in terms of a "1-2" discretionary range for the Zoning Administrator to apply in case by case applications. Had that been Town Council's intent, Section 156.171 would simply have required only one off-street parking space per "Guest Room."

(Order, p. 13). The Order's interpretation of the "1-2" parking space requirement is flat wrong. [2] The parking requirement is expressed in a "1-2" range because accommodation developments must have ***at least*** one spot per "Guest Room" and ***no more than two spots*** per "Guest Room" as a paved impervious surface. The Ordinance states the parking requirement as "1-2" so as to designate ***the maximum amount of impervious paved parking*** allowed on a given development. See Ordinance §156.171(B) which states for commercial properties any spaces above the minimum range ***must be surfaced with "pervious" materials***. (See Exhibit R, Mt. Pleasant Code of Ordinances §156-.170-176, as of September 27, 2021 ("in commercial zoning districts, all parking spaces provided above the minimum amount shall be surfaced with pervious materials"). Thus, the purpose of the "1-2" parking requirement is to set the range of impervious paved parking allowed, and to require that any additional parking added to the development beyond two spaces per "Guest Room" must be of a pervious material such as gravel.

The "1-2" has nothing to do with "discretion" in the Zoning Administrator to require either one or two spaces per "Guest Room" on a "case by case basis" as the Order erroneously concludes. As long as the proposed number of paved parking spaces is at least one space per guest room and no more than two spaces per guest room, the Zoning Administrator ***must*** approve

[2] Again, Appellant did not raise this erroneous argument in its Petition nor in its Memorandum of Law in Support, and this is the Respondents first opportunity to brief the argument to the Court.

it. There is no discretion. The Court's Order has no support in the Town Code or in the Record on Appeal for the holding that the "1-2" parking space requirement provides the Zoning Administrator with "discretion" to require one space for certain "Guest Rooms" and two spaces per "Guest Room" for others on a "case by case basis".

The Court's Order continues and erroneously reasons that the "1-2" parking space discretion would have no meaning if Town Council intended for parking space requirements to be counted per bedroom rather than lodging unit. As stated above, the "1-2" parking space requirement provides no discretion to the Zoning Administrator to require more or less spots depending on the size of the units, and the Court's whole reasoning in the Order on this point is error. (Order, p. 13). Accordingly, the Court should withdraw the Order and remove this reasoning, and reconsider the holding, and issue a new Order affirming BOZA in full.

B. This Court's Order erroneously disregards the customary and popular definition of "Guest Room".

This Court's Order defines "Guest Room" synonymous with "Lodging Unit" and rejects BOZA's definition of "Guest Room" as "bedroom". In doing so, this Court improperly disregards the customary and popular definition of "Guest Room", which is "bedroom".

This Court agrees that "Guest Room" is undefined in the then-applicable Ordinance. However, this Court improperly disregards long-standing South Carolina law on statutory construction, which holds: "when faced with an undefined statutory term, the court *must interpret the term in accord with its usual and customary meaning*." *Liberty Mut. Ins. Co. v. S.C. Second Inj. Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005) (*citing Branch v. City of Myrtle Beach*, 340 S.C. 405, 532 S.E.2d 289 (2000); *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998)) (Emphasis Added). There is no question that the usual and customary meaning of "Guest Room" is bedroom.

Respondents cited to numerous dictionary definitions showing that "Guest Room" means "bedroom" and not "lodging unit". Dictionaries are routinely utilized by Courts in determining the usual and customary meaning of a word or phrase. *See Abdo v. City of Charleston*, No. 2019-001910, 2023 WL 34431, at *1 (S.C. Ct. App. Jan. 4, 2023); *see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 62, 766 S.E.2d 707, 733 (2014).

This Court's Order discredits the dictionary definitions cited by Respondents on erroneous grounds. This Court's Order states "the Court finds the dictionary definitions advanced by the Town and the BOZA are ***in the context of a single-family residence*** (a guest room within a home) – ***not in the accommodations context***." (Order p. 13, n. 5) (emphasis added). The Order, however, is incorrect. Two of the definitions cited by Respondents explicitly state that "Guest Room" means "bedroom" ***in the context of a hotel***. *See* Macmillan: defining "Guest Room" as "a *bedroom* for a visitor in someone's home ***or in a hotel***" (emphasis added); *see also* Collins: "A guest room is a *bedroom* in a house ***or hotel*** for visitors or guests to sleep in" (emphasis added). Thus, the Court's Order relies on erroneous grounds to discredit the multiple dictionary sources showing the usual and customary meaning of "Guest Room". By ignoring the usual and customary usage of the term "Guest Room" this Court erred.

The Court further errs in finding that Town Council's 2014 amendment to the parking table to change the term "Sleeping Room" to "Guest Room" shows that "Guest Room" means "Lodging Unit" rather than bedroom. (Order, p. 14). In making the 2014 amendment, Town Council selected the phrase "Guest Room", which, as argued above, is repeatedly defined in multiple dictionaries as meaning a "bedroom" within a "hotel". Moreover, if Town Council had intended to change "Sleeping Room" to "Lodging Unit" it would have done so directly, rather than using the term "Guest Room" to mean "Lodging Unit". Therefore, the Court erred in

reasoning the 2014 amendments support reversing BOZA's determination, and the Court should issue a new order affirming BOZA in full.

C. The Court's Order fails to consider that "Guest Room" is a separate term from "Lodging Unit" in the Town's then-applicable Ordinance, and ignores Town Council's intent for the two different terms to have different meanings.

This Court's Order fails to read "Guest Room" in its statutory context. The Court reasons that "Guest Room" should be read synonymously with "Lodging Unit" rather than "bedroom". The Court fails to follow Town Council's intent that "Guest Room" is a different term from "Lodging Unit," which is used directly elsewhere in the ordinance. The Court improperly substitutes it's own judgment for that of Town Council. "Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." *Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003).

In interpreting ordinance terms, South Carolina courts must construe terms in the context of the overall ordinance in which they are contained. *Georgia-Carolina Bail Bonds, Inc.,* 354 S.C. at 24, 579 S.E.2d at 337 (Ct. App. 2003) ("Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. . . . Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction"). The usage of terms in an Ordinance must be considered intentional. *Consumer Advocate for State v. South Carolina Dept. of Ins*., 397 S.C. 599, 603, 725 S.E.2d 708, 710 (Ct. App. 2012) (finding that the undefined term "increase" did not mean "overall increase" because the legislature uses the phrase "overall increase" expressly elsewhere in the statute, and therefore the omission of "overall" must be

presumed to be intentional). *See also*, *S.C. Coastal Conservation League v. SCDHEC*, 380 S.C. 349 (2008) (refusing to interpret an undefined term in a statute as synonymous with another term because the legislature expressly used that term in other sections of the statute, and holding that this showed the legislature was able to use that specific term if that is what it meant by the undefined term).

Town Council uses the specific term "Lodging Unit" within the Ordinance at issue. Town Council uses the term "Lodging Unit" to determine what is, and what is not, a "boutique hotel". (*See* Exhibit Q, Mt. Pleasant Code of Ordinances §156.007, as of September 27, 2021). However, for determining off-street parking, the Town Council uses the term "Guest Room" and NOT "Lodging Unit". This Court's Order errs in finding that the term "Guest Room" is synonymous with "Lodging Unit". Why would Town Council use the term "Guest Room" to mean "Lodging Unit" when it could have easily used "Lodging Unit" directly as it did in other parts of the ordinance? This Court must view Town Council's use of both terms as intentional, and the two terms cannot be synonymous. "Guest Room" cannot mean "Lodging Unit". Therefore, the Court should withdraw its Order and issue a new Order affirming BOZA in full.

D. The Court's reliance on *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 13, 776 S.E.2d 753, 759 (Ct. App. 2015) is misplaced.

The Court's reliance on *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 13, 776 S.E.2d 753, 759 (Ct. App. 2015) is misplaced. This Court cites to *Helicopter Sols., Inc. v. Hinde*, for the point that this Court should liberally construe the Ordinance for the benefit of the property owner. *Helicopter* is distinguishable from the present case. In *Helicopter*, the Board of Zoning Appeals improperly limited the undefined term of "sight-seeing depot" to only "ground vehicles" (and not aerial vehicles), when based on a review of the ordinance, that limitation was not supported or contemplated by the legislature.

The principle of liberal construction for the benefit of the property owner referenced in *Helicopter* is subservient to "the intent of the legislature." *Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used."). Here, BOZA based its ruling on specific language in the ordinance at issue. BOZA concluded that Town Council's use of the term "Guest Room" and "Lodging Unit" within the same ordinance must be read that the two terms have different meanings. BOZA's interpretation of Guest Room as "bedroom" is based on Town Council's intent as ascertained from the language in the ordinance. Therefore, *Helicopter*, where the Board ignored the intent of the legislature, is distinguishable from the present case.

The Order also ignores that BOZA's interpretation is consistent with the overall purpose of the off street parking requirements. *See Georgia-Carolina Bail Bonds, Inc.,* 354 S.C. at 23, 579 S.E.2d at 336 (Ct. App. 2003) ("[L]anguage must be construed in the light of the intended purpose of the statute"). Municipalities require off street parking from developments to limit the burdens on public street parking. Requiring additional off street parking for large multiple bedroom units is consistent with reducing the public street parking burdens. Requiring the same parking for a one bedroom and a four bedroom hotel units, as the Court's Order holds, is inconsistent with the purpose of the ordinance to limit on-street parking burdens.

Further the notion within the Order that undefined terms must always be construed in favor of the property owner is misplaced. (Order, p. 11-12). Courts in South Carolina often interpret undefined terms within zoning ordinances in favor of municipalities if that interpretation is consistent with the intent of the legislature. See, e.g., *Abdo v. City of Charleston*, No. 2019-001910, 2023 WL 34431 (S.C. Ct. App. Jan. 4, 2023) (interpreting the undefined term

"monument" to restrict the property owners rights); *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 96, 791 S.E.2d 305, 311 (Ct. App. 2016) (interpreting the term "stable" to restrict the property owners rights).

In *Arkay, LLC v. City of Charleston*, a private property owner wished to operate a horse carriage business out of a portion of his building at 45 Pinkney Street in Charleston, however, the City's zoning ordinance prohibited "stables" within 100 feet of a residential district. *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 89, 791 S.E.2d 305, 307 (Ct. App. 2016). The Circuit Court ruled in favor of the property owner holding the building, which had offices and other rooms was not a "stable", but the Court of Appeals reversed. *Id*. at 96, 791 S.E.2d 305, 311. The term "stable" was not defined in the City's zoning code, but the Court of Appeals looked to the tourism code for guidance. The Court found the "stable" meant the entire building located at 45 Pinkney, including the offices and other rooms in the building, and not just the portion of the back of the building where the horses would be kept. The Court noted that "stable" and "stall" are different terms in the tourism ordinance, thus the legislature must intend for those terms to have different meanings. The Court of Appeals in *Arkay* thus interpreted the zoning restriction against a property owner because that was consistent with the intent of the legislature.

Arkay is directly analogous to the case at bar. The legislative intent behind "Guest Room" was for it to mean "bedroom". This is clear through the common usage of "Guest Room" in dictionaries and through Town Council's specific differentiation between "Guest Room" and "Lodging Unit" within the same Ordinance. Therefore, this Court erred in reliance on the distinguishable *Helicopter* holding and should look to the analogous case in *Arkay* for guidance instead. This Court should issue a new Order affirming BOZA in full.

CONCLUSION

For the reasons stated herein, the Respondents Town of Mount Pleasant and Town of Mount Pleasant Board of Zoning Appeals respectfully request that this Court withdraw its Order and issue a new Order affirming BOZA's determination in full.

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Attorneys for Respondents The Town of Mount Pleasant, South Carolina, and The Town of Mount Pleasant Board Of Zoning Appeals.

Charleston, South Carolina

Dated: July 24, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	CASE NO.: 2021-CP-10-05211
		CASE NO.: 2021-CP-10-04416
CKC Properties, LLC,	)	
	)	
Appellant,	)	
	)	
vs.	)	**ORDER**
	)	
The Town of Mount Pleasant, South Carolina; The Town of Mount Pleasant Board of Zoning Appeals; Michael Robertson, in his official capacity as Zoning Administrator; Justin O'Toole Lucey; 415 Mill St., Inc.; and 69 Scott Street, LLC,	)	
	)	
Respondents.	)	

2023 SEP 21 PM 2:49

EXHIBIT

3

Upon review of the Defendants' Motions to Reconsider filed by the Town of Mount Pleasant, the Mount Pleasant Board of Zoning Appeals, and Justin Lucey and his entities, as well as Appellant CKC's Memorandum in Opposition, the Court adopts the reasoning of Appellant's Memorandum and respectfully DENIES the Defendants' Motions to Reconsider. This matter shall be remanded to Circuit Court for further proceedings as this Court has addressed the appeal from the Consent Order of Reference, entered October 19, 2022.

IT IS SO ORDERED!

Charleston, South Carolina

Mikell R. Scarborough
Master in Equity, Charleston County

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Mikell R. Scarborough, Master-in-Equity

Case No. 2021-CP-10-05211

CKC Properties, LLC,

Respondent (Appellant Below),

v.

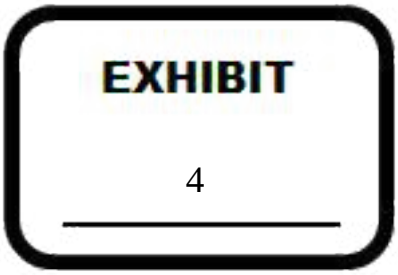
The Town of Mount Pleasant, South Carolina;
The Town of Mount Pleasant Board of Zoning Appeals;
Michael Robertson, in his official capacity as Zoning Administrator;
Justin O'Toole Lucey; 415 Mill St., Inc; and 69 Scott Street, LLC,

Respondents Below.

Of which The Town of Mount Pleasant, South Carolina, and
The Town of Mount Pleasant Board of Zoning Appeals are the

Appellants.

NOTICE OF APPEAL



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Attorneys for Respondent Below
Justin O'Toole Lucey

[1] Although the case caption has not been amended to reflect it, Michael Robertson, in his official capacity as Zoning Administrator, is no longer a party to this matter, having been dismissed by order filed May 4, 2023.

The Town of Mount Pleasant, South Carolina, and The Town of Mount Pleasant Board of Zoning Appeals (collectively, "Appellants") hereby appeal the following orders of the Honorable Mikell R. Scarborough, Master-in-Equity, Charleston County:

- **Order Reversing BOZA Order in Part and Affirming in Part**, filed July 14, 2023; and

- **Order [Denying Motions to Reconsider]**, filed September 21, 2023.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on September 21, 2023.

Respectfully submitted,

CLEMENT RIVERS, LLP

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Attorneys for Appellants

Charleston, South Carolina

October 13, 2023

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Mikell R. Scarborough, Master-in-Equity

Case No. 2021-CP-10-05211

CKC Properties, LLC,

Respondent (Appellant Below),

v.

The Town of Mount Pleasant, South Carolina;
The Town of Mount Pleasant Board of Zoning Appeals;
Michael Robertson, in his official capacity as Zoning Administrator;
Justin O'Toole Lucey; 415 Mill St., Inc; and 69 Scott Street, LLC,

Respondents Below.

Of which The Town of Mount Pleasant, South Carolina, and
The Town of Mount Pleasant Board of Zoning Appeals are the

Appellants.

PROOF OF SERVICE

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Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **NOTICE OF APPEAL** was served on all parties to this matter on October 13, 2023, by emailing (see attached email) a copy of the same to counsel of record:

Ross A. Appel, Esquire
ross@mklawsc.com
MCCULLOUGH KHAN APPEL
Mount Pleasant, South Carolina

Attorneys for Respondent (Appellant Below) CKC Properties, LLC

Justin O Lucey, Esquire
jlucey@lucey-law.com
JUSTIN O'TOOLE LUCEY, P.A.
Mount Pleasant, South Carolina

Attorneys for Respondents Below Justin O'Toole Lucey; 415 Mill St., Inc.; and 69 Scott Street, LLC

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BYBEE & TIBBALS, LLC
Mount Pleasant, South Carolina

Attorneys for Respondent Below Justin O'Toole Lucey

I also certify that a copy of Appellants' **NOTICE OF APPEAL** was today, October 13, 2023, E-Filed with the lower court (see attached NEF), which also, i.e., in addition to service by email, effected service of the notice today on the above-identified counsel of record via the E-Filing System.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellants

Charleston, South Carolina

October 13, 2023

From:	Hines, Russell
To:	"ross@mklawsc.com"; Lucey, Justin; "jst@bybeetibbals.com"; "ewilliams@bybeetibbals.com"
Cc:	Quisenberry, Brian; Kern, Zachary (Zach); Sandifer, Stephanie; Justman, Barbara; Justman, Aimee; Bell, Pollyana (Polly); Brown, Stephen L.
Subject:	CKC Properties v. Mt. Pleasant (BOZA Appeal) (Case No. 2021-CP-10-05211) -- Notice of Appeal
Date:	Friday, October 13, 2023 5:37:30 PM
Attachments:	image001.png CKC v. Town (Case No. 2021-CP-10-05211) -- Notice of Appeal.pdf 2023 07-14 -- BOZA Appeal -- Order Reversing BOZA in Part and Affirming in Part.pdf 2023 09-21 -- BOZA Appeal -- Order Denying Mot. to Reconsider.pdf

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Attached for service please find our **Notice of Appeal** (and copies of the **Appealed Orders** attached thereto) in the above-referenced matter.

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****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2021CP1005211

Official File Stamp:	10-13-2023 05:42:46 PM
Court:	CIRCUIT COURT Common Pleas Charleston
Case Caption:	Ckc Properties Llc VS Mount Pleasant South Carolina Town Of The , defendant, et al
Event(s):	Notice/Notice of Appearance
Document(s) Submitted:	Appeal/Notice of Appeal to Court of Appeals - Exhibit/Filing of Exhibits - Exhibit/Filing of Exhibits
Filed by or on behalf of:	Russell Grainger Hines

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Justin O'Toole Lucey for 69 Scott Street Llc, 415 Mill St Inc, Justin O'Toole Lucey

Jeffrey Scott Tibbals, Sr. for Justin O'Toole Lucey

Brian Lee Quisenberry for Mount Pleasant South Carolina Town Of The, Mount Pleasant Board Of Zoning Appeals Town Of The

Ross A. Appel for Ckc Properties Llc

Zachary Meade Kern for Mount Pleasant South Carolina Town Of The, Mount Pleasant Board Of Zoning Appeals Town Of The

Stephanie Ramia Sandifer for Mount Pleasant South Carolina Town Of The, Mount Pleasant Board Of Zoning Appeals Town Of The

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON CKC Properties, LLC, Appellant, vs. The Town of Mount Pleasant, South Carolina; The Town of Mount Pleasant Board of Zoning Appeals; Michael Robertson, in his official capacity as Zoning Administrator; Justin O'Toole Lucey; 415 Mill St., Inc.; and 69 Scott Street, LLC, Respondents.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2021-CP-10-05211 **APPELLANT'S NOTICE OF MOTION AND MOTION TO CONFIRM AUTOMATIC STAY NOT IN EFFECT** **(BOZA Appeal)**
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON CKC Properties, LLC, Appellant, vs. The Town of Mount Pleasant, South Carolina; and The Town of Mount Pleasant Commercial Design Review Board, Respondents.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2021-CP-10-04416 **APPELLANT'S NOTICE OF MOTION AND MOTION TO CONFIRM AUTOMATIC STAY NOT IN EFFECT** **(DRB Appeal)**

EXHIBIT

5

PLEASE TAKE NOTICE that the Appellant CKC Properties, LLC ("CKC"), by and through its undersigned counsel, does hereby give notice and move before the Master-In-Equity for Charleston County, under Rule 241, SCACR, and Rule 62, SCRCP, for an order confirming Respondents' forthcoming Notice of Appeal does not trigger an automatic stay and lifting the automatic stay if and to the extent it is deemed to apply.

On July 14, 2023, Judge Scarborough issued a twenty-one (21) page order affirming in part

and reversing in part the Board of Zoning Appeals' ("BOZA") decision at issue in this case (the "MIE Order"). The MIE Order found Justin Lucey's appeal of the Zoning Administrator's approval of CKC's by-right project to the BOZA was timely and he had standing, but it *reversed* the BOZA's decision that the Town Zoning Administrator misinterpreted the phrase "Guest Room," as it appears in the Town's off-street parking table, in approving CKC's site-specific development plan. The MIE Order also determined CKC's project was vested against the application of Ordinance No. 21071, which eliminated the ability to proceed by right with a boutique hotel and changed the off-street parking rules. Ordinance No. 21071 was adopted several months after the BOZA hearing. Finally, the MIE Order directed CKC's project to resume the development review process before the Design Review Board ("DRB"). It states "[t]he Project shall proceed to the DRB for Preliminary Approval of Site, Landscape, and Architecture." (MIE Order, p. 21).

On September 21, 2023, Judge Scarborough denied the Town's and Justin Lucey's motions to reconsider the MIE Order.

CKC is ready, willing, and able to proceed with DRB review, as ordered by the Court. On October 6, 2023, CKC formally applied to the DRB for Preliminary Approval of Site, Landscape, and Architecture as directed by the MIE Order.

However, since the issuance of the MIE Order, the Town has refused to allow the CKC to appear before the DRB.[1] First, the Town invoked the pending motions to reconsider as justification. Now that those motions have been denied, the Town now argues that their

[1] Following the issuance of the MIE Order, on August 9, 2023, counsel for CKC sent a letter to the Town's attorneys demanding that the project appear before the DRB pursuant to the MIE Order. On August 21, 2023, the Town's attorney rejected this request due to the Town's and Justin Lucey's pending motions to reconsider, but stated the issue could be revisited once the Court ruled on the motions to reconsider. On September 22, 2023, counsel for CKC requested the Town revisit its position due to the denial of the motions to reconsider. As of this filing, the Town has not responded to this request. However, the Town has objected to CKC's motion for attorney's fees and costs proceeding before the MIE due to its to-be-filed Notice of Appeal.

forthcoming Notice of Appeal will automatically stay the MIE Order, preclude CKC from appearing before the DRB, and stop the MIE from considering CKC's motion for attorney's fees and costs filed on October 2, 2023.

CKC disagrees with the Town's automatic stay analysis. As set forth below, S.C. Code Section 6-29-830(B) provides an exception general automatic stay rule. Rule 241(a), SCACR. Alternatively, if an automatic stay is deemed to be triggered by Respondents' appeal, CKC argues (1) the stay should be lifted under Rule 241(c), SCACR and (2) CKC's motion for attorney's fees and costs are not subject to the stay because they are matters not decided in the order on appeal. Rule 241(a), SCACR; *See, Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004).

CKC files the instant motion to confirm the MIE Order's intent that "[t]he Project shall proceed to the DRB for Preliminary Approval of Site, Landscape, and Architecture." (MIE Order, p. 21). CKC has suffered and will continue to suffer significant harm by the Town blocking its by-right development review process while the Town appeals the MIE Order. In essence, the Town is carrying the water of Justin Lucey's now rejected appeal and turning a cold shoulder to its own Zoning Administrator who approved the project based on CKC's by-right zoning.

CKC requests the Court further affirmatively lift the automatic stay, if it applies at all, to remove any doubt that CKC may "proceed to the DRB for Preliminary Approval of Site, Landscape, and Architecture" in accordance with the MIE Order. Rule 241(d)(1), SCACR, grants the MIE discretionary authority to lift an automatic stay in the event it is determined to apply:

> (1) Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The issuance of an ex parte order or decision, or an unnecessary delay by the lower court or administrative tribunal in ruling on this application shall constitute an extraordinary circumstance.

1. CKC submits the Town's appeal to the Court of Appeals falls under the exception to the automatic stay described in Rule 24l(b), SCACR, for instances where a specific statute controls over the general rule. Rule 241(b) confirms the list of enumerated exceptions is not exhaustive.

The statutes governing zoning appeals contain an exception to the automatic stay rule. S.C. Code Section 6-29-830(B) provides as follows: "The filing of an appeal in the circuit court from any decision of the board [of zoning appeals] does not ipso facto act as a supersedeas, but the judge of the circuit court may in his discretion grant a supersedeas upon such terms and conditions as may seem reasonable and proper."

Since there was no automatic stay triggered by CKC's appeal from the BOZA to the MIE under Section 6-29-830(B), it follows that Respondents' appeal from the MIE to the Court of Appeals ought similarly "not ipso facto act as a supersedeas." The clear intent of Section 6-29-830(B) is to prevent the mere filing of an appeal, by a losing party, to restrain the use and development of property as determined by the BOZA in the first instance or by the Master-In-Equity on an appeal of a BOZA decision. Reading Section 6-29-830(B) narrowly to provide an automatic stay exception only from the BOZA to the MIE would elevate the BOZA over the MIE in terms of significance and weight. Such a reading would allow a losing party – including a neighbor – to hold up the use and development of property for many years just by filing appeal after appeal. This cannot be the law in South Carolina because it substantially impairs property rights and dramatically favors those driven to stop development by not requiring them to demonstrate irreparable harm and post bond.

2. In addition to the express statutory exception to the automatic stay, CKC further submits that the MIE Order falls under the exception set forth in Rule 24l(b)(8), SCACR, for

appeals from "an order granting an injunction or temporary restraining order." The ultimate relief in the MIE Order was in the nature of an injunction because it directs the Town to, among other things, allow CKC to "proceed to the DRB for Preliminary Approval of Site, Landscape, and Architecture" under the ordinances in place at the time of Justin Lucey's appeal to the BOZA.

3. Equity and justice weigh heavily in favor of lifting the automatic stay to the extent it applies, if at all. It is important to recognize that the Town's Zoning Administrator – and his predecessor – approved the plans for CKC's by-right project, including its off-street parking calculations. Justin Lucey – the neighbor – initiated this appeal not due to some legitimate technical disagreement with the Zoning Administrator, but to stop CKC's project at any costs. This Court reversed the BOZA's decision thereby reinstating the Zoning Administrator's approval. For the Town to appeal the MIE Order and claim an automatic stay elevates the personal preferences of Justin Lucey over two Zoning Administrator decisions, the Town's ordinances, and this Court's ruling. The Town's position is that it can continue to force CKC to sustain millions of dollars in lost revenues and increased construction costs merely by perpetuating Justin Lucey's failed appeal without posting a bond or taking other measures to compensate CKC. This is fundamentally unfair and works extreme injustice to CKC.

CKC will continue to suffer significant harm if not allowed to proceed to the DRB for Preliminary Approval. CKC has already sustained enormous financial detriment as a result of the nearly two-year delay thus far. Moreover, while the MIE Order confirms CKC's project is vested, the time period for vested rights is not unlimited. Under state law, vested rights are good for two years plus five annual one-year extensions. Lengthy appeals to the South Carolina Supreme Court will cause most, if not all, of the vesting period to expire. This would defeat the effect and intent

of the MIE Order – all by virtue of the Town merely filing an appeal and claiming an automatic stay.

Lifting the automatic stay, if and to the extent it applies, mitigates CKC's losses that are already in the millions of dollars, without imposing any hardship, loss, or prejudice on the Town or Justin Lucey. If CKC obtains approval from the DRB that decision can, and unfortunately likely will, be appealed by Justin Lucey who has to date never missed an opportunity to challenge the project through the legal system. If that happens, the BOZA and DRB appeals can proceed through the appellate courts on parallel tracks. This will save many years and untold damages that would otherwise be incurred by CKC due to unnecessary delay. It would also reduce Town taxpayer funded attorney's fees and ultimate exposure.

CKC seeks only to develop according to its by-right zoning and the Town's rules and regulations. Equity and justice weigh heavily in favor of removing the automatic stay, if and to the extent it applies.

4. Rule 241(c)(3), SCACR, grants considerable discretion to this Court in determining whether the automatic stay should be lifted and, if so, the conditions associated with lifting the automatic stay:

> (3) The granting supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate. Further, where it appears that the granting or lifting of a stay, or the issuance of a writ of supersedeas is insufficient to afford complete relief, the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may order other affirmative relief upon such terms as are deemed appropriate.

The Court's exercise of discretion in CKC's favor is supported by the exception to the automatic stay rule found in Rule 241(b)(11), SCACR (providing an exception for "[a]ppeals from administrative tribunals as provided in S.C. Code Ann. § 1-23-380(A)(2) and § 1-23-600(G)(5)").

Local zoning boards are functionally equivalent, in many ways, to administrative tribunals governed by the Administrative Procedures Act. Rule 24l(b)(11), SCACR reflects South Carolina's pro-property rights policy that precludes a losing party in an administrative appeal to functionally "win" merely by drawing out the appeals process.

The Town and Justin Lucey have already prevented CKC from developing its property under its by-right zoning, as confirmed by not one, but two, Zoning Administrators for now well over two years. Respondents – as the losing parties – should not be allowed to do so for several more years while the appeal process drags on, without posting bond, and where there is no identifiable or cognizable harm to the Town and Justin Lucey.

CONCLUSION

For the foregoing reasons, CKC requests this Court confirm the MIE Order will not be automatically stayed upon the filing of a Notice of Appeal. To the extent an automatic stay is triggered, CKC respectfully requests the Court lift it based on the above authorities and for good cause shown. Finally, CKC requests the Court confirm its project shall "proceed to the DRB for Preliminary Approval of Site, Landscape, and Architecture" notwithstanding any appeal.

Respectfully Submitted,

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October 6, 2023
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Mikell R. Scarborough, Master-in-Equity

Case No. 2021-CP-10-05211

CKC Properties, LLC,

Respondent (Appellant Below),

v.

The Town of Mount Pleasant, South Carolina;
The Town of Mount Pleasant Board of Zoning Appeals;
Michael Robertson, in his official capacity as Zoning Administrator;
Justin O'Toole Lucey; 415 Mill St., Inc; and 69 Scott Street, LLC,

Respondents Below.

Of which The Town of Mount Pleasant, South Carolina, and
The Town of Mount Pleasant Board of Zoning Appeals are the

Appellants.

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I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that **APPELLANTS' MOTION TO CONFIRM AUTOMATIC STAY** was served on all parties to this matter on October 13, 2023, by emailing (see attached email) a copy of the same to counsel of record:

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Respectfully submitted,

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October 13, 2023

From:	Hines, Russell
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Subject:	CKC Properties v. Mt. Pleasant (BOZA Appeal) (Case No. 2021-CP-10-05211) -- Appellants' Motion to Confirm Automatic Stay
Date:	Friday, October 13, 2023 6:53:31 PM
Attachments:	image001.png CKC v. Town (Case No. 2021-CP-10-05211) -- Motion to Confirm Automatic Stay.pdf Ex. 1 -- 2023 07-14 -- BOZA Appeal -- Master"s Order Deciding CKC"s Appeal.pdf Ex. 2 -- 2023 07-24 -- BOZA Appeal -- Town"s Mot. to Reconsider.pdf Ex. 3 -- 2023 09-21 -- BOZA Appeal -- Order Denying Mot. to Reconsider.pdf Ex. 4 -- 2023 10-13 -- BOZA Appeal -- Notice of Appeal & POS.pdf Ex. 5 -- 2023 10-06 -- BOZA Appeal -- CKC"s Mot. to Confirm No Automatic Stay.pdf

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Attached for service please find **Appellants' Motion to Confirm Automatic Stay** (and the **Exhibits** attached thereto, which number 1-5) in the above-referenced matter.

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