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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

Paul M. Burch, Circuit Court Judge

Appellate Case No.: 2024-000814

Folly East Indian Co., LLC,.. Appellant,

v.

City of Folly Beach..Respondent,

and

Save Folly's Future..Intervenor.

APPELLANT'S PETITION AND MEMORANDUM FOR REHEARING *EN BANC*

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REQUEST FOR REHEARING *EN BANC*

The Appellant files this Petition for Rehearing *En Banc* of this Court's Order dated February 18, 2026 ("the Order"), affirming the circuit court's grant of summary judgment in favor of Respondent by Order dated March 7, 2024, and the Order dated April 17, 2024, which denied Appellant's Motion for Reconsideration.

This Petition seeks a rehearing *en banc* due to the nature and importance of this matter, which involves a question of exceptional importance for the State of South Carolina: the right to rent your property. It involves a novel question of law: whether an ordinance enacted through the citizen's initiative and referendum process is valid when it prohibits a property owner from using its property in a manner that is expressly permitted by the applicable zoning code? [1]

ARGUMENT

This Court's Order affirming the trial court's grant of summary judgment does not address all the material legal arguments made by Appellant in its final brief received by this Court on December 2, 2024, and Appellant raise again these issues and arguments submitted in its Memorandum. The Memorandum and the arguments and authorities cited therein are reiterated herein and that Memorandum is incorporated by reference for that purpose. Without dismissing or abandoning the arguments set forth therein, the following are the salient issues which the Court of Appeals failed to address or properly consider when it issued its Order on February 18, 2026.

[1] The Post and Courier, a respected local news outlet, has published six articles pertaining to short-term rentals on Folly Beach alone. In fact, this Court's February 18, 2026, opinion has been discussed by multiple news outlets already.

I. The Court of Appeals overlooked that the Folly Beach Short Term Rental Ordinance constitutes *de facto* zoning determines where a specific activity, renting on a short term basis, may occur.

The Court overlooked and/or misapprehended Appellant's argument that the Folly Beach Short Term Rental License Ordinance (the "Ordinance") is a *de facto* zoning regulation. The Court's Order simply accepts the City's description of the regulation as a mere business regulation. The Court's Order states that the Ordinance "did not amend City's zoning ordinance, did not rezone any properties," and "did not determine where any specific activities may occur." Order at 2. The Order focuses on form over substance and ignores the elephant in the room. The Ordinance was specifically designed in an effort to sidestep the zoning process. **If a city could regulate land uses simply by capping business licenses for each use, it could avoid all zoning procedures.**[2] A use which was (and is) expressly permitted in every zoning district has been eliminated because the Ordinance imposes an arbitrary cap on the amount of licenses for such a use. This is *de facto* zoning and, in Plaintiff's particularly circumstance, a *de facto* rezoning of its properties.

The Ordinance was intentionally crafted to sidestep the zoning process because the City was unable to enact this very Ordinance through its zoning process. It is difficult to understand, and the Court does not explain, why a regulation that regulates *only* the right to rent real property is anything but a land use regulation. This is not a general business regulation that just happens to "touch upon land." Clearly the City believed it was a land use regulation covered by zoning sinc ethe City initially attempted to install the cap on this use through zoning. The central point of *I'On, LLC v. Town of Mt. Pleasant* is that citizens should not use the Initiative and Referendum

[2] Consider this simple example about Blackacre, a hypothetical city with three zoning districts: A, B, and C. Zone C was rezoned to commercial use due to a decision from the Zoning Board. A Group of Zone C homeowners hear about the decision and propose a new ordinance via the statute's initiative and referendum process. The Zone C homeowners determine how many business licenses exist in Zones A and B, and propose a new ordinance that caps the business license number to the number of outstanding licenses. Zone C's homeowners have effectively rezoned Zone C. This is precisely what happened here.

process to “nullify a carefully established zoning system or master plan developed after debate among many interested persons and entities, resulting in arbitrary decisions and patchwork zoning with little rhyme or reason.” *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 416-17, 526 S.E.2d at 721 (2000). That is exactly what happened here. The Ordinance only applies to property owners who want to rent their land on a short term basis and it was only enacted pursuant to the Initiative and Referendum process. The Order’s holding, if it stands, effectively paves the road around the Supreme Court’s holding in *I’On*.

II. The Court of Appeals overlooked or misapprehended Apellant’s argument that *because* the City permitted and regulated the land use *through* zoning pursuant to Title 6 of South Carolina’s Code of Laws, the City can only eliminate the use through its zoning process.

In its Order, the Court appears to support its conclusion that the Ordinance is permissible because it “only amended [the] City’s business regulations to impose a cap on the number of issued short-term rental business licenses” and it “did not amend the City’s zoning ordinance.” The Court’s statement reveals that the Court misapprehends Appellant’s argument with respect to the City’s failure to amend the zoning ordinance. The zoning ordinance was not amended here because the Ordinance, as written, was rejected by zoning. Because the citizen’s initiative was designed to sidestep the zoning process, there was no reason for the zoning to be amended. This is precisely the problem. Appellant’s argument is that, once the land use (right to rent) was permitted under zoning, preventing the use all together must be done through the proper zoning procedure.

To be clear, Appellant’s argument is that, even if the City could have accomplished a limit on the number of short-term rentals through a business license regulation, *because* the City permitted and regulated the use through zoning, it must continue to regulate or ban the use through

zoning.[3] Again, not only did the City permit this land use through zoning, the only reason for the the citizen's proposed a business license regulation was to curb the land use *without* going through the zoning process. This is signficant for two reasons. First, it reveals the true nature and purpose of the citizen's initiative, which clearly violates the central purpose and policy of the *I'On* case, as described in Section I above. Second, it allows the City to strip property owners of the protections that the zoning process provides against regulatory (and polictical) changes. Property owners rely on zoning to evaluate the potential economic viability of property.

If citizens can utilize the Initiative and Referendum process to sidestep zoning by simply calling it a business license regulation, the procedural and substantive due process conferred by statute and affirmed by the Supreme Court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 417, 526 S.E.2d 716, 725 (2000); *see also Painter v. Town of Forest Acres*, 231 S.C. 56, 60, 97 S.E.2d 71, 73 (1957) ("A municipal corporation cannot make a business a nuisance by merely declaring it to be such…property consists not merely in its ownership and possession but an unrestricted right of use, enjoyment, and disposal. Anything which destroys one or more of these elements to that extent, destroys the property itself. It must be conceded that the substantial value of property lies in its use.").

Instead of amending the zoning ordinance, the citizens weaponized business licenses to accomplish what the zoning board refused to do. Business licenses should only serve administrative functions and, in the context of land use regulation, *should* work in conjunction with the zoning overlay. *See, e.g., Ani Creation Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 275, 890 S.E. 748, 752 (2023). The right to operate a business is <u>not</u> the same as

[3] Although a California case, the court in *Keen v. City of Manhattan Beach* agreed with Appellant. In *Keen*, the California court found that because the City of Manhattan Beach regulated short-term rentals through its zoning plan and process, any change to the regulation of short-term rentals must occur via the same process. The Court's Order does not address this argument.

the right to use your property for a specific activity, except in Folly Beach. This is a far cry from the holding in *I'On.*

III. The Court of Appeals overlooked that the Ordinance was enacted through citizen's power, not the City's police powers.

The Order refers to the City's police power in both of its holdings even though the Ordinance was not enacted pursuant to the City's police power. While the Court included no analysis on the City's police power, Appellant is left to assume that the Court considered the City's police power in its decision due to these references. The Court's Order cites to *Greenville County v. Kenwood Enters.*, 353 S.C. 157, 167, 577 S.E.2d 428, 433 (2003) for the proposition that an "expansive reading of *I'on* would necessarily eviscerate a [c]ounty's ability to exercise its police power if that exercise in any way impacted land use." The Court's reliance on Greenville County v. Kenwood Enterprises is misplaced. In that case, Greenville County restricted the operation of sexually oriented businesses which were not discussed in the existing Zoning Ordinance in Greenville County. In the current case, short term rentals are an allowed use under the Folly Beach Zoning Code, whereas the Greenville Zoning Ordinance did not reference sexually oriented businesses.

Similarly, the Court's Order cites to *Dantzler v. Callison*, 230 S.C. 75, 94, 94 S.E. 177, 188 (1956) for the proposition that "[n]o person can acquire a vested right to continue, when once licensed, in a business, trade or profession which is subject to legislative control and regulation under the police power." But again, the Ordinance was not enacted pursuant to the City's police power.[4] Furthermore, Appellant is not asking this Court to find that the City cannot regulate land

[4] Even if the City had enacted such pursuant to its police powers, it could not have done so in a manner that was in contravention of Title 6 of South Carolina's Code of laws. In *Whaley v. Dorchester County Zoning Bd. of Appeals*, our Supreme Court analyzed a prohibition on long-term parking as a zoning matter, and did not rule that the government had the power to make such a change under its general police power. 337 S.C. 568 (1999). Surely our Supreme Court did not overlook the general police power. Moreover, it cannot do so in a manner that is so arbitrary

use. But rather, that the citizen's Initiative and Referendum process is not the appropriate mechanism for altering and/or eliminating a land use permitted under zoning.

Although a California case, the court in *Keen v. City of Manhattan Beach* agreed with Appellant's argument. The California Court found that *because* the City of Manhattan Beach had previously permitted short-term rentals under its "old residential zoning ordinances," the City of Manhattan Beach could *only* ban short-term rentals through amendments to the same. *Keen v. City of Manhattan Beach*, 77 Cal. App. 5th 142, 148, 292 Cal. Rptr. 3d 366, 369 (2022), review denied (June 29, 2022). In *Keen*, the court rejected the City of Manhattan Beach's argument that it could enact the regulation under its general police power. *See* Brief of Appellant City of Manhattan Beach, 2021 WL 2254006 (Cal.App. 2 Dist.), 55-56. The *Keen* court rejected this argument and agreed with the trial judge that the City of Manhattan Beach must amend its zoning code to prohibit the previously authorized use. As in *Keen*, the City of Folly Beach has permitted short-term rental use under its zoning code, and it therefore cannot ban the use without amending the code.

IV. The Court of Appeals erroneously concluded that Appellant "was not developing any properties, nor were they doing do pursuant to any approved site-specific development plan."

The Order states that Appellant was "not developing any properties, nor were they doing so pursuant to any approved site-specific development plan." Order at 3. The Court's statement here ignores the Record and the realities of Appellant's business. As a property developer and short-term rental business, Appellant necessarily had to submit plans to seek approval from the City. Appellant obtained rental registration permits and made improvements to its properties for the *purpose* of short-term rentals and in reliance on the City's approval and zoning code. The

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and capricious that it lacks even rational basis. *See, e.g., Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 279, 890 S.E.2d 748, 754 (2023) (the court should disturb arbitrary and capricious actions that bear no reasonable relation to a lawful purpose).

Court seems to conclude that even if Appellant did develop its properties, it did not do so pursuant to a "site-specific plan." Order at 4. But the statutory definition of "site specific development plan" expressly states that "[t]he plan may be in the form of, but is not limited to, the following plans or approvals: planned unit development; subdivision plat; preliminary or general development plan; variance; conditional use or special use permit plan; conditional or special use district zoning plan; or **other land-use approval designations as are used by a county or municipality.**" S.C. Code Ann. § 6-29-1520(9) (emphasis added).

Appellant's right to rent on a short term basis became vested when he obtained, and/or benefited from, an affirmative government act allowing such right. S.C. Code Ann. § 6-29-1560(A). Section 6-29-1550 provides that "[a] vested right pursuant to this section is not a personal right **but attaches to and runs with the applicable real property**." S.C. Code Ann. § 6-29-1550 (emphasis added). Appellant must also show that it incurred "significant obligations and expenses in diligent pursuit of the specific project" in good faith reliance on some "significant affirmative government act." S.C. Code Ann. § 6-29-1560(A).

The right to rent on a short term basis has been (and is still) permitted in all of the City's zoning districts prior to the enactment of this land use regulation. In an effort to regulate that existing right, the City required that the Appellant obtain rental registration permits, which Appellant obtained. Appellant was never told that it could lose the right to rent its properties on a short term basis, or that it would be unable to transfer that right when Appellant sells its properties (or that a purchaser of the LLC would not be able to continue the use). While Appellant was on notice that the City regulated STRs, "there is a difference between knowing that the City requires a permit for short-term renting and having notice that the City may altogether eliminate the historically … allowable use of residential STRs." *Zaatari v. City of Austin*, 615 S.W.3d 172, 191

(Tex. App. 2019) (emphasis added). In reliance on the City's approval to rent on a short term basis, and Appellant's continued use for the same, Appellant invested substantially in its properties for the purpose of short term renting and now cannot recoup his investment. The only record evidence regarding this issue is the testimony of Appellant's owners. Appellant made substantial expenditures in reliance on the zoning status and its long-standing short-term rental use of the property. Additionally, Appellant will be damaged if a new buyer of its property(ies) cannot continue this use as the market value of Appellant's property is significantly less without such use.

V. The Court of Appeals overlooked Appellant's argument that it acquired a vested right to rent its property prior to and separate from its "license," and that the Folly Beach Short Term Rental Ordinance's deprived Appellant's of its vested right.

The ability to lease property is a fundamental right of property ownership. That right does not vary based on length of the lease term and the Court's Order does not address why Appellant does not have the right to rent its property on a short term basis, a right which Appellant enjoyed prior to any licensing ordinance. Appellant's argument is not that it has a right to a license, but that it has a right to rent its property that it has always enjoyed until it was eliminated by the citizens' Initiative and Referendum. As soon as the cap on STR business licenses was imposed, the limit was reached (and this was by design as the number for the cap was set below the number of existing short term rental properties).

The Court's Order refers to and quotes the *Dantzler* court for the proposition that a "person does not acquire a vested right to continue, when once licensed, in a business, trade or profession…" Order at 4. The Court clearly misapprehends Appellant's argument here. Appellant had a vested right to rent its property on a short term basis *before* it was ever "licensed" to do so. Appellant contends that it had a vested right (right to rent its property on a short term basis), which was used and relied upon by Appellant before the City began licensing, but was later stripped away

after the citizen’s initiative and referendum. The law of South Carolina cannot permit a vested right to be extinguished simply by requiring a license that cannot be obtained. Such a rule would render the concept of a vested right meaningless. If the Appellant possessed a vested right, the City cannot nullify that right by first imposing a licensing requirement and then limiting the number of available licenses so that the right can no longer be exercised.

CONCLUSION

For these reasons, Appllant respectfully request rehearing *en banc* and reconsideration of this Court’s February 18, 2026, Order.

Respectfully submitted,

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PROOF OF SERVICE

I do hereby certify that on March 5, 2026, I have served all counsel in this action with a copy of the ***Appellant's Petition and Memorandum for Rehearing*** via e-filing to the following email addresses:

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