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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-001615
Trial Court Case No. 2021CP1005211

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 Commercial Design Review Board;
and The Town of Mount Pleasant Board of Zoning Appeals,
Justin O'Toole Lucey; 415 Mill St., Inc.; and 69 Scott Street, LLC are the

Appellants.

FINAL BRIEF OF RESPONDENT CKC PROPERTIES, LLC

McCULLOUGH ▪ KHAN ▪ APPEL

s/Ross A. Appel
Ross A. Appel, Esq. (SC Bar #79149)
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com

Attorneys for Respondent
CKC Properties, LLC

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Respondent, CKC Properties, LLC ("CKC"), in accordance with Rule 208(a)(2), SCACR, hereby submits this response to the joint brief of Appellants The Town of Mount Pleasant, South Carolina (the "Town"); The Town of Mount Pleasant Commercial Design Review Board (the "DRB"); and The Town of Mount Pleasant Board of Zoning Appeals ("BOZA") and Appellants Justin O'Toole Lucey ("Lucey"); 415 Mill St., Inc.; and 69 Scott Street, LLC (collectively, the "Lucey Parties") (all collectively, "Appellants").

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Did the Master-in-Equity err by reversing the BOZA Order and reinstating the Zoning Administrator's (and his predecessor's) interpretation of "Guest room" and his approval of the site-specific development plan for CKC's Boutique Hotel?[1]

A. Did the Zoning Administrator err by interpreting "Guest room" to mean an individually keyed lodging unit?

B. Does the Zoning Ordinance's use of the term "lodging unit" in the definition of "boutique hotel" conflict with the Zoning Administrator's interpretation of "Guest room?"

C. May cherry-picked dictionary definitions, never presented to the BOZA and not part of the record, be considered this Court?

D. Does South Carolina case law requiring zoning and land development regulations be liberally construed in favor of the free exercise of property apply to this appeal?

E. Does the Appellants' interpretation of "Guest room" fail to honor legislative intent and produce absurd results by compelling an overabundance of wasteful off-street parking, which the Zoning Ordinance itself seeks to avoid?

F. Does Ordinance No. 21071, adopted several months after the BOZA hearing, highlight the weakness of Appellants' tortured interpretation of "Guest room?"

G. Did the Master-in-Equity err by characterizing the "1 – 2" minimum parking spaces required for each "Guest Room" as a discretionary range?

[1] The "Boutique Hotel" is defined in the Statement of the Case.

H. Did the BOZA violate the FOIA at its September 27, 2021 hearing by conducting an illegal executive session where members were polled and a decision was made entirely behind closed doors?

II. Did the Master-in-Equity err by ordering the site-specific development plan for the Boutique Hotel proceed through the development review process under the ordinances in effect at the time of the BOZA hearing and prior to the adoption of Ordinance No. 21071?

A. Did the Appellants waive their ability to challenge the Order's vested rights determination because both raised these issues, for the first time, in their motions to reconsider?

B. In reversing the BOZA Order, did the Master-in-Equity have the authority to order the site-specific development plan for the Boutique Hotel proceed through the development review process under the ordinances, as they existed, at the time of the BOZA hearing where the Lucey Appeal was considered?

III. Was the Lucey Appeal timely filed and did the BOZA have subject matter jurisdiction to hear it?

IV. Did Lucey possess statutory standing to appeal the Zoning Administrator's approval of the site-specific development plan for the Boutique Hotel?

COUNTER-STATEMENT OF THE CASE AND FACTS

This zoning appeal involves a neighboring commercial property owner's challenge to CKC's approved site-specific development plan for a boutique hotel near Shem Creek in Mount Pleasant. Not one, but two Zoning Administrators agreed the detailed plan satisfied all applicable zoning regulations as a use allowed by-right. At the appeal hearing and after a lengthy executive session – and with zero public deliberation and debate – the BOZA voted to overturn the approval of the project's off-street parking plan *only*. The BOZA affirmed the Zoning Administrator's approval in all other respects.

CKC appealed and the Master-in-Equity overturned the BOZA's tortured reinterpretation of "Guest room," reinstated the Zoning Administrator's approval, and directed the project proceed

through the development review process under the ordinances existing at the time of the BOZA hearing and prior to the adoption of Ordinance No. 21071.[2]

The Boutique Hotel and its Approved Plans

CKC received approval for a twenty-seven (27) room boutique hotel (the "Boutique Hotel") near Shem Creek. The Boutique Hotel will be located on Mill Street on parcels owned by CKC bearing TMS Nos. 517-16-00-058, -057, -034, and -035 (the "Properties"). (R. pp. 187-192.)

When CKC contracted to acquire the Properties in 2020, the Properties were zoned Neighborhood Commercial (NC) and located in the Boulevard Overlay District (BOD).[3] (R. p. 225.) At all times relevant to this appeal, a "Boutique Hotel or Inn" is a use permitted **by-right** in the NC District and BOD. (R. p. 225.) The 2019 Comprehensive Plan does not recommend the elimination of "Boutique Hotel" as a permitted use in the NC District. In fact, the 2019 Comprehensive Plan calls for continuing the "Boutique Hotel" use, which has been allowed in the NC District for decades.[4]

Once under contract, CKC and its engineering and design professionals began working closely with Town staff on plans for the Boutique Hotel. As recounted by the Zoning Administrator in the BOZA Staff Report, "[t]he Zoning Administrator discussed off-street parking

[2] As discussed in greater detail below, long after the Zoning Administrator approved the site-specific development plan for the Boutique Hotel and the BOZA heard and decided the neighbor's appeal on September 27, 2021, Town Council gave final reading to Ordinance No. 21071 on December 15, 2021. (R. pp. 538-543). This ordinance, among other things, eliminated "boutique hotels" from the list of allowed uses by-right in the NC District and changed the off-street parking regulations for accommodations uses by, among other things, defining "Guest Room" for the first time ever.

[3] The Properties are not located in the Shem Creek Waterfront Overlay District, which imposes more stringent regulations than the base zoning districts in and around Shem Creek.

[4] The Plan identifies several distinct planning areas in the "Hubs, Activity Centers and Corridors" discussion in Chapter 7 ("Land Use and Community Design"). The "Community Scale Commercial" area, which encompasses the NC District, specifically acknowledges the appropriateness of boutique hotels, stating "[t]his is the predominant commercial classification within the town, including retail, office, services, grocery stores, **boutique hotels** and restaurant uses." (Emphasis added.) Table 7-2 ("Classification Criteria for Hubs and Redevelopment Centers") specifically identifies "boutique hotels" as a "typical non-residential use" in the Community Scale Commercial area.

requirements with the developer of the Shem Creek Boutique Hotel on or around February and March 2021." (R. p. 201.) "The developer proceeded with project design and site-specific development plans based on the determination made by the Zoning Administrator." (R. p. 201.) At the time of this approval, Kent Prause was the Town's Zoning Administrator.[5]

Based on feedback and approvals from the Zoning Administrator, CKC and its team developed a site-specific development plan for the Boutique Hotel. The plan was carefully crafted, in close collaboration with the Zoning Administrator and Town staff, to satisfy all applicable zoning regulations without the need for any legislative or quasi-judicial discretionary entitlements such as variances, special exceptions, or a rezoning. Only DRB review and approval would be required prior to receiving a building permit.

CKC formally "submitted plans to determine feasibility of the project on March 19, 2021." (R. p. 201.) CKC subsequently "filed an application and submitted plans for pre-application review (Conceptual Design Review Team) of the project on May 13, 2021. Conceptual DRT reviews projects for zoning compliance." (R. p. 201; Supp. R. pp. 2-5).

On or about June 9, 2021, the Design Review Team ("DRT"), which includes the Town's Zoning Administrator, approved the site-specific development plan for the Boutique Hotel. The plan provides for thirty-five (35) off-street parking spaces. Having received the green light from the Zoning Administrator, CKC was permitted to move forward to the DRB with a request for "Preliminary Approval of Site, Landscape, and Architecture."[6]

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

[6] DRB approval was the only thing standing in CKC's way from obtaining a building permit. DRB's scope of review is limited to site, landscape, and architecture. It does not consider zoning issues such as use, height/scale/mass, and off-street parking or general policy issues.

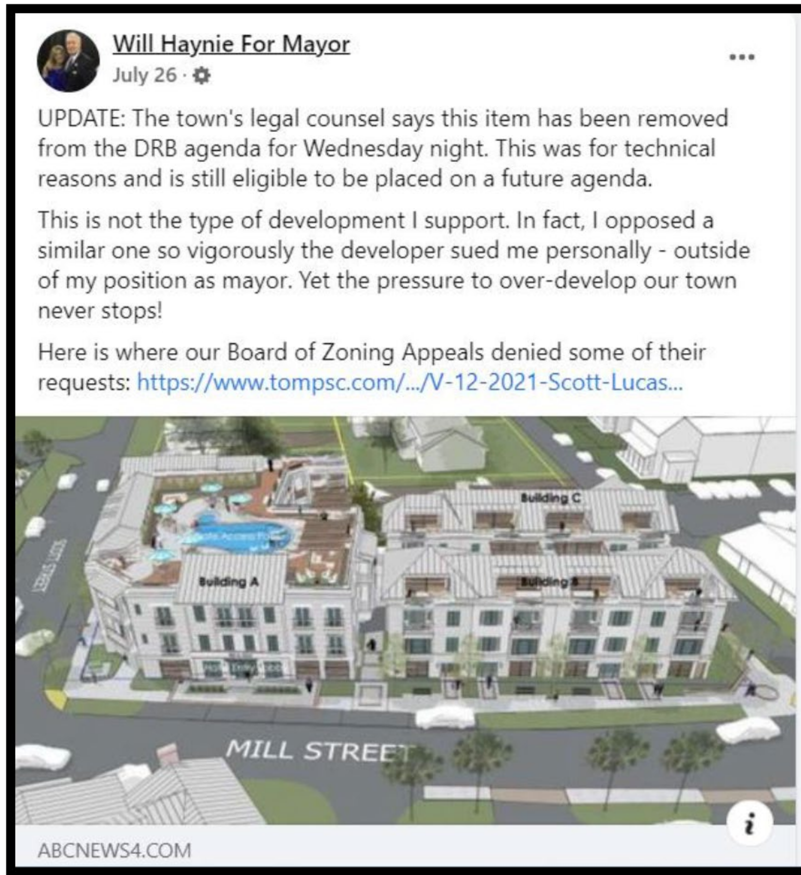
CKC "filed an application and submittal for Preliminary Design Review Board review on July 15, 2021. The submittal was hyperlinked to the Commercial Design Review Board July 2[8] (sic), 2021, meeting agenda." (R. p. 201.) "The [DRB] agenda [including the Boutique Hotel] was posted to the Town website on July 19th, 2021, at 11:35 am." (R. p. 201.)

CKC purchased the Properties for $1,450,000.00 million in reliance on the NC zoning and the Zoning Administrator's approval of not just the Boutique Hotel, conceptually, but the approval of a site-specific development plan depicting, among other things, thirty-five (35) off-street parking spaces.

Political Controversy and Removal of the Boutique Hotel from the DRB Agenda

Approximately twenty-four (24) hours before DRB the hearing, Town staff informed CKC the Boutique Hotel would be removed from the agenda due to alleged minor technical deficiencies. (R. p. 152; Supp. R. p. 45-46). This late revelation surprised CKC and its consultants, especially considering the several months of close collaboration with the Zoning Administrator and repeated assurances the Boutique Hotel complied with all applicable ordinances and was ready to go before the DRB.

Contemporaneously, Town of Mount Pleasant Mayor Will Haynie spoke to the press and posted on his campaign's Facebook Page that he did not support the Boutique Hotel, even though it was a use allowed by right under existing zoning. (Supp. R. p. 006-013.)



On July 27, 2021, Michelle Reed, the Director of Planning, Land Use and Neighborhoods, sent an email to the Mayor and Town Council. The email confirms, among other things, that the Boutique Hotel "is a permitted use by right" and "the applicant has gone through DRT." Ms. Reed forwarded the e-mail to her team, stating as follows:

> All – Sharing my email to Council with you as I know everyone is hearing about this project. If you have inquiries, feel free to use this or parts of it to answer requests.
>
> You all have done a good job with this project, as you do all other projects, even in the midst of rumblings to the contrary.
>
> Keep doing a great job, stick to the ordinances, stay professional, and stand strong.
>
> Thankful for you all!!

(R. pp 533-34.) Town Administrator Eric DeMoura responded to Ms. Reed's email, stating "You're doing good. Keep your team doing their jobs, stick to the ordinances, stay professional, then stand strong." (R. pp. 535-36.)[7]

Zoning Change Initiated

Less than a week after the Boutique Hotel was removed from the DRB agenda, the Town initiated a significant zoning amendment aimed at thwarting the Boutique Hotel.

On August 2, 2021, the Planning and Development Committee met to consider several proposed zoning text amendments that would, among other things, eliminate "Boutique Hotel or Inn" as a by-right, permitted use in the NC District, alter the definition of "unit" and "Guess Room," adjust the off-street parking requirements for this use, and alter the lot consolidation process for projects of this kind. (R. p. 155.)

On December 15, 2021, Town Council gave final reading to Ordinance No. 21071.[8] (R. pp. 538-543). Among other things, Ordinance No. 21071 eliminates boutique hotels as a use allowed by right in the NC District and redefined "Guest room" to substantially increase the off-street parking required for suite-style hotel rooms.

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[7] Ms. Reed's and Mr. DeMoura's e-mails are part of the Record on Appeal before this Court (they are exhibits to the Appeal Petition); however, the Town did not include these e-mails in the certified record filed pursuant to S.C. Code Ann. § 6-29-830(A). CKC uncovered them via FOIA request after the September 27, 2021 BOZA hearing. CKC moved to supplement the certified record with these e-mails, but the Master-in-Equity denied this relief. (R. pp. 249-253; 254-264; 265.) For purposes of this appeal, CKC submits Ms. Reed's and Mr. DeMoura's e-mails are part of the certified record on appeal pursuant to S.C. Code Ann. § 6-29-800(B) ("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."). While the Order does not cite to any of these emails, and does not depend on them in any way, CKC submits these e-mails are materially relevant to this Court's consideration. Therefore, CKC respectfully requests the Court deem these e-mails part of the certified record for the purposes of this zoning appeal.

[8] Ordinance No. 21071 was not presented at the September 27, 2021 BOZA hearing and made part of the record then because it had not been adopted. A copy of Ordinance No. 21071 was included as an exhibit to the Appeal Petition and Memorandum in Support. (R. pp. 538-543.) The Master-in-Equity properly took judicial notice of Ordinance No. 21071 pursuant to Rule 201, SCRE. *See*, *Martin v. Bay*, 400 S.C. 140, 732 S.E.2d 667 (Ct. App. 2012) (upholding the Charleston Master-In-Equity's taking judicial notice of Charleston County's zoning ordinances and their application). (R. p. 27). CKC respectfully requests this Court similarly consider Ordinance No. 21071 as part of the certified record and take judicial notice of same, as it is materially relevant to this appeal for the reasons discussed herein.

Justin Lucey's Appeal

On August 12, 2021, neighboring commercial property owner and attorney Lucey[9] sent a letter to the Town's general counsel objecting to the Boutique Hotel on several fronts (the "Lucey Letter"). (R. pp. 236-241.) The Lucey Letter took issue with, among other things, various zoning, design, and policy decisions pertaining to the Boutique Hotel. (R. pp. 236-241.)

On August 23, 2021, the Town's staff attorney replied to the Lucey Letter. (R. pp. 242-248.) This response observes that some, but not all, of the objections raised in the Lucey Letter are properly appealable to the BOZA. (R. pp. 242-248.) The response concludes as follows:

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

(R. pp. 242-248.)

Later that day, Lucey filled out and submitted his appeal through the Town's online portal (the "Lucey Appeal"). (R. pp. 370-386.) The Lucey Appeal included, as an exhibit, both the Lucey Letter (highlighted by the Town's attorney) along with the Town's August 23, 2021 response letter. (R. pp.373-378.) It also included an executed "Property Owner Acknowledgement Form" and a map of the area showing Lucey's parcels in relation to the Properties. (R. pp. 379-380.) Finally, the Lucey Appeal contained a new letter dated August 25, 2021, which contained additional arguments against the Boutique Hotel, including objections to its off-street parking calculations that were not present in the August 12, 2021 Lucey Letter. (R. pp. 381-386.)

The Lucey Appeal claims the Zoning Administrator erred when he approved the Boutique Hotel, citing to various regulations namely: use, off-street parking, height, and curb-cuts.

[9] 415 Mill St., Inc. and 69 Scott Street, LLC are Lucey controlled and affiliated entities who own property in the vicinity of the Properties. (Supp. R. p. 42).

Essentially, the Lucey Appeal claims every decision made by the Zoning Administrator was in error.

The BOZA Hearing on Lucey's Appeal

The Lucey Appeal was heard by the BOZA at its September 27, 2021 meeting. (R. pp. 208-217.) Despite the Lucey Appeal having been formally filed and perfected on August 23, 2021 and supplemented on August 27, 2021, the Zoning Administrator noted in his brief to the BOZA that "Mr. Lucey filed an appeal with the Town Legal Department, as described in the agenda, on August 12, 2021." (R. pp. 196-207.) Therefore, the Zoning Administrator concluded:

> Based on the dates of the email correspondence from the Mr. Lucey, the appeal appears to have been filed within 30 days from the date the appealing party 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 the appeal.

(R. p. 201.)[10]

Prior to the meeting, Mike Robertson (the Town's new Zoning Administrator as of August 2, 2021) filed two briefs supporting his and his predecessor's final zoning approvals for the Boutique Hotel. (R. pp. 218-223; R. pp. 224-232.) Staff Brief 1 specifically focuses on the off-street parking requirements for the Boutique Hotel, and Staff Brief 2 focuses on all other zoning issues raised in the Lucey Appeal. These briefs defend Mr. Prause's original approval of the site-specific development plan for the Boutique Hotel, including the thirty-five (35) off-street parking spots, and confirm the new Zoning Administrator's position mirrored Mr. Prause's.

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[10] As discussed in further detail below, CKC disputes the Lucey Appeal was jurisdictionally perfected on August 12, 2021 because it did not comply with the Town's zoning ordinances and the BOZA's Rules of Procedure. Therefore, neither the Town's legal counsel nor the Zoning Administrator could deem the appeal perfected on August 12, 2021. It was not perfected until, at the earliest, August 23, 2021, which was beyond the statutory thirty-day window to appeal.

The Zoning Administrator summarized the rationale behind the approval of the off-street parking plan as follows:

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

(R. p. 222.) (Emphasis added). This approach mirrors prior off-street parking plan approvals for other suite-style hotels in the Town including, but not limited to, the Staybridge Suites, Residence Inn on the Isle of Palms Connector, and the Homewood Suites. (R. p. 503.).

Prior to the hearing and on September 24, 2021, counsel for CKC submitted a letter with various exhibits opposing the Lucey Appeal. (R. pp. 267-324.) The letter argued that the Lucey Appeal should be dismissed because it was untimely, Lucey and his entities lacked standing, and the Zoning Administrator's final approval was correct on the merits. CKC's principal, Colin Colbert, and counsel for the owners of the Properties also submitted letters in opposition to the Lucey Appeal. (R. pp. 354-358; R. pp. 359-369.)

At the September 27, 2021 BOZA hearing, the Zoning Administrator argued that the Project satisfied all applicable zoning regulations, including off-street parking requirements. (R. pp. 442:17-445:9; R. pp. 208-217.) The Zoning Administrator acknowledged the term "Guest room" was undefined in the Zoning Code. He explained his interpretative process to the BOZA and how he arrived at his interpretation (which was also Mr. Prause's long-standing interpretation) that "Guest room" meant an individually keyed unit – not a bedroom. He concluded his remarks

on off-street parking by stating, "Council does not give any discretion to the staff to determine what would constitute the required parking. It is a range in the parking requirement, and we must approve it…" (R. p. 443:19-23.).

After the Zoning Administrator's presentation, Lucey argued against the Zoning Administrator's interpretation. During the entirety of his remarks and rebuttal, Lucey did not raise the issue of off-street parking once. Instead, he focused on floor area ratios, the definition of "boutique hotel," and other miscellaneous policy matters. (R. pp. 437:21- 442:14, 465:17- 469:23; R. pp. 210-215.).

After Lucey spoke, the BOZA opened the floor to public comment. CKC's counsel and representatives spoke in favor of the Zoning Administrator's decisions and against the Lucey Appeal. (R. pp. 208-217.). Counsel for the owner of the Properties commented further on standing and mentioned prior attempts by Lucey to purchase the Properties. (R. pp. 208-217.). Finally, CKC's engineering and architecture team testified about their close collaboration with Town staff for nearly a year on the project and offered further support to the Zoning Administrator's application of the Zoning Ordinance, specifically the off-street parking calculations. (R. pp. 208-217.).

After the close of public comment, the BOZA immediately and without any public deliberation moved to go into executive session to receive "legal advice." No specific issue was disclosed – just "legal advice," generally. The BOZA remained behind closed doors for approximately thirty (30) minutes. When the BOZA returned, one member – reading from a prepared script – made a motion to reverse the Zoning Administrator's interpretation of "Guest room" and affirm the Zoning Administrator on all other matters. The basis of the motion was that the term "Guest room" means bedroom – not a keyed lodging unit. The motion was approved

unanimously without a word of public discussion by the BOZA members. (R. pp. 470:8 – 471:21; R. pp. 208-217.)

The BOZA's reversal of the off-street parking plan, approved by the Zoning Administrator, effectively halted the Boutique Hotel. To date, CKC has spent approximately $500,000.00 in engineering and architecture fees, legal fees, and other expenses related to this project and in reliance on the Town's repeated confirmation and assurances that the Boutique Hotel fully complied with zoning, including off-street parking requirements. (R. p. 504.).

CKC's Appeal of the BOZA Order

The BOZA's final order, memorializing its September 27, 2021 decision, was signed on October 25, 2021 (the "BOZA Order"). (R. pp. 187-192.). The BOZA Order was mailed to parties in interest on October 26, 2021. (R. pp. 187-192.).

On November 16, 2021, CKC filed a "Notice of Appeal, Demand for Pre-Litigation Mediation, and Appeal Petition" pursuant to S.C. Code Ann. §§ 6-29-820, -825(A). (R. pp. 118-146.). The parties participated in a mediation session on January 27, 2022. The mediation was kept open after that date, and the parties continued settlement discussions. On June 24, 2022, the mediator filed an ADR Report declaring an impasse.

On June 28, 2022, CKC filed an amended Appeal Petition. (R. pp. 147-177.). According to its amended Appeal Petition, CKC appealed the BOZA Order **only** with respect to the reversal of the Project's off-street parking plan.[11] (R. pp. 148, 170-175.). CKC also challenged the timeliness of the Lucey Appeal and Lucey's standing. (R. pp. 148, 163-170.). Finally, the

[11] Neither the Town nor Lucey appealed the BOZA Order with respect to the issues affirmed by the BOZA, i.e. all zoning issues other than off-street parking. CKC agrees with the BOZA Order insofar as it upheld the Zoning Administrator's approval of the site-specific development plan for the Boutique Hotel and confirmation that it satisfied all other applicable provisions of the Zoning ordinance. Appellants have not – and cannot – attack any of these issues in this appeal, as these issues were never appealed to the Master-in-Equity.

amended Appeal Petition sought a ruling that the Boutique Hotel was vested against the application of Ordinance No. 21071 and that the BOZA violated the Freedom of Information Act ("FOIA") by conducting the entirety of its deliberations in executive session and having zero public deliberation. (R. pp. 175-176.).

On August 16, 2022, the Lucey filed a Return and Answer. (R. pp. 180-181.). On August 24, 2022, the Town and the BZA filed a Notice of Opposition to the Appeal Petition, along with the "Certified Record" before the BZA,[12] consisting of Exhibits A through I. (R. pp. 182-248.). On September 27, 2022, CKC filed a Motion to Supplement the Record on Appeal. (R. pp. 249-253). On February 24, 2023, CKC filed a Memorandum in Support of its Motion to Supplement the Record. (R. pp. 254-264.).

On October 19, 2022, CKC's Appeal Petition was referred by consent to the Master-in-Equity for Charleston County, the Honorable Mikell R. Scarborough. (R. pp. 1-4.).

On March 3, 2023, the Master-in-Equity issued an Order granting, in part, and denying, in part, CKC's Motion to Supplement the Record on Appeal. (R. pp. 265-266.) The Town and the BZA subsequently filed supplements to the Record on Appeal on March 3, 2023 and April 20, 2023 – consisting of Exhibits J through S. (R. pp. 387-491.).

On May 26, 2023, the Master-in-Equity heard CKC's Appeal Petition after receiving detailed briefs from the parties. (R. pp. 492-555; R. pp. 585-598).

On July 14, 2023, the Master-in-Equity issued an Order granting CKC's Appeal Petition (the "Order"). The Order reversed the BOZA's reinterpretation of "Guest room," reinstated the

[12] S.C. Code Ann. § 6-29-830(A) ("Upon the filing of an appeal with a petition as provided in Section 6-29-820(A) or Section 6-29-825(F), the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and within thirty days from the time of the notice, the board must file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions.").

Zoning Administrator' s approval of CKC's site-specific development plan for the Boutique Hotel and directed the Boutique Hotel to resume the development review process vested under the ordinances existing at the time of the BOZA hearing on September 27, 2021. The Order found the Lucey Appeal was timely and Lucey had standing. (R. pp. 12-33.).

On July 24, 2023, both Lucey and the Town filed motions to reconsider the Order. (R. pp. 599-613.). On September 21, 2023, the Master-in-Equity issued an order denying these motions. (R. p. 34.). This appeal by Lucey and the Town followed.

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.")).

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)).

In zoning appeals, "[i]ssues involving the construction of ordinances are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). "The appellate court gives 'great deference to the decisions of those charged with interpreting and applying local zoning ordinances.'" *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).

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.

ARGUMENT

I. The Master-in-Equity did not err by reversing the BOZA's reinterpretation of "Guest room" and reinstating the longstanding and reasonable interpretation of both Zoning Administrators.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). "When interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used." *Id*. "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Id*. "The statutory language must be construed in light of the intended purpose of the statute." *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). "In construing ordinances, the terms used must be taken in their ordinary and popular

meaning." *Charleston Cnty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995). The appellate court "will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Id*. "[I]t is well-settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011).

South Carolina recognizes a special rule of statutory construction pertaining to zoning and land development ordinances. These ordinances must be liberally construed in favor of the property owner – not the government, neighbors, or others. The Court of Appeals held as follows:

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

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

A. The Zoning Administrator correctly interpreted the undefined term "Guest room" when applying the Section 156.171 off-street parking requirements for the Boutique Hotel and approving the thirty-five (35) spaces depicted on the site-specific development plan.

The sole substantive zoning interpretative dispute before this Court is the proper definition of "Guest room" as it appears in the Town's off-street parking regulations found in Section 156.171

("Schedule of Off-Street Parking Space Requirements"). According to the table found in Section 156.171(A), the number of required minimum off-street parking spaces vary according to the proposed use and unit of measure. The parties do not dispute the Boutique Hotel's off-street parking requirements are governed by the following excerpt from the table:

Use	Spaces Required	Unit Of Measure	Notes
Accommodations and lodging	1 to 2	Guest room	

The term "Guest room" was **undefined** in Section 156.007 of the Zoning Ordinance ("Definitions") at the time of CKC's application, the Zoning Administrators' approval of plans for the Boutique Hotel, the Lucey Appeal, and the BOZA hearing on September 27, 2021. (R. pp. 404-420.).

As detailed in Staff Brief No. 1, presented by the Zoning Administrator at the BOZA hearing, the Zoning Administrator determined the site-specific development plan for the Boutique Hotel satisfied the off-street parking requirements found in Section 156.171 (A). (R. p. 219.) In so doing, the Zoning Administrator interpreted the undefined term "Guest room" to mean an individually keyed lodging unit – not a bedroom within a unit in a suite-style guest room. (R. p. 220.) CKC agrees with and adopts Staff Brief 1. This interpretation was communicated to CKC prior to closing on the Properties, remained consistent through the development review process, formed the basis of the Zoning Administrator's approval of CKC's site-specific development plan, and reflects the Town's longstanding interpretation of "Guest room" in approving the off-street parking plans for other hotels and suite-style hotels. (R. p. 201; R. pp. 203-204; R. pp. 208-217.).

The key excerpts from Staff Brief 1, supporting the Zoning Administrator's interpretation of "Guest room," follows.

- *Method of Calculation:*

"The method of calculation, that a guest room is a single unit, is consistent with the other provisions of the code, specifically the method for calculating residential parking based on a single unit regardless of the number of bedrooms or sleeping rooms and the term lodging unit used in the definitions of hotel and boutique hotel. A guest room as a single unit is consistent with these other code provisions." (R. p. 221.).

- *Legislative History:*

"In 1979, the Parking Schedule consisted of four (4) Use Categories with thirty-four (34) Uses specified. Parking calculations within each category were based on a number of factors including units, bedrooms, square footage, fixed seats, tables, and employees.

The entry for Motel, hotel, and tourist court required one space per sleeping room or suite plus one space per each three employees on shift of greatest employment. The ordinance treated both a sleeping room and a suite as a single unit.

Subsequent revisions to the Parking Schedule have reduced the number of Uses and method by which parking requirements were determined.

The 2014 Parking Schedule revision changed the method of calculating parking for hotels and lodging from *sleeping room* to *guest room*. Following the rules of statutory construction, one must presume that the change in terminology by Town Council was intentional. One must also presume that Town Council acted with thoughtful intent to craft an ordinance that was consistent with the other sections and categories in the ordinance section.

The current Parking Schedule identifies six categories of commercial uses. The Parking Schedule for five of the uses: commercial and retail; office and retail, including medical office; personal and business support services, including personal improvement education; Restaurant, bar, nightclub, lounge, including associated decks or plazas; and shopping centers are calculated using the unit of measure of square feet. Only hotels and lodging have a different unit of measure for calculating parking—*guest rooms*.

Although the hotels and lodging are considered Commercial Uses by the Parking Schedule, their function as overnight accommodations is most consistent with residential uses. **The unit of measure for calculating residential parking is based on a residential unit. Single family dwelling, Townhouse dwelling, Duplex dwelling, and multi-family (apartment) dwellings are calculated per unit. All residential uses listed in the code are based on a single unit not the number of rooms in the unit**." (R. p. 221). (Emphasis added).

- *Zoning Administrator's Approval of the Boutique Hotel's Off-Street Parking Plan:* The boutique hotel project is comprised of three buildings: Building A, Building B, and Building C. Building A contains 19 guest rooms or lodging units as defined

> above. Buildings B and C contain 4 guest rooms or lodging units each. The total number of guest rooms in all three buildings is 27. Using the standards established in §156.171 [Table], the minimum off- street parking space requirement for the boutique hotel is a range of 27 to 54 parking spaces. Plans for the boutique hotel indicate that the project provides 35 total parking spaces: 1 parking space for each guest room or lodging unit in Building A (19) and two parking spaces for each guest room or lodging unit in Buildings B and C (16). The 35 parking spaces are in the range of 27-54 minimum parking spaces established in 156.171 [Table]. **<u>The parking standards meet the minimum parking off-street parking standards established by Town Council in the ordinance</u>.** (R. p. 222). (Underlining in original, bold added).

Given the foregoing, the Zoning Administrator's interpretation of the undefined term "Guest room," which the Order reaffirmed, finds tremendous support in the record.

B. The Zoning Ordinance's use of the term "lodging unit" in the definition of "boutique hotel" does not support Appellants' interpretation.

The Master-in-Equity properly rejected Appellants' attempt to use one undefined term ("lodging unit") to interpret another undefined term ("Guest room") in a manner contrary to the determinations of two Zoning Administrators and hostile to CKC's approved plan.

Section 156.007 of the Zoning Ordinance defines "hotel" as "[a] building or group of attached or detached buildings containing **lodging units** intended primarily for rental or lease to transients by the day, week, or month." (Emphasis added). (R. pp. 411.). The term "lodging unit" is not defined in Section 156.007 or anywhere else. "Guest room" is an undefined term in Section 156.007 as well. (R. pp. 411.).

The structure of Appellants' argument – that the use of different terms evidences a legislative intent that these terms carry distinct meanings – actually supports the Zoning Administrator's, CKC's, and the Master-in-Equity's interpretation of "Guest room." Staff Brief 1 addresses the legislative history on how the phrase "Guest room" came to be used:

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

(R. p. 221.). (Emphasis in original).

The BOZA's interpretation of "Guest room" – to mean a separate bedroom – is consistent with the term "sleeping room" – not "Guest room." The new phrase "Guest room" must be given a more expansive meaning to honor well established rules of statutory construction. *TNS Mills, Inc. v. South Carolina Dep't of Revenue,* 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) (courts must presume the Legislature intended its statutes to accomplish something and did not intend a futile act).

The Order correctly found that "Town Council's amendment of the off-street parking table from 'sleeping room' to 'Guest room' reveals the clear intent to calculate accommodations parking not on the basis of bed rooms within a unit." (R. p. 25.).

C. Cherry-picked excerpts from dictionaries that were never before the BOZA and not included in the certified record must not disturb the Zoning Administrators' well-reasoned interpretation of "Guest room."

Appellants argue the Master-in-Equity erred by failing to find persuasive certain, curated dictionary definitions of "Guest room." This argument fails for two reasons. First, none of the dictionary definitions argued by Appellants were ever considered by the BOZA; therefore, they are not part of the certified record in this case and not properly before this Court. Second, South Carolina's appellate courts have observed dictionary definitions have limited utility in zoning appeals, and they are not the exclusive adjudicator of a term's "usual and customary" meaning.

This Court's review in a zoning appeal is limited to the material in the certified record and "the court may not take additional evidence." S.C. Code Ann. § 6-29-840(A). This includes the dictionary definitions offered by Appellants. None of the dictionary definitions cited by Appellants appear in the certified record prepared and filed by Appellants prior to the BOZA hearing. S.C. Code Ann. § 6-29-830. Therefore, the BOZA never reviewed and relied on any of these dictionary

definitions at the BOZA hearing prior to issuing the BOZA Order. Local zoning ordinances themselves must be included in the record as part of a zoning appeal for the Court to consider them. *Harkins v. Greenville Cty.*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000). If the ordinances at issue in the interpretive dispute must be included in the record, it follows that the dictionary definitions must be as well. Given the foregoing, Appellants' proffered definitions constitute improper "additional evidence" and must be rejected by the Court without even reaching the merits.

Even assuming Appellants' proposed dictionary definitions are properly before the Court, which they are not, they fall short of justifying the reversal of the Zoning Administrators' and the Master-in-Equity's interpretation of "Guest room." This is because dictionaries have limited utility in zoning appeals.[13] The Court of Appeals has ruled as follows:

> Dictionaries can be helpful tools during the initial stages of legal research. However, we are reluctant to rely upon either a dictionary or cases that have relied upon a dictionary for a definitive answer as to the definition of "use" when extensive case law exists that provides an accurate and reliable definition for the term. Our disinclination to adopt a dictionary definition is based, in part, upon persuasive commentary found in the literature.

Heilker v. Zoning Bd. of Appeals, 346 S.C. 401, 409, 552 S.E.2d 42, 46 (Ct. App. 2001). The "persuasive commentary" referenced by the Court of Appeals is as follows:

> In their recent law review article, Samuel A. Thumma & Jeffrey L. Kirchmeier critique the efficacy of turning to common-usage and law dictionaries as the principal authority for defining legal terms:
>
> Regarding common-usage dictionaries, Thumma and Kirchmeier state:

[13] Respondents cite *Abdo v. City of Charleston*, No. 2019- 001910, 2023 WL 34431, at *1 (S.C. Ct. App. Jan. 4, 2023) and *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 62, 766 S.E.2d 707, 733 (2014) for the proposition that "[d]ictionaries are routinely utilized by Courts in determining the usual and customary meaning of a word or phrase." These cases, however, are not persuasive. First, the *Abdo* decision states: "THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR." The *Kiawah Dev. Partners, II* case is not a zoning case. As discussed herein, special rules apply in zoning appeals with respect to both the need for dictionary definitions to be included in the record to be considered by a reviewing court and the limited utility of dictionary definitions in the zoning context.

> [**A court cannot] definitively rely on [common-usage] dictionaries as an end point in defining a word**. A descriptive dictionary sets forth definitions showing what a word may mean generally, not what a word does mean in context. Accordingly, although a descriptive dictionary may set forth possible alternative definitions for a term, it cannot provide the definitive definition for what that term actually means in a specific context. Differing definitions for a word in different dictionaries and alternative definitions of a word in the same dictionary would further confound an attempt to use a descriptive dictionary as an end point in defining a word.
>
> 47 Buff. L. Rev. at 293 (emphasis added).
>
> The authors additionally caution against a reliance upon a law dictionary as the ultimate source for defining key terms:
>
> **Definitive reliance** on law dictionaries to define terms suffers from defects similar to such reliance on general usage dictionaries. In addition, many terms in a law dictionary are legal terms and, frequently, terms of art. Thus, the definitions provided in a law dictionary are either: (1) based on case law or usage (such as statutory terms) or (2) created anew by the dictionary's editorial board. If based on case law or usage, the best source for a definition is the decision or usage in context. **Prior decisions and usage, defining the term in context, should be far more instructive than the definitions in a law dictionary, which are general paraphrases that lack any context**. And if, rather than being based on case law or usage, the law dictionary definition was created anew, **one might ask whether that definition should be afforded any weight at all**.
>
> . . . .
>
> Although perhaps a good resource for law students and lawyers unfamiliar with a term in the abstract, **law dictionaries are not particularly helpful to [a court] in determining the precise meaning of a term in context**. *Id.* at 294 (footnotes omitted) (emphasis added).

Id. at 409-10, 552 S.E.2d at 46-47 (emphasis in original).

The Order finds its support not on the back of dictionary definitions that were never argued before the BOZA, but via Staff Brief 1, which was prepared by the Zoning Administrator and presented to the BOZA. (R. p. 221.). Staff Brief 1 performed not only a customary and ordinary meaning analysis of “Guest room” in painstaking detail, but it also offered detailed analysis addressing legislative intent and internal consistency of the Town’s Zoning Ordinances. These are

important rules of statutory construction in addition "customary and ordinary meaning," and must not be ignored.

The Order found Staff Brief 1 "to be well-reasoned and consistent with the applicable rules of statutory interpretation in the zoning context." (R. p. 23.). CKC agrees. The record is devoid of compelling, countervailing authority to contradict Staff Brief 1. Therefore, the Order should be upheld.

D. To the extent there are two plausible, conflicting interpretations of the undefined term "Guest room," South Carolina compels a liberal reading in favor of the free exercise of property.

CKC contends the Zoning Administrator's interpretation of "Guest room" is correct based on the above authorities. However, to the extent this undefined term in the Zoning Ordinance is capable of reasonable, competing interpretations, which CKC denies, South Carolina law compels that the term be liberally construed in favor of the free exercise of property. *Helicopter Solutions, Inc. v. Hinde*, *supra*. Therefore, any such conflict must be settled in favor of CKC and the Zoning Administrators – not the Appellants. Local governments must legislate clearly and definitively in their local zoning and land development regulations. It is not the role of quasi-judicial bodies like the BOZA to legislate an outcome not clearly proscribed by the ordinances.

E. The BOZA's reinterpretation of "Guest room" fails to honor legislative intent and produces absurd results by requiring a wasteful overabundance of off-street parking Appellants admit the Zoning Ordinance is seeking to minimize.

Interpreting "Guest room" to refer to a bedroom within a unit – not a unit itself – produces absurd results. Requiring 1-2 off-street parking spaces per bedroom would treat accommodation uses differently than other uses with bedrooms. It would also require excessive and wasteful amounts of off-street parking that is in no way responsive to actual demand or consumer habits.

In other residential contexts, the Town's off-street parking table proscribes a number, sometimes expressed in terms of a range, of minimum off-street parking spaces based on the

number of units – not rooms. For example, Section 156.171 (A) provides the following off-street parking calculations for single family, multi-family, and townhome dwellings:

Use	Spaces Required	Unit Of Measure	Notes
Duplex, Big House, or Multi-Family Dwelling	1.5 - 3	Dwelling Unit	For multi-family dwellings, private garage spaces shall not count toward the requirement.
Single-Family Dwelling	1	Dwelling Unit	Private garage spaces shall count toward the requirement.
Townhouse Dwelling	2	Dwelling Unit	Private garage spaces shall count toward the requirement. Tandem parking is permitted.

The table does not require a greater number of off-street parking spaces based on the size of residential dwelling. Therefore, irrespective of the number of bedrooms in such dwellings – and how they can vary considerably – the code requires the same minimum spaces. The Zoning Administrators found similar logic applies to accommodations uses, which too can come in different configurations of bedrooms. (R. p. 221).

Appellants' interpretation also produces absurd results in that it would require an overabundance of unneeded off-street parking contrary to sound, modern planning practices. The site-specific development plan for the Boutique Hotel approved by the Zoning Administrators includes thirty-five (35) off-street parking spaces for the twenty-seven (27) individually keyed units containing a total of sixty-four (64) bedrooms. If "1 to 2" spaces were required for each bedroom, as Appellants maintain, the plan would have required somewhere between sixty-four (64) and one hundred and twenty-eight (128) off-street spaces. This extremely large number of off-street parking spaces neglects the fact that in the age of Uber and Lyft, many tourists refrain from utilizing off-street parking. It would also lead to an abundance of off-street parking – as opposed to buildings and other uses – that modern Zoning Ordinance's, including the Town's seek to disincentivize.

Section 156.171 (B) of the Zoning Ordinance provides that "in commercial zoning districts, all parking spaces provided above the minimum amount shall be surfed with pervious materials." Appellants offer this language to support their argument that the off-street parking table does not express a discretionary range. Putting that issue aside, for the moment, this section definitively supports the modern planning principle that discourages an overabundance of paved, off-street parking. Appellants' strained interpretation of "Guest room" does violence to this very policy and produces an absurd result, the Master-in-Equity correctly rejected.

F. Ordinance No. 21071, adopted several months after the BOZA hearing, reflects the BOZA's error and shines a light on the weakness of Appellants' arguments.

Ordinance No. 21071, adopted on December 15, 2021, was a response to political backlash against the Boutique Hotel. (R. pp. 538-543). It removed "Boutique Hotel" as a use allowed by-right in the NC District where the Properties are located. It also, for the first time ever, defines "Guest Room" and creates a new phrase "Guest Suite" as follows:

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

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

Section 156.171was amended as follows:

§ 156.171 SCHEDULE OF OFF-STREET PARKING SPACE REQUIREMENTS.

Use Category	*Use*	Spaces Required[1]		*Unit of Measure* / *Notes*
Residential	Duplex, big house, or multi-family dwelling	1.5 – 3	Dwelling unit	For multi-family dwellings, private garage spaces shall not count toward the requirement.
	Single-family dwelling	1	Dwelling unit	Private garage spaces shall count toward the requirement.
	Townhouse dwelling	2	Dwelling unit	Private garage spaces shall count toward the requirement. Tandem parking is permitted.
Commercial	Accommodations and lodging	1 2	Guest Room Guest Suite	If more than 4 Guest Rooms in a Guest Suite, 1 additional space shall be required per 2 Guest Rooms. Employee parking shall be required at 2 spaces for Boutique Hotels and 3 spaces for Hotels and Extended Stay Hotels.

Ordinance No. 21071 essentially legislatively adopts the off-street parking ruling contained in the BOZA Order. However, the term "Guest room" was undefined at all times relevant to this appeal, namely, the time of CKC's application, the Zoning Administrators' approval of the site-specific development plan for the Boutique Hotel, and the September 27, 2021 BOZA hearing.

If the BOZA's reversal of the Zoning Administrator found legal support in Section 156.171, as it existed on September 27, 2021 (prior to the adoption of Ordinance No. 21071), there would have been no reason to change the off-street parking rules via Ordinance No. 21071 to reflect the result reached by the BOZA. The fact that legislative changes were necessary *demonstrates that the BOZA lacked the legal authority to interpret "Guest room" in a manner completely divorced from the text*. The BOZA Order, therefore, constitutes unlawful legislative action and policy making and an arbitrary and capricious decision, which the Master-in-Equity was correct to reverse.

G. The Master-in-Equity did not err by characterizing the "1 – 2" minimum parking spaces required for each "Guest Room" as a discretionary range, but even if it did, this error is immaterial.

The Master-in-Equity found that the range of "1 to 2" off-street spaces supported the Zoning Administrator's interpretation that a "Guest room" and individually keyed unit are functionally synonymous. In so doing, the Order found that the range provides the Zoning Administrator with discretion in applying the Section 156.171 in the face of accommodations uses of different sizes and configurations.[14] Appellants reject the notion that Section 156.171 provides

[14] The Order correctly finds that the expression of the off-street parking requirement in terms of a *range* supports the Zoning Administrator's interpretation that a "Guest room" means an individually keyed lodging unit. The Order correctly found as follows:

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

the Zoning Administrator any discretion in terms of approving specific plans. This argument is entirely beside the point and irrelevant to the disposition of this zoning appeal.

This case is not about *who* gets to decide how many minimum off-street parking spaces must be supplied for each "Guest room." As is always the case, developers design and propose plans for approval by the Zoning Administrator, based on the applicable zoning ordinances and land development regulations. Often, as was the case here, developers receive considerable input and feedback from the Zoning Administrator on how the rules are to be interpreted and applied. However, no matter who makes the suggestions or comes up with the ideas for the submission, ultimately the Zoning Administrator is charged by law with interpreting and applying the zoning ordinances and deciding whether to approve or deny specific applications. S.C. Code Ann. § 6-29-950(A) ("It is unlawful for other officials to issue any permit for the use of any land … without the approval of the zoning administrator.").

Appellants' brief seems to suggest that the Zoning Administrator did not, in fact, approve the off-street parking plan for the Boutique Hotel and that the plan was merely the "developer's presentation." This is inaccurate for, at least, three reasons. First, the record contains Staff Brief 1 and Staff Brief 2, which detail a thorough review and **approval** of CKC's site-specific development plan for the Boutique Hotel. (R. pp. 218-223; R. pp. 224-232.) Second, the record reflects that CKC's project appeared on a DRB agenda for Preliminary Approval of Site, Landscape, and Architecture. A project cannot appear before the DRB unless the Zoning Administrator has reviewed a site-specific development plan and confirmed it satisfied all applicable zoning requirements. The DRB, after all, had to consider detailed plans in their reviews. These detailed plans were thoroughly vetted and approved by the Zoning Administrator. Third, if

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(R. p. 24).

the Zoning Administrator had not issued a final approval of CKC's site-specific development plan, the Lucey Appeal would not have been ripe and justiciable before the BOZA. Respondents' allowing Lucey's appeal to proceed to the BOZA hearing demonstrates the Zoning Administrator did, in fact, approved the site-specific development plan for the Boutique Hotel, including its off-street parking plan.

The Order properly concludes the Zoning Administrator approved CKC's site-specific development plan for the Boutique Hotel, which included an off-street parking plan that satisfied Section 156.171. The only substantive legal issue before the Court is the proper interpretation of "Guest room."

Under the common and ordinary meaning of the term "Guest room," as painstakingly detailed in Staff Brief 1, lodging units come in various different sizes and configurations (single rooms, suites, etc.). If the term "Guest room" was narrowly limited to a sleeping room or a bedroom, as the BOZA Order suggests, *there simply would be no reason whatsoever for the minimum parking requirements to be expressed in terms of a range*. Put another way, if a "Guest room" is restricted to being a bedroom or sleeping room only, no range would be necessary. The range demonstrates that there are many different types of "Guest rooms" each with their own unique configuration. The range itself is what is legally significant to sorting out this interpretative dispute - not who gets to ultimately apply it. The Zoning Administrator is clearly the final decisionmaker, and a final decision was rendered in this case – in CKC's favor.

Whether the Zoning Administrator or the developer gets to apply the range set forth in Section 156.171 – the end result is the same for the purposes of this appeal. Town Council, by expressing the off-street parking requirements for a "Guest room" in terms of a range supports the current Zoning Administrator's and his predecessor's interpretation of "Guest room" and the

approval of CKC's site-specific development plan. The Order's findings and conclusions are well supported and should not be disturbed.

H. The BOZA violated the FOIA at its September 27, 2021 hearing by conducting an illegal executive session where members were polled and a decision was formulated entirely behind closed doors.

The BOZA violated the Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 to -165, (the "FOIA") by conducting the entirety of its substantive deliberations on the Lucey Appeal and reaching a decision by polling its members –behind closed doors and under the guise of receiving legal advice. This Court recently held such conduct violates the FOIA. *Miramonti v. Richland Cty. Sch. Dist. One*, 438 S.C. 612, 885 S.E.2d 406 (Ct. App. 2023) (holding a school board's decision in executive session, on how to respond to a parent complaint, violated the FOIA). This FOIA violation further reveals the BOZA Order as an arbitrary and capricious decision and an abuse of discretion.

The verbatim transcript from the BOZA hearing[15] confirms the BOZA's decision to reverse the Zoning Administrator on his off-street parking approval only was discussed and finalized entirely in executive session. Immediately after the Zoning Administrator and Lucey gave their presentations and public comment was received, the BOZA took the following action:

> THE CHAIRMAN: Thank you, Mr. Robertson. With that we'll close the public comments and open it up to deliberations.
>
> MR. WOOD: Mr. Chairman, I would move the board move into executive session to receive the advice of counsel on this matter.
>
> MR. HOPKINS: Second.
>
> THE CHAIRMAN: We have a motion and a second to move to executive session. All in favor? (Aye) Any opposed? We will move into executive session.

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[15] The Town and the BOZA did not file the verbatim transcript of the BOZA hearing with the circuit court as part of the "certified record" on August 24, 2022. The Town and the BOZA only filed the certified record after CKC moved to compel them to do so and the Master-in-Equity agreed. (R. p. 5).

> MEMBER OF THE AUDIENCE: Wasn't there supposed to be another round of public comment?
>
> (Brief recess.)
>
> THE CHAIRMAN: The board is back and out of executive session. No votes were taken. No decisions were made. We'll open it up to the board for deliberation of the motion.
>
> MR. WOOD: I'll offer a motion, Mr. Chairman, in Case A-10-21, TMS 517-16-00-058, 057, 034, and 035 -- I would move to grant the appeal on the grounds that in the ordinances that the Town has passed a boutique hotel is defined as having 50 or fewer lodging units, but when defining the parking requirements, it chose not to use that same term, but used the term instead "guest rooms," and therefore I believe that the staff misinterpreted the term "guest rooms," and therefore the number of parking spaces would be insufficient for this particular property, and on the other matters I would move to deny the appeal.
>
> THE CHAIRMAN: So we have a motion to grant the appeal.
>
> MR. HOPKINS: I'll second.
>
> THE CHAIRMAN: We have a motion and a second. Is there any discussion? Seeing none, I'll call the motion. All in favor of the motion? (Aye) Any opposed? The motion on the appeal is granted.

(R. pp. 470:8-471:21).

<u>The above-quoted passages constitute the entirety of the BOZA's public deliberation on the merits of the Lucey Appeal. There is zero public discussion by the BOZA members on the "Guest room" issue.</u>

As in *Miramonti v. Richland Cty. Sch. Dist.,* the record leaves no doubt that the entire deliberation – to include the BOZA's decision – took place behind closed doors. There was zero public discussion by the BOZA on the merits of the appeal. Logically, the entirety of the BOZA's deliberation – to include its ultimate consensus on how to rule – took place behind closed doors. This violates FOIA.

"The essential purpose of FOIA is to protect the public from secret government activity." *Wiedemann v. Town of Hilton Head Island*, 330 S.C. 532, 535 n. 4, 500 S.E.2d 783, 785 n. 4 (1998). However, a public body may hold "a meeting closed to the public," *i.e.,* an executive session, under specific circumstances. S.C. Code Ann. § 30-4-70(a)(1)-(6). Before going into executive session, the public body must take a vote and "the presiding officer shall announce the **specific purpose** of the executive session." S.C. Code Ann. § 30-4-70(b) (emphasis added). The South Carolina Supreme Court has held that the "specific purpose" requirement cannot be satisfied by mere conclusory statements. *See Donohue v. City of North Augusta*, 412 S.C. 526, 531-33, 773 S.E.2d 140, 142-43 (2015) (announcement that "contractual matter" would be discussed in executive session insufficient to satisfy "specific purpose" requirement of section 30-4-70(b)).

The BOZA violated the FOIA first by failing to announce a "specific purpose" prior to entering executive session. A public body may enter executive session for "the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim." S.C. Code Ann. § 30-4-70(a)(2). One questions what legal interests the BOZA has as a quasi-judicial rather than legislative body. This question was not answered, much less clarified, by the BOZA's public invocation to enter executive session.

The basis of the motion was merely "to receive the advice of counsel on this matter." This general, conclusory motion was insufficient to satisfy the "specific purpose" requirement under *Donohue v. City of North Augusta*. The BOZA did not move to enter into executive session for guidance on the off-street parking issue, specifically. General, opened ended legal advice is not appropriate – especially for boards of zoning appeals in a zoning administrator appeal where the

sole, limited issue before the board is whether the zoning administrator erred in his interpretation of the zoning ordinance. This is fundamentally a legal issue, but it is one for the BOZA members to grapple with publicly as a quasi-judicial body – not out of the public's view.

The BOZA also committed a FOIA violation by unlawfully "polling" its members in executive session, preparing and drafting a motion, and obtaining unanimous consensus its ultimate decision. A public body cannot take any action in executive session other than to adjourn or return to public session. S.C. Code Ann. § 30-4-70(b). Importantly, the "members of a public body may not commit the public body to a course of action by a polling of members in executive session." *Id*. The BOZA engaged in zero public deliberation on any of the issues raised in the Lucey Appeal after the close of public comment.

Facing extreme political and public pressure[16] to deny the Boutique Hotel (despite it being a by-right entitled development approved by the Zoning Administrator), the BOZA contrived a complicated, technical, and ultimately pretextual basis behind closed doors to derail the Boutique Hotel. Lucey did not even raise the issue of off-street parking compliance during his presentation at the hearing; instead, he focused on tree issues, floor area ratios, the definition of "boutique hotel," and other miscellaneous matters. (R. pp. 437:21-442:14; 465:17-469:23.)

Nevertheless, the BOZA seized on and decided the off-street parking issue, in executive session, to overturn the Zoning Administrator's approval of the Project. This reveals nothing less than a coordinated and contrived scheme by the BOZA – cooked up in an unlawful executive

[16] Political pressure influenced not only the BOZA's ultimate decision, but how that decision came about at the hearing. In support, CKC points to Mayor Haynie's public statements opposing the Boutique Hotel (R. p. 153 and Ex. C) and Michelle Reed's and Eric DeMoura's e-mails to one another and their team wherein the Zoning Administrator was complimented that he did a "good job with this project … even in the midst of rumblings to the contrary." The statement "stick to the ordinances, stay professional, and stand strong" is clear evidence of political meddling in the approval process for the Boutique Hotel, which spilled over into and polluted the BOZA itself. (R. pp. 153-154 and Ex. D-E).

session – to kill the Boutique Hotel while Town Council worked on changing the zoning regulations.

Appellants have argued these FOIA violations are irrelevant to this appeal. This is not the case. The Court's role in reviewing a zoning appeal is to determine whether the proceedings complied with the law from both a procedural and substantive perspective. S.C. Code Ann. § 6-29-840(A). This naturally implicates FOIA because it governs everything from how BOZA meetings are noticed to how they are conducted.

II. The Master-in-Equity did not overstep his authority by overturning the BOZA's reinterpretation of "Guest Room" and ordering the site-specific development plan for the Boutique Hotel resume the permitting process under the ordinances that existed at the time of the BOZA hearing.

A. Appellants waived their right to challenge CKC's vested rights arguments by failing to contest them prior to the issuance of the Order.

The Town adopted Ordinance No. 21071 after the BOZA Order was issued. Ordinance No. 21071 eliminated "Boutique Hotel" as an allowed use in the NC district and significantly amended the off-street parking regulations for accommodations uses, defining for the first time the term "Guest Room." Ordinance No. 21071 conflicts with the approved site-specific development plan for the Boutique Hotel.

In fashioning its Appeal Petition, CKC expressly sought a ruling that its site-specific development plan approved by the Zoning Administrator and appealed by Lucey was vested against the application of Ordinance No. 21071. (R. pp. 175-176). The Appeal Petition states, in relevant part, as follows:

> Appellant claims that its site-specific development plan for the Shem Creek Boutique Hotel obtained vested rights prior to the Zoning Administrator Appeal's filing. This specifically includes being vested against the applicability of Ordinance No. 21071 and any other subsequently enacted ordinance that contains substantive, material changes to the zoning ordinances relevant to the project. As previously stated, Appellant alleges that Ordinance No. 21071 was specifically aimed at preventing the development of the Shem Creek Boutique Hotel.

> On August 3, 2021, Appellant requested a vested rights determination from the Town, but the Town refused to make a determination. Therefore, Appellant asserted a claim for a declaratory judgment on the issue of vested rights in *CKC Properties, LLC v. The Town of Mount Pleasant, et al*. (C/A No. 2021-CP-10-04761).[17] Appellant incorporates and restates by reference its vested rights arguments under the South Carolina Vested Rights Act, the Town's Vested Rights Ordinance (attached hereto as Exhibit U) and reserves all rights with respect to the vested rights issue.

(R. pp. 175-179).

A ruling on vested rights was necessary to avoid a reversal of the BOZA Order only to have the Boutique Hotel no longer be permitted to proceed through the development review process because it conflicts with Ordinance No. 21071.

Despite being on notice of CKC's vested rights claim for relief since June 28, 2022, when the Appeal Petition was filed, <u>none of the Appellants ever challenged the vested rights issue prior to the issuance of the Order</u>. No challenge was made as to the Master-in-Equity's jurisdiction to rule on vested rights or the substantive arguments supporting CKC's vested rights claims. The Town's and the BOZA's Return and Answer, filed on August 16, 2022, is silent on the vested rights issue. (R. pp. 180-181.). Moreover, the Town's and the BOZA's Memorandum in Opposition to the Appeal Petition is silent on the vested rights issue. (R. pp. 556-585).[18]

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[17] CKC respectfully requests the Court take judicial notice of CKC's vested rights arguments and claims contained in the Summons and Complaint filed in C/A No.: 2021-CP-10-04761, filed October 14, 2021 (the "Vested Rights and FOIA DJ Action"). (R. pp. 639-649.). This Summons and Complaint was referenced in the Appeal Petition and the vested rights claims and arguments contained therein were incorporated by reference into the Appeal Petition. CKC's request for a declaratory judgment as to both the vested rights and FOIA issues were, therefore, properly presented to the Master-in-Equity in its Appeal Petition. The Vested Rights and FOIA DJ Action was subsequently dismissed without prejudice and by consent of the parties. (R. pp. 650-651.). The Consent Stipulation of Dismissal provides, in relevant part, "This dismissal without prejudice shall not in any way dismiss or prejudice the following zoning appeals or any claims or arguments contained therein: C/A No. 2021-CP-10-04416 and C/A No. 2021-CP-10-05211. The litigation of those appeals shall continue."

[18] Lucey's Return and Answer, filed on August 16, 2022, and his Memorandum in Opposition to the Appeal Petition, filed on May 8, 2023, are similarly silent on the vested rights issue. Neither of these documents, however, were included in the Designation of Matter filed by Appellants.

Appellants first sought to raise the vested rights issue after the Order was issued via motions to reconsider. (R. pp. 600, 602.). The Master-in-Equity denied these motions and, in so doing, "adopt[ed] the reasoning of [CKC's] Memorandum." (R. p. 34). CKC argued Appellants failed to raise any challenge to its vested rights argument, and, therefore, these issues had been waived and were not properly before the Master-in-Equity. (R. pp. 620-623).

The Supreme Court in *Grays Hill Baptist Church v. Beaufort Cty.*, in a case involving an appeal from the planning commission, similarly rejected a local government's belated, post-order attempt to challenge a developer's vested right. 381 S.C. 172, 672 S.E.2d 567 (2009). The Court found as follows:

> The County raised the issue of vested rights in its motion to reconsider the master's final order, arguing his decision amounted to a vested rights determination and was error in light of the fact that the Church did not pursue any claim under the Vested Rights Act, S.C. Code Ann. sections 6-29-1510 to - 1560 (Supp. 2019). The master noted the issue was not raised until after the case had already been tried and a final order was entered, and therefore, the County's contention was not timely. *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider.").

Id. at 639 n.9, 850 S.E.2d at 34.

Given the foregoing, the Master-in-Equity correctly rejected Appellants' belated attempts to litigate the vested rights issue. This Court should follow suit and reject Appellants' belated attempts to litigate the vested rights issues, which were never argued before the Master-in-Equity and not preserved for this appeal. *See, Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 598, S.E.2d 712 (2004). As such the Court should affirm the Order's conclusions as to CKC's vested rights.

B. Assuming Appellants' vested rights arguments are properly before this Court, which is denied, the Order contains no error of law and the Master-in-Equity did not exceed his authority.

The Master-in-Equity was within his authority to make a finding on vested rights when he reversed the BOZA Order.

Vested rights can be raised and ruled upon in zoning appeals. For instance, in *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, the Court of Appeals affirmed the circuit court's conclusion that a property owner possessed vested rights and rejected the government's argument to the contrary. 342 S.C. 480, 499, 536 S.E.2d 892, 902 (Ct. App. 2000) ("The Board also maintains the trial court erred in finding that Vulcan has a vested right to continue its nonconforming use at the site because a party may not acquire a vested right in unzoned property. We disagree."). Similarly, the Supreme Court in *Grays Hill Baptist Church v. Beaufort Cty.* reversed the planning commission's denial of a previously approved plan due to a subsequently enacted and conflict zoning amendment, holding "we find the Church was permitted to continue its nonconforming use and to construct the fellowship hall at the time the ordinance was enacted …" 431 S.C. 630, 640 n.10, 850 S.E.2d 29, 34 (2020). Therefore, Appellants' suggestion that appellate courts in zoning appeals lack jurisdiction to rule on vested rights and direct permits be issued under ordinances in effect at the time of approval rings hollow and contrary to South Carolina precedent.

Furthermore, "[t]he adjudicative power of the Court carries with it the inherent power to control the order of its business to safeguard the rights of litigants." *Renaissance Enters., Inc. v. Summit Teleservices, Inc.,* 334 S.C. 649, 651, 515 S.E.2d 257, 258 (1999) (citing *Williams v. Bordon's, Inc.,* 274 S.C. 275, 262 S.E.2d 881 (1980)). The Master-in-Equity, therefore, possessed inherent authority to make a ruling on whether CKC's project was vested when it reversed the BOZA Order. This was necessary to carry out the Court's disposition of the appeal and fashion a

remedy that was not purely academic and illusory given the adoption of Ordinance No. 21071 several months after the BOZA hearing.

The relief contained in the Order finds support under South Carolina vested rights statutory and common law.

First, under the "time of application rule," CKC was entitled to resume the development review process vested under the ordinances existing at the time it submitted its development plans to the Zoning Administrator and the DRB. *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140, 143 (1970) (holding, where there is "good faith reliance by the owner on the right to use his property as permitted under the Zoning Ordinance in force at the time of the application for a permit," a subsequently enacted ordinance cannot deprive the owner of a use that was permitted under the then existing ordinance.).[19]

Second, CKC's development plan approved by the Zoning Administrator and appealed to the BOZA qualifies as a "site specific development plan" entitled to vested rights under the Vested Rights Act. S.C. Code Ann. § 6-29-1520(9) (defining "site specific development plan" as "a development plan submitted to a local governing body by a landowner describing with reasonable certainty the types and density or intensity of uses for a specific property or properties" to include a "preliminary or general development plan").

Third, CKC's development plan is vested under the Town's vested rights ordinance. (R. pp. 175-176; R. pp. 178-179). Section 156.049 (E)(1)(e) of the Town's Zoning Code provides that "Final Planning staff approvals" are considered "site specific development plans" and sufficient for establishing vested rights. The Zoning Administrator's approval of the site-specific

[19] *Ani Creation, Inc. v. City of Myrtle Beach* (Op. No. 28151) (filed April 19, 2023 and re-filed June 28, 2023) confirms, at footnote 11, that the "time of application rule" and *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140, 143 (1970) has not been overruled.

development plan for the Boutique Hotel, which provided the basis of the Lucey Appeal, was sufficient to establish vested rights under the Town's ordinance.

Fourth, and finally, CKC's development plan, approved by the Zoning Administrator, qualifies for common law vested rights. The Supreme Court has signaled that common law vested rights apply in zoning appeals, in addition to those arising under the Vested Rights Act. *Grays Hill Baptist Church v. Beaufort Cty.*,431 S.C. 630, 640 n.10, 850 S.E.2d 29, 34 (2020). *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 186-87, 813 S.E.2d 874, 883 (Ct. App. 2018), summarizes common law vested rights as follows:

> The majority rule regarding vested rights, as recognized by this court, provides:
>
> A landowner will be held to have acquired a vested right to continue and complete construction of a building or structure, and to initiate and continue a use, despite a restriction contained in an ordinance or an amendment thereof where, prior to the effective date of the legislation and in reliance upon a permit validly issued, he has, in good faith, (1) made a substantial change of position in relation to the land, (2) made substantial expenditures, or (3) incurred substantial obligations.

The record in this case confirms CKC devoted significant time, financial resources, and investment-backed expectations in pursuing its development plans that were ultimately approved by the Zoning Administrator.

For the above reasons, the Order's findings and conclusions regarding vested rights are the law of the case, well rooted under South Carolina law, and ought to not be disturbed on appeal.

III. <u>As an additional sustaining ground, the Court should find the Lucey Appeal was untimely and the BOZA never had jurisdiction to consider it.</u>

In its Appeal Petition, CKC argued the Lucey Appeal was untimely and the BOZA lacked subject matter jurisdiction to hear it. (R. pp. 148,163-170). The Master-in-Equity disagreed and found the Lucey Appeal was timely. (R. pp. 28-31).

CKC, as the Respondent and prevailing party with respect to the Order,[20] submits the timeliness issue as an additional sustaining ground appearing in the record. CKC respectfully requests the Court review the record on appeal and rule the Lucey Appeal was untimely and the BOZA lacked subject matter jurisdiction. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

This Court need not defer to the BOZA Order's conclusion that the Lucey Appeal was timely, as it presents a question of law. The timeliness of a zoning appeal is a jurisdictional requirement and, as such, may be raised at any time by either party or *sua sponte* by the court. *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 (Ct. App. 2000).

The Town has specific and detailed legal procedures governing zoning appeals, which must be strictly followed. The BOZA lacks authority to make substantial compliance determinations or hand-waive away clear legal mandates.

Section 156.411(A)(5)(a) governs the appeals procedure to the BOZA as follows:

> (5) Appeals to the Board may be taken by any person <u>**aggrieved**</u> or by any officer, department, board, or bureau of the municipality or county.
>
> (a) The appeal must be taken within 30 days from the date the appealing party has received <u>**actual notice**</u>[21] of the action from which the appeal is taken, **by filing with**

[20] CKC is the prevailing party because the Order reversed the BOZA Order and directed the Boutique Hotel to resume the development review process under the ordinances existing at the time of the September 27, 2021 BOZA hearing. The Town and Lucey are most certainly the losing parties with respect to the BOZA Order, presently on appeal.

[21] S.C. Code Ann. § 6-29-800(B) ("Appeals to the board may be taken by any person **aggrieved** or by any officer, department, board, or bureau of the municipality or county.") (Emphasis added).

> **the officer from whom the appeal is taken and with the Board of Zoning Appeals notice of appeal specifying the grounds for appeal**."

(R. p. 401). (Emphasis added). Section 156.413(D) goes on to state:

> The **burden of proof for the relief sought is upon the applicant**.
>
> (1) In this regard, **a complete application of forms and information is required**.
>
> (2) **Prior to consideration by the Board, incomplete applications will be returned to the applicant**.

(R. p. 403). (Emphasis added). Finally, Article II, Section 3 of the BOZA Rules of Procedure contain the following additional requirements:

> 3. Applications
>
> A. 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 …
>
> B. Applications **may require a submittal and review fee** in an amount specified by the schedule of fees established by the Town.
>
> C. **Failure to submit required information or forms and applicable fees may be grounds for rejection of the application**.
>
> D. **Requests not permitted or prohibited according to the Mount Pleasant Code of Ordinances shall be rejected** unless relief has been sought from the appropriate governing body or appellate body.

(R. pp. 389-391). (Emphasis added).

The BOZA Order states in conclusory form "[t]he Board finds that the Appeal is timely …" (R. p. 189). Despite it being his burden, Lucey failed to supply the BOZA any details as to when he obtained "actual notice" of the decisions being appealed. The Lucey Appeal fails to establish when he received actual notice, and there was no testimony on this issue at the BOZA hearing. (R. pp. 242-248, 430-491). There is evidence in the record that Lucey had knowledge of

the project's off-street parking plan as early as April 2021.[22] Therefore, there is no evidence in the record establishing the timeliness of the Lucey Appeal.

Assuming the BOZA considered July 19, 2021 to be the date Lucey obtained actual notice,[23] which CKC disputes, the Lucey Appeal was still untimely and jurisdictionally improper under the Zoning Ordinance and the BOZA Rules of Procedure. The Town concedes Lucey did not complete the necessary application and file his appeal through the Town's online portal until August 23, 2021. (R. p. 578). This was more than thirty days after July 19, 2021. Regardless, the Town portrays Lucey's August 12, 2021 letter as sufficient to perfect the appeal and describes the August 23, 2021 filing of the Lucey Appeal, to be merely "a cover form." (R. p. 578). This mischaracterizes the nature of the official application process and applicable procedural authorities.

The "Board of Zoning Appeals Appeal From Decision of Zoning Official Application" was filed by Lucey on August 23, 2021. (R. pp. 370-386.) It states "A Property Owner Acknowledgement Form must be submitted with the application." It also requires payment of a $200.00 fee. None of these required steps took place until, at the latest, August 23, 2023. These items were not included in Lucey's August 12, 2021 letter. Therefore, the Lucey Appeal was not perfected until August 23, 2021, which was outside the thirty (30) day jurisdictional time limit. Section 156.413 (D) and Article II, Section 3 of the BOZA Rules of Procedure.[24]

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[22] On April 26, 2021, Lucey sent a letter to the Town and BOZA objecting to the Boutique Hotel. (R. pp. 267-324, Ex. B herein). The letter, among other things, objects to the off-street parking plan for the project, alleging "this small neighborhood has extreme parking problems" and "the parking plan for this project is misleading." By all accounts, Lucey had notice of the Project and its off-street parking plan in April of 2021 – several months prior to August 23, 2021, when his appeal was eventually filed.

[23] "The [DRB] agenda [including the Project] was posted to the Town website on July 19, 2021, at 11:35 am." This was the Zoning Administrator's position regarding when Lucey obtained actual notice, according to the Staff Report. (R. p. 201).

[24] The word "may," as it appears in Article II, Sections 3(B) and 3(C) of the BOZA Rules of Procedure does not alter

Based on the record in this appeal and as an additional sustaining ground, this Court can affirm the Order's reversal of the BOZA Order due to the BOZA lacking subject matter jurisdiction to hear the Lucey Appeal in the first instance given its untimeliness.

IV. As a further additional sustaining ground, the Court should find Lucey lacked standing to appeal the Zoning Administrator's approval to the BOZA.

CKC also argued in its Appeal Petition that Lucey lacked standing to appeal the Zoning Administrator's approval of the site-specific development plan for the Boutique Hotel. (R. p. 147.). The Master-in-Equity disagreed and found Lucey possessed statutory standing to bring his zoning appeal. (R. p. 31.). CKC, as the Respondent and prevailing party with respect to the Order, submits the standing issue as an additional sustaining ground. CKC respectfully requests the Court review the record on appeal and rule the Lucey lacked standing to bring the Lucey Appeal.

This Court can review *de novo* and BOZA Order's conclusion that Lucey possessed standing to bring his appeal. *See Ex parte State ex rel. Wilson*, 391 S.C. 565, 570, 707 S.E.2d 402, 405 (2011). As with the timeliness issue, this Court need not defer to the BOZA Order's conclusions on this issue, as it presents a question of law.

Standing is a threshold legal question bearing on justiciability. *See Peoples Fed. Sav. & Loan Ass'n v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability"); *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010) (stating appellate courts have "the inherent authority to consider justiciability").

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this analysis. Section 3(B) simply says an application fee "may" be required, which it clearly was based on the face of the Lucey Appeal. (R. pp. 370-386.) Section 3(C) says an application "may" be returned if incomplete, but this cannot be read to modify the statutory and ordinance derived thirty (30) day jurisdictional requirement for perfecting an appeal and allow a defective appeal to be cured passed the jurisdictional appeal period. The BOZA also hears variances and special exception requests, neither of which have jurisdictional appeal deadlines.

In zoning administrator appeals, both S.C. Code Ann. § 6-29-800(B) and Section 156.411 (A)(5) limit standing to "any person **aggrieved**..." (emphasis added). Neither speaks to physical adjacency. Notably, this is to be contrasted with two other appellate procedures found in the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 that do expressly refer to adjacency in the standing context. S.C. Code Ann. § 6-29-760(C) (standing to appeal a rezoning decision limited to "[a]n **owner of adjoining land** or his representative") (emphasis added); S.C. Code Ann. § 6-29-950(A) (standing to enforce a zoning ordinance limited to "an **adjacent or neighboring property owner** who would be specially damaged") (emphasis added). Therefore, physical adjacency (which Lucey admittedly possesses)[25] does not automatically make him an "aggrieved" party for the purposes of S.C. Code Ann. § 6-29-800(B) and Section 156.411 (A)(5).

Courts must assume that legislative bodies are "aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); *see also Beck v. Prupis*, 529 U.S. 494, 500-01, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000). From a strict statutory construction perspective, it is impermissible to read into S.C. Code Ann. § 6-29-800(B) and Section 156.411 (A)(5) an adjacency test. Both the General Assembly and Town Council knew how to provide for an adjacency requirement, but chose to require a more stringent standard – a requirement that a party demonstrate it is "aggrieved."

Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001) remains the leading case in South Carolina that defines the meaning of "aggrieved" in the context of zoning appellate litigation. There, the Court held as follows:

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[25] While Lucey owns property adjacent to the Properties – this is commercial property. His home is not adjacent to the proposed Boutique Hotel. The Shem Creek area is one of the most intense commercial areas in Mt. Pleasant.

> A party is aggrieved by a judgment or decree when it operates on his or her rights of property or bears directly on his or her interest. The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation. A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests.

Id. at 301, 551 S.E.2d at 589-90. That case clarified that being "aggrieved" requires demonstration of an "actual injury" not a "purely conjectural and hypothetical" one. Clearly, more is needed than mere adjacency.

The record fails to demonstrate any "actual injury" suffered by Lucey via "competent evidence." *See, Wyndham Enters., LLC v. City of N. Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012) (requiring "competent evidence" on technical subjects in zoning appeals); *see, also Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 206, 516 S.E.2d 439, 441 (1999) (reversing a zoning board's denial of a special exception permit and holding that although neighboring residents testified they felt a proposed halfway house would increase traffic, there was no factual evidence presented to support that allegation). (R. pp. 511-515).

The Lucey Appeal's shotgun approach claims the Zoning Administrator erred when he concluded that the site-specific development plan for the Boutique Hotel met the applicable use, off-street parking, height, and curb-cut regulations. Essentially, Lucey claims every decision made by the Zoning Administrator was an error. This demonstrates his motivation was not genuinely about parking in this part of Mt. Pleasant – **it was about stopping the project at all costs to protect his own commercial (not residential) interests**.

Lucey has acquired an assemblage of eight (8) parcels directly adjacent to the Properties and has successfully rezoned two (2) of these from Conservation Open Space to Areawide Business. (R. p. 271). These are all commercial properties, including his law firm, not his or anyone else's residence. In fact, Lucey has in recent years attempted (and failed) to purchase the

Properties themselves. (R. pp. 270-271, 311-324; R. pp. 311-324.) This was echoed by the attorney for the owner of the Properties at the BOZA hearing. These business competition factors cannot be ignored in the standing analysis.

The South Carolina Supreme Court has held that where "the potential injury or prejudice is only an increase in business competition, such injury or prejudice is insufficient to confer standing." *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 340 (2008). Lucey need not be in the hotel business to be a competitor of CKC. Lucey is a competitor, as demonstrated by his actions to own and to control this entire block in the Shem Creek ecosystem. By his own admission, Lucey opposes the Boutique Hotel due to perceived parking and other impacts to *his businesses and significant real estate holdings* in the area. This is insufficient to be an "aggrieved" party under South Carolina law.

Based on the record in this appeal and as an additional sustaining ground, this Court can affirm the Order's reversal of the BOZA Order due to Lucey's lack of statutory standing to initiate the appeal before the BOZA in the first instance.

CONCLUSION

CKC respectfully requests the Court affirm the Order, reject the BOZA's reinterpretation of "Guest room," reinstate the Zoning Administrator's approval of CKC's site-specific development plan for the Boutique Hotel, and direct the Boutique Hotel resume the development review process vested under the ordinances existing at the time of the BOZA hearing on September 27, 2021. As additional sustaining grounds, CKC respectfully requests the Court find the Lucey Appeal to have been untimely filed, Lucey lacked standing to bring it, and the BOZA lacked jurisdiction to consider it.[26]

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[26] Should the Court find the BOZA lacked jurisdiction to hear the Lucey Appeal, CKC respectfully requests the Court issue an order confirming the site-specific development Plan for the Boutique Hotel – approved by the Zoning

Respectfully submitted,

McCULLOUGH ▪ KHAN ▪ APPEL

s/Ross A. Appel
Ross A. Appel, Esq. (SC Bar #79149)
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com

Attorney for Respondent
CKC Properties, LLC

Charleston, South Carolina
August 12, 2024

Administrator – is vested under South Carolina law, thus allowing CKC to proceed through the development review process under the ordinances existing at the time of the BOZA hearing on September 27, 2021.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS
Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-001615
Trial Court Case No. 2021CP1005211

CKC Properties, LLC,

Respondent (Appellant Below)

v.

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

Respondents Below.

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

Appellants

CERTIFICATION FOR FINAL BRIEF

McCULLOUGH ▪ KHAN ▪ APPEL

s/Ross A. Appel
Ross A. Appel, Esq. (SC Bar #79149)
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com

Attorneys for Respondent
CKC Properties, LLC

I, Ross A. Appel, do hereby certify that the Final Brief of Respondent CKC Properties, LLC complies with Rule 211(b), SCACR, and the Supreme Court's order of April 15, 2014.

McCULLOUGH ▪ KHAN ▪ APPEL

s/Ross A. Appel
Ross A. Appel, Esq. (SC Bar #79149)
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com

Attorneys for Respondent
CKC Properties, LLC

September 12, 2024
Charleston, South Carolina