RECEIVED
Oct 10 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County Court of Common Pleas
Honorable Bentley Price
Trial Court Case No. 2023-CP-10-01493

Appellate Court Case No. 2024-000134

Pacaso, Inc. and 2 SC Lighthouse, LLC, ... Appellants,

v.

Town of Sullivan's Island, South Carolina, Town of Sullivan's Island Board of Zoning Appeals, and Charles Drayton, in his official capacity as Zoning Administrator, ... Respondents.

RESPONDENTS' INITIAL BRIEF

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
James W. Clement (SC Bar # 102467)
WALKER GRESSETTE & LINTON, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
walker@wglfirm.com
linton@wglfirm.com
clement@wglfirm.com

ATTORNEYS FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ORDINANCES TOWN OF SULLIVAN'S ISLAND

STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court correctly affirm the BZA's decision when the determination that the Residence was operating as a Vacation Rental in violation of the Town of Sullivan's Island's ordinances was fully supported by the factual Record before the BZA?

II. Did the circuit court correctly affirmed the BZA's determination that Appellants' use of the Residence also violates the ordinances governing the RS-Single Family District because the program and commercial activity violate those ordinances requiring the Residence to be used for residential purposes?

III. Did the Circuit Court err by denying Appellants' motion to supplement the Record with the email dated June 9, 2022, when it was not part of the appeal before the BZA or the certified Record on appeal before the Court?

STATEMENT OF THE CASE

This appeal concerns the use of residential property at 3115 I'On Avenue, Sullivan's Island, South Carolina (the "Residence") in violation of the Town of Sullivan's Island (the "Town") Zoning Ordinance (the "Zoning Ordinance"). As described in detail below, Appellant 2 SC Lighthouse, LLC (the "LLC"), established by Pacaso, Inc. ("Pacaso") (collectively, "Appellants"), purchased the Residence on April 7, 2022, and began putting the Residence to a use that violates the Town's long-established ordinances governing the uses of residential property and prohibiting vacation rentals. **(TOSI – PACASO 0112, 0126)**.

In 2001 the Town enacted Article XIII of the Zoning Ordinance[1] entitled "VACATION RENTALS". **(TOSI – PACASO 0195: l. 20-22); (TOSI – PACASO 0350)**. Section 21-117 of the Zoning Ordinance states "Vacation Rentals are prohibited uses on Sullivan's Island. Nothing in this Ordinance shall be construed to permit any Principal Building or other structure to be used as a Vacation Rental…." **(TOSI – PACASO 0147)**. Section 21-203 defines a "Vacation Rental" as "[t]he commercial use of a Principal Building(s) that is: (1) rented, leased, assigned for tenancies; or (2) made available for use, occupancy, possession, sleeping accommodations, or lodging for one or more persons in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration." **(TOSI – PACASO 0341-45)**.

The Town's Zoning Administrator (the "Zoning Administrator") determined that Appellants' use of the Residence violated the Town's Zoning Ordinance and notified the Appellants. **(TOSI – PACASO 0113)**. The Zoning Administrator sent a zoning violation letter to Appellants on September 27, 2022, stating the following:

[1]The Zoning Ordinance is available online at: https://sullivansisland.sc.gov/sites/sullivansisland/files/Documents/Town%20Codes%20%26%20Ordinances/Sec21%20Zoning%20AMENDED%20111720%20With%20Bookmarks.pdf

> It has come to my attention . . . that shares of the limited liability company that owns 3115 I' On Avenue (2 SC Lighthouse, LLC) are currently being advertised for sale on www.pacaso.com. . . Pacaso, LLC controls the usage of the home and enforces "stay limitations," which include that an owner of a 1/8 membership interest . . . can only book a stay for between 2 and 14 days. The purpose of this letter is to inform you that the stay limitation is illegal under the Town's Zoning Ordinances. The Town's zoning ordinance prohibits homes "made available for use, occupancy, possession, sleep accommodations" for "less than twenty-eight (28) continuous days duration." The stay limitation imposed by Pacaso, LLC and agreed upon by the members of 2 SC Lighthouse, LLC conflicts with Article XIII of the Town's Zoning Ordinance and the definition of a "vacation rental" found in Section 21-203. Immediately cease and desist any use of this property in violation of the Town ordinances cited above and enclosed herewith. . . If you believe that I as the Zoning Administrator have made an error in my determination that your use of this property, 3115 I'On Avenue, is in violation of the above-stated Town ordinances, then pursuant to Section 21-177 of the Town's Zoning Ordinance you have thirty (30) days to exercise your right to appeal this decision to the Board of Zoning Appeals.

(TOSI – PACASO 0131). Appellants appealed the Zoning Administrator's decision to the Town of Sullivan's Island Board of Zoning Appeals (the "BZA"). **(TOSI – PACASO 0113)**. The BZA heard the appeal of the Zoning Administrator's decision on February 9, 2023. **(TOSI – PACASO 0191-299)**. Appellants were represented by their counsel at the BZA hearing. **(TOSI – PACASO 0004)**. Appellants had a full opportunity to present arguments as to why they disagreed with the Zoning Administrator's decision. **(TOSI – PACASO 0213: l. 21-0296: l. 1)**. After hearing all arguments presented, the BZA voted unanimously to affirm the Zoning Administrator's decision and deny the appeal. **(TOSI – PACASO 0296: l. 1-0298: l. 10)**. The BZA issued a Final Order on March 9, 2023, and mailed the order to the Appellants. **(TOSI – PACASO 0048)**. Appellants appealed to the circuit court. **(Appellants' Pet. for Appeal, filed August 16, 2023)**.

On March 27, 2023, Appellants filed a Notice of Appeal and Demand for Pre-Litigation Mediation. **(Appellants' Notice of Appeal and Demand for Pre-Litigation Mediation, filed March 27, 2023)**. The mediation occurred on July 17, 2023, but resulted in an impasse. **(Proof of**

ADR, filed August 7, 2023). Following mediation, Appellants filed an appeal to the circuit court. **(Appellants' Pet. for Appeal, filed August 16, 2023)**.

The circuit court heard oral arguments on the appeal. The circuit court concluded there "was ample evidence in the record on appeal support[ing] the BZA's factual determination[s]"; the BZA's determinations were "neither arbitrary, capricious, nor an abuse of discretion"; and that the BZA's ultimate decision is "supported by evidence in the record, and the BZA's application of the ordinances is reasonably related to the lawful purpose." **(Order, filed December 6, 2023)**.[2] Appellants filed a Motion to Reconsider on December 15, 2023, to which the BZA replied on December 29, 2023. **(Appellants' Mot. to Recons., filed December 15, 2023)**; **(Respondents' Response to Mot. for Recons., filed December 29, 2023)**. The circuit court denied the Appellants' Motion for Reconsideration. **(Order, filed January 17, 2024)**. Appellants then appealed this matter for a third time, this time to this Court. **(Notice of Appeal)**.

STATEMENT OF FACTS

This appeal concerns the use of the Residence in violation of Zoning Ordinance. After purchasing the Residence through the LLC on April 7, 2022, Pacaso marketed memberships in the LLC for sale. **(TOSI – PACASO 0112-14, 0125)**. Those who purchased a membership, and their designees or "guests," are allowed to use the Residence for certain short periods of time (all in

[2] Appellants also filed a Motion to Supplement the Record with extraneous evidence that was not presented at the BZA. **(Appellants' Mot. to Suppl. the R. on Appeal, filed October 26, 2023)**. Appellants also filed a memorandum in support of this motion. **(Appellants' Mem. in Supp. of Pet. for Appeal and Mot. to Suppl. the R. on Appeal, filed November 14, 2023)**. The circuit court heard oral arguments on the motion on November 16, 2023. **(Order, filed December 6, 2023)**. The circuit court found the attempt to add extraneous evidence was moot and contrary to both case law and legislation in this state **(Order, filed December 6, 2023)**; see S.C. Code § 6-29- 840(A); see also Austin v. Bd. of Zoning Appeals, 606 S.E.2d 209, 211 (Ct. App. 2004). The circuit court also found that even if it were to consider the evidence that was not presented to the BZA, it would not change the outcome. See **(Order, filed December 6, 2023, at p. 4, n. 1)**.

increments of far less than 28 consecutive days per membership), provided they buy the membership *and* pay ongoing fees to Pacaso. **(TOSI – PACASO 0005)**. Under the Pacaso program, *if the member doesn't pay, they don't use the Residence.* See **(TOSI – PACASO 0236: l. 1-l. 13); (TOSI – PACASO 0236: l. 1-l. 6)**.

The members of the LLC do not own any property interest; title is held by the LLC. See **(TOSI – PACASO 0124)** (Pacaso website discussing that members are not tenants in common, members are not on the title to the property, and that memberships can be transferred to others without a real estate closing); **(TOSI – PACASO 0208: l. 5-9); (TOSI – PACASO 0211: l. 15-20)**. If a member books a stay, the other members are not allowed to use the Residence during the booked stay. **(TOSI – PACASO 0153)** (Pacaso responding to Respondents' Counsel stating "No, two co-owners cannot book stays at the property at the same time. The time scheduled in the home is reserved for that particular co-owner and his/her guests."). There is also an "Exchange Option" whereby a member can exchange their membership in an LLC for a membership in a different LLC, entitling them to stays in a completely different property. **(TOSI – PACASO 0155)** (Exchange Option); **(TOSI – PACASO 0272: l. 1-5)** ("They can even be exchanged for another Pacaso property, according to Pacaso's own website. This is a national timeshare scheme with entitled exchangeable access to Pacaso's national properties, not just 3115."). In fact, Pacaso has even trademarked the "Home Transfer Benefit" of the program. **(TOSI – PACASO 0289: l. 1-0290: l. 3)**.

In evaluating whether the stay restrictions, or any other provisions of the membership program, violated the Town's Zoning Ordinance, the Town requested a copy of the LLC's operating agreement and the membership agreement that define the specific aspects of the program. **(TOSI – PACASO 0003-04); (TOSI – PACASO 0212: l. 5-15)**. Appellants refused

to disclose the agreements that govern the membership program Pacaso runs at the Residence. **(TOSI – PACASO 0212: l. 1-20); (TOSI – PACASO 0212: l. 14-15)** (Zoning Administrator explaining he has asked for the operating agreement and all rules and regulations but ". . . [t]hey've refused to provide that."). Instead of disclosing the details of the program, Appellants cherry picked select portions they thought may help their argument, while concealing the remainder of the governing documents:

> [MR. ELLIOTT:] I'm just asking in this case, have you given them the operating agreement?
>
> MR. APPEL: No. We don't have to give them the operating agreement.
>
> MR. ELLIOTT: Then the answer is no, right?
>
> MR. APPEL: Right.
>
> MR. ELLIOTT: How about the management agreement between Pacaso and the owners?
>
> MR. APPEL: Same answer.
>
> MR. ELLIOTT: You have not produced it because you don't want to?
>
> MR. APPEL: Well -- and there's no legal basis for it. So again, there's no legal basis for it.
>
> MR. ELLIOTT: Okay. So you say. But I just want to make sure you made that choice not to give it to them because you don't legally have to do it. True?
>
> MR. APPEL: That's correct. But we have shared certain aspects of the arrangement with the zoning staff.

(TOSI – PACASO 0229: l. 1-23); (TOSI – PACASO 0005). In addition to cherry picking which aspects of the program to disclose to the Town, Appellants even made statements to Town staff that Appellants later admitted to the BZA were incorrect. See **(TOSI – PACASO 0238: l. 10-0240: l. 11)**. That is indicative of Appellants' approach through this proceeding: hide and mislead until caught, then disclose the bare minimum to try and make a point while continuing to obfuscate

the process.

One of the few things Appellants eventually disclosed about the program documents they have refused to provide is that a member can't stay for more than 14 consecutive days: ***". . . the current operating agreement states no member can stay on the property for longer than fourteen (14) days***." **(TOSI – PACASO 0005)** (double emphasis added); see also **(TOSI – PACASO 0113); (TOSI – PACASO 0237: l. 25-0238: l. 5)** (Counsel for Appellants confirming the operating agreement precludes any single member staying longer than 14 days). The observations of the use of the Residence by Town staff are consistent with a stay limitation of a maximum of 14 days. **(TOSI – PACASO 0114)** ("Staff has witnessed multiple users of the property, whose vehicle license plates are indicative of a short-term use of the property. Further, Pacaso does not dispute that these short-term stays are what a person is entitled to in exchange for their purchase of a membership.").

The program website also states that members can only book stays for up to 14 days per membership and expressly prohibits back-to-back stays. **(TOSI – PACASO 0122-23).** Further demonstrating the nature of the program, the website explains how a member utilizes the app to book stays, states how far in advance a member may schedule a stay, and outlines the procedure (and possible penalties) for the cancellation of a booking. **(TOSI – PACASO 0122-23).** The program website even explains check-in and check-out times, and the possibility of getting a late checkout (just like any hotel or any other vacation rental program). **(TOSI – PACASO 0122-23).**

In a letter dated September 27, 2022, the Town's Zoning Administrator informed the LLC of his determination that the arrangement violates the Town's Zoning Ordinance because, among other things, the program includes a "stay limitation" wherein a member can book stays at the residence for between 2-14 days, in violation of the Town's Ordinance that prohibit the

commercial use of a residence that is: "(1) rented, leased, assigned for tenancies; or (2) made for use, occupancy, possession, sleeping accommodations, or lodging for one or more persons in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration." **(TOSI – PACASO 0341)**.[3]

Appellants appealed the Zoning Administrator's decision to the BZA. **(TOSI – PACASO 0112-14)**. The BZA heard the appeal at a public meeting on February 9, 2023. **(TOSI – PACASO 0048)**. The transcript to the hearing is part of the Record on Appeal. **(TOSI – PACASO 0191-0328)**. At the hearing, the Zoning Administrator explained in his staff report that Vacation Rentals are a prohibited use in the RS District. **(TOSI – PACASO 0198: l. 3-7)**.[4] The term "Vacation Rental" is defined in Section 21-203 of the Zoning Ordinance to mean:

> The commercial use of a Principal Building(s) that is: (1) rented, leased, assigned for tenancies; or (2) made available for use, occupancy, possession, sleeping accommodations, or lodging for one or more persons in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration.

(TOSI – PACASO 0350). Further, Section 21-19(A) of the Zoning Ordinance states,

> It is the intent of the RS-Single Family Residential District to be developed and reserved for **low-density residential purposes** built in a manner that is respectful of the Island's building mass and scale, historic structures, and compatible with neighborhood character. The regulations that apply within this district are designed to encourage the formation and continuance of a stable, healthy, environment for

[3] Importantly, as already noted, programs like the one at issue have been illegal on Sullivan's Island for more than 20 years. **(TOSI – PACASO 0003)**. Appellants in this appeal seek to circumvent over two decades of enforcement of those use restrictions, but don't actually challenge the prohibition. **(TOSI – PACASO 0003); (TOSI – PACASO 0195: l. 20-0196: l. 7);** see also **(Appellants' Mem. in Supp. of Appeal Pet., filed November 14, 2023)** (Appellants conceding that "[t]he Town banned short-term rentals over two decades ago. This appeal does not challenge the Town's Vacation Rental Ordinance").

[4] Section 21-117 of the Zoning Ordinance provides that "Vacation Rentals are prohibited uses on Sullivan's Island. Nothing in this Ordinance shall be construed to permit any Principal Building or other structure to be used as a Vacation Rental." **(TOSI – PACASO 0342)**. See also Section 21-20(D)(6) (Vacation rentals are a prohibited use). **(TOSI – PACASO 0003)**.

> ***one single family, primarily owner-occupied dwelling per lot*** with each lot having an area of at least one-half (1/2) acre and to discourage any encroachment by commercial, or other uses capable of adversely affecting the residential character of the district.

(TOSI – PACASO 0106) (emphasis and double emphasis added).

At the BZA hearing, the Zoning Administrator cited materials from the Pacaso.com website that "clearly show and describe the process by which Pacaso assigns tenancy for the use of property." **(TOSI – PACASO 0199-200)** (Zoning Administrator presenting his case to the BZA). Pacaso offers general and short notice stays at the Residence (none over 28 days). See **(TOSI – PACASO 0199: l. 6-0200: l. 1)** (Zoning Administrator explaining the use restrictions and program rules stated on Pacaso's website). These restrictions include that Pacaso also blocks off federal holidays and other dates of local interest, which it calls "special dates." **(TOSI – PACASO 0199: l. 6-0200: l. 1)**. Members may only book one special date at a time, per membership. **(TOSI – PACASO 0199: l. 6-0200: l. 1)**. Pacaso has procedures for booking stays, rules for how long stays may last (no longer than 14 consecutive days per membership), protocols for arrivals and departures, and procedures to assess cancellation penalties. **(TOSI – PACASO 0199: l. 6-0200: l. 1)**

As noted, Pacaso limits the length of stays to no more than 14 days per membership. **(TOSI – PACASO 0237: l. 25-0238: l. 5).** This is significant because the Town's Zoning Ordinance explicitly prohibits programs where stays are less than 28 days in length. **(TOSI – PACASO 0344)** (noting the text of Section 21-124). Pacaso also charges a monthly fee for "program management"—an "ongoing fee structure that requires the shareholders to provide valuable consideration for use of the property." **(TOSI – PACASO 0200: l. 19-0201: l. 1)** (Zoning Administrator explaining the fee structure to the BZA). Pacaso levies this monthly program management fee on top of the cost of purchasing a membership. **(TOSI – PACASO 0200: l. 19-**

0201: l. 1). Importantly, delinquency in the monthly fees to Pacaso results in Pacaso suspending the member's user rights. **(TOSI – PACASO 0236: l. 1-13)** (counsel for Appellants stating to the BZA that if a member does not pay Pacaso a monthly fee they have no right to use the Residence). This monthly fee allows a member to access the app and the right to book a short stay if the Residence is vacant. **(TOSI – PACASO 0225: l. 24-0226: l. 14)**.

Finally, in addition to the violation of Section 21-203 of the Zoning Ordinance, the Zoning Administrator asserted to the BZA that Pacaso's operation is illegal for a second, independent reason—the program is an impermissible commercial use in the RS, single-family zoning district and, specifically, violates Section 21-19(A) of the Zoning Ordinance set forth above. **(TOSI – PACASO 0202: l. 2-10)**. According to the Zoning Administrator, ". . . the use of the property [also] violates the RS, single-family residential district in both intent ***and prohibited use of the RS district***." **(TOSI – PACASO 0202: l. 13-17)** (double emphasis added). Further, the written and verbal public comments at the BZA also explained the disruptive nature of the program, even mentioning: "[e]very weekend, there's a different car." **(TOSI – PACASO 0265: l. 8-0274: l. 6); (TOSI – PACASO 0006, 0036-40);** see **(TOSI – PACASO 0116-18)** (BZA Staff Report including pictures of cars from various states at the Residence).

After a lengthy hearing, the BZA voted unanimously to deny the appeal and affirm the Zoning Administrator's decision. **(TOSI – PACASO 0048)**. The BZA issued a written decision denying the appeal and affirming the Zoning Administrator's decision. **(TOSI – PACASO 0048-54);** see **(TOSI – PACASO 0357-58)**. The BZA found, based on the facts presented, that the Residence is being used as a "Vacation Rental," as that term is defined in the Town's Zoning Ordinance, because the Residence is being used for commercial purposes, tenancies are being assigned, and the Residence is being made available for use in exchange for valuable consideration

for a period of less than 28 days. **(TOSI – PACASO 0048-54)**. The written decision, affirming the Zoning Administrator and finding the program in violation of multiple ordinance, states:

> Motion was made by James Elliott, seconded by Jody Latham, to deny the appeal and affirm the Zoning Administrator's decision in as much as ***the program and usage of this house*** falls under the definition of vacation rental per zoning ordinance ***Section 21-203***, as it is used for ***commercial purposes*** in that there are assigned tenancies and it's made available ***for use in exchange for valuable consideration*** for a period of less than 28 days and the use violates RS, single-family residential district Section 21-19, Section A, Intent, and Section 21-20 D, Prohibited Uses in the RS District, by ***creating a commercial use*** of this home that caters to multi-families on one lot, ***disrupts neighborhood compatibility***, and is not permitted in accordance with Article XIII, ***passed unanimously***.

(TOSI – PACASO 0048-54) (double and triple emphasis added)**;** see **(TOSI – PACASO 0357-58); (TOSI – PACASO 0296: l. 10-0297: l. 10)**.

On August 16, 2023, Appellants filed a Petition for Appeal. **(Appellants' Pet. for Appeal, filed August 16, 2023)**. Appellants also tried to get the circuit court to consider extraneous "evidence" that was not part of the appeal and was not presented to the BZA. (**Appellants' Mot. to Suppl. the R. on Appeal with Exs., filed October 26, 2023).** Appellants' Motion was accompanied with a memorandum pleading their case to add this "evidence". **(Appellants' Mem. in Supp. of Pet. for Appeal and Mot. to Suppl. the R. on Appeal, filed November 14, 2023)**. The circuit court heard oral arguments on Appellants' Petition for Appeal and Appellants' attempt to supplement the Record with extraneous evidence on November 16, 2023. **(Order filed December 6, 2023)**. The circuit court concluded there "was ample evidence in the record on appeal support[ing] the BZA's factual determination[s]", the BZA's determination was "neither arbitrary, capricious, nor an abuse of discretion", and that the BZA's ultimate decision is "supported by evidence in the record, and the BZA's application of the ordinances is reasonably related to the lawful purpose." **(Order filed December 6, 2023, at 1, 3)**. The circuit court found that admitting that evidence would neither change the outcome of the appeal nor would it be permissible under

the case law and applicable statutes. See **(Order, filed December 6, 2023, at p. 4, n. 1)**; see also S.C. Code § 6-29- 840(A); Austin v. Bd. of Zoning Appeals, 606 S.E.2d 209, 211 (Ct. App. 2004). Appellants filed a Motion to Reconsider on December 15, 2023, to which the BZA replied on December 29, 2023 **Appellants' Mot. to Recons., filed December 15, 2023)**; **(Respondents' Response to Mot. for Recons., filed December 29, 2023)**. The Appellants'' motion was denied. **(Order filed January 17, 2024)**. Appellants then filed this appeal. (**Notice of Appeal)**.

STANDARD OF REVIEW

This Court and the court below review decisions of a municipal zoning board, such as the BZA, pursuant to the same standard or review. S.C. Code § 6-29-840(A); Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals, 813 S.E.2d 874, 880 (Ct. App. 2018). The BZA's "findings of fact . . . must be treated in the same manner as a finding of fact by a jury, and the court ***may not take*** additional evidence." S.C. Code§ 6-29-840(A); Austin, 606 S.E.2d at 212 ("'the factual findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings.'") (citation omitted).

Even if this Court disagrees with the decision below, it shall "'refrain from substituting its judgment for that of the reviewing body'". Austin, 606 S.E.2d at 211 (citing Rest. Row Assocs. v. Horry Cnty., 516 S.E.2d 442, 446 (1999)); see Heilker v. Zoning Board of Appeals for the City of Beaufort, 552 S.E.2d 42, 48 (Ct. App. 2001) ("In zoning matters, this [c]ourt is obligated to apply the extremely narrow standard of review . . . . The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities."). A decision will only be overturned if it is "arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion."[5] Rest. Row, 516 S.E.2d at 446.

[5] An abuse of discretion only occurs if a trial court's decision is not supported by any evidence or

ARGUMENT

I. The circuit court correctly affirmed the BZA's decision affirming Zoning Administrator's determination that the use of the Residence pursuant to the Pacaso program violates the Town's long established zoning ordinance prohibition on Vacation Rentals.

A. The Record fully supports the circuit court's decision to affirm the BZA's final order affirming the Zoning Administrator.

Section 21-117 of the Zoning Ordinance states that "Vacation Rentals are ***prohibited uses*** on Sullivan's Island. Nothing in this Ordinance shall be construed to permit any Principal Building or other structure to be used as a Vacation Rental." (double emphasis added). Section 21-203 defines the term "Vacation Rental" to include more than just lease agreements:

> The commercial use of a Principal Building(s) that is: (1) rented, leased, **assigned for tenancies**; ***or*** (2) **made available for use, occupancy, possession, sleeping accommodations, or lodging** for one or more persons in return for **valuable consideration for any period of less than twenty-eight (28) continuous days** duration.

(TOSI – PACASO 0132) (double and triple emphasis added); see also **(TOSI – PACASO 0077)**.

The facts before the BZA and the circuit court fully support the conclusion that the Residence is being put to a "commercial use." Appellants' program includes the sale and exchange of memberships,[6] as well as ongoing fees and costs associated with the short stays a member can book using the program platform.

The commercial activity does not end with the sale of memberships—it continues in the form of monthly fees including program management fees and fees for the use of a booking app.[7]

---

is "controlled by some error of law." Ledford v. Pennsylvania Life Ins. Co., 230 S.E.2d 900, 902 (1976).

[6] Pacaso also charges a 12% fee on the initial sale of a membership. (**TOSI – PACASO 0154)**.

[7] The booking app and current payment of associated fees are the only way for a member to book a stay:

(TOSI – PACASO 0005). A member forfeits the right to use the property if the member does not pay the member's share of the monthly program fees. **(TOSI – PACASO 0005)** ("In order to be a member of good standing all fees must be paid, including the $99 monthly app fee, otherwise the member forfeits their use rights."); **(TOSI – PACASO 0236: l. 1-13)** (Counsel for Pacaso confirming that a member who does not pay the monthly fees is not allowed to use the Residence until they are current on all fees). The "no pay, no stay" aspect of the program is at the core of the use violation.

At the BZA hearing, counsel for Appellants described the various ways which Pacaso generates revenue from the activities at the Residence, almost bragging to the BZA that Pacaso is such a well-considered commercial enterprise that it has a multitude of revenue streams from the short term stays at the Residence:

> "Oh, we make money on an app. Oh, we make money for managing the property. Oh, there's a transfer exchange by that program." All of which are true.

(TOSI – PACASO 0292: l. 7-10); see also **(TOSI – PACASO 0223: l. 19-0225: l. 19)** (discussing fees from original sale, monthly fees, management fees, and fees to use the booking app).

Appellants do not dispute that specific (up to 14 day) tenancies are assigned to the members for valuable consideration through the program and the app. See **(TOSI – PACASO 0005);** see

---

> MR. SCRUGGS:. . .I just want to be clear about this app. You cannot book your seven to 14 days without the app, right?
>
> MR. APPEL: That is correct.
>
> MR. SCRUGGS: And each member, not just the LLC, each member pays $100 -- $99 a month, 800 to be -- so a total of $800 a month for the privilege of being able to be assigned a certain number of days, right?
>
> MR. APPEL: Right.

(TOSI – PACASO 0225: l. 24-0226: l. 9).

also **(TOSI – PACASO 0113); (TOSI – PACASO 0237: l. 25-0238: l. 5)** (Counsel for Appellants confirming the operating agreement precludes any stay longer than 14 days per membership). Stated differently, the Residence is made available for use, occupancy, possession, sleeping accommodations, or lodging for one or more persons in return for valuable consideration. As explained above, members may reserve a limited number of "stays" at the Residence each year. During the stay, the assigned member (or guests of the member) is allowed possession of the Residence for that short time (always less than 28 days per member stay). Accordingly, the BZA was correct in finding, that Appellants' use of the Residence involves assigning tenancies/making the Residence available for stays of less than 28 days. In fact, all of the BZA's factual determinations were based primarily on undisputed facts about the program.

Based on the facts presented and the plain language of the ordinances, the BZA correctly found the Appellants use the Residence as a Vacation Rental because Appellants put the Residence to a commercial use, and Appellant assigns specific tenancies (of less than 28 days) for those members willing to pay Pacaso. Provided the members continue to make their payments and the Residence is vacant, the Residence is available for "stays," all of which are less than twenty-eight (28) days. Therefore, this Court should affirm the circuit court order affirming the BZA's decision to deny the appeal and this Court should re-affirm the Zoning Administrator's determination that the Residence operates as an unlawful Vacation Rental.

B. Appellants' characterization of the BZA and Zoning Administrator's decisions as "legal conclusions" is wrong and inconsistent with South Carolina law.

Appellants incorrectly characterize the BZA and Zoning Administrator's decision, which the circuit court affirmed, as a "legal conclusion." **(Appellants' Br. 24)**. The decision below did not involve any statutory construction. See **(TOSI – PACASO 0131)** ("The purpose of this letter is to inform you that the stay limitation is illegal under the Town's Zoning Ordinances."); **(TOSI – PACASO 0048)** ("the program and usage of this house falls under . . . [the] Prohibited Uses in the RS District, by creating a commercial use of this home that caters to multi-families on one lot, disrupts neighborhood compatibility, and is not permitted in accordance with Article XIII, passed unanimously."); **(Order, filed December 6, 2023)**. Even Appellants admit they are in no way challenging the relevant ordinances. See **(Appellants' Mem. in Supp. of Appeal Pet., filed November 14, 2023)** (Appellants conceding that "[t]he Town banned short-term rentals over two decades ago. This appeal does not challenge the Town's Vacation Rental Ordinance"). Therefore, because there was no legal decision interpreting the ordinances, and since Appellants don't challenge the ordinances, the assertion that the decision was a legal conclusion must be rejected.

The decision by the BZA, as affirmed by the circuit court, did not concern the meaning of any ordinance or any term therein. The ordinances are not vague or unclear. In fact, the BZA hearing focused on the program, not on the meaning of any ordinance. See **(TOSI – PACASO 0192-318)** (Transcript of BZA hearing). The decision involved evaluating the facts presented to the BZA.

Only "issues involving the ***construction*** of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." Mikell v. Cnty. of Charleston, 687 S.E.2d 326, 329 (2009) (double emphasis added).

The proper distinction between factual findings and legal conclusions is apparent in Furr

v. Horry Cnty. Zoning Bd. Of Appeals. In that case, there was a dispute over whether the proposed establishment of a hospice was permitted. Furr v. Horry Cnty. Zoning Bd. Of Appeals, 767 S.E.2d 221, 225 (Ct. App. 2014). The property in that case was zoned Commercial Forest Agriculture, and Horry County's ordinances did not forbid or permit a hospice in that district. Id. The zoning administrator for Horry County determined that the hospice would be a permissible use, but this decision was appealed to the zoning board of appeals. Id. at 222. The zoning board of appeals had to determine if the proposed hospice was a nursing home or group housing, which were permitted uses, or if it was a hospital, which was an impermissible use in that zoning district. Id. at 225. This Court found that because the zoning board inquired into the "type of care, staffing, and activity that would be involved at the . . . facility along with consideration of the relevant ordinances" those were findings of fact that the circuit court should have given deference to, rather than overturning the board's findings that the relevant use that was permitted. Id.

Importantly, "[a] determination by a zoning board that a particular purpose or activity does or does not constitute a 'use' is a finding of fact." Heilker v. Zoning Bd. of Appeals for City of Beaufort, 552 S.E.2d 42, 48, (Ct. App. 2001).[8]

Appellants cite to Helicopter Sols., Inc. v. Hinde, and assert that the broad standard of review for legal conclusions should apply, rather than the deferential standard that applies to factual determinations. The Hinde case actually supports Respondents' position, because that case involved the construction of an ordinance and this appeal did not. This case involved evaluating the facts surrounding Appellants' program, not the construction of the words in any ordinance.

[8] Appellants cite to Mitchell v. City of Greenville, 770 S.E.2d 391, 392 (2015) and suggest this case should be subject to a different standard of review. **(Appellants' Br. 14)**. Mitchell is not even a zoning case. In Mitchell, the ordinance at issue related to municipal elections. See Mitchell v. City of Greenville, 770 S.E.2d 391, 392 (2015).

In Hinde, a "helicopter sight-seeing tour business" opened in Horry County. Helicopter Sols., Inc. v. Hinde, 776 S.E.2d 753, 755 (Ct. App. 2015). A county zoning ordinance allowed for "sight-seeing depots" but did not specify if helicopter sight-seeing facilities were permitted uses. Id. A zoning administrator told the proprietor that although the term "sight-seeing depot" was not defined in the ordinance, his use was permissible in the Amusement Commercial zoning district. Id. at 755-56. The zoning board reversed this decision and found that the ordinance did not permit their use. Id. at 756. The business appealed to the circuit court, who ruled in their favor, permitting their use of the premises. Id. The Court of Appeals upheld the circuit court's decision, which determined that the zoning administrator made a legal conclusion by construing a zoning ordinance. Id. at 758. The determination was considered a conclusion of law rather than a finding of fact because the reviewing parties in that case engaged in "administrative interpretation" of an undefined term to determine if the use was indeed permitted. See id. at 758.

There was no such construction of an undefined term in this appeal. As has been stated, Vacation Rental is a defined term in the ordinance. The Zoning Administrator's decision and the BZA interpreted the facts before them to determine whether the program met the definition of Vacation Rental provided in the ordinance. See **(TOSI-PACASO 0131) (TOSI-PACASO 0048-54).** That was clear to the circuit court, which explicitly stated in its order that the evidence in the record supported the BZA's factual determination. **(Order, filed December 6, 2023)** ("The Court finds that ample evidence in the record on appeal supports the BZA's factual determination that the use of the Property under the Pacaso program fits into the above definition of Vacation Rental.").

Appellants assert that words within the defined term Vacation Rental are undefined. Specifically, they point to the words "commercial," "commercial use," "assignment of tenancies"

and "in return for valuable consideration" **(Appellants' Br. 16-18)**. Appellants assert those words[9] should be given their ordinary meaning, which is correct,[10] and they were.

Ironically, after spilling much ink asserting those terms were interpreted as legal conclusions, Appellants immediately launch into a lengthy discussion of why the facts of their program don't meet the definition of Vacation Rental. **(Appellants' Br. 16-18)**. Appellants ignore, as exhaustively explained in this brief, the facts surrounding the Appellants program support the conclusions below that Appellants' program comes under the definition of Vacation Rental. It is worth nothing that there is no suggested meaning of any term, just a discussion of the facts surrounding the program and assertions those facts don't violate the Zoning Ordinance.

Appellants' are not the first property owner who has tried to recharacterize a factual decision as a legal conclusion in an attempt to avoid the deferential standard of review afforded local zoning boards. This Court should reject this strategy just as it did in Furr. See Furr, 767 S.E.2d at 224 ("The Board contends its determination . . . should be accorded deference by the circuit court. Respondents argue the Board's decision involved its interpretation of the Horry County zoning ordinances . . . constitute[ing] a question of law . . . . We find the Board's position to be persuasive.").

As noted above, Appellants don't even explain how the Zoning Administrator, BZA or circuit court allegedly misapplied the law and reached an incorrect legal conclusion. They assert that zoning ordinances must be strictly construed and that this court should review this cases as a

[9] Appellants argue whole phrases are undefined terms. The argument makes no sense. Every word and phrase in every ordinance cannot be separately defined. Further, this appeal case does not come down to the meaning of a word or a phrase, but the facts surrounding Appellants' use of the property.

[10] What Appellants never explain is what improper meaning was allegedly ascribed those words.

legal conclusion, then they ask the court to adopt their view of the facts over the BZA's. See **(Appellants' Br. 17-18).** Appellants main assertion in that section of their brief is that there are no payments per night under their program. See **(Appellants' Br. 17-18)** (discussing Appellants' position that the payments required under the program are not for the rentals, a factual termination the BZA rejected.). That is the factual argument that was rejected by the BZA. The facts are covered extensively in this brief and not repeated in full here. However, it is worth noting that the facts did include admissions by Appellants that payments are required to have the right to stay for a short period of time. Only a member who is up to date on their ongoing payments is allowed to come have a short stay in the property.

The Zoning Ordinance is explicit and there was no interpretation (by the Zoning Administrator, the BZA, or the circuit court) of the meaning of the relevant provisions of the Zoning Ordinance. See **(TOSI – PACASO 0145)**; **(TOSI – PACASO 0048-54)**; **(Order, filed December 6, 2023)**. The only decision was whether Appellants' use pursuant to the program they have established violates the plain language of the ordinances. Therefore, the case law and legislation of this state support that the decision below is a factual finding that should not be overturned because the record supports the decision of the BZA.

C. The Zoning Ordinance does not regulate ownership, it regulates use.

Appellants concede that local governments can regulate property usage. **(Appellants' Br. 20)**. The Town's enactment the Zoning Ordinance is within their enumerated powers under the South Carolina Local Government Comprehensive Planning Enabling Act (the "Act"). See S.C. Code Ann. § 6-29-710 et seq. The term "use" refers to "the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." Heilker, 552 S.E.2d at 48 (quotation omitted).

Appellants argue that the Zoning Ordinance and the BZA's decision regulates ownership, not use. See **(Appellants' Br. 20-22)**. That argument ignores the Record, which makes clear that the Zoning Administrator's decision, the BZA's decision and the circuit court's decision were based on the impermissible **use** of the Residence, not on who or what entity ***owns*** the Residence. **(TOSI – PACASO 0048)** ("the program and ***usage*** of this house falls under the definition of vacation rental per zoning ordinance Section 21-203") (double emphasis added); **(Order, filed December 6, 2023)** ("These provisions of the Zoning Ordinance regulate the ***use***, not ownership, of property, and the BZA's factual determinations that they were violated is neither arbitrary, capricious, nor an abuse discretion."). As explained above in Section I.B., no legal interpretation was involved in this decision by either the Zoning Administrator or the BZA either.

i. The Zoning Ordinance prohibits the use of the Residence as a "Vacation Rental," a defined term encompassing the Appellants' program.

Section 21-117 of the Zoning Ordinance plainly states "Vacation Rentals are prohibited uses on Sullivan's Island." **(TOSI – PACASO 0351).** The Town went on to define what constitutes a "Vacation Rental" in Section 21-203 of the Zoning Ordinance. **(TOSI – PACASO 0351)**. Nothing in the Town's ordinances or the enforcement of its ordinances has attempted to regulate the ownership of the Residence. Vacation Rentals are simply a prohibited use. See **(TOSI – PACASO 0351)** (stating that "Vacation Rentals are prohibited uses . . .").

ii. The Zoning Ordinance also regulates the use of the Residence because it is located in the RS-District.

Under state law, the Town has broad powers to enact ordinances to "guide[] development in accordance with existing and future needs of promoting . . . morals . . . order, appearance, prosperity and the general welfare." S.C. Code Ann. § 6-29-710; § 6-29-950(B) ("In case a building, structure, or land is or is proposed to be used in violation of an ordinance adopted

pursuant to this chapter, the zoning administrator or other designated administrative officer may . . . issue and serve upon a person pursuing the activity or activities a stop order requiring that entity stop all activities in violation of the zoning ordinance."). That includes regulating the use of buildings is through zoning. See S.C. Code Ann. § 6-29-720(A)(1) (providing that within each zoning district the governing body may regulate ". . . the use of buildings. . ."); see also, S.C. Code Ann. § 6-29-720(A)(3) & (7).

The Residence is located in the Town's RS-Single Family Residential District. **(TOSI – PACASO 0001)**. This type of zoning district, according to Section 21-19(A) of the Zoning Ordinance, is "designed to encourage the formation and continuance of a stable, healthy, environment for **one single family, primarily owner-occupied dwelling per lot . . .** that discourage[s] encroachment by commercial, or other uses capable of adversely affect[ing] the residential character of the district." (emphasis added). Further, Vacation Rentals are expressly prohibited in the RS district under Section 21-20(D)(6) of the Zoning Ordinance. **(TOSI – PACASO 0169-70)**.

iii. Appellants claims of disparate treatment are unsupported by the record, irrelevant and should be rejected.

In the section of their brief discussing the regulation of use v. ownership, Appellants shoehorn a highly speculative and completely unsupported claim that Appellants have been treated differently than other LLCs that own property within the Town. See **(Appellants' Br. 21)**. There are no citations to the Record and no basis for Appellants' mudslinging. Appellants made the same type of unsupported arguments at the BZA hearing. The following exchange occurred, showing Appellants have not been treated any differently and that it is the particular impermissible *use* of the Residence by Appellants that resulted in the violation:

MR. APPEL: No, no. I mean, the members of the -- there's a lot of properties that are

owned as LLCs. I would be willing to guess there's got to be hundreds out here that are owned by LLCs.

MR. SCRUGGS: Do you know of any that have a 14-day or less time limit? Any?

MR. APPEL: No.

MR. SCRUGGS: Do you know of any that charge $99 a month per LLC member for the privilege of being able to use their property?

MR. APPEL: Well, it's not --

MR. SCRUGGS: Do you know any?

MR. APPEL: No, but neither does the Town.

MR. SCRUGGS: So you're not saying that we treat some people that act like Pacaso differently from other people?

MR. APPEL: No, no. And I want to be crystal clear. This is a massive singling out of a particular property ownership entity.

MR. SCRUGGS: And that's what I'm asking. Who else -- what other LLC -- what other trust charges a fee for the app, won't let you stay in the property for more than 14 days, won't let you stay in the property unless you pay them $800 a month?

MR. APPEL: Great question. Nobody knows, because there's no ordinance that compels any property ownership in the entity in this island from producing that material to the government. If the Town wants to get into the business of requiring every LLC that owns property on the island to disclose their operating agreement and their management agreements and their agreements between their family members, we might be in a different situation.

(TOSI – PACASO 0261: l. 5-0262: l. 17) (bold added). The BZA posed similar questions to the Town's Zoning Administrator:

MR. SCRUGGS: It's been pointed out that there are LLCs that own properties, and I believe there are. And there are trusts that own properties. **Are you aware of any other LLC that limits the stay of their members to 14 days?**

MR. DRAYTON: I am not.

MR. SCRUGGS: Are you aware of any other LLCs or trusts that charge a $99-a-month fee to each member so that they can use the scheduling software?

MR. DRAYTON: No, I am not.

(TOSI – PACASO 0209: l. 8-18) (bold added). The Zoning Administrator also assured the BZA that he would pursue similar *activity* as a violation. **(TOSI – PACASO 0206: l. 13-15)** ("If that was brought to our attention . . . we would pursue that activity as a violation.").

The Appellants mistakenly argue that the regulation hinges on the type of owner rather than the use of the Residence. The decision below is clear however that both grounds decided by the BZA were determinations that the use violates the Zoning Ordinance:

> The Court finds that ample evidence in the record on appeal supports the BZA's ***factual determination that the use of the Property*** under the Pacaso program fits into the above definition of Vacation Rental. . . . Moreover, the Court notes the ***BZA made a finding that the use of the Property*** in accordance with Pacaso's program violates the regulations set forth in Section 21-19 A of the Zoning Ordinance, which apply to the RS-Single Family District. The BZA also made the ***factual determination that such use violates the express*** prohibitions against Vacation Rentals found in Section 21-20 D and Article XIII (including Section 21-117) of the Zoning Ordinance. ***These provisions of the Zoning Ordinance regulate the use, not ownership, of property***, and the BZA's factual determinations that they were violated is neither arbitrary, capricious, nor an abuse discretion. Nor is that determination incorrect as a matter of law. Rather, the factual determinations underlying the BZA's decision are supported by evidence in the record, and the BZA's application of the ordinances is reasonably related to a lawful purpose.

(Order, filed December 6, 2023, at 3) (double emphasis added). Therefore, for the reasons explained by the circuit court, the designation of Vacation Rentals as an impermissible use in the RS District is within the broad authority given to the Town by the state legislature and is enforced impartially by the Zoning Administrator, as affirmed by the BZA and circuit court.

II. The circuit court correctly affirmed BZA's determination that Appellants' use of the Residence also violates the ordinances governing the RS-Single Family District because the program and commercial activity violate those ordinances requiring the Residence to be used for residential purposes.

A. The BZA had jurisdiction to hear the appeal, and Appellants have had due process.

It was well within the BZA and circuit court's powers to hear the issues in this appeal and render its decision. Appellants argue that the BZA improperly considered Section 21-19(A) of the Zoning Ordinance, which explains the intent for the RS zoning district, because the Zoning Administrator's October 21, 2022, letter, from which the appeal was taken, does not mention that particular section. See **(Appellants' Br. 24)**; **(TOSI – PACASO 0358)**. The Appellants cite no authority that supports the proposition that the BZA cannot consider the entire Zoning Ordinance when hearing an appeal. In fact, "[t]he Board of Zoning Appeals exercises substantial power in its review of Zoning Administrators' decisions [, and f]ew restrictions encumber the scope of the Board's authority." Clear Channel, 602 S.E.2d at 79, aff'd, 372 S.C. 230, 642 S.E.2d 565 (2007).[11] The statutes governing the BZA's authority even specifically give the BZA all the powers of the administrative official and the BZA may "reverse or affirm, wholly or in part, or ***may modify*** the order, requirements, decision, or determination, and to that end, ***has all the powers of the officer from whom the appeal is taken*** and may issue or direct the issuance of a permit." S.C. Code Ann. § 6-29-800(E) (double emphasis added). The Town's Zoning Ordinance similarly recognizes the

[11] In Clear Channel, the Court overturned a circuit court decision where they overturned a decision of the zoning board. See Clear Channel, 602 S.E.2d at 79, aff'd, 372 S.C. 230, 642 S.E.2d 565 (2007). The zoning administrator in that case cited a specific passage of the zoning ordinance when denying an application for a permit. Id. On appeal to the board of zoning appeals, the board went outside this provision cited by the zoning administrator. Id. This court recognized that zoning boards have few restrictions on their powers of review and noted that the zoning board there was even granted more powers from their zoning ordinances to make decisions they felt were right based on facts in the record. Id.

BZA's wide authority: "[t]he Board of Zoning Appeals may reverse or affirm wholly or partially or may modify or reverse the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as should be made." See Section 21-177; **(TOSI – PACASO 0364)**.

In this case, the BZA affirmed the determination of the Zoning Administrator, and the BZA also added an additional affirming ground. **(TOSI – PACASO 00048)**. Appellants had a full opportunity to make their arguments to the BZA. **(TOSI – PACASO 0213: l. 21-0296: l. 1)**. The additional affirming ground was discussed at the BZA. **(TOSI – PACASO 0195: l. 6-12); (TOSI – PACASO 0198: l. 15-0202: l. 21)**; **(TOSI – PACASO 0255: l. 24-0264: l. 23)** (Opposing Counsel noting that the RS district was not referenced in the letter and the ensuing discussion at the BZA); **(TOSI – PACASO 0296: l. 10-0297: l. 10)**. In addition to asserting a lack of jurisdiction, Appellants also claim in passing that their due process rights were violated. See **(Appellants' Br. 24)**. As stated by Appellants, "[t]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008); **(Appellants' Br. 25)**.

Appellants have had many opportunities to put forth their arguments. It is very telling that when Appellants have opportunities to make their case, they have concealed potentially revenant facts and obfuscated the process. **(TOSI – PACASO 0228: l. 25-0230: l. 3)** (noting Pacaso has refused to show the BZA or Respondents their operating agreement and management agreement). Nonetheless, Appellants have had ample opportunities to be heard fully and for judicial review. This is the third appeal of this matter. There was a hearing in front of the BZA, the issue was briefed to the circuit court, the circuit court heard oral arguments on these issues, and the circuit

court denied Appellants' Motion to Reconsider.

Therefore, for all these reasons, the Court should affirm the circuit court decision.

B. <u>As an independent reason for affirming the BZA, the circuit court correctly held that BZA's decision is correct because the business model, the program and commercial activity, is incompatible with the ordinances governing the RS-Single Family District.</u>

The Residence is located in the RS-Single Family Residential District. **(TOSI – PACASO 0001)**. Section 21-19(A) of the Zoning Ordinance states that the residential district on Sullivan's Island is "to be developed and reserved for low-density purposes" that are "compatible with neighborhood character." **(TOSI – PACASO 0106)**. With respect to the regulations that apply to the RS-Single Family Residential District, Section 21-19(A) explains that they are "designed to encourage the formation and continuance of a stable, healthy, environment for one single family, primarily owner-occupied dwelling per lot," and "to discourage any encroachment by commercial, or other uses capable of adversely affecting the residential character of the district." **(TOSI – PACASO 0106)**. Consistent with the stated intent for the RS district, Section 21-20 (D)(6) of the Zoning Ordinance reiterates the Town's prohibition against Vacation Rentals, specifically in the RS-District. **(TOSI – PACASO 0110)**.

There is plenty of evidence in the Record that shows Pacaso's business model is incompatible with the single-family residential nature of the zoning district. Under the program, it is guaranteed that the Residence will <u>not</u> serve as the residence of any person or family. The Residence will be constantly turning over, as members and/or their guests arrive and depart for the short stays that are allowed by Appellants. Each turnover brings a stream of housekeeping and other services required to keep a vacation rental running and remove the traces of the last occupant. Such activity and use are not consistent with a low density single-family residential neighborhood. The circuit court should be affirmed in its finding that the BZA did not abuse its discretion in

determining based on the facts presented and the plain language of the Zoning Ordinance that Appellants' use that violates the ordinance.

C. A BZA Member's "spirit of the law" comment does not make the BZA's Final Order an abuse of discretion or an arbitrary and capricious ruling.

Appellants argue that a comment by a BZA member at the hearing about the "spirit of the law" makes the BZA's Final Order an abuse of discretion or arbitrary and capricious. **(Appellants' Br. 22)**. That contention is incorrect. The BZA decision and its Final Order were not based on the "spirit of the law" comment, which appears to have been made in reference to Section 21-19(A) of the Zoning Ordinance, which discussed the intent of the ordinance. **(TOSI – PACASO 0048);** see **(TOSI – PACASO 0106)**. That section explains that the regulations that apply to the RS district are "designed to encourage the formation and continuance of a stable, healthy, environment for one single family, primarily owner-occupied dwelling per lot," and "to discourage any encroachment by commercial, or other uses capable of adversely affecting the residential character of the district." **(TOSI – PACASO 0106)**. Accordingly, Section 21-20(D)(6) of the Zoning Ordinance specifically bans Vacation Rentals in the RS district. **(TOSI – PACASO 0110)**. A BZA member's reference to Section 21-19(A), or even just the spirit of the Zoning Ordinance, does not make the BZA's decision or Final Order an abuse of discretion or arbitrary and capricious. In fact, there are several comments wherein board members specifically state they are applying the law as it is written in the ordinances. **(TOSI – PACASO 0241: l.19-0242: l. 1); (TOSI – PACASO 0276: l. 14-0277: l. 9)** ("It's the plain language of the ordinance.")**; (TOSI – PACASO 0280: l. 7-0281: l. 2); (TOSI – PACASO 0298: l. 2-6)** ("[T]he Board of Zoning Appeals looks at the actual text of the zoning ordinance").

Therefore, for all of these reasons, the circuit court should be affirmed.

D. Appellants did not experience any procedural unfairness because the language of the Zoning Ordinance is not vague.

Appellants state the Zoning Ordinance is "void-for-vagueness" in violation of their procedural due process rights. **(Appellants' Br. 23)**. Appellants cite two general propositions from case law, but Appellants do not state how they apply to the Record on Appeal. See **(Appellants' Br. 23).** In general, "'procedural due process requires fair notice and proper standards for adjudication.'" State v. Neuman, 683 S.E.2d 268, 271 (2009) (quotation omitted). "'If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional.'" State v. Neuman, 683 S.E.2d 268, 271 (2009) (quotation omitted).

Even though it is unclear from their brief, if Appellants are claiming that Section 21-19(A) is vague or violates their procedural due process rights, this claim is incorrect. See **(TOSI – PACASO 0106)**. Much like the analysis in subsection II.C., this provision of the Zoning Ordinance describes the purpose of the RS district, while other sections explicitly prohibit Vacation Rentals. See Section 21-20(D)(6); **(TOSI – PACASO 0110).** The BZA, composed of ordinary citizens, required no specialized knowledge to unanimously agree on what the proper application of the clearly written law was to the facts presented to it. **(TOSI – PACASO 0296: l. 10-0297: l. 10);** see **(TOSI – PACASO 0276: l. 19-22); (TOSI – PACASO 0281: l.16-18).** Additionally, Article XIII outlines the specific procedures for appealing a decision to the BZA, the zoning letters cite the proper Ordinances for the appeal process, and the BZA outlined the procedure for the appeal at the outset of the hearing. **(TOSI – PACASO 0341-45); (TOSI – PACASO 0348); (TOSI – PACASO 0193: l. 16-24)**. As stated above, the BZA held a hearing where the Appellants had a chance to make their arguments, the Appellants submitted a brief to the circuit court, the Appellants participated in oral arguments on these issues in front of the circuit

court, and the Appellants submitted a Motion to Reconsider—there is no possibility in which this case could be procedurally unfair as Appellant contends.

III. The circuit court's decision to not consider an email that was outside the Certified Record did not constitute an abuse of discretion and did not otherwise violate South Carolina law. In fact, the circuit court was prohibited from considering the email as is this court.

Appellants argue that an email, dated June 9, 2022, should have been considered by the circuit court even though it was not part of the appeal and was never presented to the BZA. See **(Appellants' Br. 11)** (conceding that "[c]learly, the Zoning Administrator E-mail was not presented to the BZA."). Appellants' argument is inconsistent with South Carolina law that expressly limits what can be heard by the circuit court and *prohibits* the taking of additional evidence. The circuit court also found that if it were to consider the email, it would not change its decision to affirm the BZA. **(Order, filed December 6, 2023, at p. 4, n. 1)** ("The Court declines to consider information not included in the record on appeal, as supplemented, because it was not before the BZA, and the Circuit Court is forbidden from taking additional evidence … [e]ven if it were to be considered, the Court finds that this additional information would not provide a basis for reversing the BZA's final decision and would not change the Court's decision on the appeal.").

Having lost at the circuit court, Appellants now urge this court to impermissibly consider additional evidence on appeal. The Town's Zoning Administrator sent the email to a Town resident in response to an email from that same resident expressing concern about the Appellants' use of the Residence. The email exchange was not evidence heard before the BZA or otherwise part of the proceedings held before the BZA. Therefore, it was not made part of the Record on Appeal. Under South Carolina, the BZA is prohibited from including anything in the Record on Appeal that was not before it. See S.C. Code § 6-29-830(A) (". . . 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.").

Furthermore, the Zoning Administrator did not include the email exchange in the documents transmitted to the BZA because his email exchange with a resident was not part of the "papers constituting the record upon which the action appealed from was taken." See S.C. Code § 6-29-800(B). The action from which the Appellants took their appeal was the Zoning Administrator's decision, conveyed to the Appellants on October 21, 2022, that the Residence was being operated in violation of the Zoning Ordinance's use restrictions. See **(Appellants' Pet. for Appeal, filed Aug. 16, 2022, at ¶ 28)** ("As mentioned above, Appellants appealed to the BZA the zoning interpretations contained in the October 21, 2022, letter, and the BZA affirmed the Zoning Administrator as set forth in the BZA Order.").

Appellants ask this Court to turn the role of appellate review on its head and require appellate courts to "police the record." **(Appellants' Br. 13)**. That argument is totally at odds with our state statute precluding any additional evidence that was not before the BZA being added to the Record: ". . . the court may not take additional evidence." S.C. Code§ 6-29-840(A). It would analogous to an appellate asking this court to consider evidence that was not submitted during a jury trial. It's against South Carolina law and totally at odds with the process.

Furthermore, it is worth noting that even if it were considered by the BZA, the email is not a zoning determination, it notes that the matter is still being evaluated, and ***specifically states that Appellants are trying to circumvent the vacation rental prohibition***. Appellants do not specifically explain why the email would change the result or is evidence of the BZA acting in a reversable manner. Therefore, for those reasons, the circuit court should be affirmed.

CONCLUSION

Based on the foregoing, Respondents respectfully request this court **AFFIRM** the circuit court's orders affirming the decision of the BZA and denying and dismissing the Appellants' Appeal.

By: _____

G. Trenholm Walker (SC Bar # 5777)
John P. Linton, Jr. (SC Bar # 79130)
James W. Clement (SC Bar # 102467)
WALKER GRESSETTE & LINTON, LLC
P.O. Box 22167
Charleston, SC 29413
(843) 727-2200
walker@wglfirm.com
linton@wglfirm.com
clement@wglfirm.com

ATTORNEYS FOR RESPONDENTS

October 10, 2024
Charleston, South Carolina