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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. MARK HAYES, II Circuit Court Judge

Spartanburg County and Cole Alverson in his Official Capacity as County Administrator.....Respondent,

v.

The Spartanburg County Board of Zoning Appeals, and Adam Washington Ballenger Camp #68, Sons of Confederate Veterans, Inc.,

Of which The Spartanburg County Board of Zoning Appeals is a Respondent and Adam Washington Ballenger Camp #68, Sons of Confederate Veterans, Inc. is the Appellant.

Appellate Case No. 2024-CP-00-000735

INITIAL REPLY BRIEF OF THE ADAM WASHINGTON BALLENGER CAMP #68, SONS OF CONFEDERATE VETERANS, INC

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JURISDICTION

"The timeliness of an appeal from a zoning board's decision is a jurisdictional requirement and, as such, may be raised at any time by either part or sua sponte by this court." *Friends of Mcleod v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544, 545 (S.C. Ct. App. 2008) (citing *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 (Ct. App.2000)). An appeal from a decision of a board of zoning appeals must be filed within thirty days. S.C. Code Ann § 6-29-820. "Additionally, Rule 74, SCRCP, recognizes that statute governs the procedure on appeal to the circuit court from the decision of inferior tribunals and states further that '[n]otice of appeal to the circuit court *must* be served on all parties within thirty (30) days after receipt of written notice' of the decision from which appeal is made." *Friends of Mcleod v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544, 545 (S.C. Ct. App. 2008) (citing Rule 74, SCRCP (emphasis added).).

The Board issued its Order overturning the Notice of Violation on February 28, 2023. Board of Zoning Appeals, Order, Feb. 28, 2023. This action was taken in Respondent's building with Respondent's attorney present. Board of Zoning Appeals, Minute Meetings Feb. 28, 2023 (listing various county staff as present including "county attorney"). The written Order was provided to Respondent's employees to file in the office of Respondent where it became a public record. S.C. Code Ann. § 6-29-800(F). Said Order was in Respondent's hand February 28, 2023, as evidenced by a letter dated same and mailed by Respondent's staff in the Spartanburg County Planning and Development Department on March 2, 2023; received by Appellant March 6, 2023. *See* Affidavit of Katharine Houston, Feb. 3, 2024. Respondent had notice of the board's decision the day it was made because it was made in front of their attorney, given to their personnel, and

recorded in their offices. Respondent filed an appeal in the circuit court on March 30th, 2023. However, Respondent did not serve Appellant until April 28, 2023; 59 days after receiving the order, 57 days after mailing it, and 53 days after receipt by Appellant. Affidavit of Jesse Jones, May 4, 2023. "This Court has consistently stated that service of Notice of Appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the Notice of Appeal must be served." *Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000). The Notice of Appeal had to be served within 30 days after receipt, and Respondent failed to accomplish this. *See Friends of Mcleod v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544, 546 (S.C. Ct. App. 2008) (finding an appeal untimely for failure to serve within thirty days). *Friends of Mcleod* is controlling, and the circuit court's order must be vacated and the order of the board of zoning appeals reinstated due to lack of jurisdiction.

Further, Respondent did not properly serve the Board of Zoning Appeals. Rather than serving the Secretary as required by Article II, Section 2 of the Spartanburg County Land Management Board of Appeals Rules of Procedure, Respondent attempted to serve the Board by serving its own County Council Clerk, Debbie Ziegler. Affidavit of Jesse Jones, May 4th, 2023. In providing for service, the enabling statute requires service to be to the board or to its secretary. *See* S.C. Code Ann. § 6-29-800 (B) ("The appeal must be [filed] with the officer from whom the appeal is taken and with the board of appeals"); S.C. Code Ann. § 6-29-830 ("the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and within thirty days from the time of the notice"). *Also See* Spartanburg County Land Management Board of Appeals Rules of Procedure, Art. II, § 2 ("An appeal shall be filed by delivery of the approved appeal form to the

secretary of the Board who shall notify the official appealed from.").

Respondent failed to correctly serve the Board of Zoning Appeals, and to date, the Board has made no appearance in this matter and has only responded to this Court after receiving a letter from the clerk of court. This failure is jurisdictional and is fatal to Respondent's appeal.

Each of these issues relates to the timeliness of Respondent to serve the notice of appeal upon the parties to the appeal. "The timeliness of an appeal from the decision of a zoning board is jurisdictional." *Friends of Mcleod v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544, 545 (S.C. Ct. App. 2008) (citing *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 (Ct. App.2000)). Jurisdictional defects cannot be waived and may be raised at any time. *Id.* Filing the notice of appeal is not enough as the appeal "*must* be served on all parties within thirty (30) days." *Id.* (citing Rule 74, SCRCP). Respondent failed to accomplish service, and therefore the order of the circuit court must be vacated and the order of the board of zoning appeals reinstated.

FACTS

Respondent inserts erroneous arguments and statements into its statement of facts. Respondent asserts that Appellant "never asked the Spartanburg County Planning and Development Department if a permit was required to erect a flagpole on the property." Respondent's Initial Brief, pp. 4, R. __. However, Appellant testified to the Board of Zoning Appeals that it "indeed did in 2019 call planning." Spartanburg Cty. Planning and Dev. Dep't, Bd. of Zoning Appeals Meeting, 19:4-5 (Jan. 31, 2023) (Hereinafter "BOZA Transcript").

Appellant further testified that it asked the clerk who answered the phone in the Planning and Development Department about erecting a flagpole on the property.

> "The clerk was able to not really help. They referenced me to a supervisor. That supervisor was speaking about the scope and course of their employment concerning the scope and course of their employment. That supervisor told me that a permit was not needed for a flagpole; I should call building."

BOZA Transcript, 20: 6-12. This phone call was in addition to a call to the Building Department where Appellant was also told by a supervisor in "the scope and course of their employment concerning the scope and course of their employment . . . that no permit was required in Spartanburg County for placing a flagpole on property." BOZA Transcript, 19: 23-25, 20:1. The Spartanburg County Building Codes Department holds itself out as "enforce[ing] regulation development practices in accordance with the S.C. Building Code and Local Land Use Regulations" and ergo is therefore an apparent department to which to apply for land use permits. https://www.spartanburgcounty.org/173/Building-Codes (last visited Jan. 10, 2025).

Appellant testified it reached out to both the Department which Respondent claims has authority, and the Department of Respondent which holds itself out as having authority. Both Departments said the same: no permit was required. BOZA Transcript 19:8 – 20:15.

The Board of Zoning Appeals, as fact finder, was required to, and did, determine the facts of the case. The Board heard evidence that Appellant asked the Planning and Development Department for a permit for a flagpole and that none existed. The Board asked the head of the Planning and Development Department if there was a flagpole permit. BOZA Transcript, 52:15-19 (Board Member Langford: "[I]s there a flagpole permit application that we can go get right now?" Planning and Development Department Head Ms. Holliday: "There is not a flagpole permit."). Ms. Holliday's answer to this direct question wholly undermines Respondent's hypothetical assertion that Appellant would have been told a permit was required had they asked.

Ms. Holliday opined about what would happen; Appellant told what happened. Having

heard this evidence, the Board was entitled, as fact finder, to make a determination about whether Appellant sought a permit. **The Board of Zoning Appeals found as a fact that Appellant asked for permits** and received the only permit identified thereby satisfying the requirements of ULMO § 1.07. BOZA Transcript, 90:23 – 91:1 (Board Member Padgett: "**Mr. Chairman, I make a motion that the [] violation notice was issued in error based on the fact that they got permission to put the [] flagpole up.**" Motion passed five to three.).

"The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." *S.C. Code Ann.* § 6-29-840(A). The circuit court's order stating, as a fact "that the landowner never inquired to the Planning Department whether or not a permit to erect its flagpole was required" or that "no development application was ever made by the landowner to the Spartanburg County Planning and Development Department prior to the erection of the 120-foot flagpole on the property" is both incorrect and a violation of the standard of review. Feb. 20, 2024, Order, "Findings of Fact", R. at ___). The fact is Appellant "got permission to put the [] flagpole up." BOZA Transcript, 90:23 – 91:1. The circuit court erred "when [it] went beyond just the mere evidence standard of review" and disregarded facts determined by the Board. Circuit Ct. App. Tr. March 27, 2024, 15:25 – 16:1.

ARGUMENTS

I. WHAT CONSTITUTES A USE AND WHAT ALTERS A USE IS A DETERMINATION OF FACT BY THE BOARD OF ZONING APPEALS, AND THE CIRCUIT COURT INCORRECTLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE BOARD OF ZONING APPEALS.

Respondent urges this Court to allow the Planning and Development Department to usurp the role of the Board of Zoning Appeals. Respondent asserts

"The Spartanburg County Planning and Development Department determined that

> the Camp had changed the use of the property, that such change required a permit from the Spartanburg County Planning and Development Department, and that the Camp had never sought such a permit from the Spartanburg County Planning and Development Department."

Respondent's Initial Brief, 6, R.___. Appellant has shown *supra* how the Board was presented with competing evidence regarding Appellant asking the Planning and Development Department for a Permit. Appellant testified it did ask for a permit and was told none was required. The Board was entitled to decide the facts regarding whether or not a permit was sought, and they decided that one was sought. BOZA Transcript, 90:23 – 91:1 (Board Member Padgett: "Mr. Chairman, I make the motion that the [] violation notice was issued in error based on the fact that they got permission to put the [] flagpole up." Motion passed five to three.)

The Board was further entitled to determine what is a use. "[I]n South Carolina, a zoning board determination regarding whether a particular activity or purpose constitutes a 'use' of property is a finding of fact." *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 411, 552 S.E.2d 42 (S.C. App. 2001). It is not the Planning Department's role to "determine[] that the Camp had changed the use of the property." Determining what is a use, and therefore what is a change of use, is the sole purview of the Board of Zoning Appeals. Just because a 'structure,' which may include pink flamingos according to this Court in *City of Aiken v. Cole*, 345 S.E.2d 760, 289 S.C. 239 (S.C. App. 1986), is added to a property does not necessarily change the use of the property. In fact, the Board was informed that pink flamingos are a structure, but the Board correctly focused on whether the use of the property changed, and if it did change, whether a permit was required. *See* BOZA Transcript 47:15-18.

The Board determined, as a fact, that the use of the property had not changed. BOZA Transcript, 48:13-14 (Board Member Brady: "the use has not changed except for the fact that you

put a [p]ole on it"), 82:15-20 (Board Member Padgett: "My point is they're not using the property. The flagpole is there. That's all that's there." Unknown Council Member: "That's right."). The determination that the use was not altered because a flagpole is merely a means of speech and does not change the land's status from vacant is entitled to the same deference as the decision of a jury.

"[T]he 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." *Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals*, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000) (internal citation omitted) (emphasis in original). This "no evidence" standard may be phrased in the positive as: "The 'findings... must be affirmed ... if there is any evidence to support them.'" *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 37, 606 S.E.2d 209, 213 (S.C. App. 2004) (discussing the appropriate standard of review). The Board heard testimony that the land was not being used, that it was vacant, and that it was closed to the public. *See* BOZA Transcript, 47:15 – 48:25. They heard evidence that there was nothing but a flagpole on the property. *See* BOZA Transcript, 23:4-10. They also heard that some uses are so *de minimis* that they do not require a permit. *See* BOZA Transcript, 58:10 – 59:12. And the Board could see for itself, discussed *infra*, that the use of a flagpole in the PZO was explicitly exempted from a permit. From this, the Board could and did determine that the placing of a flagpole, like a for-sale sign or political sign, was so *de minimis* that it did not change the use of the land, and a permit was not required. That factual determination by the Board is required to be given respect, and all conclusions by the Circuit Court determining 'facts' otherwise, are erroneous.[1]

[1] The Circuit Court observed that the "Board of Zoning Appeals [] did not file a response to the petition." However, S.C. Code Ann. § 6-29-830 requires the board "file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the

II. THE BOARD OF ZONING APPEALS FINDING THAT NO PERMIT WAS REQUIRED FOR A FLAGPOLE WAS REQUIRED BY BLACK LETTER LAW AND STATEMENTS OF THE SPARTANBURG COUNTY PLANNING AND DEVELOPMENT DEPARTMENT.

The Board of Zoning Appeals had to determine whether Appellant violated ULMO § 1.07. Section 1.07 however, like the Tenth Amendment to the Constitution, is a truism. It merely requires "all applicable and appropriate licenses, certificates and permits" to be issued before building. ULMO § 1.07. The Section does not create permit requirements, and the Board had to look elsewhere for the actual creation of a permit requirement. Rather, Section 1.07 is a catch-all.

The County cited Section 1.07 hoping to find some permit, any permit, which Appellant did not receive. In failing to cite a specific section in the Notice of Violation, the County failed to appropriately put Appellant on notice of the violation and permit which Appellant allegedly failed

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evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions." The circuit court further criticized the brevity of the Board's Order. Circuit Ct. App. Tr. March 27, 2024, 7:22-22 ("I don't want to say it was detailed.")

"The [Order] was only executed by one board member, the chairman. Accordingly, the [Order] cannot constitute the final action of the Board." *Vulcan Materials v. Greenville Cty Bd.*, 342 S.C. 480, 493, 536 S.E.2d 892 (S.C. App. 2000). The February Order of the Board is a nullity because of the way it was issued. *Id.* The Board's Minutes however are little better. The summary of the motion does not capture the actual motion, and much of the testimony presented by the Appellant is absent, truncated, or incomplete. This however is unsurprising as the staff of the Planning and Development Department, the losing side, was tasked with writing the minutes, and their attorney, the Respondent's employee, knew that the decision of the Board would be appealed by the County. Thus, the stage was set, and the cure is to look beyond the minutes into the transcript. *Id* at 494 (looking at the transcript and no other documents where material differences exist between the documents.) Indeed, the circuit court did look at the transcript, but only to find a reason not to address constitutional arguments. *See* Feb. 20, 2024, Order, "Conclusions of Law", 13, R. at___). It was an error not to look to the transcript for the full details of the decision and finding of facts of the Board of Zoning Appeals.

While it is the position of the Appellant that the Board's findings of fact, such as use, can be determined from the transcript, the circuit court ignored it. If the transcript is insufficient, the circuit court erred by inserting its own judgment rather than requiring a certified record from the Board or remanding the matter to the Board to address the insufficiency of the certified record as provided for in S.C. Code Ann. § 6-29-830.

to secure. In searching for a permit that was not acquired, Respondent turns to ULMO Section 1.13. Section 1.13, however, does not require a permit in all situations. Section 1.13 only requires a permit when "any building, structure or land be converted, wholly or in part, to any other use." Further, Section 1.13 exempts from its requirements "such uses specifically exempted by this Ordinance or meet the following conditions: Continued identical use(s) of any building or land in existence and occupied on the effective date of this ordinance."

Discussed supra, the Board is the fact finder in this case, and what is a use, and therefore what is a change of use, is a determination of fact. *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 411, 552 S.E.2d 42 (S.C. App. 2001). The Board found the use had not changed; the property was still vacant. BOZA Transcript, 82:15-20 (Board Member Padgett: "My point is they're not using the property. The flagpole is there. That's all that's there." Unknown Council Member: "That's right."). That finding of fact should not be disturbed.

Just as important, Section 1.13 exempts from permits "uses specifically exempted by this Ordinance." "This Ordinance" is the ULMO which has been supplanted, in part, by the Spartanburg County Performance Zoning Ordinance (PZO). The PZO regulates signs in Article 7, which "Article shall apply to all the unincorporated portions of Spartanburg County." PZO § 7.1.00. "[I]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Beaufort Cnty. v. S.C. State Election Comm'n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). "Under the 'last legislative expression' rule, where conflicting provisions exist, the last in point of time or order of arrangement prevails." *Ramsey v. Cnty. of McCormick*, 206 S.C. 393, 397, 412 S.E.2d 408, 410 (1991). The PZO applies county-wide to the regulations of signs, including flags, and the Board

correctly considered the text of the PZO. BOZA Transcript, 36:-5 – 37:6 (discussing when restrictions were added to the PZO regarding flagpoles.)[2]

The PZO explicitly exempts flags from permits:

7.2.10 Quick Reference Chart

All allowed or exempt signs, including flags, must meet the requirements as outlined in this Ordinance.

Sign Type	Ordinance Section Reference	Temporary	Permanent	Exempt	Not Allowed	Required Setback From Right-of-Way	Required Setback From Adjoining Property	Display Area, Height and/or Spacing Restrictions
		$ = Permit Required						
Advertising Signs	Chapter 8		✓$			10 ft.	10 ft.	✓
Audible Signs	7.5.10				✓			
Banners Within Public R/W	7.6.00	✓						
Business Signs	Chapter 7		✓$			10 ft.	10 ft.	✓
Canopy Signs	7.7.20		✓$			10 ft.	10 ft.	✓
Changeable Copy Signs	7.7.10		✓$			10 ft.	10 ft.	✓
Commercial Center Signs	7.7.10		✓$			10 ft.	10 ft.	✓
Contractor's Signs	7.6.10	✓						✓
Directory Signs	7.7.10		✓$			10 ft.	10 ft.	✓
Driveway Signs	7.7.20		✓				10 ft.	✓
Electronic Message Board	7.7.10	**	**					
Flag	7.4.00			✓				
Flashing Signs	7.7.20				✓			
Illuminated Signs	7.3.20 (d) 7.3.40 7.7.40	** ** **	** ** **					

PZO § 7.2.10 (Apr. 18, 2022). As seen in the table excerpt, "Flag" is marked as exempt, there is no "$" indicating a permit is required, and there are no other requirements. PZO § 7.4.00, "Exempt Signs," is referenced. PZO § 7.4.00 (Apr. 18, 2022).

Listed as exempt in § 7.4.00(b) is "[t]he flag or insignia of the United States or any other governmental or corporate entity, except when displayed in connection with commercial promotion." *Id*. (Apr. 18, 2022). The flag displayed is adopted by Appellant, a corporate entity,

[2] The Board discussed thoroughly, and the circuit court acknowledged, that flags are not explicitly mentioned in the ULMO. This is not surprising as the PZO has supplanted the ULMO in the regulation of signs and flags. In fact, the ULMO even refers to the PZO for signage regulations. ULMO § 3.29-3 (10) (discussing business signs). To interpret ULMO § 1.07 as it applies to signs, the Board had to look at the PZO to determine if a permit was required.

and is a flag of the Confederate States of America, a government entity now defunct. Even if the flag was clearly a flag not related to any corporate or government entity, such as a "pride" flag, the content restriction of the exemption would cause the permit requirement to fail. *See Dimmit v. City of Clearwater*, 985 F.2d 1565, 1572 (11th Cir. 1993).

Observing flags were "exempt signs" and no permit was identified in the PZO, the Board explicitly asked the head of the Planning and Development Department if there was a permit for a flagpole. Board Transcript, 52:15-19 (**Board Member Langford: "[I]s there a flagpole permit application that we can go get right now?" Planning And Development Department Head Ms. Holliday: "There is not a flagpole permit."**). The Board then determined that "[a]pparently no permit was required." BOZA Transcript, 79:5-9. (Board Member Brady).

Section 1.13 does not require a permit for "uses specifically exempted." The PZO, which supplants the ULMO for signs, specifically exempts flagpoles and placed no restrictions on height or setback. PZO §§ 7.2.10 & 7.4.00(b) (Apr. 18, 2022). The Board reviewed the PZO and specifically enquired with the Planning and Development Department at the hearing to make this determination. *See* BOZA Transcript, 36:-5 – 37:6 & 52:15-19.

Having determined there was no planning permit required for flagpoles, the Board, which also determined that Appellant did enquire about permits and did receive all identified permits, correctly concluded Section 1.07 was not violated because a necessary permit was not identified by the County. BOZA Transcript. 79:5-9 (Board Member Brady: "[I]t says no building, structure, or sign requiring a permit. Apparently, no permit was required.").

III. CONSTITUTIONAL VIOLATIONS WERE RAISED TO AND CONSIDERED BY THE BOARD OF ZONING APPEALS, AND APPELLANT, AS THE PREVAILING PARTY, WAS NOT REQUIRED TO MAKE SUPERFLOUOUS EFFORTS TO PRESERVE THOSE ALREADY-PRESERVED ISSUES.

Appellant raised multiple constitutional issues to the Board of Zoning Appeals. *See* Adam Washington Ballenger Camp #68's Appeal of Notice of Violation, Counts V -VI.[3] That document was raised in the hearing and brought to the attention of the Board. BOZA Transcript, 95:14-23 (Mr. Merting: "That appeal that you held up I actually reference back to the document sent to Mr. Davies, and that document has in there the grandfathered revision. So that is put in front of you along with a long set of other [causes]").

Further, the Board heard and considered constitutional issues several different times. Appellant presented the free speech aspect. BOZA Transcript, 85:10-19 (Mr. Jedziniak: "And we keep throwing around use. What's the use of a flagpole? The use of a flagpole is speech. If you want to put a political sign in your yard, you don't have to go down to the county office and say, "I want a Lindsey Graham sign in my yard. You get to put it up because it's free speech. All this is doing is stifling free speech. If you put a flagpole on land, it doesn't do anything except produce speech and expression which are protected by the South Carolina Constitution and the United States Constitution."). Appellant discussed with the Board the Ex Post Facto law issue and the attempt to apply a new statute to Appellant's existing flagpole. *See* BOZA Transcript, 49:7-18. Appellant presented evidence and argument that the Notice of Violation was a pre-textual action to suppress speech. *See* BOZA Transcript, 60:4-11 (discussing how the County has only requested

[3] The circuit court's decision results in several violations of the state and federal constitutions, including violations of: the First Amendment – see *Sons of Confederate v. Comm'r of VA Dept. of Motor*, 288 F.3d 610 (4th Cir. 2002); Equal Protection guarantees – see *Adarand Constructors, Inc. v. Pena*, 515 US 200 (1995); prohibition of Ex Post Facto laws – see *Weaver v. Graham*, 450 US 24 (1981), and Due Process guarantees – see, *Graham v. Connor*, 490 US 386 (1989). The decision also results in violations of the right to a jury trial under the Sixth Amendment, and to the extent the process was civil in nature, the Seventh Amendment.

the removal of the flagpole and not the light poles or other 'improvements' while ostentatiously arguing the issue is the use of the property and not the speech). Appellant acknowledged the Board wanted to focus the argument on other aspects of the Appeal, but Appellant continually raised constitutional issues even after such acknowledgment.[4] Spartanburg County Board of Zoning Appeals, '4.A. Appeal Request', Minutes of meeting January 31, 2023, at 3.

The Board chose to make its ruling, in favor of Appellant, on other grounds. *See supra* discussions on use, change of use, and no permits required. Having dismissed the Notice of Violation on factual grounds, it would have been wrong for the Board to address constitutional issues. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found the most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory

[4] Appellant observes that boards of zoning appeals are commonly described as "quasi-judicial" and are considered to have an administrative agency type function. The South Carolina Supreme Court has stated "an agency has no authority to pass on the constitutionality of a statute. *South Carolina Tax Comm'n v. South Carolina Tax Bd. Of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983). Accordingly, neither the Beaufort Board nor the State Board could have addressed the constitutional issue which was therefore properly raised for the first time in circuit court." *Bft. Co. Bd. Of Ed. v. Lighthouse Charter School*, 335 S.C. 230, 516 S.E.2d 655 (1999). The Planning Department argued this very issue stating, "the issues the Zoning Board of Appeals has jurisdiction over here are the appeal of the planning staff's issuance of a notice of violation." BOZA Transcript: 65:25 – 66:2.

Further, the enabling statute acknowledges that there are issues "beyond the subject matter jurisdiction of the board of appeals" and that those issues may be subsequently asserted in appeal. S.C. Code Ann. § 6-29-840(b). Thus, it was questionable if Appellant could even raise the constitutional issues to the Board or if it had to wait until appeal to the circuit court to do so.

construction or general law, the Court will decide only the latter.").[5]

Appellant, victorious in the tribunal below, did not have to, and frankly could not, due to the constitutional nature of the issues, return and ask for rulings on the other causes to preserve the issues. "It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." *See L'On v. Town of Mount Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000).

"[T]he 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *L'On v. Town of Mount Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000); *See also* Rule 220(c) *SCACR* ("The appellate court may affirm any [order] upon any ground(s) appearing in the Record on Appeal."). Appellant raised these issues to the circuit court, both in its filings and its briefs. The circuit court, citing that it had only a few hours previously received a timely filed brief, was hostile to Appellant's raising constitutional arguments. Despite the circuit court taking roughly three months to consider the matter and issue an order, the court refused to consider and address properly raised constitutional arguments. Circuit Ct. App. Tr. March 27, 2024, 20:7-9 ("I made the decision and said, no, I'm not going to accept this brief when we tried to have this hearing scheduled."). This is error, and this Court should address such issues if the Notice of Violation is not otherwise invalidated.

IV. THE SPARTANBURG COUNTY UNIFORM LAND MANAGEMENT ORDINANCE AND THE PERFORMANCE ZONING ORDINANCE DID NOT PROHIBIT AN

[5] The Board also chose not to rule upon Appellant's cause of action regarding grandfathering. The recent amendment to the PZO explicitly provided for "allow[ing] flags which are displayed on existing flagpoles as of today, September 27, 2022." PZO § 8.3.08 (Sept. 27, 2022). Appellant's flagpole was already existing and displaying flags and thus it should be grandfathered under the amendment. This argument too survives and is ripe to be ruled upon.

ACCESSORY USE WITHOUT A PERMIT FOR A PRINCIPAL USE.

When Appellant placed the flagpole on its property, Spartanburg County had yet to draft and introduce the September 27, 2022, Amendment to Ordinance No. O-19-29 amending the Performance Zoning Ordinance.[6] It is this Amendment, passed September 27, 2022, which added the requirement that "Flags and Flagpoles are considered an accessory activity and can only be located on a parcel which has a Principal Activity." PZO § 7.7.20 (Sept. 27, 2022). The Board took notice of this. BOZA Transcript, 36:22-25, 37:1-6. ("Mr. Gowan: I'm curious of when the date was that this was put on there – Mr. Harris: It's the same – same date as the September 27 date. Mr. Gowan: Okay. So that and the —so page 108 and pages 116 and 124, all those happened September 27? Mr. Harris: Correct."). It was this Amendment that also introduced height and location restrictions for flagpoles.

The rule against surplusage requires "to give effect, if possible, to every word [] used." *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 632 (internal quotation marks omitted); *see also Carroll v. Logan*, 735 F.3d 147, 152 (4th Cir.2013). "In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing." *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). Respondent determined it necessary to add the requirement that flags and flagpoles are an accessory and "can only be located on a parcel which has a Principal Activity." PZO § 7.7.20 (Sept. 27, 2022). For this addition to have an effect, there must not have already been a requirement for flags and flagpoles to be located only upon property having a principal activity. To hold otherwise would render this new language

[6] As discussed more fully below, government prohibition after the fact violates the prohibitions of Ex Post Facto laws contained in the United States Constitution. U.S. Const. art I, § 10, Clause 1 and art 1, § 9, Clause 3.

mere surplusage.

The Board was correct that prior to the September 27, 2022, amendment, accessory use did not require a principal use. Thus, prior to September 27, 2022, accessory use could occur on property where the principal use was none or otherwise vacant. Therefore, it was a question of fact for the Board whether the flagpole was a use and, if it was a use, whether said use changed the principal use of the property.

V. A COUNTY GOVERNMENT CANNOT APPEAL THE DECISION OF ITS BOARD OF ZONING APPEALS AND THEREFORE DOES NOT HAVE STANDING TO BRING AN APPEAL.

A board of zoning appeals is not mandatory but a voluntary creation. S.C. Code Ann. § 6-29-780. By creating the board, the governing council is delegating certain administrative decision-making authority to the board. S.C. Code Ann. § 6-29-800. The actions taken and decisions made by the board are the final administrative action of the local government. *See* S.C. Code Ann. § 6-29-820 (allowing for appeals to the courts).

Having delegated this power to the board, the governing council has made the board superior to departments from which appeals can be taken and has delegated their own authority in such matters to the board. "To allow administrative officials the right to attack the actions of their superiors, or the decisions which the officials had empowered the board of zoning appeals to make on their behalf, would defeat the purpose for which the board of zoning appeals was created." *Kasper v. Coury* 51 Ohio St.3d 185, 188, 555 N.E.2d 310, 313 (Ohio). "An important purpose of establishing the board of zoning appeals was to provide a property owner [] with an administrative review of an adverse decision[]. That purpose would be defeated if, after the property owner had prevailed in an administrative review, the city or its agents could attack or disregard such favorable

decision." *State es rel. Broadway Petroleum Corp v. City of Elyria* 247 N.E.2d 471, 475, 18 Ohio St.2d 23, 29 (Ohio).

"The weight of authority negatives the right of an administrative officer of a governmental entity, or even the governmental entity or any representative thereof, to attack or avoid the decision of an agency of such governmental entity, which is authorized to review and reverse that determination, except to the extent that legislation gives such administrative officer, the governmental entity or its representative the right to do so." *Id.* (citing a litany of cases.)

Here the Court should not recognize standing for Respondent and should instead vacate the order of the circuit court and reinstate the order of the Board. As noted supra, Respondent attempted to serve the Board by serving its own county council clerk. Respondent patently admit that it and the Board are one in the same. Surprisingly, Respondent's attorney has advised the Board in this appeal. Board of Zoning Appeals, Minute Meetings Apr. 25, 2023 (providing for an executive session with County Attorney John Harris "regarding an appeal of decision of the Board of Zoning Appeals"). In a recent letter to this Court, the Chairman of the Spartanburg County Board of Zoning Appeals revealed that the Board was advised the County would represent its interest. Letter from Jack Gowan, Chairman, Spartanburg BOZA to Catherine Harrison, Deputy Clerk South Carolina Court of Appeals, January 17, 2025. Further, the Board's ability to participate in this case is being controlled, and throttled, by Respondent. *Id.* ("we have no budget with which to secure our own counsel and would need Spartanburg County Council to approve any expenditures.").

Respondent's ability to prevent a party in opposition from appearing in court and defending itself underscores why authority does not allow a governmental entity to appeal the decision of

any agency of such governmental entity. The very fact that one party appears on both sides of the litigation questions whether or not this is truly a contested matter. This conflict is compounded by one attorney providing advice to both the County and the Board. Further, such conduct by the County imperils the independence of the administrative body which it established. *Id.* ("several members resigned following the county's actions and public statements with regard to the matter referenced in the complaint.").

The enabling statute does not explicitly give the county standing and this Court should deny standing to the county to second guess the Board of Zoning Appeals which it has empowered to be the last administrative decision maker with regard to the zoning ordinances.

CONCLUSION

Jurisdiction in Respondent's appeal fails for lack of timely service. Respondent did not serve Appellant until 59 days after receipt of notice and have yet to properly serve the Board of Zoning Appeals. Therefore, this matter was heard improperly, and the orders of the circuit court should be vacated.

If the merits are reached, Appellant should prevail. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Eagle Const. Co. v. Cty of Newberry*, 379 S.C. 564, 570, 666.S.E.2d 892, 895 (2008). The County Council addressed flags in the PZO, which applies to all of the unincorporated county, and it explicitly exempted flags from permits. PZO § 7.4.00(b) (Apr. 18, 2022). Exemption from permitting with the County Planning and Development Department for this very specific item was the intent of the Council, and thus the Notice of Violation was in error.

The Board of Zoning Appeals heard evidence and made a factual determination about several matters including: Appellant asked the Planning Department for permission to place the flagpole on the property, Appellant was told by the Planning Department no permit was required for flagpoles, the County Planning codes, including the ULMO and PZO, do not require a flagpole permit, Appellant received and complied with all identified permits, and the placing of the flagpole on the property did not change its use. All such findings are factual and should be respected by the Courts as there was ample evidence in the record to support these findings.

These findings are controlling because flagpoles were indeed contemplated by County Council, Council chose to explicitly exempt flagpoles from any permits, and flying of a flag is not a use or change of use which requires a permit, ergo no violation of ULMO § 1.07 occurred and therefore the Notice of Violation was issued in error. Appellant respectfully asks this Court to reverse the circuit court and uphold the findings and order of the Board of Zoning Appeals.

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. MARK HAYES, II Circuit Court Judge

Spartanburg County and Cole Alverson in his Official Capacity as County Administrator.....Respondent,

v.

The Spartanburg County Board of Zoning Appeals, and Adam Washington Ballenger Camp #68, Sons of Confederate Veterans, Inc.,

Of which The Spartanburg County Board of Zoning Appeals is a Respondent and Adam Washington Ballenger Camp #68, Sons of Confederate Veterans, Inc. is the Appellant.

Appellate Case No. 2024-CP-00-000735

RULE 211(B) CERTIFICATE

I certify, as counsel for Appellant in this matter, that the Reply Brief of Appellant was filed and served according to South Carolina Appellate Court Rules and that, to the extent it applies, this brief complies with Rule 211(b).

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CERTIFICATE OF FILING AND SERVICE

I certify that I have served a copy of the Appellant's Initial Reply Brief, electronically to the Court of Appeals, at ctappfilings@sccourts.org, and to the following attorneys of record for the Respondents to the following electronic addresses, on this date March 4, 2025.

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