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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Mikell R. Scarborough, Master-in-Equity

Case No. 2021-CP-10-05211
Appellate Case No. 2023-001615

CKC Properties, LLC, Respondent,

v.

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

Of which The Town of Mount Pleasant, South Carolina;
The Town of Mount Pleasant Board of Zoning Appeals;
Justin O'Toole Lucey; 415 Mill St., Inc.; and 69 Scott Street, LLC, are Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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Appellants make the following points in reply to CKC's respondent's brief.[1] [2]

ARGUMENT IN REPLY

1. It is BOZA's decision that is entitled to deference—not the Zoning Administrator's.

CKC's opposition to this appeal relies on an incorrect standard of review. While recognizing that "'great deference [is owed] to the decisions of those charged with interpreting and applying local zoning ordinances,'"[3] CKC wrongly asserts (in conclusory fashion, i.e., without supporting legal authority) that the decision maker entitled to such deference is the Zoning Administrator—not BOZA:

> Both the Zoning Administrator and the BOZA have a statutory role in interpreting and applying zoning ordinances. However, the Zoning Administrator's and the BOZA's interpretation of "Guest room" are in conflict. The Master-in-Equity reinstated the Zoning Administrator's interpretation. That is the interpretation presently on appeal. As such, and at this juncture, it is the Zoning Administrator's determination that is entitled to deference – not the BOZA's.

(Br. of Respondent p. 16.)

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[1] Shorthand references already defined in Appellants' principal brief are continued in this reply brief (e.g., the "Town" refers to Appellant The Town of Mount Pleasant, South Carolina; "BOZA" refers to Appellant The Town of Mount Pleasant Board of Zoning Appeals; "Mr. Lucey" refers to Appellant Justin O'Toole Lucey; the "Lucey Parties" refers to Mr. Lucey and Appellants 415 Mill St., Inc., and 69 Scott Street, LLC, collectively; "Appellants" refers to the Town, BOZA, and the Lucey Parties, collectively; "CKC" refers to Respondent, CKC Properties, LLC; and the "Proposed Hotel" refers to the boutique hotel that CKC wants to build in the Town on a site that runs along Mill Street between Lucas and Scott Streets).

[2] As they did with their principal brief, Appellants join in this single reply brief pursuant to Rule 208(b)(6), SCACR.

[3] (Br. of Respondent p. 16 (quoting *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 91, 791 S.E.2d 305, 308 (Ct. App. 2016) (quoting *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995)).)

Respectfully, CKC has it backwards: It is BOZA's decision—not the Zoning Administrator's—that is entitled to deference in this appeal, as indeed the plain language of CKC's own statement of the standard of review shows:

STANDARD OF REVIEW

> "[S]ection 6-29-840 [of the South Carolina Code] prescribes the standard of review a circuit court should apply when considering an appeal from a local **zoning board**." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 35, 606 S.E.2d 209, 212 (Ct. App. 2004) (citing S.C. Code Ann. § 6-29-840(A) ("[t]he findings of fact by the **board of appeals** must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.")).
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> The Court of Appeals "appl[ies] the same standard of review as the circuit court below." *Id.* at 33, 606 S.E.2d at 211. "In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the **[b]oard** is correct as a matter of law." *Id.* (citing S.C. Code Ann. § 6-29-840(A)). "However, a decision of a municipal **zoning board** will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Id.* (quoting *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting *Cty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)).
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> ***

(Br. of Respondent pp. 15–16 (emphasis added via bold print).).

It is BOZA, i.e., the "board of zoning appeals," a/k/a the "board," created pursuant to S.C. Code Ann. § 6-29-780,[4] that is entitled to deference—not the Zoning Administrator, i.e., the

[4] Section 6-29-780(A) provides:

> As a part of the administrative mechanism designed to enforce the zoning ordinance, the zoning ordinance may provide for the

"administrative official," a/k/a the "officer from whom the appeal is taken," whose "alleged . . . error . . . in the enforcement of the zoning ordinance" the board is statutorily empowered to hear and decide on appeal.[5] The statutory scheme makes clear that, in deciding an appeal from the Zoning Administrator, BOZA may "reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination [on appeal], and to that end, has all the powers of the [Zoning Administrator];"[6] that it is the decision of BOZA—not the Zoning Administrator—that is thereafter subject to judicial review on appeal;[7] and that, in the event of such review, it is the decision of BOZA—not the Zoning Administrator—that is entitled to deference. S.C. Code Ann. § 6-29-840(A) ("In determining the questions presented by the appeal, the [circuit] court must determine only whether the decision of *the board* is correct as a matter of law.") (emphasis added).

This same standard, which gives deference to the "board of zoning appeals" created pursuant to § 6-29-780, i.e., BOZA, and only allows its decision to be overturned "if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its

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> creation of a board to be known as *the board of zoning appeals*. Local governing bodies with a joint planning commission and adopting a common zoning ordinance may create a board to be known as the joint board of appeals. All of these boards are referred to as *the board*."

(emphasis added).

[5] S.C. Code Ann. § 6-29-800(A)(1) (granting "[t]he board of appeals" power "to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an *administrative official* in the enforcement of the zoning ordinance") (emphasis added); § 6-29-800(B)(C) & (E) (referring to the administrative official in the Zoning Administrator's position as the "officer from whom the appeal is taken).

[6] § 6-29-800(E).

[7] S.C. Code Ann. § 6-29-820(A) ("A person who may have a substantial interest in any decision of *the board of appeals* or an officer or agent of the appropriate governing authority may appeal from a decision of *the board* to the circuit court . . . .") (emphasis added).

discretion,"[8] applies the same in this Court as in the circuit court. *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) ("On appeal, we apply the same standard of review as the circuit court below . . . .").

2. Properly applying the correct standard of review—which, again, gives deference to BOZA and only allows its decision to be overturned "if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion"[9]—it is clear that BOZA's determination that the Proposed Hotel does not meet the off-street parking space requirements in § 156.171 should have been affirmed by the circuit court—and that the circuit court's ruling to the contrary (like CKC's arguments to this Court in support thereof) relies on the improper substitution of its judgment in place of BOZA's, not the existence of any actual reversible error.

As already explained in Appellants' principal brief, and contrary to CKC's characterization of its reasoning as "tortured,"[10] BOZA faithfully employed the means of statutory construction to reach an end that honors the undeniably intended purpose of the lawmakers to address the practical, real-world issue (sufficient off-street parking) via a meaningful correlation of the term "Guest Room" to actual off-street parking needs, interpreting "Guest Room" as synonymous with "bedroom" (as opposed to "keyed lodging unit")[11]—thereby rejecting the absurd construction that

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[8] *Wyndham Enters., LLC v. City of N. Augusta*, 401 S.C. 144, 147–48, 735 S.E.2d 659, 661 (Ct. App. 2012) ("In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the [Zoning] Board is correct as a matter of law.") (citing § 6-29-840(A)); *id.* at 148, 735 S.E.2d at 661 ("Furthermore, '[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.'") (citing *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)); *id.* ("However, a decision of a municipal [Z]oning 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.") (citation omitted); *see also Purdy v. Moise*, 223 S.C. 298, 302–05, 75 S.E.2d 605, 607–08 (1953) (finding zoning board's "construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor").

[9] *See* footnote 8, *supra*.

[10] (Br. of Respondent p. 2.)

[11] Thus, interpreting the ordinance in accordance with the rule that it must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Mikell v. Cnty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009)

the circuit court would later come to endorse, and CKC now champions, whereby a single off-street parking space is said to suffice for any single keyed lodging unit, no matter how many bedrooms there might be therein[12]—and, in turn, determining that the provision of a mere thirty-five (35) off-street parking spaces where the Proposed Hotel contains sixty-four (64) bedrooms (i.e., "Guest Rooms") is plainly inadequate under § 156.171. BOZA's interpretation of "Guest Room" as synonymous with "bedroom" (as opposed to "keyed lodging unit") rests on solid textual support from both within[13] and without[14] the Town's Ordinance.[15]

(emphasis added) (citing *Eagle Container, LLC v. County of Newberry*, 379 S.C. 564, 568, 666 S.E.2d 892, 894 (2008)).

[12] Thus, interpreting the ordinance in accordance with the rule that it should not be read "in a way which leads to an absurd result or renders it meaningless." *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012).

[13] As BOZA duly observed, the Town's Ordinance uses the term "lodging unit" for determining what constitutes a "Boutique Hotel" but does not use that term, and instead uses the different term "Guest Room," to determine the number of parking spaces required. (R. pp. 190–191.)

[14] As explained in Appellants' principal brief, dictionaries are routinely utilized by courts in determining the usual and customary meaning of a word or phrase, and there is no question that the usual and customary meaning of "Guest Room" is bedroom, as shown in the numerous dictionary definitions that Appellants cited to the circuit court to that effect. CKC's opposition to utilizing dictionary definitions in this case is unavailing. The nature of the interpretive task involved in this zoning matter, and the applicable rules of construction, is no different than in any other matter of statutory construction where a dictionary might be consulted for guidance as to the generally accepted meaning of words. *See Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 466, 602 S.E.2d 76, 79 (Ct. App. 2004) ("*As with statutes*, the lawmakers' intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'") (citation omitted) (emphasis added); *id.*, 602 S.E.2d at 79–80 ("We review a zoning ordinance to give it a 'practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers.') (citation omitted); *Purdy*, 233 S.C. at 304, 75 S.E.2d at 608 ("The generally accepted meaning of words used in statutes or ordinances are to be accepted unless such words have a well recognized meaning in law . . . .").

[15] As for CKC's argument about the Town's subsequent adoption of Ordinance No. 21071, it is unavailing, too. As an initial matter, having been adopted on December 15, 2021, which was approximately a month after CKC had already appealed BOZA's decision to the circuit court by notice filed November 16, 2021, the ordinance post-dated the proceedings before BOZA. Moreover, and in any event, notwithstanding CKC's desire to have the adoption of the ordinance seen as reflecting legislative intent to change the prior law, it may just as well be viewed as clarifying the original legislative intent. *See Amazon Services, LLC v. S.C. Dep't of*

In no reasonable way can BOZA's decision be said to be arbitrary or capricious, or without a reasonable relation to a lawful purpose, or to constitute an abuse of its discretion. The circuit court's ruling to the contrary is itself reversible error because it (like CKC's arguments to this Court in support of the circuit court's ruling) relies on the improper substitution of its judgment in place of BOZA's, not the existence of any actual reversible error. *See Boehm v. Town of Sullivan's Island Board of Zoning Appeals*, 423 S.C. 169, 813 S.E.2d 874 (Ct. App. 2018) ("A court will not substitute its judgment for the judgment of the board in a zoning law case."); *id.* ("The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. Nonetheless, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.") (quoting *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952)).

3. CKC's FOIA allegations are irrelevant to this appeal.

In support of affirmance of the circuit court's decision, CKC also raises speculative allegations that BOZA secretly deliberated in executive session to grant the Lucey Parties' appeal in violation of the South Carolina Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 et seq. ("FOIA"). Essentially, CKC asks this Court to infer FOIA violations based only on the alleged "lack of public discussion" during the public vote to deny the Lucey Parties' appeal in all respects except for off-street parking.

Revenue, 442 S.C. 313, 329, 898 S.E.2d 194, 202 (2024). And in any event, any presumption that the adoption of the ordinance reflected legislative intent to depart from the original law is merely an interpretive aid and not conclusive. *Id.*

As an initial matter, the record shows that BOZA's motion and vote on the Lucey Parties' appeal occurred during public session. (*See* R. pp. 208–217, 470:22–471:21.) Moreover, and in any event, CKC's FOIA allegations are irrelevant to this appeal, as this zoning appeal is not the proper forum to litigate in the first instance any potential FOIA violation arising from the BOZA hearing on September 27, 2021. FOIA provides remedies for violations of its provisions, and they do not include reversal of BOZA decisions. *See* § 30-4-100(A). In determining an appeal from BOZA, "the court must determine *only* whether *the decision* of the board is correct as a matter of law." § 6-29-840 (emphasis added). The statutorily prescribed scope of review leaves no room for consideration of alleged violations of FOIA procedure having no bearing upon the substantive correctness of BOZA's disposition of the question before it on appeal.

4. CKC's argument that the Court should affirm the circuit court's reversal of BOZA's decision on the additional sustaining ground that the Lucey Parties' appeal was untimely is unavailing.

As an initial matter, CKC's attempt to raise this argument as an additional sustaining ground is misplaced. The doctrine of additional sustaining grounds allows an appellate court discretion to affirm the underlying decision of the lower court (i.e., the trial level court that hears the matter in the first instance) on appeal for any reason appearing in the record. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (explaining that "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

The "lower court" to which the *I'On* Court referred was the circuit court sitting as the trial level court, not the circuit court sitting as an appellate court, as it did in the instant case. Here, in the context of this second-level appeal regarding BOZA's underlying decision where

this Court "appl[ies] the same standard of review as the circuit court below,"[16] logically, the only decision that could be affirmed on the basis of an additional sustaining ground would be that of BOZA, which was in essence the trial level court, not the circuit court's first-level appellate decision. Indeed, the issue of the timeliness of the Lucey Parties' appeal was decided against CKC in the first instance by BOZA in its underlying decision, whereupon CKC lost on this issue on appeal to the circuit court. Having lost this issue in the first instance, then lost it on appeal to the circuit court, and then declined to appeal the matter further, the timelines of the Lucey Parties' appeal should be deemed established as the law of the case. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E. 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case.")

In any event, however, CKC's argument fails on the merits. The Town's Ordinance provides a 30-day time period to file an appeal to BOZA:

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

(R. pp. 399–403.) Thus, the material dates are the date that Mr. Lucey received actual notice of the staff's determinations and the date he filed the appeal.

The Zoning Administrator himself represented to BOZA during the September 27, 2021, hearing that the Lucey Parties' appeal was timely. (*See* R. pp. 196–207.) On August 12, 2021, Mr. Lucey served an appeal to the Town Attorney via letter detailing his numerous zoning concerns regarding the Proposed Hotel. (*See* R. pp. 236–241.) Mr. Lucey's letter states, "Please *accept this*

[16] *Austin*, 362 S.C. at 33, 606 S.E.2d at 211 ("On appeal, we apply the same standard of review as the circuit court below . . . .").

letter as an appeal of the following errors relating to the Mill Street Boutique Hotel project currently pending before the Design Review Committee." (*See* R. pp. 236–241 (emphasis added).)

The Zoning Administrator confirmed that staff first published on July 19, 2021, determinations regarding the Proposed Hotel development in their staff report for the July Design Review Board meeting. (*See* R. pp. 196–207.) Thus, the Zoning Administrator confirmed that July 19, 2021, was the earliest date that the Lucey Parties could have received actual notice of staff determinations, because that was the first date staff published the determinations. (*See* R. pp. 196–207.) Based on the August 12, 2021, date of Mr. Lucey's appeal letter, which was duly submitted within thirty days of staff's July 19, 2021, posting, the Zoning Administrator concluded Mr. Lucey timely filed his appeal. (*See* R. pp. 196–207.) And BOZA ruled in favor of this analysis when it found that the Lucey Parties' appeal was timely filed. (R. p. 189.)

Nonetheless, CKC argues that notice should be imputed to the Lucey Parties as far back as April of 2021. Specifically, CKC relies on an April 26, 2021, letter Mr. Lucey submitted to the Town complaining generally about the Proposed Hotel in opposition to an April 2021 height variance hearing. At the variance hearing, CKC sought to add an additional floor to the development. At that time, however, design plans showing the number of rooms and number of parking spaces had not yet been completed and staff had not yet made final determinations. CKC did not apply for preliminary approval with completed plans until July 15, 2021. (*See* R. pp. 196–207.) Mr. Lucey's April 26, 2021, letter submitted in opposition to the height variance hearing thus cannot show he had actual notice of staff's final determinations regarding parking calculations, because staff had not yet made its final determinations at that time.

CKC also argues that even if the Lucey Parties' actual notice date is July 19, 2021, their appeal is still untimely because Mr. Lucey submitted the appeal on August 12, 2021, in the form of

a letter to counsel for the Town instead of using the form prescribed by BOZA. CKC argues that Mr. Lucey did not submit the processing form and pay the appeal fee until August 23, 2021 (*See* R. pp. 370–386), which, CKC points out, is more than thirty days after staff's July 19, 2021, posting.

To support this argument, CKC cites to BOZA's Rules of Procedure, which state in relevant part: "Requests to be heard before a Board shall be made by submitting the appropriate application form(s) approved by the Department of Planning and Development in accordance with the submittal deadline . . .", "Applications may require a submittal and review fee in an amount specified by the schedule of fees established by the Town", and "Failure to submit required information or forms and applicable fees may be grounds for rejection of the application." (*See* R. pp. 389–398.) CKC further relies on Ordinance Section 156.413(D), which states that "complete applications" are required, and that "incomplete applications will be returned to the applicant." (*See* R. pp. 399–403.)

BOZA's Rules of Procedure and Ordinance §156.413(D) do not strip BOZA of the ability to accept Mr. Lucey's August 12, 2021, appeal letter as the date of the Lucey Parties' appeal submission. CKC misreads Mt. Pleasant Code of Ordinances §156.413(D). The section states that an incomplete application will be returned if it remains incomplete "prior to consideration by the Board." (*See* R. pp. 399–403.) BOZA received the Lucey Parties' processing form and fee long before consideration by BOZA on September 27, 2021. After receiving Mr. Lucey's appeal letter, the Town Attorney informed Mr. Lucey that BOZA accepted his August 12, 2021, letter as his appeal, but requested that he prepare the form and pay the $200 fee. (*See* R. pp. 242–248.) On August 23, 2021, Mr. Lucey submitted the fee and processing form—well before the September 27, 2021, BOZA hearing. Thus, Section 156.413(D) does not render the Lucey Parties' appeal untimely.

CKC's argument also unduly elevates form over substance. Mr. Lucey's August 12, 2021, letter provided notice of the appeal and contained all the information relevant to the appeal, including lengthy grounds therefor. (*See* R. pp. 236–241.) In his August 12, 2021, letter to counsel for the Town, copying the Planning Department and Town Council, Mr. Lucey provided the required information from the BOZA form by supplying applicant information, property information, grounds for appeal, grievances, interpretation of the zoning code, and request for relief. (*See* R. pp. 236–241.) The August 23, 2021, processing form did not contain any additional substantive information relevant to his appeal that was not already contained in his August 12, 2021, letter. (*See* R. pp. 370–386.)

Courts routinely reject arguments that unduly elevate form over substance. *See Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005) (finding even though content of notice of appeal did not exactly match the example contained in the appendix, it sufficiently informed respondent that appellants were appealing the trial court's denial of the new trial motion and was acceptable); *Charleston Lumber Co. v. Miller Hous. Corp.*, 318 S.C. 471, 458 S.E.2d 432 (Ct. App. 1995) (overlooking clerical error in the notice of appeal because the respondent did not allege that prejudice resulted from a clerical error obviously had knowledge that the appellants had appealed the case); *Chapman v. S.C. Dep't of Soc. Servs.*, 420 S.C. 184, 801 S.E.2d 401 (Ct. App. 2017) (reversing the ALC's holding that a terminated employee's grievance was untimely because he failed to submit the designated cover form, and finding that the employee submitted the substance of his grievance before the expiration of the deadline via letter from his attorney); *Gordon v. Busbee*, 367 S.C. 116, 623 S.E.2d 857(Ct. App. 2005) (reversing the circuit court's dismissal of an action for failure to file a probate court form because the appellant's filing contained the necessary information and holding the Circuit Court's ruling elevates form over substance); *see also Pierce v.*

Owen Loan Servicing, LLC, 987 F.3d 577, 579–80 (6th Cir. 2021) (notice of appeal was timely filed when placed in court's drop box despite local rule requiring electronic filing; failure to comply with local rule did not render notice of appeal untimely); *GBJ, Ltd. v. Redman*, 521 F.Supp.2d 1000, 1001–02 (D. Ariz. 2007) (notice of removal constructively delivered to clerk; clerk cannot refuse notice when not filed by electronic means as required by local rule); *U.S. v. Harvey*, 516 F.3d 553, 556 (7th Cir. 2008) (notice of appeal that was filed electronically was timely even though local rules required hard copy; difference between hard copy and electronic copy is mere error of form).

CKC offers no authority holding that failure to file a processing form with a BOZA appeal letter constitutes an ineffective appeal for purposes of timeliness. The governing statute, § 6-29-800(B), contains no reference to a processing form requirement in order to perfect a zoning appeal.[17] "[A] regulation has the force of law, [but] it must fall when it alters or adds to a statute." *Chapman* at 190-91; *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 390 S.C. 418, 429 (2010); *see Goodman v. City of Columbia*, 318 S.C. 488, 490 (1995) (finding a regulation that required a particular form for review of a hearing commissioner's decision added to the statute, which only required the filing of notice of intent to appeal within fourteen days).

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[17] Section 6-29-800(B) provides as follows:

> Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. If no time limit is provided, the appeal must be taken within thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken. The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken.

Like its decision on the parking requirements of § 156.171, BOZA's decision on the timeliness of the Lucey Parties' appeal is entitled deference and may only be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if BOZA has abused its discretion, none of which CKC has shown here.

5. CKC's argument that the Court should affirm the lower court's reversal of BOZA's decision on the additional sustaining ground that the Lucey Parties' lacked standing is unavailing.

As an initial matter, CKC's attempt to raise this argument as an additional sustaining ground is misplaced for the same reasons as its other purported additional sustaining ground addressed above regarding timeliness. Again, the doctrine of additional sustaining grounds allows an appellate court discretion to affirm the underlying decision of the lower court (i.e., the trial level court that hears the matter in the first instance) on appeal for any reason appearing in the record. *See I'On*, 338 S.C. at 419, 526 S.E.2d at 723 (2000). And here, in the context of this second-level appeal regarding BOZA's underlying decision where this Court "appl[ies] the same standard of review as the circuit court below,"[18] logically, the only decision that could be affirmed on the basis of an additional sustaining ground would be that of BOZA, which was in essence the trial level court, not the circuit court's first-level appellate decision. Indeed, the issue of the Lucey Parties' standing was decided against CKC in the first instance by BOZA in its underlying decision, whereupon CKC lost on this issue on appeal to the circuit court. Having lost this issue in the first instance, then lost it on appeal to the circuit court, and then declined to appeal the matter further, the Lucey Parties' standing should be deemed established as the law of the case. *See Atl. Coast Builders*, 398 S.C. at 329, 730 S.E. at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case.")

[18] *Austin*, 362 S.C. at 33, 606 S.E.2d at 211 ("On appeal, we apply the same standard of review as the circuit court below . . . .").

In any event, however, CKC's argument fails on the merits. The site of the Proposed Hotel is located on the block surrounded by Mill Street, Lucas Street, Scott Street, and Live Oak Drive. (*See* R. p. 380.) The Lucey Parties own eight (8) of the ten (10) lots that share the block with the proposed development—including parcels immediately adjacent to the proposed development. (R. p. 380.)

Generally, a proposed development will most significantly impact persons owning adjacent and/or neighboring property. Thus, a longstanding principle of zoning law holds that an adjacent property owner is presumed to be an aggrieved person with standing to appeal zoning compliance. *See*, 4 Rathkopf's The Law of Zoning and Planning § 63:18 (4th ed.) ("An adjoining or nearby property owner, on the face of it, has a sufficient interest to enable him to appeal a determination of a board regarding the zoning usage of adjacent property without proof of special injury or damage"); *see also* 3 Rathkop's The Law of Zoning and Planning § 57:35 (4th ed.).

South Carolina courts have held that individual adjacent property owners have sufficient standing to challenge zoning decisions on neighboring properties. *Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013) (affirming the circuit court's holding that adjacent property owners had standing to appeal approval of communications tower to BOZA due to the proximity of their homes to the proposed tower site at issue, and holding that other neighboring property owners also had standing to join in the appeal); *see also Austin*, 362 S.C. at 32, 606 S.E.2d at 211 (treating neighboring property owner Austin as an "aggrieved party" in analyzing the dispute in her appeal regarding the sufficiency of the record among other matters).

CKC argues that the phrase "any person aggrieved" in § 6-29-800(B) does not encompass adjacent property owners. CKC cites for comparison other zoning statutes that provide only

adjacent property owners the ability to bring direct enforcement actions. *See* S.C. Code Ann. § 6-29-760(C); *see also* S.C. Code Ann. § 6-29-950(A). CKC argues that the use of "any aggrieved party" within § 6-29-800(B), rather than the specific reference to "adjacent property owners," means adjacency is insufficient to bring a zoning appeal before BOZA. CKC is mistaken.

In § 6-29-800(B), "*any* aggrieved person" (emphasis added) is a broad classification that includes both adjacent property owners and others negatively impacted. Section 6-29-800(B), which provides for an appeal to a municipal zoning appeal board, is broader than the statutes CKC cites for comparison (§ 6-29-760(C) and § 6-29-950(A)), which govern who can bring certain direct enforcement actions in circuit court.

Also, BOZA relied on evidence in the record showing parking and traffic concerns arising from the proposed development. The hearing transcript before BOZA contains the following evidence:

- Christine Reilly (neighbor): "I'm concerned about the parking and the drainage." (R. p. 446:21–22.)
- Ashely Woody (neighbor): "My issue with is the parking. . . . They don't have enough off-street parking." (R. pp. 447:7–448:1.)
- Charles Lucey (neighbor): Complaining that his mother cannot take a walk near the property except at 4:00 or 5:00 in the morning because the traffic is so bad by 7:30 am. (R. pp. 448:12–450:10.)
- Kevin Berry (civil engineer for the Proposed Hotel): Acknowledging that people already park illegally on the street (which shows there is already a parking problem). (R. pp. 457:18–459:6.)

The evidence in the record supports BOZA's standing determination. South Carolina courts impose a "no evidence" standard in zoning appeals, whereby to reverse the zoning board, it must be found that that the zoning board's decision was supported by "no evidence." *Austin*, 362 S.C. at 36, 606 S.E.2d at 213; *see also, Venture Eng'g for DT LLC v. Horry Cnty. Zoning Bd. of Appeals*, 433 S.C. 419, 433–34, 858 S.E.2d 638, 646 (Ct. App. 2021), reh'g denied (June 25, 2021) (reversing the circuit court's holding that the Board's determination in that case was arbitrary because the court should infer from the record the Board's factual basis for making a determination, and holding that "testimony of residents in the surrounding community expressing concerns about particulates, noise, and traffic" was sufficient to support the Board's determination).

CKC argues that a heightened "competent evidence" standard is required to satisfy standing in zoning cases arguing that the Lucey Parties should have submitted a traffic expert with technical knowledge of traffic concerns to BOZA to prove he was an aggrieved party. CKC cites two cases that analyze the evidence necessary to obtain a "special exception." *See Wyndham Enterprises*, *LLC v. City of N. Augusta*, 401 S.C. 144, 145, 735 S.E.2d 659, 660 (Ct. App. 2012) (no standing analysis); *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 203, 516 S.E.2d 439, 439 (1999) (no standing analysis). Neither case relied on by CKC analyzes the evidence required to establish standing.

CKC relies heavily on *Beaufort Realty Co., Inc. v. Beaufort County*, 346. S.C. 298, 551 S.E.2d 588 (Ct. App. 2001), where the Court held the Coastal Conservation League members did not have standing as aggrieved persons because they could not show individualized injury. Here, the Lucey Parties, as an individual adjacent property owners, are far different from the "organizational standing" concerns presented in the *Beaufort Realty* case.

Finally, CKC cites to *ATC S., Inc. v. Charleston Cnty*., 380 S.C. 191, 198, 669 S.E.2d 337, 340 (2008), and argues that the alleged harms to the Lucey Parties are commercial and competitive in nature. The Court in *ATC S., Inc.* held that the challenger lacked constitutional standing because the only potential harm was an increase in business competition between the two cell phone companies and competitive interests alone are not enough to confer constitutional standing. *Id*. The *ATC* case is not applicable here because BOZA applied *statutory* standing pursuant to § 6-29-800(B) and did not rely on *constitutional* standing, which was the issue in *ATC*. *See Bevivino*, 402 S.C. 57, 737 S.E.2d 863 ("The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute."). Moreover, BOZA did not rely on any competitive interests between the Lucey Parties and CKC in conferring standing. Rather, BOZA found standing based on Mr. Lucey owning adjacent property and the traffic and parking concerns from the Proposed Hotel.

Here again, like its decision on the parking requirements of § 156.171, BOZA's decision on the Lucey Parties' standing is entitled deference and may only be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if BOZA has abused its discretion, none of which CKC has shown here.

6. Appellants did not waive the right to challenge CKC's vested rights arguments by failing to contest them prior to issuance of the circuit court's order.

Again, § 6-29-840(A) prescribes the circuit court's role in appeals from boards of zoning appeals and limits the courts inquiry to determining "only whether the decision of the board is correct as a matter of law." Besides its rulings in favor of the Lucy Party on the issues of timeliness and standing, BOZA ruled only that the Proposed Hotel lacked sufficient off-street parking to comply with the Zoning Code. The circuit court was limited to addressing only that decision.

BOZA made no determinations concerning other non-BOZA design review approvals, vested rights, or final approval of a site-specific development plan. Nor could it. BOZA has no power to direct other design review approvals to occur, to accord vested rights in a development project, or approve a site-specific development plan. *See* § 6-29-800 (describing BOZA's powers). As such, a reversal of BOZA's decision could not result in relief regarding CKC's vested rights arguments. The circuit court did not overstep its bounds in this regard until the issuance of its order of July 14, 2023, whereupon Appellants duly challenged the circuit court in regard to the same via timely motion for reconsideration.

CONCLUSION

For the foregoing additional reasons, together with those already set forth in their principal brief, Appellants ask this Honorable Court to reverse the circuit court entirely and reinstate BOZA's decision directly (or, alternatively, remand the matter to the circuit court for it to affirm and reinstate BOZA's decision) or, alternatively, even assuming, *arguendo*, that the circuit court did not commit reversible in reversing BOZA's decision that the Proposed Hotel lacks the required amount of off-street parking spaces under § 156.171, this Court should reverse the circuit court as to its grant of the improper relief addressed in Issue/Argument II Appellants' principal brief.

<SIGNED ON THE FOLLOWING PAGE>

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Mikell R. Scarborough, Master-in-Equity

Case No. 2021-CP-10-05211
Appellate Case No. 2023-001615

CKC Properties, LLC, Respondent,

v.

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

Of which The Town of Mount Pleasant, South Carolina;
The Town of Mount Pleasant Board of Zoning Appeals;
Justin O'Toole Lucey; 415 Mill St., Inc.; and 69 Scott Street, LLC, are Appellants.

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Appellants' counsel hereby certify that the **Final Reply Brief of Appellants** complies with Rule 211(b), SCACR, and the Supreme Court's order of April 15, 2014.

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I, Russell G. Hines, of Clement Rivers, LLP, hereby certify that the **FINAL REPLY BRIEF OF APPELLANTS** and **APPELLANTS' CERTIFICATION FOR FINAL REPLY BRIEF** were served on all other parties to this matter on September 17, 2024, by emailing (see attached email) a copy of the same to their counsel of record:

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September 17, 2024

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Attachments:	Final Brief of Appellants.pdf Final Reply Brief of Appellants.pdf Appellants" Certification for Final Brief.pdf Appellants" Certification for Final Reply Brief .pdf image001.png

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Enclosed please find Appellants' Final Brief, Final Reply Brief, and Certifications for service upon you in the above-referenced matter.

Thank you,

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