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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
Honorable Bentley R. Price

Trial Court Case No. 2022-CP-10-01493

Pacaso, Inc. and 2 SC Lighthouse, LLC,

Appellants,

vs.

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.

INITIAL REPLY BRIEF OF APPELLANTS

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Appellants make the following points in reply to the Town of Sullivan's Island's brief.

ARGUMENT IN REPLY

I. The Town mischaracterizes Appellants' motion to supplement the Certified Record as an attempt to introduce new evidence. This motion was filed to ensure the Town complies with the statutes governing its obligation to compile and file the Certified Record.

Prior to the hearing before Judge Price, Appellants filed a motion to supplement the Certified Record[1] with the following e-mail from the Town's Zoning Administrator Charles Drayton (the "E-mail"):

[1] The phrase "Certified Record" is used herein to refer to the record from the BZA proceedings filed with the Circuit Court pursuant to S.C. Code Ann. § 6-29-800 (B) and S.C. Code Ann. § 6-29-830(A). S.C. Code Ann. § 6-29-800(B) provides that once a zoning administrator appeal is filed with the board of zoning appeals, "[t]he 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." S.C. Code Ann. § 6-29-830(A) requires "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" be filed as part of the official record. The phrase "Record on Appeal" is used to refer to the Record on Appeal filed with this Court pursuant to Rule 210, SCACR.

On Jun 9, 2022, at 1:49 PM, Charles Drayton < CDrayton@sullivansisland.sc.gov> wrote:

Good afternoon Mr. George,

This is certainly a concern that we are working to find the appropriate way to address, and by address, I mean eliminate. I am the point of contact for dealing with STR violations, but this occupancy structure does not fall into the category of a STR, since there is no rental contract or similar mechanism to provide for the property's use. Our legal team is working on a couple of strategies to block this circumvention of this temporary vacation use, and hopefully, one or more of those strategies will be presented to the Town Council soon. In the meantime, I think the strategies employed by the residents in Sonoma County can give some ideas for avenues where you can assist; specifically, I think that oppositional signage on adjacent properties and other activities (check out https://stoppacasonow.com/) will and do discourage potential buyers, who do not want to manifest their "vacation home" in a hostile environment, will keep Pacaso from wanting to buy future properties on the island if they can't sell their shares.

Please feel free to stay in contact with me for any updates as this moves forward.

Best regards,

Charles

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(Appellants' Motion to Supplement the Record on Appeal with Exhibits, filed October 26, 2023, Exhibit 1).

Judge Price denied this motion as moot. (Circuit Court Order Affirming the Decision of the BZA and Dismissing the Petition for Appeal, filed December 6, 2023, p. 2). In a footnote, Judge Price concluded as follows:

> 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. See S.C. Code § 6-29-840(A). Even 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.

(Circuit Court Order Affirming the Decision of the BZA and Dismissing the Petition for Appeal, filed December 6, 2023, p. 2). The Town's brief argues in support of Judge Price's decision to reject the E-mail from the Certified Record. (Respondent's Br. 30-32).

Supplementing the Certified Record with the E-mail does not constitute "taking additional evidence." Rather, the statutes governing the compilation of the Certified Record in zoning appeals required the Town to include the E-mail from the outset, as a matter of law, because it constitutes one of many "papers constituting the record upon which the action appealed from was taken." S.C. Code Ann. § 6-29-800 (B). The E-mail has always been part of the Certified Record – by operation of law. It is not "additional evidence" foreign to the appeal.

In zoning appeals, the collection and filing of the Certified Record is exclusively a local government obligation controlled by statute. S.C. Code Ann. § 6-29-800(B), governing the first level appeal from the zoning administrator to the board of zoning appeals, provides that once an appeal is filed, "[t]he 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." S.C. Code Ann. § 6-29-830(A), governing appeals from the board of zoning appeals to the circuit court, requires the government file with the circuit court "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."

Material falling within the scope of S.C. Code Ann. § 6-29-800(B) ("all the papers constituting the record upon which the action appealed from was taken") must be included, by operation of law, into the "proceedings held before the board of appeals," under S.C. Code Ann. § 6-29-830(A). If material was statutorily required to be filed with the board, then this very material must be part of the record before the board in an appeal to the circuit court. This statutory mandate

ensures the board and the appellate courts have a complete record of the material relevant to the matter on appeal.

The central issue in this appeal is whether the Zoning Administrator properly interpreted and applied the definition of "Vacation Rental" to the use of 3115 Ion Ave, Sullivan's Island, SC 29482 (TMS No. 529-12-00-095) (the "Property"). The Town's Zoning Ordinance prohibits "Vacation Rentals." The Zoning Administrator's October 21, 2022 letter (the "Zoning Administrator Letter") interprets the term "Vacation Rental" and concludes, based on this interpretation, it applies to the Property. (BZA Record, October 21, 2022 Letter from Charles Drayton, [PACASO 0358 to 0366]). Appellants appeal the Zoning Administrator's interpretation and application of "Vacation Rental."

The Zoning Administrator's Letter itself hardly constitutes the *only* material contemplated by S.C. Code Ann. § 6-29-800(B). The E-mail falls squarely within the definition of "all the papers constituting the record upon which the action appealed from was taken." E-mail contains the Zoning Administrator's original interpretation of "Vacation Rental," specifically with respect to the Property. The E-mail was sent mere months before the Zoning Administrator Letter. It clearly reflects an evolution of the Zoning Administrator's legal interpretation of "Vacation Rentals," not to mention some alarming background motivating forces and, frankly, animus towards Appellants that must be considered in this appeal.

In the E-mail, the Zoning Administrator flips the Zoning Administrator Letter on its head by making the shocking admission that **"this occupancy structure [for the Property] does not fall into the category of a STR,[2] since there is no rental contract or similar mechanism to**

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[2] "STR" is a common acronym for Short Term Rental, *i.e.* a "Vacation Rental" under the Town's ordinances.

provide for the property's use."[3] This interpretation of "Vacation Rental" mirrors Appellants' position from day one. In that sense, the E-mail serves to support Appellants' central legal argument in this case, namely, that there are not rental transactions, leases, or tenancies of any kind with respect to the "Pacaso Program."

S.C. Code Ann. § 6-29-800(B) encompasses the Zoning Administrator's entire file concerning the Property and his interpretations of "Vacation Rental," *including prior interpretations*. The E-mail is one of many "papers constituting the record upon which the action appealed from was taken." Only by including the E-mail, can the BZA and appellate courts have a full and complete record of what has transpired in this zoning dispute. The Zoning Administrator's evolving interpretation of "Vacation Rental," as reflected in the E-mail, is certainly relevant to this appeal and part of the Certified Record. The Zoning Administrator's extremely prejudicial comments about Appellants are also relevant for the reasons discussed below. Given the foregoing, the E-mail is part of the "record upon which the action appealed from was taken" pursuant to S.C. Code Ann. § 6-29-800(B) and, as such, part of the Certified Record in this appeal by operation of law.

When viewed from this perspective, Appellants' motion to supplement the Certified Record with the E-mail can hardly be portrayed as an attempt to introduce "additional evidence" on appeal. In zoning administrator appeals, the local government adverse to the appellant, has unilateral control over filing the record. This is fundamentally unlike the process for filing the Record on Appeal under the South Carolina Appellate Court Rules. This process, of course, allows

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[3] The Pacaso website provides detailed, transparent information regarding the "Pacaso Program." (BZA Record, Pacaso Website, [PACASO 0182 – 0190]). At the time the E-mail was sent, the Zoning Administrator knew or should have known the details concern the "Pacaso Program."

each party to designate matter to be included in the Record on Appeal. *See*, Rule 209, SCACR. As such, in zoning appeals it is incumbent on the appellate courts to review the record, upon motion by the appellant, to ensure material wrongfully omitted from the Certified Record is included.[4] This especially includes material prejudicial to the local government's position, which it has every incentive to omit for its own strategic purposes. Judge Price abdicated this responsibility by misperceiving Appellants' motion as an attempt to introduce "additional evidence" and ruling it moot.

This case offers an opportunity for this Court to send a strong message to local governments that the record in zoning appeals must be taken seriously. Given the favorable standard of review for local governments in these appeals, it is essential appellants, at the very least, have a complete and accurate record for review. This is not Appellants' mere policy preference – it is what S.C. Code Ann. § 6-29-800(B) and S.C. Code Ann. § 6-29-830(A) already require. Upholding Judge Price's handling of the Certified Record in this case fosters an intolerable moral hazard and condones an unfair playing field in this area of the law that greatly impacts property rights.

Judge Price committed further error by finding that consideration of the E-mail "would not provide a basis for reversing the BZA's final decision and would not change the Court's decision on the appeal." This is manifestly false and reflects an abuse of discretion on Judge Price's part.

Put simply, the E-mail is nothing short of shocking, smoking gun evidence of the Town's bad faith and politically motivated attempt to frustrate the use of the Property and Appellants' property rights in utter disregard to the definition of "Vacation Rental." Please consider the

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[4] The Court of Appeals has acknowledged, in principle, the ability for an appellant in a zoning appeal to move to supplement the Certified Record. *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 39, 606 S.E.2d 209, 214 (Ct. App. 2004).

following outrageous statements by the Zoning Administrator contained in the E-mail:

- Referring to the use of 3115 Ion Ave., which at that time he had deemed consistent with the Zoning Ordinance, he states **"we are working to find the appropriate way to address, and by address, I mean eliminate."**

- Despite acknowledging the "Vacation Rental" prohibition does not apply, he states, **"[o]ur legal team is working on a couple of strategies to block this circumvention of this temporary vacation use, and hopefully, one or more of these strategies will be presented to the Town Council soon."**

- He concludes the E-mail by offering the private citizen complaining about 3115 Ion Ave. recommendations on how to frustrate the use of the property. The Zoning Administrator suggests the deployment of **"oppositional signage on adjacent properties and other activities (check out https://stoppacasonow.com/)"** as this "**will and do[es] discourage buyers, who do not want to manifest their 'vacation home' in a hostile environment, [and] will keep Pacaso from wanting to buy future properties on the island if they can't sell their shares."**[5]

When the E-mail is considered alongside the Zoning Administrator Letter, it paints a clear and troubling picture of what transpired in this case. Put simply, the Zoning Administrator – no doubt in coordination with the Town's elected officials – admitted he was on a mission to stop the

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[5] The opposition campaign sponsored, promoted, and encouraged by the Zoning Administrator and the Town led to numerous property owners placing illegal signs in the right of way in violation of Section 21-127 of the Town's Zoning Ordinance.

use of the Property and Appellants' property rights *even though he acknowledged the use does not violate the "Vacation Rental" prohibition*. He admits the Town is working on other legal means to thwart Appellants use even though it does not violate the Zoning Ordinance **by his own admission**.

However, the Town did not end up pursuing any *other* legal means to address the use of the Property. Ultimately, the Zoning Administrator decided to flip his original interpretation of "Vacation Rental" on its head and shoehorn the use of the Property into a newfangled, tortured legal interpretation of this term based on the "assignment of tenancies … in return for valuable consideration." This forced legal interpretation, which directly contradicts the Zoning Administrator's interpretation in the E-mail, hardly constitutes a genuine, well-reasoned interpretative change. No, the E-mail proves the Zoning Administrator Letter is simply the culmination of the Town's results-oriented quest to stop Appellants' use of the Property at all costs – the law be damned. This is the textbook definition of arbitrary and capricious decision-making, and it provides this Court with the grounds – even under the favorable standard of review for local governments – to overturn the BZA Order.

The E-mail proves why the Town's interpretation of "Vacation Rental" should be overturned because it is arbitrary, capricious, has no reasonable relation to a lawful purpose, and the Town abused its discretion. *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007). For these reasons, Judge Price erred and committed his own abuse of discretion by finding the E-mail "would not provide a basis for reversing the BZA's final decision and would not change the Court's decision on the appeal."

II. This appeal centers on a challenge to the Town's tortured, arbitrary, and capricious interpretation of the term "Vacation Rental," specifically the language "assignment of tenancies … in return for valuable consideration," which is a question of law for

this Court to review de novo and the BZA's interpretation is not entitled to any deference.

The Town mischaracterizes this appeal as a challenge exclusively to the BZA's findings of fact.[6] This is simply not so. The issue in this appeal is a legal one, namely, whether the Zoning Administrator, the Town, and Judge Price properly constructed and interpreted the term "Vacation Rental" as it appears in the Zoning Ordinance. The correct legal interpretation of "Vacation Rental" is a necessary first step before the Court can determine whether the factual record supports the Town's application of the facts to the law.[7]

In determining the applicable standard of review in a zoning appeal, this Court need not make a binary choice, as the Town suggests, between whether the standard of review governing findings of fact or conclusions of law applies.[8] Both can and do often apply, especially in cases

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[6] "The decision below did not involve any statutory construction." (Respondent's Br. 6). "The decision by the BZA, as affirmed by the circuit court, did not concern the meaning of any ordinance or any term therein." *Id*.

[7] As mentioned in Appellants' brief, the facts in this case concerning the features of the "Pacaso Program" are largely undisputed. (Appellants' Br. p. 14).

[8] Town cites *Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, XXX, 552 S.E.2d 42, 48 (Ct. App. 2001) for the proposition that "[a] determination by a zoning board that a particular purpose or activity does or does not constitute a 'use' is a finding of fact." This is misleading. The issue in *Heilker* was not a dispute over the interpretation and construction of a zoning ordinance, which is the issue in this case. There, the issue was whether the storage of outdoor furniture was a "use" for purposes of qualifying as a legal nonconforming use. This Court upheld the board of zoning appeals' determination that outdoor storage was "practice" – not a "use" because this determination was found to be a finding of fact – not a legal interpretation.

This case is controlled by this Court's holding in *Helicopter Sols., Inc. v. Hinde.* There, this Court rejected an attempt to characterize the zoning administrator's use determination, specifically, a finding that "a helicopter tour facility is not a sight-seeing depot and is not consistent with the uses in the AC zoning district" as a finding of fact entitled to significant deference on appeal. 414 S.C. at 10, 776 S.E.2d at 758. The Court found that since the zoning administrator made an "administrative interpretation" of the zoning ordinance, "[w]e agree with the circuit court that **in construing the County Ordinance**, the Zoning Administrator, and subsequently, the Zoning Board, **made a legal conclusion**." *Id*. (citing *Mikell*, 386 S.C. at 158, 687 S.E.2d at 329) (emphasis added). Here, the Zoning Administrator and the BZA made a similar legal conclusion regarding the interpretation of "Vacation Rental."

such as the instant one involving – at its core – a dispute over the interpretation and application of language in the zoning ordinance. *Brooks v. Benore Logistics Sys*., 442 S.C. 462, 476, 900 S.E.2d 436, 443 (2024) ("Because this appeal presents both a question of law and a question of fact, our standard of review is necessarily bifurcated.").

"[I]ssues 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. Cty. of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009).[9] A governing body's "intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 466, 602 S.E.2d 76, 79 (Ct. App. 2004) (quoting *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843). The "determination of legislative intent is a matter of law." *Somers*, 319 S.C. at 67, 459 S.E.2d at 843. "An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers." *Id*. at 68, 459 S.E.2d at 843. "In construing ordinances, the terms used must be taken in their ordinary and popular meaning." *Id*.

This Court also recognizes a special rule of statutory interpretation in connection with zoning and land use regulations:

> 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."

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[9] The Town claims Appellants' reliance on *Mitchell v. City of Greenville*, 411 S.C. 632, 770 S.E.2d 391 (2015) is misplaced because *Mitchell* "is not even a zoning case." However, *Mikell v. Cty. of Charleston* is a zoning case, and it stands for the exact proposition as *Mitchell*, namely, "[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." *Id*. at 634, 770 S.E.2d at 392.

Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 13, 776 S.E.2d 753, 759 (Ct. App. 2015) (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.")

With the proper standard of review in focus, the analysis turns to the specific language in the Town's zoning ordinances at the heart of this dispute. Section 21-203 of the Zoning Ordinance defines "Vacation Rental" as follows:

> Vacation Rental. 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.

(BZA Record, Town Zoning Ordinance, Article XIII ("Vacation Rentals") [PACASO 0008 to 0010]). The Town baldly asserts the definition of "Vacation Rental" is neither "vague [n]or unclear." (Respondent's Br. 16). That may be the case in the context of what is commonly understood to constitute short-term rental activity, namely, the renting and leasing of residential property by its owners to members of the public, for periods less than 28 days, in return for consideration (i.e. a nightly or weekly rental rate). However, it is far from clear whether the "Vacation Rental" definition applies to the "Pacaso Program" whereby no rental transaction ever

takes place[10] and the only people allowed to use the Property are its owners and guests.[11] In fact, the "Pacaso Program" expressly prohibits short-term rentals of the Property to members of the public.[12]

The Town's legal interpretation in this case hinges on the phrase "**assigned for tenancies … for one or more persons in return for valuable consideration** for any period of less than twenty-eight (28) continuous days duration." A careful legal review of this language reveals the Town's erroneous legal interpretation.

First, there is no "assignment" of any "tenancy" involved whatsoever in the "Pacaso Program." These are terms of art with precise legal meanings. Under South Carolina common law, a "tenancy" can take various forms, including tenancy at will, tenancy for a term, and tenancy for years. *Townsend v. Singleton*, 257 S.C. 1, 183 S.E.2d 893 (1971)**;** *Tannery v. Knight*, 213 S.C. 520, 50 S.E.2d 185 (1948). All forms of "tenancy" have a common feature, namely, an owner of the property – by definition – cannot be a tenant. *Id*. These common law definitions are further supported by statutory definitions. S.C. Code Ann. § 27-33-10(3) (defining "tenant at will" as "[e]very person **other than the owner** of real estate, excepting a domestic servant and farm

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[10] None of the Property's co-owners ever pay Pacaso or anyone else money in return for any periodic use or stay at the Property as is the case with traditional short-term rentals. The co-owners each pay a monthly fee to Pacaso for property management services; **however, this fee is in no way paid for or in connection with any periodic use or stay at the Property**. (BZA Record, Pacaso Answers to Town Questions, [PACASO 0013]).

[11] The Property can only be used as a second home for Owner's members and their guests and must, at all times, maintain its exclusively residential character. (BZA Record, Pacaso Website, [PACASO 0091 – 0092, 0095, 0098]. "The only people who may use the home are owners and a limited number of their guests. Owners cannot use other Pacasos other than their own." (BZA Record, Pacaso Website, [PACASO 0098].

[12] The operating agreement **strictly prohibits short term rentals**, precludes large events or parties, and mandates quiet hours between 9 p.m. and 7 a.m. (BZA Record, Pacaso Website, [PACASO 0092, 0095, 0098, 0101].

laborer, using or occupying real estate without an agreement, either oral or in writing") (emphasis added); S.C. Code Ann. § 27-33-10(4) ("[a] person **other than the owner** using or occupying real estate under a written or oral agreement") (emphasis added); S.C. Code Ann. § 27-33-10(5) ("[a] person **other than the owner** using or occupying real estate under a written agreement for a term of one year or more") (emphasis added).

Given the legal definition of "tenancy," it simply cannot be said that the co-owners of the Property agreeing, amongst themselves, on an equitable framework for sharing their own property amounts to a "tenancy" or "assignment" of any "tenancy" whatsoever.[13] To suggest otherwise stretches the meaning of these terms past their breaking point and does violence to the special rules of statutory construction applicable in the zoning and land use context. *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. at 13, 776 S.E.2d at 759 ("the terms limiting the use of the property must be liberally construed for the benefit of the property owner.").

The correct interpretation of "assigned for tenancies … for one or more persons in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration" is revealed upon closer review of the Town's Vacation Rental ordinance itself. "It 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." *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 232 (2001).

[13] There is absolutely no evidence in the record that the "Pacaso Program" involves any leases or tenancies of any kind whatsoever. Pacaso does not dictate or assign specific times to the members, and at no time do co-owners pay Pacaso anything in return for each periodic stay. Pacaso merely assists the Property's co-owners schedule non-overlapping stays via its proprietary SmartStay technology. (BZA Record, Pacaso Answers to Town Questions, [PACASO 0012]; Pacaso Website, [PACASO 0122]). The Property's co-owners pay a $99 per month fee for use of this scheduling software, which is not paid in connection with or in return for any use or stay at the Property. (BZA Record, Pacaso Answers to Town Questions, [PACASO 0013]).

Section 21-124(A) of the Town's Zoning Ordinance reads as follows:

> It shall be a violation of these regulations to enter into a long-term lease with a mutual intent to subvert the regulatory goals of this Article. It shall be a violation of these regulations to sublease or allow the subleasing of a Principal Building for less than twenty-eight (28) days with intent to subvert the regulatory goals of this Ordinance. It shall also be a violation of these regulations for a property owner to lease space to "roommates" for a period of less than twenty-eight (28) days when not licensed as provided hereunder. For the purposes of enforcement, a reputable [sic] presumption that "roommates" are involved shall exist if the persons use a common entrance to the Principal Building.

(BZA RECORD, Town Zoning Ordinance, Article XIII ("Vacation Rentals") [PACASO 0010]). This language marries perfectly with the language "assigned for tenancies … for one or more persons in return for valuable consideration for any period of less than twenty-eight (28) continuous days duration" found in the definition of "Vacation Rentals" itself. The intent of Town Council is clear – leases and the corresponding tenancies created cannot be employed to circumvent the ban on "Vacation Rentals." It can hardly be said that the intent of Town Council was to address, with precision and specificity as South Carolina law requires, the "Pacaso Program." More to the point, it is absurd to suggest that the "assignment of tenancies" language reflects Town Council's intent to reach agreements amongst *co-owners* on how to share *their own property*, which is exactly what the "Pacaso Program" entails.

Once the correct standard of review is applied, the weakness of the Town's tortured and politically motivated interpretation of "Vacation Rental" becomes evident. No "tenancies" exist under the "Pacaso Program." There is no evidence of any tenancies in the Certified Record. The owners contracting with Pacaso to provide property management services and the use of an app to coordinate stays amongst themselves does not give rise to a "tenancy" under South Carolina law.[14]

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[14] Owner contracts with Pacaso "as a full-service property manager to reduce the hassle of second home ownership." (BZA Record, Pacaso Website, [PACASO 0090]. The Property's co-owners do not pay Pacaso anything in return for each stay at the Property. They pay Pacaso only for property management and

To suggest otherwise is absurd. As the Zoning Administrator himself acknowledged in the E-mail, the Property's "occupancy structure does not fall into the category of a STR, since there **is no rental contract or similar mechanism to provide for the property's use**." He is exactly right. The "Pacaso Program" was the same on June 9, 2022 when the E-mail was generated as it was when the Zoning Administrator Letter was issued. Nothing has changed from a legal standpoint. The bottom line is the E-mail confirms the Zoning Administrator's admission that no tenancies exist in this case. Appellants could not agree more.

The Town's erroneous legal interpretation of "Vacation Rental," specifically its reliance on the "assignment of tenancies" language must be rejected by this Court.

III. The Principal Use of the property by its owners and guests is residential – not commercial – hence there is no RS-District violation.

The Zoning Administrator Letter, upon which this appeal was originally filed, is devoid of any mention of RS-District violation. It is solely based on the Zoning Administrator's erroneous interpretation of "Vacation Rental." Apparently, sometime between the filing of this appeal to the BZA and the BZA hearing itself, counsel for the Town – no doubt recognizing the weakness of the "Vacation Rental" argument – decided to insert the RS-District violation issue into the BZA appeal as a backup plan. The strategy appears to be, if the use of the Property does not meet the definition of "Vacation Rental," the use should nevertheless be deemed an unpermitted

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scheduling coordination services, as agreed by the Property's co-owners. (BZA Record, Pacaso Answers to Town Questions, [PACASO 0013]). Pacaso assists the Property's co-owners schedule non-overlapping stays via its proprietary SmartStay technology. (BZA Record, Pacaso Answers to Town Questions, [PACASO 0012]; Pacaso Website, [PACASO 0122]). The Property's co-owners pay a $99 per month fee for use of this scheduling software, which is not paid in connection with or in return for any use or stay at the Property. (BZA Record, Pacaso Answers to Town Questions, [PACASO 0013]).

commercial use, generally, and thus a violation of the RS-District regulations.

Assuming the alleged RS-District violation was ever even properly before the BZA and thus properly before this Court, which Appellants deny,[15] it can hardly be said the use of the Property constitutes a violation under a strict reading of the RS-District regulations. As with the "Vacation Rental" analysis above, this Court must first consider the proper legal interpretation and construction of the language in RS-District regulations relied on by the Town. This analysis must proceed under special rules of statutory construction applicable in the zoning and land use context. *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. at 13, 776 S.E.2d at 759 ("the terms limiting the use of the property must be liberally construed for the benefit of the property owner.")

A close examination of the RS-District regulations reveals no express prohibition on commercial uses or activity *per se*. Instead, as it is prone to do in this case, the Town strains and twists language in the RS-District regulations to reach a politically motivated, preordained determination to put an end to Appellants' use of the Property. This is accomplished by citing to two provisions of the RS-District regulations, namely, Section 21-19(A), entitled "Intent," and Section 21-20(D)(6), which simply cross references the Town's "Vacation Rental" prohibition. Appellants arguments pertaining to the inapplicability of the latter have been addressed above and in the Appellants' brief.

It is highly unusual for local governments to rely on general language in the "Intent" section when seeking to enforce a zoning ordinance. This is no doubt due to the legal requirements that zoning ordinances be crafted clearly and specifically to be enforceable. *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

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[15] Appellants maintain the insertion of new zoning issues at the BZA hearing, which were not part of the Zoning Administrator Letter on appeal, violates due process. (Appellants' Br. pp. 23-25).

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."). The language in Section 21-19(A) that seeks to "discourage any encroachment by commercial, or other uses capable of adversely affecting the residential character of the district" is vague and unenforceable under South Carolina law. *Toussaint v. State Bd. of Medical Examiners,* 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991) ("[a] law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application.").

To the extent an enforceable commercial use prohibition can be read into the RS-District regulations, which it cannot, the undisputed facts in the record do not give rise to such a use. The Property is undeniably a single-family residence. There are no partitions for separate units so as to make the structure a duplex, triplex, or other multi-family structure. Moreover, the Principal Use of the Property is wholly residential in nature. The only users of the Property are its owners and guests. While the Town makes much of the fact that the owners and guests only spend part of the year at the Property (because they have agreed on an equitable framework for using and sharing it), that hardly morphs the Property into something other than a residence and a residential use. There are countless other properties in the RS-District in the Town that are not a single family's primary residence each day of the year. Of course, in a beach community like the Town, there are properties in the RS-District that are second or third homes or vacation homes for individuals, families, friends, or other arrangements. These are not *commercial* uses.

To the extent Section 21-19(A) purports to restrict *ownership* of RS-District zoned property to a single family's primary residence, this exceeds the Town's zoning authority because the

regulation is focused on how a property is owned – not on how it is *used*. S.C. Code Ann. § 6-29-720(A)(1) (limiting zoning regulations to "the use of buildings, structures, and land"). Such owner occupancy requirements also violate the Dormant Commerce Clause and other constitutional limitations on the regulation of private property. *Hignell-Stark v. City of New Orleans*, 46 F.4th 317 (5th Cir. 2022). Put simply, the Town lacks legal authority to require property owners in residential zoning districts be owner-occupied, primary residences, as this would unconstitutionally discriminate against out of towners or those desiring a second, non-primary residence home.[16]

Finally, certain limited commercial activity associated with the "Pacaso Program" hardly renders the "Principal Use" of the Property a commercial use. Section 21-203 of the Town's Zoning Ordinance defines "Principal Use" as "[t]he specific, primary purpose for which land or a building is used." *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 187, 813 S.E.2d 874, 883 (Ct. App. 2018) (confirming the definition of "Principal Use" under Section 21-203). As previously discussed, the Principal Use of the Property is residential. The Principal Structure is residential as well; it is a single-family home. The only people who can occupy the Property are its owners and guests. The Property is not rented or leased, on a short-term basis, to members of the public in return for money. It functions just like a shared vacation home, which is a common arrangement in the RS-District throughout the Town.

The mere fact that the "Pacaso Program" involves a property management contract between the owners and Pacaso and the use of an app to coordinate stays does not somehow convert the "Principal Use" of the Property from residential to commercial. In fact, the property

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[16] Appellants respectfully request the Court take judicial notice of the fact that there are hundreds of residential properties in the Town assessed at the 6% non-owner occupied, non-primary residence rate. Obviously, vacation homes and second (or third) homes exist throughout Sullivan's Island.

management contract and app do not even rise to the level of a "use" under South Carolina law. *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 407-10, 552 S.E.2d 42, 45-47 (Ct. App. 2001) (distinguishing between a "use" and a "practice" or "activity" in the context of zoning).

The mere fact that somebody makes money in connection with the residential use of real property does not convert the use into a commercial use. It is common in the Town for property owners to have all sorts of commercial contracts with third-parties – be it for property management or otherwise. Such common, accepted business transactions do not amount to a commercial use for zoning purposes under South Carolina law.

CONCLUSION

Appellants respectfully request the Court reverse the Order and the BZA Order. In so doing, Appellants seek an order confirming the June 9, 2022 e-mail, wherein the Zoning Administrator admits the Property is not a "Vacation Rental," shall be considered a part of the Certified Record and Record on Appeal. Appellants further seek an order reversing the Town's interpretation of "Vacation Rental" and the prohibitions in the RS-Single Family Residential District regulations as well as a finding that Appellants' use of the Property violates neither. In the alternative, Appellants respectfully request the Court order a remand to the BZA for a rehearing pursuant to S.C. Code Ann. § 6-29-840(A) (because "the certified record is insufficient for review").

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Honorable Bentley Price

Appellate Case No.: 2024-000134
Trial Court Case No. 2022-CP-10-01493

Pacaso, Inc. and 2 SC Lighthouse, LLC,

Appellants,

vs.

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.

PROOF OF SERVICE

I certify that I have served Appellants' Initial Reply Brief on all parties to this matter via email to their respective counsel of record, on 31st day of October, 2024, containing the above-referenced document as an attachment in .pdf, sent to the addresses shown below.

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