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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

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

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STATEMENT OF THE CASE

This matter comes before the Court of Appeals on Appellant's appeal of the February 20, 2024 Order of the Circuit Court over turning the decision of the Spartanburg County Board of Zoning Appeals and the April 25, 2024 Order of the Circuit Court denying Appellant's motion to reconsider.

Spartanburg County Planning Department issued Appellant a Notice of Violation on October 21, 2022, regarding the placing of a flag and flagpole on Appellant's property. Appellant appealed the Notice of Violation to the Spartanburg County Board of Zoning Appeals. After an extensive two plus hour hearing with voluminous testimony and exhibits, the Board of

Zoning Appeals vacated the Notice of Violation. Spartanburg County appealed the Board of Zoning Appeals decision to the Circuit Court ultimately resulting in the orders which are the subject of this appeal.

STANDARD OF REVIEW

On appeal from the decision of a board of zoning appeals, "this Court is obligated to apply the extremely narrow standard of review outlined in *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct.App.2000). The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities." *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 412, 552 S.E.2d 42 (S.C. App. 2001).

"On appeal, the findings of fact by the [Zoning] Board shall be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." *Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 8-9, 776 S.E.2d 753, 757 (Ct. App. 2015) (alteration in original) (quoting *Wyndham Enters., LLC v. City of North Augusta*, 401 S.C. 144, 147, 735 S.E.2d 659, 661 (Ct. App. 2012)); *See,* S.C. Code Ann. § 6-29-840(A) (Supp. 2020) ("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.") "[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 included 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 appellate court gives 'great deference to the decisions of those charged with interpreting and applying local zoning ordinances.'" *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 91, 791 S.E.2d 305, 308 (Ct. App. 2016) (quoting *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995)).

"In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law." *Austin v. Bd. of Zoning Appeals,* 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004); *Clear Channel v. Myrtle Beach,* 642 S.E.2d 565, 567, 372 S.C. 230 (2007). "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Id.* (citing *Rest. Row Assocs. v. Horry County,* 335 S.C. 209, 216, 516 S.E.2d 442,446 (1999)).

A decision of the Board of Zoning Appeals will be overturned only "if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Furr v. Horry Cnty. Zoning Bd. Of Appeals*, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014); *Purdy v. Moise,* 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) ("[A local zoning board's] construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefore."). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (internal citations omitted). Because the Court is constrained by the evidence already admitted, it may only consider the minutes and, if the minutes are considered invalid, the Court may consider the transcript. *See, Vulcan*, 342 S.C. 480, 493–94, 536 S.E.2d 892, 899 (holding that a transcript of the hearing can constitute the final findings if

the minutes are found invalid).” A reviewing court in a zoning case may rely on uncontroverted facts which appear in the record, but not in a zoning board’s findings. *Id* 342 S.C. at 492 (citing *Stanton v. Town of Pawleys Island*, 317 S.C. 498, 455 S.E.2d 171 (1995).

FACTS

In 2019, Appellant Adam Washington Ballenger Camp #68, Sons of Confederate Veterans, Inc., (“Camp”) acquired property located at 2294 Teaberry Road, Spartanburg, South Carolina. *See*, Spartanburg County Planning and Development Department, Board of Zoning Appeals Meeting, 19:4-8 (Jan. 31, 2023) (Hereinafter “BOZA Transcript”) (R. p 242). The property was acquired for the sole purpose of exercising the Appellant’s First Amendment Right related to the Appellant’s primary purpose, preservation of South Carolina and southern heritage. After it acquired the property at issue, the Camp approached Robert Merting to assist with the legal and procedural aspects of installing a flagpole on the property. *Id.*

Merting inquired on six separate occasions as to whether Spartanburg County requires a permit to erect a flagpole. *See* BOZA Transcript, 19-23 (R. pp. 242-243). On each of these six inquiries, County representatives stated that a permit was not required for flagpole. *Id.* One of the exchanges was via email from County Building Codes Director Gregg Hembree, in which Mr. Hembree stated that “no permit is required for a flagpole.”[1] *See* BOZA Transcript, Exhibit A (R.

[1] According to the Spartanburg County Website, the mission statement of the Building Codes Department is “to ensure sound construction of new buildings, promote steady maintenance of existing structures, and enforce regulation development practices in accordance with the S.C. Building Code and Local Land Use Regulations.” The website goes on to say that “[t]his will be accomplished by expediting the permit and inspection process.” Spartanburg County, *Building Codes*, SPARTANBURG CNTY. BLD. CODES, https://www.spartanburgcounty.org/173/Building-Codes (last visited Nov. 5, 2023).

p. 184); Also *see,* BOZA Transcript 20:17-21 (R. p. 242). Merting's inquiries were made both to Spartanburg County Planning and Development and Spartanburg County Building Codes and were made to supervisors in each department. *See* BOZA Transcript, 19:10-25, 20:1-21 (R. p. 242).

During this three-year time period Merting repeatedly made efforts and inquiries with both the Spartanburg County Planning Department and Spartanburg County Building Codes, and Merting was repeatedly told no permit was required for a flagpole from those two entities.[2] Merting successfully secured several permits for the property and the proposed flagpole including a permit from the Federal Aviation Administration and a permit from South Carolina Department of Health and Environmental Control. BOZA Transcript, 20:22-25, 21:1-2 (R. p. 242). After realizing that the Camp wanted the flagpole lighted at night, Merting, along with an electrical contractor, again, went to Spartanburg County to inquire about an electrical permit for the property to light the flagpole. Once again, the Camp was told that neither a building permit nor an electrical permit were required. BOZA Transcript, 21:3-16 (R. p. 242).

Finally, after explaining to several members of the Spartanburg County Building Codes Department that the lighting to surround the flagpole was not being installed for security purposes, but rather for purposes of displaying the flag and to illuminate the flagpole, Spartanburg County issued an Electrical Permit for the property. BOZA Transcript, 22:15-22, Exhibit B (R. pp. 242, and 185). Once the electrical work was completed, Spartanburg County inspected the property and approved of the electrical work done. BOZA Transcript, 22:22-24 (R. p. 242). The flagpole was placed on the Property in July of 2022.

[2] No other entity has challenged the Camp's exercise of its First Amendment Right.

On August 6, 2022, the Camp raised the South Carolina State Flag on the property, and, for two months while the South Carolina Flag was flying atop the flagpole, the Camp, the landowner, nor any member or representative of the Camp received any pushback from Spartanburg County. *See generally*, BOZA Transcript 23:19-21 (R. p. 243). The Camp did not hide the fact that it was flying a South Carolina Flag. It cannot be genuinely argued that Petitioners Spartanburg County and Cole Alverson in his Official Capacity as County Administrator, Spartanburg County Planning Department, and, for that matter, the estimated 80,400 vehicles per day that pass the flagpole each day, were unaware of the flagpole's existence or the South Carolina Flag's adornment atop the flagpole.

Nor did the Camp hide its intentions to display a Confederate Flag atop the pole. Indeed, the Camp publicized several fundraising opportunities, including a picnic cancelled by the Spartanburg County Historical Society because of the events purpose, and the Camp even held a public flag raising ceremony. *See generally,* BOZA Transcript 23:23-25, 24:1-7, Exhibit E (R. pp. 243, and 670-674).

Once the Camp publicized in mid-August that a Confederate Battle Flag would fly atop the pole and the County learned of this intention, the County began to attempt to manufacture a pretextual reason to suppress the Camp's protected speech, in violation of the First Amendment. Spartanburg County Council amended the Spartanburg County Performance Zoning Ordinance (PZO) to limit the height of flagpoles and to prevent flagpoles from being erected without a primary structure. The amendment was accomplished in thirty-six (36) days, record time, through the use of two special meetings, one regular monthly meeting, and one executive session discussion on legal ramifications of the change. *See* Spartanburg Cnty Council Meeting Minutes,

Special Meeting, Art. IV (Aug. 22, 2022); Spartanburg Cnty Council Meeting Minutes, Exec. Session, Art. II, § D (Sept. 19, 2022); Spartanburg Cnty Council Meeting Minutes, Art. VII § M (Sept 19, 2022); Spartanburg Cnty Council Meeting Minutes, Special Meeting, Art. IX (Sept. 27, 2022). Only after amending the PZO and publishing the amended version did Spartanburg County issue the Notice of Violation under the Spartanburg County Uniform Land Management Ordinance (ULMO) in a back door attempt to apply the new height and location restrictions of the PZO to Appellant's pre-existing flagpole.

ARGUMENTS

I. THE SPARTANBURG COUNTY BOARD OF ZONING APPEALS CORRECTLY DETERMINED THAT FLAGPOLES DO NOT REQUIRE A PERMIT AND THEREFORE THE NOTICE OF VIOLATION WAS ISSUED IN ERROR.

The issue before the Board of Zoning Appeals was whether the Spartanburg County Planning and Development Notice of Violation based upon a violation of ULMO Section 1.07 – Required Permits/Certificates was issued in error. ULMO Section 1.07 – Required Permits/Certificates reads as follows:

> No building, structure or sign requiring a permit or any part thereof shall be erected, added to or structurally altered, nor shall any excavation or grading be commenced until the required permits have been issued.
>
> No building, structure or land shall be used; nor shall any building structure or land be converted, wholly or in part to any other use, until all applicable and appropriate licenses, certificates and permits have been issued certifying compliance with the requirements of this Ordinance.
>
> No permits inconsistent with the provisions of this Ordinance shall be issued unless accompanied by an approved variance.
>
> Unless elsewhere regulated, the provisions of this Section shall not apply to the necessary construction, replacement, or maintenance by a public utility of its outside plant facilities,

including such items as poles, cross arms, guys, wire, cable and drops.

Because of the plain language of the ordinance, the Board focused on whether the Camp complied with the requirements set forth in Section 1.07 during the hearing.[3] Importantly, much of the testimony and evidence presented was related to Paragraph 2 of the Ordinance, specifically the clause stating, "[n]o building, structure or land shall be used; nor shall any building structure or land be converted, wholly or in part to any other use, *until all applicable and appropriate licenses, certificates and permits have been issued*." ULMO § 1.07 (Emphasis added) (R. p. 367). Concisely stated, the Ordinance proclaims that, if a permit is required, then a permit must be obtained. The inverse of this Ordinance is equally as simple: if no permit is required, then no permit must be obtained. The Board's decision, which must be given the same weight as facts determined by a jury, was that no permit was required, and this Court may end the analysis there.

Indeed, the County reaffirmed this issue several time at the hearing. As stated by

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[3] Similar to the case in *Vulcan Materials v. Greenville Cty. Bd.*, the "Order on Appeal" issued by the Spartanburg County Board of Zoning Appeals was signed only by the Chairman, Jack Gowan. 342 S.C. 480, 492-494. 536 S.E.2d 892 (S.C. App. 2000).

> "Generally, an administrative agency, board, or commission should act as a body, and, in the absence of a statutory exception, can act officially only in or at a lawfully convened session, if the act is one requiring deliberation or the exercise of discretion or judgment. Except where authorized by statute, the powers and duties of an administrative body may not be exercised by the individual members separately."

Id. (quoting 73 C.J.S. *Public Administrative Law and Practice* § 16 at 3840385 (1983). Where the issued "order" is not properly executed, it "cannot constitute the final action of the Board." *Id.* In such case it is appropriate to look to the transcript for the evidence and findings of the Board. *Id.* 342 S.C. at 492 (giving three reasons to look past the 'order' and to the transcript: 1) there was no evidence that members of the Board voting for the decision considered or assented to the 'order', 2) the 'order' was materially different from the transcript, and 3) the transcript sets forth the decision of the Board in its entirety.)

Spartanburg County Attorney John Harris: "ultimately the board has to determine whether staff was correct in issuing the notice of violation and whether or not the applicant or the appellant, in this case, is required to get a permit." BOZA Transcript 62:6-9 (R. p. 252).

Throughout the hearing, the Board of Zoning Appeals heard ample evidence on this issue to reach their conclusion. The transcript in this case is rich with evidence, considerations, and findings by the Board. It is uncontroverted that no permit is required for a flagpole. *See*, Spartanburg County Planning and Development Department, Board of Zoning Appeals Meeting, Exhibit A (Jan. 31, 2023) (hereinafter "BOZA Transcript") (Statement by Spartanburg County Building Codes Director Gregg Hembree that "no permit is required for a flagpole.") (R. p. 184); BOZA Transcript, 52:19 (Statement by Spartanburg County Building Codes Director Joan Holliday that "[t]here is not a flagpole permit.") (R. p. 250); BOZA Transcript, 19:4 to 20:15 (testimony of land owner that the ordinances did not require a permit and that land owner spoke with supervisors in both the Planning Department and the Building Code Department who stated "in the scope and course of their employment, concerning the scope and course of their employment. . . that a permit was not needed for a flagpole.") (R. p. 242).

The Board took specific notice that no permit was required for a flagpole with Board Member Padgett, former director of the Spartanburg Building Codes, observing that every use requiring a permit is explicitly listed. BOZA Transcript, 82:2-9 (R. p. 257). Therefore, the Board of Zoning Appeals heard ample evidence directly on the issue to reach their conclusion, made a factual finding based on that evidence, and is entitled to the same deference as a jury making a factual determination. BOZA Transcript, 41:5-6 (Board Member Gowan: "I don't find where an application for a flagpole is needed.") (R. p. 247), 42:5-5 (Board Member Brady: "[T]hey were

told they didn't have to do permits, they didn't have to do anything.") (R. p. 247).

At the hearing Spartanburg County Planning and Development argued that the Camp's placing of a flagpole upon the property was a change-of-use of the property. See generally, BOZA Transcript (R. pp. 236 – 278). The Camp offered evidence contradicting and disproving that argument. The Camp established that the land is vacant since the flagpole is not a structure and is not capable of being occupied. Several of the members of the Board of Zoning appeals agreed with the Camp that the flagpole could not be occupied and acknowledged that the primary use 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") (R. p. 249), 82:15-18 (Board Member Padgett:" My point is they're not using the property. The flagpole is there. That's all that's there.") (R. p. 257). Indeed, the flagpole is a form of speech expression, no different than a for-sale sign, a boundary sign, a political sign, or any myriad of signs that, when placed on vacant land, do not change the nature of the land. The principal use of the land, that is the primary purpose for which the land is used, remains vacant land, suitable for future development. *See ULMO*, Article 6 – Definitions, Use, Principal.[4] (R. p. 464). Similar improvements of vacant land, such as fences, roads, grading and clearing do not change the use of land. Some of these actions may require permits, others do not. But the use does not change as the property is still

[4] The definition of Use, Accessory directs the reader to the definition of Building, Accessory. A building is defined as "[a]ny structure built for support, shelter, or enclosure for any occupancy or storage." *See ULMO*, Article 6 – Definitions, Use, Building. (R. p. 455). An accessory building is defined as, "[a] subordinate structure on the same lot as the principal or main building or use occupied or devoted to a use incidental to the principal use. Included in this definition are private garages, storage sheds, workshops, domestic animal shelters, pool houses, etc., when detached from the principal buildings." *See ULMO*, Article 6 – Definitions, Use, Building, Accessory. (R. p. 455). Contrary to the County's argument, a flagpole is neither contemplated in this definition of buildings nor accessory buildings as a flagpole is not "built for support, shelter, or enclosure for any occupancy or storage."

vacant.

The flagpole did not change the use of the property triggering a required permit. BOZA Transcript, 82:15-18. (R. p. 257). "[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). Findings of fact "will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the [] findings." *Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 406, 552 S.E.2d 42, 45 (S.C. App. 2001) (quoting *Sterling Dev. Co. v. Collin*s, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992) (emphasis added) (citing *Townes Assoc's, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976)). It was the Board's decision whether or not a flagpole was a 'use' and whether that 'use' required a permit. Transcript, 62:17-20 ("The issue tonight is whether or not they need a permit to change the use of the property, and whether or not the use has, in fact, changed.") (R. p. 252).

Not only did the Board hear some evidence, the Board heard a lot of evidence – two hours' worth of evidence – to conclude that the placement of a flagpole upon the property did not change the land's use and did not trigger the requirement for a permit. In fact, Spartanburg County Planning and Development admitted in the hearing that "[t]here is not a flagpole permit." Transcript, 52:15-19 (Board Member Langford: "[I]s there a flagpole permit application that we can go get right now?" Planning Department Head Ms. Holliday: "There is not a flagpole permit.") (R. p. 250). Further, the Board had and considered the Spartanburg County Performance Zoning Ordinance which regulates the placing of signs in "all the unincorporated portions of Spartanburg County." PZO § 7.1.00 (July 2022). The PZO defines flags as "a piece

of durable fabric of distinctive design that is used as a symbol or decorative feature." Id § 7.2.00. (R. p. 581). Flags are further described as an "exempt" sign not requiring a permit. Id. § 7.2.10 and 7.4.00 (R. pp. 583 and 586).

Even after considering unambiguous, black letter law that flags are exempt from permits and an admission from Spartanburg County Planning and Development that "[t]here is not a flagpole permit," the Board searched the Unified Land Management Ordinance for any regulations on flags or flagpoles.[5] BOZA Transcript 52:19 (R. p. 250). The Board found no regulations on flagpoles in the ULMO which under statutory construction of zoning laws counsels finding in the favor of the landowner. *City of Myrtle Beach v. Juel P. Corp.*, 543 S.E.2d 538, 344 S.C. 43 (S.C. 2001) (citing *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953) ("[O]rdinances 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.").

The Board simply was persuaded by the weight of the evidence, of which there is plenty, and confirmed that the ULMO does not require permits for flagpoles. Since permits are not required for a flagpole, no permit was required, applicable, or appropriate. This is underscored by the fact that the County repeatedly told the Camp no permit was required for the flagpole. Therefore, the Board concluded that the Camp had effectively received permission to place the pole on the property. BOZA Transcript, 90:23 – 91:1 (Board Member Padgett: "**Mr. Chairman, I make motion that the [] violation notice was issued in error based on the fact that they got**

[5] This evidences the discriminatory reason behind the County's efforts to prohibit the Camp's speech.

permission to put the [] flagpole up." Motion passed five to three.) (R. pp. 259-260).

Because ULMO §1.07 did not require the Camp to obtain a flagpole permit –a permit that does not exist – the only way the Camp could violate §1.07 is if the County changed its position and took the position that some permit was required. The only required permit identified by either the County or the Camp was a permit for electrical work, which Spartanburg County Building Codes (SCBC) issued. SCBC inspected the completed work and signed off on it.

The Board correctly observed that all the required, applicable, and appropriate permits were obtained by the Camp, and, therefore, correctly concluded the Notice of Violation was issued in error **because the Camp had "permission to put the [] flagpole up."** BOZA Transcript, 90:23-91:1 (Motion Carried.) (R. pp. 259-260). Because the decision was supported by ample evidence, the low "any evidence" threshold is satisfied. There is no evidence that the Board's decision was arbitrary, capricious, or an abuse of discretion. With all the evidence offered by the Camp, much of it undisputed, it would have been hard for the Board to come to any other conclusion. The Board of Zoning Appeals decision must be upheld in order to comply with *Heilker, Sterling Dev. Co*. and the body of case law which requires the Board's findings to be given the same weight as a jury verdict.

II. THE CIRCUIT COURT ERRED FAILING TO GIVE DEFERENCE TO FINDINGS OF THE BOARD OF ZONING APPEALS BASED ON THE EVIDENCE BEFORE THE BOARD AND THUS SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE BOARD'S.

The standard of review for the Circuit Court, as a court of appeal in this matter, is clear: "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. . . [T]he court must determine only whether the decision of the board is correct as a matter of law." S.C. Code Ann. § 6-29-840(A) (Supp. 2020).

The Circuit Court however failed to follow this straightforward standard. First, the Circuit Court disregarded evidence presented to the Board of Zoning Appeals.[6] The Circuit Court alleges that it was "determined that no development application was ever made" for the flagpole. Order Feb. 20, 2024, 3 (R. p. 5). It bases this conclusion in part on a claim from the Spartanburg County Planning Department "that the landowner never inquired to the Planning Department whether or not a permit to erect its flagpole was required." Id., 5 (R. p. 7). However, the landowner testified that it had indeed asked the Spartanburg County Planning Department about a permit for the flagpole and was told by a supervisor "speaking in the scope and course of their employment concerning the scope and course of their employment . . . that a permit was not needed for a flagpole." BOZA Transcript, 20:7-11 (R. p. 242). The Circuit Court makes no mention of the alternative testimony heard by the Board of Zoning Appeals and completely disregards this critical evidence considered by the Board of Zoning Appeals.

Second, the Circuit Court disregarded the decision made by the Board of Zoning Appeals in evaluating the evidence and deciding what the facts were. It was a contested fact at the hearing whether or not the landowner has approached the Spartanburg County Planning Department and requested permission. The Board heard testimony from both sides on whether or not Appellant, that is the landowner, had sought and received permission to place a flagpole on

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[6] The Circuit Court acknowledged that it was a "factual determination[] that there is no requirement for a permit" but then failed to even mention this in either order. Circuit Ct. App. Tr. Nov. 27th 14:20-24 (R. p. 292, lines 20-24).

the property. After hearing all of the evidence over two hours, **the Board of Zoning Appeals concluded that Appellant had received permission to place the flagpole on the property**. BOZA Transcript, 90:23-91:1 (Motion Carried: the Camp had "permission to put the [] flagpole up.") (R. pp. 259-260). Instead of deferring to the factual decisions made by the Board of Zoning Appeals, the Circuit Court reaches the opposite decision and presents it as a fact.

Third, the Circuit Court fails to consider all of the relevant law in its application. The Circuit Court completely disregards the Performance Zoning Ordinance; a copy of which was handed up to it at hearing. The PZO applies countywide to signs. PZO, Section 7.1 (Apr. 18, 2022) ("This Article shall apply to all the unincorporated portions of Spartanburg County.") (R. p. 580). The Board of Zoning Appeals reviewed the PZO and noted that flagpole height restrictions cited by the County did not appear in the PZO at the time of the actions in question. BOZA Transcript, 36:5 – 37:6 (discussing when restrictions were added to the PZO regarding flagpoles.) (R. p. 246). At the time of the action in question, the PZO did not restrict the height of flagpoles, and *it explicitly stated flagpoles were exempt from the regulations of Spartanburg County Planning*. PZO § 7.2.10 (R. p. 583). For clarity, the Board of Zoning Appeals explicitly asked Spartanburg County Planning Department if there was a permit required for flagpoles and was told there was no such permit. BOZA Transcript*,* 52:19 (Joan Holliday, Director of the Planning Department:. "There is not a flagpole permit.*"*) (R. p. 250).

The Circuit Court builds upon this triumvirate of error to reach a conclusion that disregards the determination of facts from the evidence presented to the Board of Zoning Appeals and then fails to apply the critical section of Spartanburg Planning law which actually governs the action in question. The Circuit Court starts by assuming non-compliance with

Section 1.07 of the ULMO, and stating that obtaining an electrical permit does not excuse this non-compliance. Order Feb. 20, 2024, 8-9 (R. pp. 10-11). Starting with its conclusion, the Circuit Court fails to appreciate the Board of Zoning Appeals reasoning and decision. There are only two items on the property in question: 1) electrical work, and 2) a flagpole. Section 1.07 of the ULMO only requires permits if permits are required. ULMO Section 1.07 ("No building, structure or land shall be used . . . until all **applicable** . . . permits have been issued.") (emphasis added) (R. p. 367). ULMO Section 1.07 is not a permit requirement on its own. Therefore, the Board of Zoning Appeals looked to determine what permits were required. Knowing that an electrical permit was required, and was applied for and received, the Board determined that this requirement was not violated. Next the Board of Zoning Appeals looked for permit requirements for a flagpole. It found no such permit existed. PZO Section 7.2.10 (exempting flagpoles from permits) (R. p. 583); BOZA Transcript, 52:19 (Joan Holliday, Director of the Planning Department:. "There is not a flagpole permit.") (R. p. 250).

The Board of Zoning Appeals, finding that there was no permit to be had for a flagpole, and that the only required permit, an electrical permit, had been issued, determined that ULMO Section 1.07 was satisfied because there was no missing permit. The Circuit Court fails to address uncontroverted statements that no permit was needed for a flagpole, disregards the determination of facts by the Board pertaining to the seeking of permission to put the flagpole on the property, and fails to consider the exemption for flagpoles in the PZO.

The Circuit Court may claim to have used the correct standard, but in fact it has used the much more relaxed standard of review for appeals from magistrate court which allow for

overturning the findings of fact.[7] The standard of review in a Board of Zoning Appeals does not allow for this, and the Board of Zoning Appeals determination that the Appellant had indeed applied for a permit, had been told no permit existed, and thus had "permission to put the [] flagpole up" should be upheld. BOZA Transcript, 90:23-91:1 (R. pp. 259-260).

III. THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER AND GIVE WEIGHT TO ALL OF THE EVIDENCE BEFORE THE BOARD OF ZONING APPEALS WHICH SUPPORTS THE BOARD'S DECISION.

"On appeal, 'the findings of fact by the [Zoning] Board shall be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence.'" *See Helicopter Sols., Inc. v. Hinde*, 414 S.C. 1, 8-9, 776 S.E.2d 753, 757 (Ct. App. 2015) (alteration in original) (quoting *Wyndham Enters., LLC v. City of North Augusta*, 401 S.C. 144, 147, 735 S.E.2d 659, 661 (Ct. App. 2012)); s*ee also* S.C. Code Ann. § 6-29-840(A) (Supp. 2020) ("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."). A decision of the Board of Zoning Appeals will be overturned only "if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Furr v. Horry Cnty. Zoning Bd. Of Appeals*, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014).

Importantly, "[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 included in original). This "no evidence"

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[7] The Circuit Court practically acknowledges that it failed to use the correct standard. Appellant's Mot. To Recons. Tr. Mar 27th, 2024, 15:25-16:1 ("I went beyond just the mere evidence standard of review.") (R. pp. 332, line 25 – 333, line 1).

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).

While it is generally true that the Court may only consider the evidence already admitted and the minutes created by the Board, if the minutes are considered invalid, the Court may consider the transcript. *See Vulcan*, 342 S.C. 480, 493–94, 536 S.E.2d 892, 899 (holding that a transcript of the hearing can constitute the final findings if the minutes are found invalid).

In its appeal, Spartanburg County attached, as Exhibit B, the Board of Zoning Appeals "Order on Appeal." This document, which the Court relies upon for disrupting the Board's decision, is *not* the minutes recorded and approved by the Board of Zoning Appeals. It is not the 'findings of fact and conclusions' which the Circuit Court is supposed to depend upon. The Board of Zoning Appeals should have made a complete return to the Circuit Court which would have included the transcript and the findings of facts and conclusions. S.C. Code Ann. § 6-29-830(A) ("[W]ithin thirty days from the time of the notice, the board must file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions."). However, the Board of Zoning Appeals failed to do this and the Circuit Court is well aware of this as it notes that Board of Zoning Appeals has completely failed to answer this suit. Order Feb. 20, 2024, Fn. 1 (R. p. 3, Fn. 1).

Knowing that critical documents are missing, the Circuit Court should have required the Board of Zoning to respond. Instead, the Circuit Court proceeded using only a two-page order. See Appellant's Mot. To Recons. Tr. Mar. 27th, 2024, 9:22-23 (Court admitting the order was not

detailed) (R. p. 326, lines 22-23). This was error, and the Circuit Court should have used the transcript when the minutes were absent.[8] *See, Vulcan*, 342 S.C. 480, 493–94, 536 S.E.2d 892, 899 (holding that a transcript of the hearing can constitute the final findings where proper minutes are not available).

Relying on the transcript and the exhibits and attachments thereto, the Circuit Court Orders clearly go against the weight of the evidence received and considered by the Board, and there is *ample* evidence to support the Board's findings – much more than the "any" evidence standard. *See Austin v. Board of Zoning Appeals*, 362 S.C. 29, 37, 606 S.E.2d 209, 213 (S.C. App. 2004) ("The findings... must be affirmed ... if there is any evidence to support them."). *See Supra* Section I.

The Board of Zoning Appeals heard countless evidence that no permit was required, including an email from and a conversation with Spartanburg County Building Codes Director, Gregg Hembree, stating "[n]o permit is required for a flagpole." Transcript, Exhibit A (R. p. 184). Appellant testified that a supervisor in the Planning Department had directly told Appellant there was no permit required for a flagpole. Transcript, 20:4-12 (R. p. 242). Indeed, when asked directly whether there was an application for a flagpole permit, the Director of the Planning Department, Joan Holliday, concisely stated that "[t]here is not a flagpole permit*."* BOZA Transcript*,* 52:19 (R. p. 250). Simply put, the Board had ample evidence to support their decision that, because Appellant sought a permit, Appellant was told repeatedly no permit was needed,

[8] The Board of Zoning Appeals did produce minutes which give a more in-depth analysis of the arguments by both sides and the evidence presented to the Board. However, the Minutes were not before the Circuit Court, because the Respondent failed to produce the Minutes created and approved by the Board. Respondent did produce the BOZA Transcript, and therefore Respondent must solely rely upon the transcript of the hearing as allowed by *Vulcan Materials*.

other necessary permits, including an electrical permit and FAA permit were obtained, no permit was in fact needed, and thus the Notice of Violation was issued in error because Appellant had permission to put the flagpole up. BOZA Transcript, 90:23-91:1 (Motion Carried.) (R. pp. 259-260).

IV. THE ONLY VIOLATION BROUGHT AGAINST THE CAMP WAS A VIOLATION OF ULMO SECTION 1.07, AND ULMO SECTION 1.13 WAS NOT PROPERLY RAISED BY THE COUNTY.

Spartanburg County raised, for the first time on appeal, a violation ULMO § 1.13.[9] The only Notice of Violation issued to the property owners was violation of "ULMO Section 1.07 – Required Permits/Certificates." Again, the sole issue before the Spartanburg County Board of Zoning Appeals was whether the Spartanburg County Planning and Development Notice of Violation based upon a violation of ULMO Section 1.07 – Required Permits/Certificates was issued in error. Therefore, the only violation before the Circuit Court was whether the Spartanburg County Board of Zoning Appeals erred in finding that the Spartanburg County Planning and Development Notice of Violation based upon a violation of ULMO Section 1.07 – Required Permits/Certificates was issued in error. The County's assertion that the Camp violated Section 1.13 of the ULMO, raised for the first time on Appeal, should not be considered by the Circuit Court because it was not preserved for appellate review.

The County chose the grounds upon which it issued its Notice of Violation, the County chose the grounds upon which it argued at the Board of Zoning Appeals hearing, and the County chose

[9] The only mention of ULMO Section 1.13 by Spartanburg County came on page 73 of the BOZA Transcript (R. p. 255), in which Joan Holliday responded to an allegation that a minor improvement on land does not change the use of the land. Holliday did not allege the Planning Department also issued a Notice of Violation in violation of Section 1.13 of the ULMO and failed to raise the issue at the hearing.

to cite only a violation of ULMO Section 1.07. Having failed to cite Section 1.13 of the ULMO in the Notice of Violation, the Respondent cannot raise it and the Circuit Court erred in depending upon this line of argument.

Despite raising a new ground for violation, even if, *arguendo,* ULMO Section 1.13 did apply, ULMO Section 1.13 does not prohibit flagpoles. Section 1.13 explicitly acknowledges that some uses are "specifically exempted by this Ordinance.". *Id.* (R. p. 368). As discussed at length in the Board of Zoning Appeals hearing and the hearing before this Court, the PZO, Spartanburg County's new land use ordinance, amends and supersedes the ULMO as it applies to signs and flags, and the PZO specifically exempts the erection of flags. PZO, Section 7.1 (Apr. 18, 2022) ("This Article shall apply to all the unincorporated portions of Spartanburg County.") (R. p. 580); Section 7.2.10 (Noting that flags are "exempt signs" and explicitly providing no "height, size, or set back requirements.) (R. p. 583). If two statutes or ordinances are incapable of being reconciled, "the last statute passed will prevail, so as to impliedly repeal the earlier statute to the extent of the repugnancy." *Chris J. Yahnis Coastal*, *Inc. v. Stroh Brewery Co.*, 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988). Therefore, the last legislative expression rule applies. "Under the 'last legislative expression' rule, where conflicting provisions exists, 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). This rule "requires that in instances where it is not possible to harmonize two sections of a statute, the later legislation supersedes the earlier enactment." *Williams v. Town of Hilton Head Island, S.C.*, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993).

In this case, Spartanburg County has competing zoning ordinances. The ULMO, which was last amended in March of 2022, and the PZO, which was passed and put into effect in

January of 2020, as amended in April of 2022. The ULMO is silent on the issue of whether a flagpole requires a permit. The PZO, on the other hand, is clear that a flagpole is exempt from requiring a permit. As discussed, the PZO defines flags as "a piece of durable fabric of distinctive design that is used as a symbol or decorative feature." Id § 7.2.00 (R. p. 581). Flags are further described as an "exempt" sign not requiring a permit. Id. § 7.2.10 and 7.4.00 (R. pp. 583 and 586). Therefore, even if § 1.13 of the ULMO was applicable, given the last legislative expression rule, a flagpole would still be an exempt purpose and not require a permit. This gives a clear insight into legislative intent on the issue.[10] It is also the legal requirement that there is no planning department permit for flagpoles. *See* BOZA Transcript, 52:19, 19:4 to 20:15, Exhibit A (R. pp. 250, 242, and 184).

The Board's findings are supported by the multiple statements made by the County and County employees and agents acting in the scope and course of County employment. Both before and during the hearing, the County repeatedly stated and confirmed there is no permit required for a flagpole. *Id.* No permits are required for many other routine signs, such as political signs, incidental signs, real estate signs, and the like, and the County's interpretation of ULMO § 1.13, and the Order of the Circuit Court, leads to absurd results, namely, requiring of permits that do not exist for actions that are explicitly exempt from permits.

It is not contrary to any established readings, the Board was well within its discretion to determine that a flagpole is a use which is exempted from ULMO § 1.13, and the Board's decision regarding use is a finding of fact, entitled to the same deference as a jury verdict. *See, Heilker v. Zoning Bd. of Appeals*, 346 S.C. 401, 411, 552 S.E.2d 42 (S.C. App. 2001) (holding

[10] This is also further evidence and facts considered by the Board supporting its ruling that a permit was not required for the placing of the flagpole.

that findings of fact "will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the [] findings" and that "a zoning board determination regarding whether a particular activity or purpose constitutes a 'use' of property is a finding of fact").

V. THE CIRCUIT COURT IGNORED PROPERLY PRESERVED ARGUMENTS RELATED TO RESPONDENT'S VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS.

Appellant properly articulated to the Circuit Court that Respondent violated their Constitutional Rights. The issue was raised in Appellant's sixth defense to the appeal and again by brief filed before the hearing on appeal. Further, Appellant was the prevailing party – the winner in the BOZA Hearing where original arguments were made and facts decided. Therefore, "the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." *L'On v. Town of Mount Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Therefore, Appellant does not have to preserve issues for appeal. This is not a cross appeal. Indeed, "[i]t 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 id.* at 420-421,723. Further, it would be improper for a court to unnecessarily rule on constitutional questions. *See Arnold v. Ass'n of Citadel Men*, 337 S.C. 265, 275, 523 S.E.2d 757, 762 (1999) ("This Court will decline to rule on constitutional questions unless the determination is essential to the disposition of a case." (citing *Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 126 S.E.2d 15 (1962))); cf. *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 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 construction or general law, the Court will decide only the latter.").

Appellant, in responding to Spartanburg County's appeal, is allowed to advance any and all arguments made to the BOZA tribunal either in writing or in argument. The Circuit Court (and this Court), as the Court with appellate jurisdiction, certainly can hear arguments advanced by Appellant to the lower tribunal and may even consider additional arguments under *L'On*.[11] Appellant raised multiple Constitutional issues in its Appeal of Notice Violation, including Count V and Count VI, the Board of Zoning Appeals heard and discussed constitutional issues, Appellant raised Constitutional issues in its response to Respondent's Petition for Appeal including incorporation of the transcript as an exhibit and Respondent's Sixth Defense, and Appellant thoroughly briefed the issues in its Brief and offered to discuss the same in the Circuit Court Appeal hearing. The Circuit Court however refused to consider the Brief. Appellants Mot. To Recons. Tr. Mar 27th, 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.") (R. p. 337, lines 7-9).

Despite raising the issues at every step and the established law, the Circuit Court's Order declined to consider the Free Speech and Constitutional issues arguing Appellant waived and/or

[11] Specifically, for Appellant to abandon the issue on appeal, he must have "fail[ed] to raise it in the appellate brief." *L'On*, 338 S.C. at 420, 526 S.E.2d 723. Appellant submitted a Brief on the issues. However, the Circuit Court refused to consider it despite its timely filing prior to the hearing.

failed to properly preserve the issues. Circuit Ct. App. Tr. Nov. 27th, 2023, 9:11-12, 12:17-20 (R. pp. 287, lines 11-12, and 290, lines 17-20). However, this assertion is directly at odds with established caselaw, the hearing's transcript, and the pleadings and brief filed in this action.

A cursory review of pleadings, filings, and the Board of Zoning Appeals transcript reveals the Circuit Court's ruling is contradictory with the record and arguments advanced by Respondent at the Board of Zoning Appeals hearing. The Circuit Court's Order fails to acknowledge the Constitutional issues raised in Appellant's Appeal of Notice of Violation, including Count V and Count VI, the Board of Zoning Appeals Transcript, which extensively discuses constitutional issues, and Appellant's Response to Respondent's Petition for Appeal, including the incorporation of the transcript into the Response, its attachment as Exhibit A, Appellant's Sixth Defense, and Appellant's Brief. Appellant attempted to raise Constitutional arguments previously advanced at the Board of Zoning Appeals hearing. Nonetheless, the Circuit Court refused to allow the arguments to proceed because of the filing of a brief hours before the hearing.[12]

Even if, *arguendo*, Constitutional issues were somehow not preserved, our Supreme Court has consistently maintained, issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 323, 730 S.E.2d 282, 285 (2012). The Supreme Court has explained: "[w]hile it may be good practice for us to reach the merits of an issue when error preservation is doubtful,

[12] Appellant would respectfully show unto the Court that Spartanburg County does not have timing requirements for when documents must be filed prior to hearings. Therefore, Appellant's brief was timely, and should have been considered. Further, the attorneys for the Appellant recall a time, not that long ago, when the custom was to hand up briefs at the hearing. Electronic filings the day of or day before is the continuation of that custom in the age of electronic filing.

we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved." *Id.* at 324, 730 S.E.2d at 285. More recently, the Supreme Court again reaffirmed the notion that "issue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers as to prevent the appeal of a legitimate issue." *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023). Likewise, because the issue was fully argued at the BOZA hearing, and both sides had an ability to argue at the BOZA hearing, an appellate court is empowered to "affirm a judgment on any ground appearing in the record." *City of Aiken v. Cole*, 289 S.C. 239, 242-43, 345 S.E.2d 760, 762 (Ct. App. 1986).

The Circuit Court's decision to overturn the BOZA decision necessitates addressing the Constitutional arguments which the BOZA avoided by resolving the dispute on other grounds.

Appellant, therefore, requests that this Court remand this matter to the Circuit Court to consider the constitutional issues and find in favor of Respondent. In the alternative, this Court may consider the constitutional arguments directly as presented below.

It is axiomatic that the government may not restrict speech "to suppress a particular point of view." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 812 (1985). Indeed, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion of the perspective of the speaker is the rationale for the restriction." *Rosenerger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Put differently, a government has engaged in viewpoint discrimination when it "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

The County's choice to selectively apply the ULMO against the Camp and the Confederate Battle Flag is a clear suggestion of a preference for certain viewpoints and speech over the Camp and is discriminatory in practice. It also seeks to treat the Camp and its expression differently than other groups and their expression in violation of the Equal Protection Clause of the Fourteenth amendment. See *Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982).

A very similar case was presented in *Dimmit v. City of Clearwater*. 985 F.2d 1565 (11th Cir. 1993). There, the City of Clearwater had a restriction limiting flag displays to "government flags." Such limitation "clearly restricts speech based upon its content." *Id.* at 1572. The Court found that such restriction was overbreadth, and the ordinance was "facially unconstitutional." *Id.* at 1573. In its ruling, the court also determined that the statute "which requires a permit for any sign or flag, must also be declared unconstitutional as it exists in this statutory framework." *Id.* at 1572. The landowner in that case could not be required to get a permit for the flying of flags due to the constitutional defect. *Id.*

Like the ordinance of the City of Clearwater, The April 2022 PZO had an exemption for flags limited to "the flag or insignia of the United States or any other governmental or corporate entity." PZO § 7.4.00 (April 2022) (R. p. 586). *See* Clearwater Code of Ordinances, § 134.008(18) (1993) ("Such flags shall represent a governmental unit or body."). This restriction is based upon content, and thus it must pass the most exacting scrutiny. *See Texas v. Johnson, 491 U.S. 397, 412, 109 S.Ct. 2533, 2543-44, 105 L.Ed.2d 342 (1989).* The Court in *Dimmi*t could find no interest supporting such clear content regulations stating "[i]nterest in aesthetics and traffic cannot justify limiting the permit exemption to governmental flags." *Dimmit* at 1569.

Moreover, such "interests are clearly not served by the distinction between government and other types of flags; therefore the regulation is not 'narrowly drawn' to achieve its asserted end." *Id.* at 1570 (citing *Perry Education Ass'n v. Perry Local Educations Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 955 (1983). After lengthy reasoning the court determined that "by exempting only government flags from the permit requirement, [the ordinance] clearly restricts speech based upon its content. . . Because of the content-based exemption, the [] ordinance is not narrowly drawn to serve a compelling government interest and thus cannot withstand the scrutiny applicable to a content specific regulation." *Id.* at 1572. The Court "must invalidate the [] sign ordinance as facially unconstitutional." *Id.* 1573.

Trying to avoid the Constitutional issues implicated by attacking the flagpole, the County argues to interpret the ULMO and ULMO § 1.07 such that every structure requires a permit, and a structure is anything which is built or constructed. While the County argues the restriction is viewpoint neutral on its face, that cannot be true in practice. The County's interpretation that everything built or constructed requires a permit each and every time anything is placed on property is not applied uniformly or to all things. Spartanburg County officials are not going door to door in Spartanburg County issuing citations for basketball goals, planters, yard signs, holiday decorations, Santa Claus inflatables, garden hose holders, and pink flamingos. Not only would that interfere with landowner's use of their property and violate the Due Process Clause, but it would also be impossible.

Rather, the County is using their interpretation to apply, ex post facto, a new ordinance against Appellant. The County began enacting these new regulations seven days after learning of

Appellant's intent to raise a Confederate flag.[13] The new restrictions on flagpoles define flagpoles to include "other devices used to display a flag at a height of greater than ten (10) feet above the ground included but not limited to a bucket truck or crane." PZO § 7.2.00. Flags can be "no taller than thirty (30) feet." *Id.* § 7.7.20. Flags can be no larger than five feet by eight feet. *Id.* And a flagpole must be set back from the property line by at least the height of the pole. *Id*. § 7.2.10. None of these restrictions existed when Appellant placed its flagpole on the property, but nevertheless Respondent seeks to enforce the same against Appellant disregarding their own grandfather clause.

The County is not even trying to enforce their new ordinance against clearly violating

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[13] Shortly after publicizing its intent to raise the Confederate Battle Flag, third parties shared that intent with "highly placed city, county and community leaders" via an anonymous email. Email from David Wood, President, Spartanburg County Historical Association ("SCHA") to James Crocker, Member, Adam Washington Ballenger Camp, August 17, 2022 ("I have direct confirmation that highly placed city, county and community leaders received this same email.") (R. p. 675); *also see* email from Ginger Davis, Chairman, SCHA to David Wood, President, SCHA, August 17, 2022 ("That same email was sent to Allen Smith at One Spartanburg and Troy was then informed.") (R. p. 626).; *also see* letter from Ginger Davis, Chairman, SCHA to Senator Shane Martin, South Carolina Senate, August 29, 2022 ("On Monday, August 15th, David Wood of SCHA, Allen Smith of One Spartanburg and A. Manning Lynch, Spartanburg County Council Chairman received an anonymous email. . . The anonymous person said that the primary reason for this particular meeting was a fundraiser to raise funds to purchase a 30' x 60' Confederate Battle flag to be placed upon a 120' pole on the side of Interstate 85.") (R. p. 628).

After receiving notice of the Respondent's intent to raise a Confederate Battle Flag, the County went into action to see what could be done. *Id.* ("This email was followed up with phone calls by David Wood, Allen Smith and David Britt, Spartanburg County Councilman, to several members of the organization to confirm the fundraising efforts were fact and not rumor."). A special meeting of the Spartanburg County Council was called where an amendment to the Performance Zoning Ordinance was introduced to regulate flagpole heights, size, and locations. Article IV, Spartanburg County Council Meeting Minutes, Special Meeting August 22, 2022. This new legislation, which is the only flagpole restriction in the county, was drafted and introduced at a special meeting seven days after County Council learned of Respondent's intent. *Id.*

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flagpoles. These restrictions have been rampantly disregarded in the County, and the restrictions have been disregarded directly by the County itself at the County Administrative Buildings. About July 4th of this year, the American Legion Post outside of Woodruff City Limits was observed to have a large United States Flag display hoisted on a crane truck. Affidavit of Thomas Hampton Chumley, Sept. 8, 2024 (R. pp. 654-658). The display was "well over 100 feet tall" and appeared above the tree lines at great distance. *Id.* The truck was parked adjacent to the road and did not observe the required setback. *Id.* This display violated the County ordinance for height, flag size, and set back requirements.

On September 9th, a display of United State Flags was erected in Landrum along E. Rutherford St. Affidavit of James William Crocker Jr., Sept. 14, 2024 (R. pp. 663 - 668). The flags were placed on light poles in excess of ten feet high. *Id.* Several of these poles were on parcels of property outside of Landrum City limits. *Id.* The light poles, which were being used in a manner consistent with the definition of flagpole, were not set back their height from the property lines. *Id.*

On September 5th, the County was host to a Veterans ceremony at the County Administrative Building. Affidavit of James William Crocker Jr., Sept 14, 2024(R. pp. 659 - 662). To recognize the veterans, the County displayed a large United States Flag suspended between two fire trucks. *Id.* The flag was higher than thirty feet and larger than the five by eight foot maximum. *Id.* This occurred on Respondent's property immediately outside the office for code enforcement. *Id.*

These illegally excessive displays of patriotism have two things in common. No citations were issued by the County for the violations, and the flags displayed were the flag of the United

States. Respondent has directly disregarded its own ordinance choosing to display a larger than allowed flag. It has ignored violations of other flag displays. But only where the flag displayed has been the United States Flag. When the flag to be displayed was the Confederate Battle Flag, the County instead created these restrictions and applied the same, not equally, but selectively to silence the 'offensive' speech of Appellant. Such action is not a violation of the First Amendment, but also of the equal protection clause of the U.S. Constitution.

In this case, the County has not uniformly applied provisions of the ULMO, and a policy that is "viewpoint neutral on its face may still be unconstitutional if not uniformly applied." *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 803 (9th Cir. 2011). The Camp placed the flagpole upon its property in July of 2022 after seeking permits from both Spartanburg County Planning and Development and Spartanburg County Building Codes. Six times, one of which was in writing, the Camp was informed that no permit was required. The County issued the Camp a permit for electrical lights to illuminate the flagpole and flag and inspected the work completed on and around the flagpole. The County had complete knowledge in July of 2022 that the Camp was placing a flagpole upon the property.

On August 6, 2022, the Camp began flying the South Carolina State Flag atop the flagpole on its property. The South Carolina State Flag flew nearly the entire time between August 6, 2022, and October 21, 2022: 77 days. The South Carolina Department of Transportation estimated that 80,400 vehicles per day pass by the flagpole. During the 77 days the South Carolina State Flag flew, approximately 6,190,800 vehicles would pass and view the flag. This is eighteen (18) times the population of Spartanburg County.

Despite this extreme visibility, the Camp did not receive the Notice of Violation until

after the County was made aware of the well-publicized intentions to raise a Confederate Battle Flag and said flag was raised. There was never any indication or suggestion by the County that any issue existed whatsoever related to the flagpole during 77 days the South Carolina State Flag was displayed. The County explicitly did not require a permit, inspected the property, and raised no objections until the content of the speech became, in the County's view, unpopular.[14] The First Amendment is needed most where speech is unpopular, and the County's clear motivation by the content of the Camp's speech is an unconstitutional violation of the First Amendment.

Simply put, the County failed to "abstain from regulating speech when the specific motivating ideology or the opinion of the perspective of the speaker is the rationale for the restriction." *Rosenerger,* 515 U.S. 819, 829 (1995). Therefore, even if Spartanburg County's untenable proclamation that everything which is built or constructed requires a permit, the result of the County's enforcement of the ordinance and the specific and targeted efforts to prohibit political speech is unconstitutional and an unconstitutional burden on the Camp's right to free speech.

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[14] One Spartanburg County Council member explained the rational for the new restriction this way: "Nobody moves their corporate headquarters to Hicksville. It is Spartanburg County Council's job to create the economic environment where the county thrives." David Ibragimov, Pride or Prejudice? Confederate flag lifted over Spartanburg Highway, (Nov. 18, 2022) https://mytjnow.com/2022/11/18/pride-or-prejudice-confederate-flag-lifted-over-spartanburg-highway/, (accessed Sept. 2, 2024) (quoting Council Member Monier Abusaft explaining the County's motivation to remove the flagpole). Further: "It sends an unwelcoming message to a large group of people. In a county like ours, it does not have a place." Bob Montgomery, Confederate Flag on I-85 in Spartanburg County ordered removed, (October 28, 2022), https://www.goupstate.com/story/news/local/2022/10/28/confederate-flag-interstate-85-spartanburg-sc-ordered-removed/69598829007/ (accessed Sept. 2, 2024) (quoting County Council Member Monier Abusaft explaining the County's motivation to remove the flagpole).

CONCLUSION

The Spartanburg County Board of Zoning Appeals held a two-hour hearing regarding the Notice of Violation where it heard ample evidence from the parties. That evidence clearly supports the conclusion that the Camp sought permits, no permits were required, flags are explicitly exempt from permits in the PZO, the use of the property has not changed, and therefore the Camp had permission to place the flagpole on its property. The evidence presented supports the Board's decision and therefore satisfies the any evidence standard requiring upholding the decision of the Board of Zoning Appeals.

The Circuit Court failed to apply the correct standard of review when it disregarded the transcript of the Board of Zoning Appeals, stated contested matters as facts contrary to the evidence considered by the Board of Zoning Appeals, and ignored evidence considered by the Board of Zoning Appeals which supported its decision. The Circuit Court, in short, substituted its judgment for that of the Board of Zoning Appeals in violation of the standard of review required. See *Rest. Row Assocs. v. Horry County,* 335 S.C. 209, 216, 516 S.E.2d 442,446 (1999)). Applying the correct standard of review, and considering all of the evidence in the transcript, including the uncontroverted fact that flagpoles do not require permits, the Circuit Court should have upheld the Board of Zoning Appeals. BOZA Transcript, 52:19 (Statement by Spartanburg County Building Codes Director Joan Holliday that "[t]here is not a flagpole permit.") (R. p. 250).

Even if a permit was required, Spartanburg County's exemption of "the flag or insignia of the United States or any other governmental or corporate entity" from the permit requirements was unconstitutional content-based regulation. PZO § 7.4.00 (April 2022) (R. p. 586); See

Dimmit v. City of Clearwater. 985 F.2d 1565, 1573 (11th Cir. 1993). Because the exemption was unconstitutional, a permit could not be required under such ordinance. *Id.* at 1572. The effect of the unconstitutional language is that no permit could be required until the constitutional defect was corrected, and Camp placed its pole on the property while such defect existed. Further, the County exhibited clear viewpoint discrimination in proposing a new ordinance a mere week after learning of Camp's intent and then applying said ordinance only against the unpopular speech of Appellant and ignoring violations of the ordinance occurring throughout the county and on Respondent's own property.

For the myriad of reasons stated supra, the Board of Zoning Appeals should have been upheld, and the Circuit Court erred in ignoring evidence and overturning the decision of the Board of Zoning Appeals.

Respectfully submitted,

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Dated: April 23, 2024

Greenville, SC

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

CERTIFICATE OF FILING AND SERVICE

I certify that I have served a copy of the Appellant's Final 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 April 23, 2025.

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