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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Court Case No. 2024-000134
Unpublished Opinion No. 2026-UP-078

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

v.

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

RESPONDENTS' PETITION FOR REHEARING AND FOR REHEARING EN BANC

G. Trenholm Walker (SC Bar # 5777)
Walker@WGLFirm.com
John P. Linton, Jr. (SC Bar # 79130)
Linton@WGLFirm.com
James W. Clement (SC Bar # 102467)
Clement@WGLFirm.com

WALKER GRESSETTE & LINTON, LLC
66 Hasell Street / P.O. Box 22167
Charleston, SC 29401 / 29413
(843) 727-2200

ATTORNEYS FOR RESPONDENTS

I. OVERVIEW

Petitioners Town of Sullivan's Island, Town of Sullivan's Island Board of Zoning Appeals, and Charles Drayton (collectively "Respondents" or "the Town"), by and through undersigned counsel, respectfully petition this Court for rehearing pursuant to Rule 221, SCACR, of the opinion issued February 18, 2026 (the "Opinion"), which reversed the circuit court's order affirming the BZA determination that Appellants' use of the property at 3115 I'On Avenue, Sullivan's Island (the "Property") violates the Town's Zoning Ordinance. The majority overlooked or misapprehended material facts and law as discussed herein.

Further, pursuant to Rule 219, SCACR, Respondents also respectfully request rehearing en banc. The majority opinion is totally inconsistent with long standing decisions of this Court and the South Carolina Supreme Court. Rehearing or rehearing en banc is necessary to preserve unanimity. There is no better indication of this circumstance than the lengthy dissent by Judge Thomas.

Additionally, the majority opinion's failure to defer to the factual determinations of the local board present a question of exceptional importance because it gets right at the heart of our local governmental structure. The Board of Zoning Appeals' ("BZA") is a group of citizens assembled to evaluate the facts presented to them. Our courts, until now, have given great deference to boards of zoning appeals who are tasked with evaluating the statements and documentary evidence before them. Here, the majority opinion has taken that responsibility away from the BZA and sent a clear message that our appellate court system is the real arbiter of the facts presented to a local board. It's a dangerous message because it is inconsistent with clearly established law governing appeals of this type. Further, what citizen will be willing to serve on a board of zoning appeals if there is no efficacy that their judgment of the facts presented them will

be respected on appeal? Stated differently, here, the majority incorrectly reviewed the facts de novo and made its own inferences and findings as to the facts. Rehearing and rehearing en banc are appropriate.

A. The majority erred in holding that the BZA's determination involved a question of law subject to de novo review rather than a factual determination entitled to deference.

The majority states: "Initially, we hold the circuit court erred in affirming the BZA's determination as a factual finding." Opinion at 2. The majority further states that "[i]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." Id. (citing Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals, 423 S.C. 169, 184, 813 S.E.2d 874, 881 (Ct. App. 2018)).

The Zoning Ordinance defines "Vacation Rental" as:

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

Town of Sullivan's Island Zoning Ordinance, Art. XXI, § 21-203 (R. p. 390).

The BZA did not construe undefined terms or resolve ambiguity in the ordinance. Rather, the BZA determined—based on substantial evidence in the record—that the Property's use under the Pacaso program satisfies the ordinance's definition because: (1) the Property is used for commercial purposes; (2) tenancies are assigned through the Pacaso scheduling system; (3) the Property is made available for use in return for valuable consideration (membership purchase price and monthly fees); and (4) stays are limited to less than 28 consecutive days. (R. pp. 97-103; R. pp. 240-377 (BZA hearing transcript)). Those were all factual findings, not legal conclusions or interpretations of law.

As Judge Thomas correctly observed in her dissent:

> I find the Zoning Administrator and BZA made factual findings here, not legal conclusions as Appellants argue. The decision by the BZA, as affirmed by the circuit court, did not concern the meaning of any ordinance and it did not create definitions for any undefined term. The Zoning Ordinance is neither vague nor unclear, and **Appellants concede they are not challenging the ordinance**. The BZA's decision focused on the facts surrounding the use of the Property, not on the meaning of the ordinance, and '[a] determination by a zoning board that a particular purpose or activity does or does not constitute a 'use' is a finding of fact.'

Opinion at 4-5 (Thomas, J., dissenting) (quoting Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42, 48 (Ct. App. 2001)) (double emphasis added).

South Carolina law is clear: "A determination by a zoning board that a particular purpose or activity does or does not constitute a 'use' is a finding of fact." Heilker, 346 S.C. at 412, 552 S.E.2d at 48. The majority's decision is inconsistent with that established legal principle.

Here, the BZA determined that the Pacaso program constitutes use of the Property as a "Vacation Rental"—a factual determination supported by substantial evidence. The circuit court correctly recognized this, stating: "The Court finds that ample evidence in the record on appeal supports the BZA's factual determination that the use of the Property under the Pacaso program fits into the above definition of Vacation Rental." (R. p. 10). By recharacterizing the BZA's factual determination as a legal conclusion, the majority applied an incorrect standard of review and improperly substituted its judgment for that of the BZA. The majority never explained why its different view of the facts makes the decision a legal decision.

B. The majority misapprehended the record regarding whether Appellants' use involves "assignment of tenancies" and "valuable consideration".

The majority concludes: "In construing these sections of the Zoning Ordinance, we find the BZA improperly determined SC Lighthouse's ownership structure involved operating the

Property as a prohibited vacation rental." Opinion at 3. In reality, however, the majority construed the facts, not the ordinance, and thereby exceeded the scope of appellate review.

The record establishes the following facts:

1. **Membership Purchase**: Individuals purchase membership interests in 2 SC Lighthouse, LLC for a substantial sum. (R. pp. 161-163, 174). Pacaso charges a 12% transaction fee on the initial sale. (R. p. 203).

2. **Monthly Fees Required for Use**: Members must pay Pacaso $99 per month to access the "SmartStay" scheduling system. (R. p. 62; R. pp. 171-172). If a member fails to pay this fee, ***the member loses the right to use the Property***. (R. p. 285:1-13; R. pp. 274:24-275:9).

3. **Stay Limitations**: Members may only book stays of 2-14 consecutive days per membership interest. (R. p. 54; R. pp. 286:25-287:5; R. pp. 171-172). Back-to-back stays are prohibited. (R. pp. 171-172).

4. **Exclusive Possession During Stays**: When a member books a stay, other members are excluded from using the Property during that period. (R. p. 202).

5. **Pacaso Controls Scheduling**: Pacaso, not the members collectively, controls the scheduling system and establishes the rules governing use. (R. p. 60).

As the Zoning Administrator explained to the BZA: Pacaso offers general and short notice stays at the Pacaso property (none over 28 days), (see R. pp. 248:6-249:1); Pacaso limits the length of stays to no more than 14 days per membership, (R. pp. 286:25-287:5); and Pacaso also charges a monthly fee for "program management"—an "ongoing fee structure that requires the shareholders to provide valuable consideration for use of the property." (R. pp. 249:19-250:1).

The BZA also heard testimony from Appellants' counsel confirming that members who do not pay the monthly fee cannot use the Property:

> MR. SCRUGGS: You cannot book your seven to 14 days without the app, right?
>
> MR. APPEL: That is correct.
>
> MR. SCRUGGS: And each member . . . pays $99 a month . . . for the privilege of being able to be assigned a certain number of days, right?

MR. APPEL: Right.

(R. pp. 275:1-9).

This evidence establishes that: (1) specific tenancies (defined periods of exclusive possession) are assigned to members; and (2) members provide valuable consideration (membership purchase price and ongoing monthly fees) in return for the right to use the Property for short stays. In fact, a member's ability to use the Pacaso property depends upon its payments, and ongoing payments, to Pacaso.

The majority's statement that "[t]he co-owners of SC Lighthouse do not pay Pacaso or any other entity to stay at the Property" overlooks the undisputed fact that members must pay monthly fees to Pacaso to maintain the right to book and use the Property. (Opinion at 3). The "no pay, no stay" structure of the program demonstrates the exchange of valuable consideration for use.

As Judge Thomas noted in dissent:

> [T]he BZA order, affirmed by the circuit court, held the Property was a vacation rental because it: (1) assigned tenancies, (2) was made available for use in exchange for valuable consideration, and (3) imposed stay limitations for a period of less than 28 days. I find support for each of these findings within the record.

Opinion at 5-6 (Thomas, J., dissenting).

C. The majority erred in holding that the BZA lacked appellate jurisdiction to consider the RS-District Ordinance.

Regarding whether the use violated the RS-District Ordinance, the majority states: "We agree the circuit court abused its discretion by affirming this determination by the BZA because the BZA did not have appellate jurisdiction to consider this issue." Opinion at 4.

The Zoning Administrator's October 21, 2022 letter to Appellants stated: "The stay limitation imposed by Pacaso, LLC (sic) and agreed upon by the members of 2 SC Lighthouse, LLC conflicts with Article XIII of the Town's Zoning Ordinance and the definition of 'vacation

rental' found in Section 21-203." (R. pp. 407). At the BZA hearing, the Zoning Administrator explicitly addressed both the Vacation Rental prohibition and the RS-District regulations: " . . . [T]he use of the property [also] violates the RS, single-family residential district in both intent and prohibited use of the RS district." (R. p. 251:15-17).

The Property is located in the RS-Single Family Residential District. (R. p. 50). Article III, Section 21-19(A) of the Zoning Ordinance states that this district is:

> . . . designed to encourage the formation and continuance of a stable, healthy, environment for one single family, primarily owner-occupied dwelling per lot . . . and to discourage any encroachment by commercial, or other uses capable of adversely affecting the residential character of the district.

(R. p. 155). Section 21-20(D) lists prohibited uses in the RS-District, including "Vacation Rentals other than those permitted in accordance with ARTICLE XIII." (R. p. 159).

South Carolina law grants boards of zoning appeals broad authority in reviewing zoning administrator decisions: "The Board of Zoning Appeals exercises substantial power in its review of Zoning Administrators' decisions. Few restrictions encumber the scope of the Board's authority . . . ." Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004), aff'd, 372 S.C. 230, 642 S.E.2d 565 (2007). By statute, the BZA may "reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken . . . ." S.C. Code § 6-29-800(E).

The BZA did not impermissibly expand the scope of the appeal. Rather, the BZA properly considered the entire Zoning Ordinance—including the RS-District regulations—in affirming the Zoning Administrator's determination that the Property's use violates multiple provisions of the ordinance. As Judge Thomas observed:

> Now, they [the majority] fail to provide support for the proposition that the BZA is precluded from considering the entire Zoning Ordinance in its review of the Zoning Administrator's decision. In fact, '[t]he Board of Zoning Appeals exercises substantial power in its review of Zoning Administrators' decisions. Few restrictions encumber the scope of the Board's authority.'

Opinion at 7 (Thomas, J., dissenting) (quoting Clear Channel, 360 S.C. at 465, 602 S.E.2d at 79).

South Carolina law directs courts to read ordinances as a whole: "The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967). The BZA properly considered the Zoning Ordinance's intent provisions and the RS-District regulations as part of its review. The majority's holding that the BZA lacked jurisdiction to do so has no statutory basis nor supporting legal precedent and conflicts with South Carolina law governing the scope of BZA authority.

II. ARGUMENT

A. The BZA made factual determinations supported by substantial evidence in the record.

The standard of review in zoning appeals is highly deferential to local zoning boards. "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). "A determination by a zoning board that a particular purpose or activity does or does not constitute a 'use' is a finding of fact." Heilker, 346 S.C. at 412, 552 S.E.2d at 48.

Here, the BZA determined that the Pacaso program constitutes use of the Property as a "Vacation Rental" based on the following factual findings supported by substantial record evidence:

1. Commercial Use

The Pacaso program involves substantial commercial activity:

- Sale of membership interests with 12% transaction fees (R. p. 203)
- Monthly fees of $99 per member for scheduling access (R. p. 203)
- Property management fees (R. pp. 272:19-274:19)
- Exchange/transfer programs allowing members to swap into different properties (R. p. 204; R. pp. 321:1-5; R. pp. 338:1-339:3)

2. Assignment of Tenancies

The program assigns specific tenancies through Pacaso's proprietary scheduling system:

- Members book exclusive stays of 2-14 consecutive days (R. p. 54; R. pp. 286:25-287:5)
- Other members are excluded during booked stays (R. p. 202)
- Pacaso controls scheduling rules and limitations (R. p. 202)
- Back-to-back stays are prohibited (R. pp. 171-172)

3. Valuable Consideration

Members provide valuable consideration for use:

- Initial membership purchase price
- Ongoing monthly fees of $99 per member (R. p. 62)
- Members who fail to pay monthly fees lose the right to use the Property (R. p. 285:1-13; R. pp. 274:24-275:9)

4. Stays Less Than 28 Days

All stays under the program are limited to less than 28 consecutive days per membership interest. (R. p. 54; R. pp. 286:25-287:5; R. pp. 171-172).

These factual findings are amply supported by the record, including:

- Appellants' own admissions regarding program structure (R. pp. 274:24-275:9; R. pp. 285:1-13)
- Information from Pacaso's website (R. pp. 171-172; R. pp. 231-239)
- Testimony from the Zoning Administrator (R. pp. 248:6-250:1)
- Public comments describing the transient nature of occupancy (R. pp. 314:8-323:6)

The circuit court correctly recognized these as factual determinations: "The Court finds that ample evidence in the record on appeal supports the BZA's factual determination that the use of the Property under the Pacaso program fits into the above definition of Vacation Rental." (R. p. 10). By recharacterizing these factual findings as legal conclusions subject to de novo review, the majority improperly substituted its judgment for that of the BZA and failed to apply the deferential standard of review required by S.C. Code § 6-29-840(A).

B. The record establishes that members provide valuable consideration for stays of less than 28 days.

The majority's conclusion that "the co-owners of SC Lighthouse do not pay Pacaso or any other entity to stay at the Property" misapprehends the economic structure of the Pacaso program as established by the record. Opinion at 3. The flow of funds and economic structure of the Pacaso membership stay program is exactly the type of facts that local boards, not the appellate court, are tasked with evaluating.

The undisputed evidence establishes a clear quid pro quo: members must pay ongoing monthly fees to Pacaso to maintain the right to book and use the Property. If a member stops paying, that member loses the right to use the Property. This "no pay, no stay" structure demonstrates the exchange of valuable consideration for use.

The BZA heard the following testimony from Appellants' counsel:

> MR. SCRUGGS: . . . I just want to be clear about this app. You cannot book your seven to 14 days without the app, right?

MR. APPEL: That is correct.

MR. SCRUGGS: And each member, not just the LLC, each member pays $100 -- $99 a month . . . for the privilege of being able to be assigned a certain number of days, right?

MR. APPEL: Right.

(R. pp. 274:25-275:9). Appellants' counsel also confirmed that, in order to be a member of good standing all fees must be paid, including the $99 monthly app fee, otherwise the member forfeits their use rights. (R. p. 54; R. p. 285:1-13). And at the BZA hearing, the following exchange occurred:

MR. ELLIOTT: . . . I'm just asking in this case, have you given them the operating agreement?

MR. APPEL: No. We don't have to give them the operating agreement.

MR. ELLIOTT: How about the management agreement between Pacaso and the owners?

MR. APPEL: Same answer.

(R. pp. 278:1-11).

Despite Appellants' refusal to provide the complete operating agreement and management agreement, the evidence they did provide—including their own admissions—establishes that:

1. Members pay an initial purchase price for membership interests
2. Members pay ongoing monthly fees of $99 to access the scheduling system
3. Payment of monthly fees is required to maintain the right to use the Property
4. Members who fail to pay lose their use rights
5. Each stay is limited to 2-14 consecutive days per membership

This evidence amply supports the BZA's finding that the Property is "made available for use, occupancy, possession, sleeping accommodations, or lodging for one or more persons in

return for valuable consideration for any period of less than twenty-eight (28) continuous days duration." Zoning Ordinance § 21-203 (R. p. 390). The majority's contrary conclusion overlooks this substantial evidence and improperly substitutes its interpretation of the facts for that of the BZA.

C. The BZA properly considered the RS-District regulations as part of the Zoning Ordinance governing the Property.[1]

The majority's holding that the BZA lacked "appellate jurisdiction" to consider the RS-District regulations conflicts with South Carolina law governing the scope of BZA authority. Section 6-29-800(A)(1) grants a board of zoning appeals the authority to "hear and decide appeals where it is alleged there is error . . . made by an administrative official in the enforcement of a zoning ordinance;" it does not preclude the board from considering any pertinent evidence or issues. In fact, the board makes its decision based on the evidence and arguments presented to it, not to the zoning official, and is free to render its findings and conclusions on any grounds it chooses.

South Carolina law grants boards of zoning appeals broad authority: ". . . [T]he board of appeals may, in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit." S.C. Code § 6-29-800(E). "The Board of Zoning Appeals exercises substantial power in its review of Zoning Administrators' decisions. Few restrictions encumber the scope of the Board's authority . . . ." Clear Channel, 360 S.C. at 465, 602 S.E.2d at 79.

[1] It is worth noting that the BZA (and circuit court) should have been affirmed with or without consideration of the RS-District Regulations, because the Vacation rental prohibition was clearly violated based on the facts in the record.

The Town's Zoning Ordinance similarly provides: ". . . The Board of Zoning Appeals may reverse or affirm wholly or partially or may modify or reverse the order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as should be made." Zoning Ordinance § 21-177 (R. p. 413).

Here, the Property is indisputably located in the RS-Single Family Residential District. (R. p. 50). The RS-District regulations are part of the Zoning Ordinance and apply to all properties within that district. At the BZA hearing, the Zoning Administrator explicitly addressed the RS-District regulations: ". . . [T]he use of the property [also] violates the RS, single-family residential district in both intent and prohibited use of the RS district." (R. p. 251:15-17). Appellants had full opportunity to address this issue at the BZA hearing. The transcript reflects extensive discussion of the RS-District regulations. (R. pp. 244:6-12; R. pp. 247:15-251:21; R. pp. 304:24-313:23).

South Carolina law directs courts to construe ordinances as a whole: "The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967).

The BZA properly considered the Zoning Ordinance in its entirety, including both the specific Vacation Rental prohibition in Article XIII and Section 21-203, and the RS-District regulations in Article III. The BZA's Final Order reflects this comprehensive analysis:

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

(R. p. 97).

The BZA's consideration of the RS-District regulations was not an improper expansion of the appeal's scope. Rather, it was a proper exercise of the BZA's broad authority to review the Zoning Administrator's determination and to consider all applicable provisions of the Zoning Ordinance.

III. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court:

1. Grant this Petition for Rehearing and/or Rehearing En Banc;

2. Vacate the Opinion filed February 18, 2026;

3. Issue a substituted opinion affirming the circuit court's order affirming the BZA's determination that Appellants' use of the Property violates the Town's Zoning Ordinance; and

4. Grant such other and further relief as the Court deems just and proper.

By: *s/ James W. Clement*

G. Trenholm Walker (SC Bar # 5777)
Walker@WGLFirm.com
John P. Linton, Jr. (SC Bar # 79130)
Linton@WGLFirm.com
James W. Clement (SC Bar # 102467)
Clement@WGLFirm.com

WALKER GRESSETTE & LINTON, LLC
66 Hasell Street / P.O. Box 22167
Charleston, SC 29401 / 29413
(843) 727-2200

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PROOF OF SERVICE

I certify that I have served the **Respondents' Petition for Rehearing and for Rehearing En Banc** on Appellants, Pacaso, Inc. and 2 SC Lighthouse, LLC, addressed to Appellants' attorneyof record, Ross A. Appel of McCullough Khan Appel, LLC, at ross@mklawsc.com, by electronic mail, on March 5, 2026.

Nancy Jane Dennis
Paralegal

WALKER GRESSETTE LINTON LLC

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SC Court of Appeals

G. Trenholm Walker
Thomas P. Gressette, Jr.
John P. Linton, Jr.
Charles P. Summerall, IV
Jennifer S. Ivey
James W. Clement

NANCY JANE DENNIS
Direct: 843.727.2222
Email: njdennis@WGLFIRM.com

U.S. MAIL

March 5, 2026

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctapp@sccourts.org

Re: Pacaso & 2 SC Lighthouse v. Town of Sullivan's Island, et al.
Appellate Case No. 2024-000134
Our File No. 6670.021

Dear Ms. Kitchings:

Enclosed is our firm's check for $50 for the filing of Respondent's Petition for Rehearing and for Rehearing En Banc with Proof of Service in the above-referenced appeal. Thank you for your courtesy herein.

WALKER GRESSETTE & LINTON LLC

Nancy Jane Dennis
Paralegal

Enclosure (Filing Fee)