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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

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Appellate Case No.: 2024-000814

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Folly East Indian Co., LLC, ..... Appellant,

v.

City of Folly Beach ..... Respondent,

and

Save Folly's Future ..... Intervenor.

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# INITIAL BRIEF OF APPELLANT

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Alice F. Paylor (SC Bar#: 4380)
Bijan K. Ghom (SC Bar#: 103531)
Saxton & Stump, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 414-5080
afp@saxtonstump.com
bkg@saxtonstump.com

ATTORNEYS FOR APPELLANT

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## STATEMENT OF THE ISSUES

**I. Did the Trial Court err in finding that the Folly Beach Short Term Rental Ordinance was validly enacted pursuant to the initiative and referendum process despite the Supreme Court's holding in *I'On, L.L.C. v. Town of Mt. Pleasant*, which held that a land use regulation cannot be enacted by initiative and referendum process of § 5-17-30?**

**II. Did the Trial Court err in finding there was no genuine issue as to a material fact when Respondent stripped Plaintiff's vested property right, a right that runs with the land, to rent its property on a short term basis?**

## STATEMENT OF THE CASE AND FACTS

### A. INTRODUCTION

Municipalities are not sovereign bodies with inherent powers. They are political subdivisions of the state with those powers delegated by state law. At the trial level in its briefing, the City defended the Ordinance as a police power ordinance as if that resolves the question. **There is no question that every zoning ordinance is also a police power ordinance.** Municipalities do not have the inherent power to restrict the use of real property or to zone property within its boundaries; they possess that power, which is an exercise of the police power, only insofar as it is delegated to them by the General Assembly. S.C. Const. art. I, § 1; *see* statutes *infra*. The Legislature gave to municipal corporations police powers, which are powers to make rules promoting the health, safety, and welfare of people. A zoning ordinance fits this description (and is defined that way) and is therefore a police power ordinance. However, our Legislature identified zoning ordinances as *unique* among police power ordinances. A statutory framework for regulating land use and planning was created by the Legislature and given to the municipalities, not merely for guidance, but for control.

The real issue in the pending action is whether the Ordinance adopted by referendum, because of its subject matter, must be enacted through the zoning process. The City has already answered that question by expressly recognizing the use of STRs and permitting that use in every

zoning district. The City cannot sidestep the zoning process through a citizen's initiated referendum. In fact, the City did not enact this Ordinance through any power of its own, but was forced to do so because of the citizen's initiative and referendum process. The Supreme Court has already rejected such circumvention as a nullification of the carefully developed zoning rules in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 720 (S.C. 2000). At the trial level, the City claimed that it can zone or restrict the STR use under its "general police power."[1] The City's position is untenable as it would allow the City to ignore Title 6 of South Carolina's Code of Laws setting forth the procedures to be followed when restricting or zoning property for specific uses.

## B. STATEMENT OF FACTS

Folly East Indian Co., LLC (hereinafter "Appellant"), a South Carolina Limited Liability Company is a real estate development company that owns and develop real properties on Folly Beach for use as short term rentals ("STRs"). Appellant currently owns real property located within the City of Folly Beach (hereinafter "Respondent Folly Beach" or "the City") at 112 East Indian Ave. (units A & B), 114 East Indian Ave. (Units A & B), 116 East Indian Ave., and 118 East Indian Ave. (units A & B), Folly Beach, South Carolina 29439 and holds five Short Term Rental licenses for these properties[2]. Compl., ¶¶ 1,5. Appellant develops property on Folly Beach

[1] In a prior filing, the City cited a string of cases which hold that a license is a privilege and confers no property right. While it is true that a license does not bestow a property right, the citizens of Folly Beach have **always** possessed the property right to rent property on a short term basis. Thus, the City is using its "license" to take away an already existing property right, a property right that is listed as a permitted use under its zoning ordinance. Calling it a "license" does not change the fact that eliminating a permitted use (outside of the zoning process) is a violation of due process.

[2] Appellant has two properties currently in development at 112 East Indian Ave. When Appellant initially applied for two licenses for this location in October of 2022, the City told Appellant that, if the citizen's initiated referendum passed, no STR license would be issued for those locations unless the certificates of occupancy were completed prior to the vote. *See* Exhibit A, Affidavits of Brendel and Riffert. On February 8, 2023, just one day before a scheduled hearing, Appellant learned through counsel that Respondent made an error and that these two license applications were, in fact, granted. *See* Exhibit A.

for the purpose of providing vacationers residential space on a short term basis, i.e., for a period of less than 30 days.

In 2020, the City formed an ad hoc committee to study STRs on Folly Beach. In response to the recommendations from this committee, the Mayor of Folly Beach introduced a proposed ordinance to City Council in 2021 attempting to restrict the number of non-owner occupied STRs allowed on Folly Beach to 800. At the time of the proposal, there were well over 1000 such STRs. (Pope March Aff.). The Mayor subsequently proposed amendments in June of 2022 that would limit the short term rental business licenses for non-owner-occupied properties to 800. The Mayor's proposed ordinance amending the STR ordinance was rejected by City Council on June 28, 2022 (Pope March Aff., ¶ 10).

On October 11, 2022, citizens filed a Petition to require an election on a similar proposed amendment to the STR ordinances. Compl., ¶ 11. The City had the right to either adopt the proposed ordinance or hold an election for all qualified electors to vote on the Petition. The Folly Beach City Council again rejected the proposed ordinance on December 13, 2022. Compl., ¶ 15-16. The City subsequently held a special election pursuant to the citizen's initiated referendum on February 7, 2023 and the voters approved the Petition to change the STR ordinances. (Pope March Aff., ¶ 13, 14). As a result of this special election, the City has enacted an ordinance that restricts the number of STR licenses and eliminates the transferability of current STR licenses to subsequent purchasers of licensed properties. There are currently more STR licenses than the allowed amount so now no new licenses will be issued until the number falls below the 800 cap, effectively eliminating the use as an STR for many.

Despite the change to the STR ordinances approved by the voters, "short term rentals remain an allowable use under the zoning code." (Pope March Aff.). At no point in time has

Respondent Folly Beach eliminated the use of property as an STR on Folly Beach. There is no question that the new ordinance, limiting the number of business licenses, in actuality is a land use regulation that bars future owners of properties from using them as an STR, an allowable use.

Short Term Rentals are defined in § 117.02 of the Folly Beach Code of Ordinances as "[r]esidential dwellings rented for less than 30 days, used in a manner consistent with the residential character of the dwelling" and states that "[t]ourist accommodations, including hotels, motels, inns, and bed and breakfasts, are not considered Short Term Rentals." Vacation Rental is defined in the Zoning section of the Folly Code of Ordinances at § 161.02 as "a residential unit rented for 29 days or less that typically is utilized by tourists." Thus, a Short Term Rental is a Vacation Rental under the Zoning ordinances and is referenced and included in the Table of Uses, § 164.01, and is listed as a permitted use in every zoning district in that table.

Pursuant to the authority conferred under § 6-29-710, Respondent enacted the City of Folly Beach Zoning and Land Development Ordinance ("ZDO"), which contains a comprehensive scheme for planning, approving, and rezoning real estate parcels to ensure efficient, equitable, and reasoned land use decisions in the City of Folly Beach. Folly Beach, South Carolina Code of Ordinances (amlegal.com), Code § 160 et seq. The purpose and intent of the ZDO "is to guide development in accordance with the existing and future needs of the city and its Comprehensive Plan, and to promote the public health, safety, convenience, order, appearance, prosperity, and general welfare of the landowners and residents of the city, and other members of the public." *Id.* at § 160.03-01. In conjunction with the processes set forth in Title 6, the ZDO defines both the substantive and the procedural due process to which landowners are entitled prior to a zoning change and sets forth procedures which must be followed prior to changing a zoning classification. *See* Folly Beach, South Carolina Code of Ordinances (amlegal.com), §§ 160, 162, *supra*.

Additionally, the South Carolina Vacation Rental Act, which was enacted prior to the Ordinance at issue, requires property owners to honor rentals for ninety days after the sale of property. Thus, if the Ordinance is upheld, then any person who purchases property would be prevented from complying with the Act because the STR license is not transferable, and a new property owner will not be able to get a new one.

## PROCEDURAL HISTORY

On January 17, 2023, Appellant brough this action in the court of common pleas alleging the Ordinance adopted by Respondents was null and void. (Complaint). On the same day, Appellant filed a Motion for Preliminary Injunction. (Plaintiff's Motion for Preliminary Injunction). Eight days later, Respondent Folly Beach filed a Memo in Opposition. (Defendant Folly Beach's Memo in Opposition to Motion for Preliminary Injunction). The next day Save Folly's Future (hereinafter "Respondent Save Folly's Future" or "SFF") filed its Motion to Intervene along with a Memo in Support and Respondent Folly Beach filed a Motion to Dismiss. (Save Folly's Future's Motion to Intervene; Save Folly's Future's Memo in Support of Motion to Intervene; Defendant Folly Beach's Motion to Dismiss).

Appellant filed the amended summons and complaint on February 15, 2023. (Amended Complaint). Appellant subsequently filed a Motion and Memo in Support of Summary Judgment on March 14, 2023. (Plaintiff's Motion and Memo in Support of Summary Judgement). Respondent Folly Beach filed a Motion and Memorandum in Support of Summary Judgment on March 31, 2023.

Seven days later, Respondent Save Folly's Future's Motion to Intervene was granted. (Order Granting Save Folly's Future's Motion to Intervene). On April 19, 2023, Respondent Save Folly's Future filed a Motion to Dismiss pursuant to 12(b)(1) and 12(b)(6) and a Memorandum in Support of the Motion to Dismiss and in Opposition to Plaintiff's Motion for Summary Judgment.

(Defendant's Motion to Dismiss; Defendant's Memo in Support of Motion to Dismiss and in Opposition to Motion Summary Judgment). Respondent Folly Beach subsequently filed a Supplemental Memo in Support of Summary Judgment on January 5, 2024. (Defendant Folly Beach's Supplemental Memo in Support of Summary Judgment). Appellants filed a Consolidated Memo in Opposition to Respondents Motions and Memoranda three days later. (Plaintiff's Consolidated Memo in Opposition). Respondent Folly Beach filed a Reply Memo in Opposition to Plaintiff's Motion for Summary Judgement on January 11, 2024.The court denied Appellant's Motion for Summary Judgment and granted Respondents Motion for Summary Judgment on March 7, 2024. (Order Granting Defendant's Motion for Summary Judgement). Eleven days later Petitioner filed a Motion to Reconsider the Order denying Appellant's Motion for Summary Judgment and granting Respondent's Motion for Summary Judgment. (Plaintiff's Motion to Reconsider). The Court denied Appellant's Motion to Reconsider on April 17, 2024, and Appellant subsequently filed a timely Notice of Appeal on May 16, 2024. (Order denying Plaintiff's Motion to Reconsider; Plaintiff's Notice of Appeal). Appellant filed Motion for Extension of Time to File and Serve Initial Brief on June 10, 2024, and said Motion was granted the next day. (Plaintiff's Motion for Extension of Time; Order Granting Motion for Extension of Time).

## STANDARD OF REVIEW

Summary judgment shall only be granted when there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; *USAA Property and Cas. Inc. CO. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791 (2008). However, a grant of summary judgment is improper when further inquiry to the facts is needed to apply the law, or when the conclusions and inferences drawn from the facts are in dispute. *Id.* (citing *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Motedison S.p.A.*, 320 S.C. 470, 479, 465

S.E.2d 765, 771 (Ct. App. 1995)). On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence shall be viewed in the light most favorable to the non-moving party. *Id.*

## ARGUMENT

**I. The Circuit Court erred in granting summary judgment to the City and denying Appellant's motion for summary judgment because the Folly Beach Short Term Rental Ordinance was enacted via an improper procedure rendering it null and void.**

**A. The Ordinance enacted by referendum is null and void as it is a zoning ordinance and not enacted in accordance with Title 6 of the South Carolina Code of Laws.**

As a preliminary matter, whether property can be rented on a short or long term basis is a zoning matter according to the majority of states that have addressed the matter.[3] *See, e.g., Keen v. City of Manhattan Beach*, 77 Cal.App.5th 142 (2022) (determining that the City must amend its zoning ordinance in order to ban short term rentals); *South Weber City v. Cobblestone Resort LLC*, 511 P.3d 1207 (Utah 2022) (South Weber enacted a permit and business license for a property to be used as an STR pursuant to its zoning rules and procedure); *Chaumont v. City of New Orleans*, 302 So.3d 39 (2020) (the City of New Orleans regulates short term rentals as part of its zoning code); *Zaatari v. City of Austin*, 615 S.W.3d 172 (2019) (finding a zoning ordinance banning short term rentals to be unconstitutional) .

As further proof, one needs to only look at the City's filings in this matter. The City cites to other municipalities that have banned or regulated short term rentals. All of these Municipalities did so pursuant to their respective zoning ordinance, rules, and procedure. *See* Exhibit B to Appellant's Memo in Support of Preliminary Injunction (collecting zoning ordinances cited by Respondent).

[3] As discussed, infra, the City's zoning ordinances recognize short term rentals as a matter for zoning considering this use (short term rentals) is a permitted use in every zoning district.

### B. The Ordinance regulates the use of land, therefore it must be enacted as a zoning ordinance and City has not followed the proper procedure to do so.

In this action, Appellant urges the Court to declare the short term rental restriction ordinance at issue in this case invalid in accordance with the holding of *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 720 (S.C. 2000), as clarified in *Greenville County v. Kenwood Enterprises, Inc.*, 353 S.C. 157, 577 S.E.2d 428 (2003). As the Supreme Court has stated in these two cases, a "**land use regulation cannot be effected via the referendum and initiative process.**" 353 S.C.167, 577 S.E.2d at 433 (emphasis added).

The Folly Beach Zoning Ordinance provides that short term rentals are an allowed use in every zoning district. The new Short Term Rental Ordinance, adopted as a business license ordinance, restricts the use of properties on Folly Beach by capping the number of properties that may be licensed as short term rentals. It cannot be disputed that this is a land use regulation since it affects how property owners can use their land. *See* Order Granting Defendant City of Folly Beach's Motion for Summary Judgment 6 If Folly Beach had enacted this ordinance in the due course of exercising its police powers, which it repeatedly rejected, the ordinance would be valid. Because the City Council only accepted the ordinance after a referendum under § 5-17-30, the ordinance is invalid and must be set aside as the Supreme Court held in the two cited cases.

Whereas, had the City followed the proper procedure to enact an amendment to the zoning ordinance, the business license would only serve in an administrative capacity. For example, in *Ani Creation, Inc. v City of Myrtle Beach Bd. of Zoning Appeals*, the city council enacted a zoning overlay regulating the use of retail spaces in the downtown area of Myrtle Beach. 440 S.C. 266, 275, 890 S.E. 748, 752 (2023). Pursuant to the zoning overlay, business owners were given an amortization period to cease any nonconforming retail operations. *Id.* However, if the nonconforming use continued then the business "would be subject to suspension or revocation of

its business license." *Id.* at 267, 753. Thus, when the proper procedures to amend the zoning ordinance are followed, the business license does not dictate how one may use their property because these are two separate issues: (1) the right to use your property in a certain way and (2) the right to operate a business. The former pertains to a zoning matter, while the latter is governed by general police powers.

This ordinance enacted by referendum and initiative is the first Folly Beach ordinance that limits and, in all new cases, eliminates the allowed use of a property as a short term rental. The City repeatedly rejected the very land use changes proposed in the Ordinance until the City was compelled to enact the Ordinance by initiative and referendum under § 5-17-30, SC Code. *See* Aaron Pope Affidavits for the history of the restriction on STRs.

Put plainly, Appellant's action challenges the initiative and referendum process as the means to enact this land use regulation. Whether, as the City and SFF argue, the City can take away this right by other means (i.e., police powers or amending the Zoning Ordinance) is irrelevant here because the City rejected those methods and, instead, allowed the initiative and referendum process to do what the City Council refused to do. That is not allowed by Supreme Court precedent.

The "South Carolina Local Government Comprehensive Planning and Enabling Act of 1994" combined existing Code provisions governing zoning and planning provisions for municipalities "into a single, comprehensive set of provisions available to local governments" contained in Title 5 and 6. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 720 (S.C. 2000). Title 6 of the South Carolina Code governs matters related to zoning, including the procedure that must be followed when a change in zoning is sought. As discussed above, this is not an inherent right of the City, but rather a delegated power from the state. Restatement

(Fourth) of Property § 1.1 (Vol. 7) TD No 3 (2022). A regulation that changes the permitted use of certain parcels of land must be done by amending the zoning ordinance. *See Ani Creation, Inc.*, 440 S.C. 266, 890 S.E.2d 748 (zoning overlay was permissible regulation of the use of property when enacted by City Council in accordance with Title 6).

Under Title 6, a municipality's local planning commission must "undertake a continuing planning program for the physical, social, and economic growth, development, and redevelopment of the area within its jurisdiction. The plans and programs must be designed to promote public health, safety, morals, convenience, prosperity, or the general welfare as well as the efficiency and economy of its area of jurisdiction." S.C. Code Ann. § 6-29-340(A). In the discharge of its responsibilities, the local planning commission has the power and duty to, among other things, "prepare and recommend for adoption to the appropriate governing authority or authorities as a means for implementing the plans and programs in its area . . . zoning ordinances to include zoning district maps and appropriate revisions thereof, as provided in this chapter." *Id.* at § 6-29-340(B). The Legislature specifies in Title 6 that "[z]oning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare." *Id.* at § 6-29-710(A). Title 6 also includes the ***only*** procedure for enactment or amendment of zoning ordinances, § 6-29-760, and the process for appealing from the zoning board, § 6-29-820, among other forms of process, see §§ 6-29-825, 6-29-850. These are processes which must be followed.

Pursuant to the authority conferred under § 6-29-710, Respondent enacted the City of Folly Beach Zoning and Land Development Ordinance ("ZDO"), which contains a comprehensive scheme for planning, approving, and rezoning real estate parcels to ensure efficient, equitable, and reasoned land use decisions in the City of Folly Beach. Folly Beach, South Carolina Code of

Ordinances (amlegal.com), Code § 160 et seq. The purpose and intent of the ZDO "is to guide development in accordance with the existing and future needs of the city and its Comprehensive Plan, and to promote the public health, safety, convenience, order, appearance, prosperity, and general welfare of the landowners and residents of the city, and other members of the public." *Id.* at § 160.03-01. In conjunction with the processes set forth in Title 6, the ZDO defines both the substantive and the procedural due process to which landowners are entitled prior to a zoning change and sets forth procedures which must be followed prior to changing a zoning classification. *See* Folly Beach, South Carolina Code of Ordinances (amlegal.com), §§ 160, 162, *supra*. Accordingly, both Title 6 and the ZDO set forth the standards by which a zoning amendment will be evaluated so as to comport with substantive due process and the steps to be followed so as to comport with procedural due process.

The ZDO discusses "vacation rentals" and "short term rentals," which are permitted "uses" of property. The use of "Vacation Rental" is defined as "a residential unit rented for 29 days or less that typically is utilized by tourists." ZDO, supra, § 161.02. The ZDO further defines "Short Term Rentals" as "[r]esidential dwellings rented for less than 30 days, used in a manner consistent with the residential character of the dwelling" and states that "[t]ourist accommodations, including hotels, motels, inns, and bed and breakfasts, are not considered Short Term Rentals." *Id.* at § 117.02. Thus, as defined within the ZDO, an STR is referenced and included in the Table of Uses, see § 164.01, and is listed as a permitted use in every zoning district in that table.

Once a municipality adopts a zoning ordinance to help implement its comprehensive plan (as Folly Beach has done), all its "regulations must be uniform for each class or kind of building, structure, or use throughout each district." S.C. Code Ann. § 6-29-720(B). The goal here, as the

section's title indicates, is to provide for uniformity within each district (i.e., uniformity within a geographic area in accordance with the comprehensive plan).

Here, the City has permitted all real property to be rented on a short-term basis through its zoning ordinance. It is undisputed that no amendment has been made to restrict this use through the zoning procedure. Although the City asserted that this Ordinance was enacted through its "general police power," it was not enacted pursuant to any power on the City's behalf. In fact, it was merely an exercise of the citizen's power.[4] Moreover, it strips property owners of the procedural and substantive due process conferred by statute and affirmed by the Supreme Court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417, 526 S.E.2d 716, 725 (2000); *see also Painter v. Town of Forest Acres*, 231 S.C. 56, 60, 97 S.E.2d 71, 73 (1957) ("A municipal corporation cannot make a business a nuisance by merely declaring it to be such…property consists not merely in its ownership and possession but an unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements to that extent, destroys the property itself. It must be conceded that the substantial value of property lies in its use.").

### C. The Ordinance is null and void because zoning cannot be accomplished by the citizen initiative procedure.

As the South Carolina Supreme Court has held, "zoning provisions may not be enacted by the initiative and referendum process contained in Sections 5-17-10 and -30." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417, 526 S.E.2d 716, 725 (2000).

The Ordinance at question in this litigation results in spot zoning and subjects specific properties to special zoning rules, developed outside of the normal procedures and reviews

[4] This ordinance, particularly the way it was enacted, poses a major threat to property owners. If upheld, any group of individuals can interfere with the property rights of others. As an example, a group of citizens could petition the city to require licenses for all long term rentals and set a cap low enough to prevent the majority of property owners from renting property *period*. South Carolina law cannot allow for such interference with property rights.

established by Title 6 and the ZDO and in disregard of the City's comprehensive zoning plan. Such ad hoc, individualized treatment of different parcels of land is entirely inconsistent with what the Legislature intended when it created and passed the comprehensive set of provisions found in Title 6 and is furthermore at odds with the ZDO.

Indeed, for these very reasons, the State Supreme Court held in *I'On, L.L.C. v. Town of Mt. Pleasant*, that municipalities cannot enact zoning provisions via the initiative and referendum process contained in S.C. Code Ann. §§ 5-17-10 and -30. 526 S.E.2d at 720-21. In so holding, the Supreme Court embraced the view that "the detailed nature of zoning acts indicates a legislative intent that zoning matters must be decided only in the manner specified in those acts," explaining that "[t]he obvious incompatibility between the initiative and referendum process and the comprehensive Title 6 provisions indicates the Legislature did not intend to allow voters to enact more complex zoning measures by initiative and referendum." *Id.* The Court further explained that by enacting Title 6, the Legislature recognized that the haphazard and potentially thoughtless decisions that might result from the initiative and referendum process are "the antithesis of meaningful zoning." *Id.* at 722. Indeed, the Court cautioned, permitting voters to circumvent the deliberative process "could nullify a carefully established zoning system or master plan developed after debate among many interested persons and entities, resulting in arbitrary decisions and patchwork zoning with little rhyme or reason." *Id.*

The Ordinance, which was accomplished by initiative, is inconsistent with the purpose and intent of Title 6, and in total contravention of the Supreme Court's holding in *I'On*. Additionally, the Ordinance has and will further amount to impermissible spot zoning. Over half a century ago, the State Supreme Court defined the term spot zoning and explained as follows:

> [I]t has been held that where an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those

> permitted within the larger, such "spot zoning" is invalid where the ordinance does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare.

*Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952).

Not only is the ordinance not a part of the comprehensive plan, the ordinance conflicts with and was enacted by citizens for mere private gain. Because Appellant's property has not been properly rezoned to exclude STR uses, Appellant is entitled to Summary Judgment from the Court that Appellant's property can be utilized as an STR unless the zoning use is changed in accordance with the established zoning procedure and rules.

## II. The Circuit Court erred in granting summary judgment because the Ordinance interferes with Appellant's vested rights.

### A. Appellant has a vested right to rent its property on a short term basis and the right runs with the land.

The City again tries to avoid Appellant's substantive argument by mischaracterizing the issue as a challenge to a business license regulation. At no point in Appellant's pleadings has it argued or even suggested that it has a vested right to some business license. Appellant does, however, have a vested right in the use of its property—a use currently permitted under the City's zoning rules.

The City argues a "vested right" under the Vested Rights Act only "means the right to undertake and complete the development of property under the terms and conditions of site specific development plan…" City's Brief at 28. The City fails to include the definition of "site specific development plan" which expressly says that "[t]he plan may be in the form of, but is not limited to, the following plans or approvals: planned unit development; subdivision plat; preliminary or general development plan; variance; conditional use or special use permit plan; conditional or special use district zoning plan; or **other land-use approval designations as are used by a county or municipality.**" S.C. Code Ann. § 6-29-1520(9) (emphasis added). Appellant's right to rent on

a short term basis became vested when he obtained, and/or benefited from, an affirmative government act allowing such right. S.C. Code Ann. § 6-29-1560(A). Section 6-29-1550 provides that "[a] vested right pursuant to this section is not a personal right **but attaches to and runs with the applicable real property**." S.C. Code Ann. § 6-29-1550 (emphasis added). Appellant must also show that it incurred "significant obligations and expenses in diligent pursuit of the specific project" in good faith reliance on some "significant affirmative government act." S.C. Code Ann. § 6-29-1560(A).

The right to rent property, whether short or long term, is as established and historically significant as any other property right.[5] *See Main v. Thomason*, 342 S.C. 79, 89, 535 S.E.2d 918, 923 (2000), *overruled on other grounds by Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005) (referring to the right to lease as one of the "bundle of rights typically associated with property ownership"); *see generally, Terrace, Columbia Ry., Gas & Elec. Co., supra; Emily M. Speier, Comment, Embracing Airbnb: How Cities Can Champion Private Property Rights Without Compromising the Health and Welfare of the Community*, 44 Pepp. L. Rev. 387, 395–97 (2017); *see also*, Denise A. Johnson, *Reflection on the Bundle of Rights*, 32 Vt. L. Rev. 247, 253-258

[5] It is difficult to understand how the city can restrict the leasing of property under its "general police powers." Why have Title 6 at all? Under the City's interpretation of its police power, the City could cap the number of the homes permitting virtual work (work-from-home) and/or eliminate the ability of a purchaser of property from doing the same merely by limiting the number of homeowners who can get a "license" for it. For obvious reasons, our Legislature intends for such decisions to be made through the zoning process. *See, e.g.*, S.C. Code Ann § 6-7-15 (exempting church-related activities in a single-family residence from zoning). Why would the Legislature enact § 6-7-15 to exempt this type of land use from zoning if it granted municipalities the power to restrict the same use under its general police power (the exercise of which allows for less oversight, planning, and due process)? In *Whaley v. Dorchester County Zoning Bd. of Appeals*, as another example, Dorchester County resorted to its zoning procedure to prohibit long-term parking in residential neighborhoods. 337 S.C. 568 (1999). Our Supreme Court analyzed this case as a zoning matter. Under the City's interpretation of its police power, as asserted in its briefing at the trial level, a political subdivision can sidestep this entire analysis merely by calling it a license. Surely our Supreme Court did not overlook this. *See Painter v. Town of Forest Acres*, 231 S.C. 56, 60, 97 S.E.2d 71, 73 (1957) ("A municipal corporation cannot make a business a nuisance by merely declaring it to be such…property consists not merely in its ownership and possession but an unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements to that extent, destroys the property itself. It must be conceded that the substantial value of property lies in its use.").

(2007) (property ownership can be viewed as a bundle of sticks affording an owner various rights, including the right to use, the right to manage, and the right to earn income off of his property).

The right to rent on a short term basis has been permitted in all of the City's zoning districts prior to the enactment of this land use regulation. In an effort to regulate that existing right, the City required that the Appellant obtain rental registration permits, which Appellant obtained. Appellant was never told that it could lose the right to rent its properties on a short term basis, or that it would be unable to transfer that right when Appellant sells its properties (or that a purchaser of the LLC would not be able to continue the use). While Appellant was on notice that the City regulated STRs, "there is a difference between knowing that the City requires a permit for short-term renting and having notice that the City may altogether eliminate the historically … allowable use of residential STRs." *Zaatari v. City of Austin*, 615 S.W.3d 172, 191 (Tex. App. 2019) (emphasis added). In reliance on the City's approval to rent on a short term basis, and Appellant's continued use for the same, Appellant invested substantially in its properties for the purpose of short term renting and now cannot recoup his investment.[6]

**B. Pursuant to § 6-29-1560, Appellant is entitled to an order from the Court declaring that it has a vested use which is freely transferable.**

As addressed hereinabove, Appellant develops real property for the purpose of renting on a short-term basis and in reliance on the City's zoning ordinance, which permits such use of its property. The City required that Appellant obtain rental registration permits, which Appellant obtained. The City has now enacted a new ordinance, outside of the zoning procedure, which imposes new restrictions on Appellant's ability to use its property, including a limitation on the

[6] Many of the neighboring municipalities cited by the City allow for license transfers in recognition of this right. Town of Mt. Pleasant, Code of Ordinances, Section 110.08(C); Town of Kiawah Island, Code of Ordinances, Section 14-505; Town of Sullivan's Island, Code of Ordinances, Section 21-121. The right to rent your property is one that has always existed and runs with the land, even prior to Appellant's possession. The City's contention that this right did not exist until it began regulating short term rentals in 2010 is silly.

transferability of the right to rent the property on a short term basis when Appellant sells its property. In reliance on this approval, Appellant has invested in the development of its properties for this purpose (short term renting) and stands to lose income, and will be subject to a devaluation of its property if and when this existing use is terminated.

In its briefing at the trial level, the City misstated the issue as one of licensing. The vested right here is the ability to rent the property on a short-term basis, which is permitted through zoning. Thus, when operating their business as a short-term rental, Appellant is complying with the current zoning requirements. Because this investment was geared towards this specific use, Appellant will be unable to recoup this value because Appellant will be unable to transfer its license and a buyer of the property will not be able to obtain a new license due to the new Ordinance.

### C. The City failed to follow the proper procedure to eliminate a land use which was and is permitted under the zoning rules.

#### 1. Short term rentals are permitted under zoning rules and no amendment to zoning has been made.

Neither the City nor SFF contests the fact that short term rentals are permitted in every zoning district in the City. Instead, the City admits this but argues that the fact that this use (renting on a short term basis) is permitted in every zoning district is irrelevant here because the Ordinance amends only the Business License Code. *See* City's Mot. and Mem for Summ. J. at 1, 41. One of Appellant's arguments, though, is that the City was required to amend its zoning code because the City has already permitted the use under the same. *See Keen v. City of Manhattan Beach*, 77 Cal.App.5th 142 (2022) The trial court rightly ruled the City's old ordinances did permit short-term rentals. This means the City's recent laws against platforms like Airbnb indeed are amendments requiring Commission approval, which the City never got.").

The City fails to appreciate the holding of *Keen v. City of Manhattan Beach*. Appellant is not arguing that Keen stands for the proposition that "short-term rentals can only be created by zoning amendments." *See* City's Mot. and Memo for Summ. J. at 21. Instead, and as expressly stated in Appellant's Motion and Memorandum in Support of Summary Judgment, the California Court found that the City of Manhattan Beach had previously permitted short-term rentals under its "old residential zoning ordinances," and consequently, the City of Manhattan Beach could ***only*** ban short-term rentals ***through amendments to the same***. *Keen v. City of Manhattan Beach*, 77 Cal. App. 5th 142, 148, 292 Cal. Rptr. 3d 366, 369 (2022), review denied (June 29, 2022) (emphasis added). In *Keen*, the City of Manhattan Beach raised the same argument as the City of Folly Beach has—a city can ban short-term rentals under its general police power. *See* Brief of Appellant City of Manhattan Beach, 2021 WL 2254006 (Cal.App. 2 Dist.), 55-56. The *Keen* court rejected this argument and agreed with the trial judge that the City of Manhattan Beach must amend its zoning code to prohibit the previously authorized use. As in *Keen*, the City of Folly Beach has permitted short-term rental use under its zoning code, and it therefore cannot ban the use without amending the code. The City's reliance on *Greenville County v. Kenwood Enterprises*, infra, is misplaced. In that case, Greenville County restricted the operation of sexually oriented businesses which were not discussed in the existing Zoning Ordinance in Greenville County. In the current case, short term rentals are an allowed use under the Folly Beach Zoning Code, whereas the Greenville Zoning Ordinance did not reference sexually oriented businesses.

The City refers to neighboring municipalities as support for its argument that it can regulate STRs. However, the neighboring municipalities cited by the City support Appellant's position that STR restrictions should be enacted under the Zoning Ordinance, because each of the listed

municipalities regulates STRs within its Zoning Code. More importantly, none of them adopted STR restrictions using their police powers or initiative and referendum under § 5-17-30.

SFF points out that all of the municipalities listed by the City (and again by Appellant for discussion of their zoning code) also require that each person seeking to operate a STR must also obtain a business license. This is true. However, none of these municipalities limit or ban the right to rent on a short term basis through a business license. Any restriction or limits placed on the owner's ability to operate a short-term rental on the property is included in the zoning ordinance—where it belongs. And, most importantly, none of these municipalities used § 5-17-30 to enact the STR restrictions.

**2. The Ordinance regulates and/or eliminates the right to rent for all properties in Folly Beach.**

The ability to lease property is a fundamental privilege of property ownership. That right does not vary based on length of the lease term and the City has not, and cannot, cite any law to the contrary. As soon as the cap on STR business licenses was imposed, it was reached (and this was by design as the number for the cap was set below the number of existing short term rental properties). At this point in time, the Zoning Code is inaccurate because a potential new owner cannot apply for a short term rental license. An unsuspecting property owner viewing the zoning tables would not know that "permitted use" does not, in fact, mean it is a permitted use. The City has effectively barred the new owner from leasing the property on a short term basis, unless the new owner becomes a resident and lives in the property. In other words, the City has eliminated the use as a rental for each and every new potential property owner through a "business license."

## CONCLUSION

For the set forth herein, Appellants respectfully request this Court to reverse the circuit court's erroneous grant of the City's Motion for Summary Judgment and GRANT Appellant's Motion for Summary Judgment.

Respectfully Submitted,

s/ Bijan K. Ghom
Alice F. Paylor, SC Bar No. 4380
Bijan K. Ghom, SC Bar No. 103531
151 Meeting Street, Suite 400
Charleston, SC 29401
afp@saxtonstump.com
bkg@saxtonstump.com
(843) 414-5080

ATTORNEYS FOR APPELLANT

Charleston, South Carolina
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