THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Appellate Case No. 2023-000891

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

v.

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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF CASE

The subject property in this Appeal is located at 12 Park Road, Hilton Head Island, South Carolina. Two building structures exist on the property. (R. p. 193). The front building is the main house on the property. The rear structure is an accessory structure equipped with beds and toilet facilities. The rear structure has no stove for cooking. The rear structure is entirely dependent on the main house facility for access to the rear structure and for cooking and privacy. One can only access the rear building through the main house and all cooking must be done in the main house. When rented by the Sherriers, both buildings are rented as a single unit to a single party. Both buildings have been taxed as a single unit. (R. p. 203).

The rear structure has existed for decades and has been continuously used in conjunction with the main house as a dwelling. (R. p. 193). Mark Piper, the prior owner of the property, purchased the property in 1985. Eventually, Piper sold the property to the Sherriers in 2020. (R. p. 193). Shortly after the Sherriers purchased the property, a team of disgruntled neighbors, who objected to the Sherriers' use of their legally acquired property, initiated a campaign against the Sherriers for reasons unrelated to flooding. (R. pp. 170–173). Indeed, in the decades of use, there is no record of any flood issues, notwithstanding it being at the lowest grade in the surrounding residential property.

Based on numerous Freedom of Information Act requests, the Sherriers uncovered a coordinated effort among these neighbors and certain officials for the Town of Hilton Head (Town) throughout 2021. (R. pp. 170–173). On each occasion when the neighbors repeatedly insisted the Town take action, the Town reported back to them after the Town's attorneys had essentially turned "over every rock," failing to find the Sherriers' rear structure was in violation of any Town ordinance. (R. p. 310). These interactions nevertheless continued, and in January 2022, after

months of pressure, the Town reversed course and issued the violation at the center of this Appeal. The citation was issued notwithstanding the Town's thoroughly researched and prior determination that no violation existed.

On April 7, 2021, Diane Busch, staff attorney for the Town of Hilton Head Island, wrote in response to a neighbor's complaint:

> [W]e are not FEMA, and we have no authority to enforce Federal guidelines or regulations. The town is authorized to enforce our ordinances and LMO, and I have shared our position with you several times. Thank you so much for your understanding that this issue has been thoroughly researched and considered. If you wish to pursue further, we have an Island full of reputable and experienced real estate lawyers who might offer a different perspective.

(R. p. 171 (emphasis added)).

On March 29, 2021, Wendy Conant, Code Enforcement Officer for the Town of Hilton Head Island, wrote to Diane Busch regarding a neighbor's complaint:

> I am happy to call her and advise no violations. But she will probably go to the Town Council.
>
> This woman is continuing to complain about 12 Park Road…. There are no code violations at this time, but I imagine this is not going away.

(R. p. 171).

On February 15, 2022, Chris Yates, Development Services Manager for the Town of Hilton Head Island, wrote that the neighbors' continued complaints appeared to be "borderline harassment." (R. p. 171).

There are many emails between Town Officials and their attorneys confirming that the Town determined after thorough review that no violation existed. (R. pp. 171–172, 177–179, 181–183, 185, 187). Indeed, during a remodel, a building inspector informed the Sherriers they would need to remove any stove in the rear structure to avoid issuance of a violation. Once the Town determined no stove was present, the Sherriers passed the inspection. (R. p. 182).

As disclosed in the FOIA production, all communications among the Town Officials themselves indicate the Town of Hilton Head Island did not consider the Sherriers' rear structure in violation of any Town ordinances. Despite the Town's repeated opinion of no violation, on January 7, 2022, in a complete reversal of position, the Town issued a Notice of Violation alleging the rear structure was in violation of Municipal Code of The Town of Hilton Head Island, South Carolina, Section 15-9-312(a) (1983) (Section 15-9-312(a) or Ordinance). (R. p. 216).

The Sherriers appealed the Notice of Violation to the construction Board of Adjustments & Appeals (CBAA). Mr. Sherrier appeared at a May 24, 2022 hearing before the CBAA and presented the Sherriers' case. On June 7, 2022, the CBAA issued its Notice of Action denying the Sherriers' appeal. (R. p. 312–313). The Sherriers appealed the CBAA decision to the Beaufort County Court of Common Pleas Circuit Court pursuant to S.C. Code Ann. § 18-7-10. The Honorable Marvin H. Dukes III denied the Sherrier's appeal in a May 5, 2023 (Order). Appellants served a timely Notice of Appeal of the Order on June 2, 2023.

STANDARD OF REVIEW

The standard of review on appeal from a local government review board has been stated by the South Carolina Supreme Court as follows:

> This Court will not reverse the findings of a county review board unless the board's findings have no evidentiary support, or the board has committed an error of law. *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). In the zoning context, a decision of the reviewing body will not be disturbed if there is evidence in the record to support its decision. *Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997). Indeed, we will not substitute our judgment for that of the reviewing body, even if we disagree with the decision. *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952). "However, the decision of the zoning board will not be upheld where it is based on errors of law." *Hodge v. Pollock*, 223 S.C. 342, 348, 75 S.E.2d 752, 754 (1953). Instead, "a decision of a municipal zoning board will be overturned if it is arbitrary, capricious,

> has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Rest. Row Assocs. v. Horry Cty*., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

Grays Hill Baptist Church v. Beaufort Cty., 431 S.C. 630, 637, 850 S.E.2d 29, 33 (2020) (internal quotation marks omitted).

As to interpretation of ordinances, according to South Carolina law, "[a]lthough 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." Charleston Cty. Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). South Carolina's appellate law concerning statutes offers further guidance to interpreting local ordinances:

> In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction. *Higgins v. State*, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). *See also Jackson v. Charleston Cty. Sch. Dist.*, 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose.").

Ray Bell Constr. Co. v. School Dist., 331 S.C. 19, 27–28, 501 S.E.2d 725, 730 (1998). See also Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 640, 723 S.E.2d 191, 195 (2012) ("Regulations are interpreted using the same rules of construction as statutes."). The South Carolina Supreme Court has also stated the following: "issues involved in the construction of an ordinance are reviewed as a matter of law under a broader standard of review applied in reviewing issues of fact." Mikell v. City of Charleston, 386 S.C. 153, 158, 687 S.E. 2d 326, 329 (2009).

When dealing with ordinance provisions, South Carolina courts have stated the following:

> Further, where two provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails. *Capco of Summerville v. J.H. Gayle Constr. Co., Inc.*, 368 S.C. 137, 628 S.E.2d 38

(2006). *See also Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (specific statutory provision prevails over a more general one); *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (general rule of statutory construction is that a specific statute prevails over a more general one). When reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law. *Eagle Container*, *supra.*

Id. at 160, 687 S.E.2d at 330.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY FINDING THAT SECTION 15-9-312(A) APPLIES TO THE REAR STRUCTURE ON THE SHERRIER PROPERTY.

In relying on the Town's incorrect reading of the subject ordinance, the entire lower court's ruling is tainted by an error of law.

A. Lower Court Ruling

In denying the Sherriers' CBAA appeal, the lower court continually refers to the term "residential living space." (*See* R. pp. 2–16). From the outset, the lower court incorrectly framed the issue: "The nature of the violation is that the accessory structure was converted to residential living space after September 30, 1977." (R. p. 3). From the outset, the lower court accepted, ostensibly as a matter of law, the Town's incorrect reading of the subject ordinance as set forth in the Town's May 24, 2022 Staff Report: "The structure at 12 Park Road is a structure unlawfully being used for habitation in violation of [Section 15-9-312(a)]." (R. p. 214.)

Based on and recasting the finding of "habitation," the lower court erred by reconstruing Section 15-9-312(a): "A change in the use of the accessory structure to residential living space must be done in conformity to the building code as adopted by the Town, and in conformity to § 15-9-312(a)." (R. p. 7). The lower court continued: "the only evidence in the record [shows] that the conversion of the accessory structure to residential living space was after 1985." (R. p. 8 , n.

27). In essence, the lower court itself failed to correct an error of law committed by the CBAA, instead adopting the CBAA's error of law as a matter of law.

Section 15-9-312(a) which reads as follows:

> *Residential construction*. New construction and substantial improvement of any residential structure (including manufactured homes) must be constructed so the lowest floor, is elevated no lower than three (3) feet above the base flood elevation or thirteen (13) feet above mean sea level using NAVD88, whichever is higher.

As is evident by a quick reading of the ordinance, the terms "habitation," or "habitable living space," or "residential living space," appear nowhere in the ordinance.

B. Preservation of Issue

In its Notice of Appeal to the Circuit Court (Circuit Court Appeal), the Sherriers stated the issue as follows: "Whether the CBAA erred in determining that Section 15-9-312(a) is applicable to the rear structure." (R. p. 19). During the lower court hearing, counsel for the Sherriers continually noted to the lower court that the Town improperly referenced the term "habitable space" as a term used in Section 15-9-312(a). (R. p. 320, line 6–p. 322, line 18). Therefore, the issue was clearly raised to the lower court and preserved for this Court's review.

C. Improper Construction of Section 15-9-312(a)

By substituting the term "residential living space" for "habitable space," the lower court failed to correct the CBAA's error of law, instead committing its own error of law by inserting a term into Section 15-9-312(a). Contrary to the lower court's interpretation, the wording of Section 15-9-312(a) is concise, and its meaning and scope is unambiguous. Significantly, the Building Code itself defines the relevant terms of the Ordinance, a definition which aids this Court in its determination of the legislative intent in its drafting and the Ordinance's applicability to the Sherriers' property. It is well established that a legislative body has the power within reasonable

limitations to prescribe legal definitions of its own language, and when an Act passed by it embodies the definition, that definition generally binds the courts. *See Windham v. Pace*, 6 S.E.2d 270, 275, 192 S.C. 271, 283 (1939).

The critical terms of Section 15-9-312(a) are defined in the Town of Hilton Head's Land Management Ordinance (LMO): "new construction," "substantial improvement to any residential structure," "residential use," and "dwelling." The Hilton Head Municipal Building Code 15-9-119 defines "new construction" as the "start of construction commenced on or after September 30, 1977." This definition limits the applicability of 15-9-312(a) to the start of construction of a residential structure after September 30, 1977. Thus, the legislative intent was to avoid *ex post facto* and due process constitutional challenges. The only evidence presented to the CBAA and the lower court was that the Sherriers' rear structure was built prior to September 30, 1977. (R. p. 203).

Based on the above evidence and clear intent of the Ordinance, the Ordinance only applies to the Sherriers' rear structure if it qualifies as a residential structure that was substantially improved after September 30, 1977. While the lower court substituted its own terminology into the Ordinance to find that the Sherriers substantially improved a residential structure after September 30, 1977, this Court has the authority to undertake a "broader and more independent review . . . of an ordinance." Charleston Cty. Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995). Further, in conducting its review, South Carolina law requires an appellate court to "read [an ordinance] as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction." Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). Additionally, "where two provisions deal with the same issue, one in a general and the other in a

more specific and definite manner, the more specific prevails." Capco of Summerville v. J.H. Gayle Constr. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006).

Both before the CBAA and the lower court, the Sherriers argued the subject rear structure is not a "residential" construction as required by the Ordinance. (R. p. 240, line 5–p. 241, line 7; p. 242, line 23–p. 243, line 24; p. 244, line 11–p. 262, line 6; R. pp. 23–27). Because the CBAA and the lower court ignored the argument below, the Sherriers reiterate their argument as follows.

It is clear that the legislative intent of Section 15-9-312 (a) is that it only applies to "residential construction." The significance of the application of the Ordinance to only residential structures evidences the intent of the legislature that the Ordinance would not apply to every structure on Hilton Head Island. If such were intended by the legislature, the scope of the Ordinance would not have been proscribed or limited to only residential structures. Therefore, one must determine what definition of residential must have been intended by the legislature.

First, one can reason that if the legislators meant it to include any structure, the use of "residential" would be contradictory since it would create a limited scope. Further, one must conclude that in using the term residential a specific definition was contemplated by the legislators, so to avoid indiscriminate application of the Ordinance, and more importantly to avoid applying the Ordinances to unintended structures.

As discussed above, the Respondents argue the intention was to apply the Ordinance to any "habitable living space;" for its part, the lower court's ruling hinged on the application of the Ordinance to any "residential living space." Again, if the intention was to apply the Ordinance to structures which are habitable or are considered "living space," these terms could have been used. Use of such terms would result in applying the Ordinance to a vast majority of structures, since

many structures can be inhabited or lived in. If the intention was to apply the Ordinance to any habitable or living space, there would have been no need to use the term residential.

In this instance, a court need not speculate as to the intended definition of "residential structure." The Hilton Head Land Management Ordinance (LMO), Section 16-10-103, Use Classification Definitions Subsection A defines "residential uses": "The Residential ***Uses*** classification is primarily characterized by the residential occupancy of a ***dwelling unit*** by a household." (Emphasis in original.) The LMO Administration Section 15-1-302 provides the following:

> The latest edition of the International Building Code and the International Residential Code . . . as adopted by the South Carolina Building Code Council are hereby adopted as the minimum standard for the construction, alteration, use, demolition and removal of buildings or other structures, or any appurtenances connected or attached thereto with effective dates established by the South Carolina Building Code Council. A copy of each code is hereby made a part of this chapter as fully and completely as if the same were set out herein verbatim. A copy of each code is on file in the office of the municipal clerk.

The 2021 International Building Code (IBC) Chapter 2 Definitions, Section 202 defines a "Dwelling Unit" as a "single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation." Based on Section 15-1-302 of the LMO, the Town has adopted the IBC definition of "dwelling unit." As demonstrated by the Town's correspondence, the Town understood the IBC definition provided the scope of Section 15-9-312(a)'s applicability. (R. pp. 199, 216–217).

South Carolina appellate courts have employed the above reasoning in other previous cases. In Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229 (2001), the South Carolina Supreme Court addressed the meaning of the term "residential" in its application to the City of

Folly Beach's flood Ordinance.[1] The Grant court examined the applicability of the municipalities' zoning/flood ordinance regarding a "residential" structure located in in a two-story building with three apartments on the second floor and three units on the ground floor. Id. at 76, 551 S.E.2d at 230. One of the ground units had a bath, kitchen, wall heater, and air conditioner. Id. One unit contained only a kitchen. Id. The municipality had advised the property owner that "since less than 75% of this structure is devoted to residential use, it is classified as a non-residential structure." Id. at 77, 551 S.E.2d at 230. The owner, however, installed a bathroom and kitchen in the final ground unit. Id. Based on these improvements, the city determined that a kitchen in the lower unit converted those units to residential units which altered the percentage of residential to non-residential. Id. at 77, 551 S.E.2d at 230–31. Because the kitchen converted the units to a residential structure, the City determined that the ground units had to be evacuated and the kitchens removed. Id. at 77–78, 551 S.E.2d at 231. [2]

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[1] Though not specifically addressed by the Grant Court, the ordinances at issue in *Grant* are substantially similar to the ordinances at issue in the instant appeal:
Folly Beach Code of Ordinances Section 150.002
(A) The latest edition of the mandatory building codes as adopted by the SC Building Codes Council and shall be enforced at all times within the corporate limits of the City of Folly Beach as follows:
(1) International Building Code with S.C. modifications and including Chapter 1
Section 152.25
In all areas within the city limits of Folly Beach, all permits for new construction and substantial improvement must be reviewed to determine whether proposed structures will be reasonably safe from flooding.
(D) New construction or substantial improvements shall be constructed by methods and practices that minimize flood damage.
Section 152.26
(A) Residential construction.
(1) New construction and substantial improvement of any residential building (or manufactured home) shall have the lowest floor, including basement, elevated no lower than the design flood elevation (DFE).

[2] See also Seabran LLC. v. Town of Naples, 153 A.3d 113 (2017). In Seabran, the property owner sought a permit to build a 3 accessory bedroom with 2 baths on the second floor of an existing garage. The Town of Naples denied the permit application based on the determination that the proposed structure constituted a dwelling and as such would violate the ordinance relating to permissible footage as to shore footage. Essentially, the ordinance would not permit two dwelling units on the property. Seabran advised there would be no kitchens in the proposed structure. An administrative appeal followed at which time Seabran argued there was no plan for a kitchen in the proposed structure, arguing it was not a separate residential dwelling. The Town of Naples characterized the structure as a dwelling unit and focused on the argument of the violation. The appeal board denied the appeal agreeing the proposed structure was a dwelling structure and would therefore violate the restrictive footage allowance. Seabran appealed to the Supreme Court which affirmed the Board's decision giving deference to the Board's determination that the structure was a dwelling unit. The Supreme Judicial Court of Maine took an appeal from Seabran and reviewed the matter *de novo*.

The Grant case is analogous to the situation confronted by the Sherriers. Upon observing this, the Town's Chief Building Inspector advised the Sherriers to remove the stove to avoid being in violation of a municipal ordinance. They removed the stove, and there are now no cooking facilities in the rear structure. The Hilton Head officials acknowledged and made admissions that the absence of a stove in the subject rear structure rendered the Ordinance inapplicable. (R. p. 199, 307, 309–311).

Numerous emails confirm this. On April 7, 2021, Diane Busch, Staff Attorney for the Town of Hilton Head Island email complaining parties:

> [W]e are not FEMA, and we have no authority to enforce Federal guidelines or regulations. The Town is authorized to enforce our Ordinances and the LMO, and I have shared our position with you many times. Thank you for your understanding that this issue has been thoroughly researched and considered. If you wish to pursue, we have an Island full of reputable and experienced real estate lawyers who might offer a different perspective.

(R. p. 171).

On March 29, 2021, Wendy Conant, Code Enforcement Officer for the Town of Hilton Head island emailed the Sherriers regarding their property: "There are no code violations at this time." (R. p. 171). Teri Lewis, Deputy Community Development Director for the Town of Hilton Head Island confirmed Hilton Head definition of a dwelling unit in an email to the Hilton head Town Manager:

> The LMO defines a dwelling unit as a building or portion of a building providing complete and independent living facilities for a family, including permanent provisions for living, sleeping, eating, cooking, and sanitation. This decision is

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The court addressed the Seabrans' assertion that the Board improperly determined that the proposed structure was a residential structure in that the Town of Naples defines a "residential dwelling unit" as a structure which includes "cooking facilities." The Seabran court noted that the Town of Naples Definition Ordinance defined a "residential dwelling unit" as one which "contains cooking, sleeping, and toilet facilities." The Seabran court stated that in looking at the definition of a residential dwelling unit, its meaning is clear: the structure must contain cooking facilities to constitute a residential dwelling unit, stating it "could not ignore the plain language of the SZO definition." "To interpret a statute and its implementing regulations, we must first look to the plain meaning of the language used." Based on this reasoning, the Seabran court reversed.

> taken in part from the building code definition of dwelling unit. The Residential Building Code definition of dwelling unit is a unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating cooking and sanitation. LMO Section 16-2-103 permits staff to make interpretations. Staff previously (over 20 years ago) made the determination that if a structure does not have a stove in it then it doesn't have permanent provisions for cooking and therefore is not considered a dwelling unit.

(R. p. 177).

An email from the Hilton Head Staff Attorney Busch to the Town Manager stated: "Mr. Sherrier is now compliant with the LMO. He remedied the violations by removing the multi-splits out of the buffer and removing the stove." (R. p. 178).

Attorney Busch thereafter provided analysis and an opinion regarding the application of Section 15-9-312 (a) to the Sherriers' rear structure by way of email to the Town Manager Marc Orlando:

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

(R. pp. 178–179).

Based on the above, the Sherriers argue the CBAA committed an error of law by basing its affirmance of the Town's Notice of Violation, finding that because the subject rear structure is "habitable space," the Sherriers violated Section 15-9-312(a). The lower court not only failed to correct the CBAA's error of law; the lower court also committed its own error of law by finding that the Sherriers violated Section 15-9-312(a) because the rear structure had been converted to a

"residential living space." While the Sherriers articulated their argument clearly by referencing how reading the Town's municipal code as a whole and by discussing how more specific sections of the municipal code informed the more general Section 15-9-312(a), the lower court failed to follow clearly established caselaw by finding, in purely conclusory terms, the following:

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

(R. p. 7 n. 26).

Importantly, the lower court failed to cite any caselaw supporting its position that two sections of the same code cannot be used to inform one another. Not only did the lower court fail to cite any authority for its conclusion, the lower court also ignored appellate law in direct contravention to the lower court's reasoning.[3] Therefore, based on the above errors of law, this Court must reverse the lower court and find that Section 15-9-312(a) does not apply to the Sherriers' rear structure because it does not meet the definition of "residential structure" as clearly defined by the Municipal Code of The Town of Hilton Head Island and as discussed in analogous precedent.

[3] In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). See also Jackson v. Charleston Cty. Sch. Dist., 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994) ("The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose."). Further, where two provisions deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails. Capco of Summerville v. J.H. Gayle Constr. Co., Inc., 368 S.C. 137, 628 S.E.2d 38 (2006). See also Wooten ex rel. Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (specific statutory provision prevails over a more general one); Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (general rule of statutory construction is that a specific statute prevails over a more general one).

II. THE LOWER COURT AND CBAA ERRED BY RELYING ON INADMISSIBLE HEARSAY IN RENDERING THEIR DECISIONS.

The CBAA and by extension the lower court based critical findings of fact on inadmissible hearsay. More specifically, both the CBAA and lower court relied substantially on a purported written statement from MaryAnn Perri Jackson. (R. p. 215). Ms. Jackson was not a witness at the CBAA hearing.

A. South Carolina Law

According to the Rule 802 of the South Carolina Rules of Evidence, "[h]earsay is not admissible except as provided by these rules or other rules prescribed by the Supreme Court of this state or by statue." Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. A declarant is "a person who makes a statement." Rule 801(b), SCRE. A statement is a "written assertion." Rule 801(a), SCRE.

South Carolina courts have set forth guidelines as to whether introduction of inadmissible hearsay constitutes an error of law.

> Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. . . . A harmless error analysis is contextual and specific to the circumstances of the case. . . . No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.

State v. Simmons, 423 S.C. 552, 565–66, 816 S.E.2d 566, 573–74 (2018).

While research uncovered no South Carolina law governing the presentation of evidence at municipal zoning board hearings, state law governing state agency proceedings are instructive. According to state law,

> (C) A party to these [state agency] proceedings may cause to be taken the depositions of witnesses within or without the State and either by commission or

> *de bene esse*. Depositions must be taken in accordance with and subject to the same provisions, conditions, and restrictions as apply to the taking of like depositions in civil actions at law in the court of common pleas.

S.C. Code Ann. § 1-23-320(C).

South Carolina law defines an affidavit as follows:

> An affidavit is a voluntary *ex parte* statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation. 3 Am. Jur. (2d), *Affidavits*, Section 1. It differs from an oath in that an affidavit consists of a statement of fact which is sworn to as the truth, while an oath is a pledge. *Id.* Section 2; 58 Am. Jur. (2d), *Oath and Affirmation*, Section 3.

State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 472 (1987).

B. CBAA and Circuit Court Reliance on Inadmissible Hearsay

During the CBAA hearing, the CBAA demonstrated its reliance on Ms. Jackson's written statement. (R. p. 233, Line 10–15; 264, Line 16–25.) In its report to the CBAA, the Town stated that it "had received a signed and notarized affidavit from a previous owner of 12 Park Road stating that the structure at the rear of the property was previously a concrete slab with a roof but no walls. (Attachment 1 Affidavit of MaryAnn Perri Jackson)." (Record on Appeal to Circuit Court pp. 213–214). In its Notice of Action, the CBAA states that the Sherriers' rear structure "was illegally improved sometime after September 30, 1977." (R. p. 312).

The statement at issue is not an affidavit according to South Carolina law: the statement is not sworn to as the truth before a person legally authorized to administer oaths or affirmation. While Jackson's statement appears to be signed by a person who may be a notary public in New Jersey, nothing in the statement constitutes an oath as to the truth of the statement. (R. p. 215).

The lower court continued the improper reliance on the Jackson statement. In finding that the Sherriers' rear structure was converted to a residential living space sometime after 1985, the lower court cited "[t]he statement of Mary Ann Jackson was that the accessory structure was a

pole barn type structure during her ownership of 12 Park Road from 1983 to 1985." (R. p. 10). This reliance was objected to by counsel for the Sherriers based on the statement's failure to meet the requirements for an affidavit and the Sherriers' inability to cross-examine the declarant on her out of court statement. (R. p. 323, line 24–p. 324, line 5).

While the Sherriers argue that the Jackson statement was not a proper affidavit and should not have been relied upon as such by the CBAA or the lower court, the more pressing issue is that no matter the statement's characterization, no doubt exists that the statement constitutes inadmissible hearsay. Jackson's statement is an out of court statement offered as evidence that the Sherriers' rear structure was converted to a residential living space after 1985. As demonstrated above, both the CBAA and lower court relied substantially on Jackson's hearsay and it unquestionably affected the result of the below hearings. Thus, South Carolina law requires this Court find that the CBAA and lower committed reversible error by considering and issuing findings of fact based on Jackson's hearsay.

III. THE CBAA AND CIRCUIT COURT COMMITTED AN ERROR OF LAW BECAUSE THEIR FINDINGS HAVE NO EVIDENTIARY SUPPORT.

Additionally, without Jackson's statement, the only evidence presented by the Sherriers to the CBAA and the lower court proves there was no substantial change to the rear structure since its construction in 1969. As discussed at length above, the Beaufort County records demonstrate that the foundation, footprint level, and square footage of the rear structure has never been altered since its construction in 1969. (R. p. 203). According to Beaufort County records, the living space of the property has not changed since 1969. (R. p. 203, 211). During this ordeal, the Town itself acknowledged no changes had been made to the rear structure since its 1969 construction. In a December 22, 2021 letter, Teri Lewis, Deputy Community Development Director for the Town of Hilton Head Island, wrote the following:

> The property is currently considered legally non-conforming because it has a structure located in the setback and buffer and this structure was constructed prior to the Town adoption of the LMO. Property owners may make changes to a property that is non-conforming as long as the footprint of a non-conformity is not increased. If changes are proposed to the footprint of a non-conforming structure, the change is required to be in conformance with the LMO and a waiver is required. The waiver necessitates the applicant bringing some portions of the site into conformance with the LMO. If no change is proposed to a structure or site feature that is considered nonconforming, then a waiver is not required. The owner of 12 Park Road has not made any changes to the footprint of the non-conforming structure and therefore a waiver is not required.

(R. p. 185).

> Additionally, in a November 2021 draft letter, Teri Lewis stated the following:
>
> At this time, we have completed our investigation into the 12 Park Road and we have concluded that the structures and uses on 12 Park Road are not in violation of the LMO or the building code at this time.
> . . . .
> [A]ccording to tax records, both structures were built in 1969, which means that they are considered pre firm and were not required to be elevated.

(R. p. 244, line 18–p. 245, line 5; p. 248, line 19–23).

Because the CBAA and lower court's findings have no evidentiary support, this Court must reverse the lower court's factual determination that the subject rear structure was converted to a residential living space after September 30, 1977.

IV. THE CIRCUIT COURT ERRED BY REFUSING TO ESTOP THE TOWN OF HILTON HEAD FROM ISSUING A NOTICE OF VIOLATION AGAINST THE SHERRIERS PURSUANT TO SECTION 15-9-312(A).

The lower court erred in failing to find that the Town of Hilton Head Island is estopped from asserting a violation of 15-9-312 (a). The Town of Hilton Head Island LMO *Title 15 Chapter 1 Official Construction Code at Article* 1 provides that "the latest edition of the International Building Code-Chapter 1 Administration shall govern the administration of all construction codes adopted by the Town of Town of Hilton Head Island." Further, the Town of Hilton Head Island

LMO Section 16-2-103, R.2. states "[t]he Official is authorized to and shall be responsible for making interpretations of this Ordinance-including, but not limited to, the text of this Ordinance."

As reported in an email to town Officials in December 2021, Teri Lewis, Deputy Community Development Director wrote: "LMO Section 16-2-103 permits staff to make interpretations of the Ordinance." (R. p. 177). Earlier in May 2021, Teri Lewis, had informed Officials as follows: "our Chief Building Inspector reviewed changes to the secondary structure on the property and found that the interior changes were cosmetic in nature and did not require a building permit. At this point, unfortunately we cannot state with authority that the owners of 12 Park Road are in violation of thew substantial improvement section of the Municipal Code." (R. pp. 180–181).

This email reports that an inspection was made by the Chief Building Inspector in or about May 2021. There is no evidence that the Chief Building Inspector found the rear unit to be in violation of any Town of Hilton Head Island Ordinances since none was reported. Indeed, the evidence is that the Inspector told the Sherriers to remove the installed stove so that they would not be in violation of an Ordinance. Clearly, all discussions and emails regarding an Ordinance violation must have been focusing on the application of section 15-9-312(a), since there is no Town of Hilton Head Island ordinance which incorporates a condition of the existence of a stove or "cooking facilities" in a structure other than the flood Ordinance. Therefore, it was implicit in the representations made to the Sherriers that reference was to the flood Ordinance.

Most significantly, in March of 2021, Nicole Dixon, AICP, CFM Development Review Administrator wrote directly to the Sherriers: "the way the Town can allow you to use that building for living space would be if you removed the stove, which is considered a permanent provision for cooking." (R. p. 182).

These communications to the Sherriers demonstrate the Town of Hilton Head Island determined the rear structure did not violate the flood ordinance. No evidence has been provided to justifiably qualify, limit, or revoke the representations made to the Sherriers by the Chief Building Inspector or Nicole Dixon in March of 2021. Additionally, the evidence is that Town of Hilton Head Island officials continually reported and confirmed internally that the Sherriers were not in violation of the flood ordinance. Teri Lewis emailed the following to the Town Manager Marc Orlando on May 11, 2021: "Where we landed for now is that as long as they don't have a stove back in they are not in violation." (R. p. 182). Josh Gruber, Deputy Town Manager, in September 2021 wrote the following to Marc Orlando: "Photos from a site visit this afternoon at the complaint property are attached. No violations were observed." (R. p. 311).

These references are relevant to the estoppel issue because they evidence the Town's knowledge of the representations being made to the Sherriers regarding an Ordinance violation. Indeed, in May 2021, a Town Official, obviously concerned that approval had been given to the Sherriers, wrote the following: "Did the owner violate any provision that wasn't pardoned by the staff?" (R. p. 172).

In Landing Development Corporation v. City of Myrtle Beach, 285 S. C. 216, 329 S. E. 2d 423 (1988), the Supreme Court discussed the essential elements of estoppel as to a municipality: "(1) lack of knowledge and the means of knowledge of the truth of the facts in question (2) reliance upon the conduct of the party estopped, and (3) the action based thereon was of such a character as to change prejudicially the position of the party claiming estoppel." *Id*. at 219, 329 S.E.2d at 424.

Landing sought to enjoin the City of Myrtle Beach from enforcing an ordinance which denied them the opportunity to rent condominiums on a short-term basis. A City Official who

interpreted and enforced City's ordinances had, at one time, advised Landing that such rentals were permitted. Subsequently, after Landing made substantial investment in developing the property, the City reversed its position advising Landing that its rentals were not permitted by ordinance. The City thereafter sought warrants for the arrest of the Landing's principal officer for violation of the City's Ordinance. Citing the City's prior representations to the property owners, the Landing court found for Landing, stating the following: "To allow the City to repudiate its former interpretation of permissible rentals and the statements of its zoning director, based upon a re-assessment of the meaning of an undefined term in the ordinance would be unconscionable." Id. at 221, 329 S.E.2d at 426.

The Landing court acknowledged that the doctrine of estoppel is not to be applied to deny a governmental agency the due exercise of its power. Id. at 221, 329 S.E.2d at 425. The court noted however, "[g]overnment agents, acting within the proper scope of their authority, can by their acts give rise to estoppel against a municipality." Id. at 221, 329 S.E.2d at 426. Significantly, the City's position in *Landing* was that the terms in the City's Ordinance were not specifically defined allowing for a broad interpretation. Id. at 220, 329 S.E.2d at 425.

As to the estoppel issue, the Landing case is factually similar to the Sherrier case. Arguably, the Sherriers' estoppel argument is more persuasive: while the subject ordinance in Landing lacked defined terms, the terms in the Town of Hilton Head Island Ordinance are well defined. As to Section 15-9-312(a), the controlling terms "Residential use," "new construction," "substantial improvement," and "dwelling" have specific definitions which clearly establish the scope of the Ordinance and evidence its inapplicability to the Sherriers' rear structure at 12 Park Road, as discussed above. As in Landing, direct representations were made to the Sherriers by the Chief Building Inspector and by Nicole Dixon, both Town of Hilton Head Island Officials, advising the

Sherriers that "once the stove was removed" the structure would not be in violation of a Town of Hilton Head Island ordinance.

In further support for the application of estoppel to Town of Hilton Head Island regarding Ordinance 15-9-312(a), in the case Abbeville Arms v. City of Abbeville, 273 S.C. 491, 257 S. E. 2d 716 (1979). In Abbeville, a City Official issued a letter confirming the use of the property per zoning ordinances. Shortly thereafter, the City of Abbeville determined that the zoning ordinance "through inadvertence, mistake or oversight" was inaccurate. The ordinance was revised and as a result Abbeville Arm's application for a building permit was denied. Id. at 492. 257 S.E.2d at 717.

The Abbeville court found that Abbeville Arms met the criteria for estoppel, in that they had the means of reviewing the ordinance, which they did; they relied upon the representation of the City permitting the use; and they had expended significant sums in anticipation of a permit being granted. Id. at 494–95, 257 S.E.2d at 718. Accordingly, the court held that "the essential elements of estoppel are present and that the City of Abbeville is thus estopped from denying the Respondents the building permit on the basis of the corrected zoning." Id.

Even assuming the Sherriers had reason to consult the Ordinance, they would have determined it to be inapplicable having understood that the removal of the installed "stove" would resolve any question of a violation. Further, given the absence of cooking facilities in the rear structure, and the assurances from Town of Hilton Head Island officials as to compliance with an ordinance, the Sherriers would have no reason to be concerned of an ordinance violation.

In reliance on the representations of the Town of Hilton Head Island Officials, the Sherriers continued use of the rear structure as a rental unit. The Sherriers have been and will be subject to great financial and personal consequences if the Ordinance is enforced. The Sherriers have expended considerable time and money in the renovation of the property and in pursuing a legal

resolution of the dispute. They have been and will be denied the benefit of their rental investment. Further, if the structure remains constrained by the terms "habitable" or "living space," as proposed by Town of Hilton Head Island to invoke the Ordinance, the Sherriers would necessarily face extraordinary expense in razing the structure and rebuilding, or in engineering a reconstruction so to meet the flood Ordinance requirements.

Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible. Jones v. Leagan, 384 S.C. 1, 681 S.E.2d 6 (Ct. App. 2009). A court of equity will refuse to protect a party's rights if the party's unreasonable delay has resulted in prejudice to its adversary. Grossman v. Grossman, 242 S.C. 298, 309, 130 S.E.2d. 850, 855 (1963).

The Town of Hilton Head Island seeks to invoke a violation of the statute for a condition which existed prior to the enactment of the flood Ordinance or has been long standing. This is being done without evidence of change to the footprint of the rear structure or evidence of a recently discovered reason or situation requiring the Ordinances application. The Notice of Violation of the flood Ordinance, assuming the Ordinance was applicable to the rear structure on the Sherriers' property, which it is not, was not issued until decades after the establishment of the structure's footprint and longstanding. There is little room for argument that due to the inordinate and unreasonable delay, and in absence of any reasonable explanation from the Town of Hilton Head Island, fairness and equity dictate that the Town of Hilton Head Island is estopped from asserting a violation of 15-9-312 as to the rear structure on 12 Park Road.

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

CONCLUSION

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

Respectfully submitted,

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