

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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Honorable R. Markley Dennis, Jr., Circuit Court Judge

**Court of Appeals**

Case No. 2015-001230

Paul Boehm,

Respondent,

v.

Town of Sullivan's Island Board of Zoning Appeals  
and Town of Sullivan's Island,

Appellants.

FINAL BRIEF OF APPELLANTS TOWN OF SULLIVAN'S ISLAND BOARD OF  
ZONING APPEALS AND TOWN OF SULLIVAN'S ISLAND

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January 5, 2016

## **TABLE OF CONTENTS**

|                                                                                                                                                                                                                                                                                                                                              |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Table of Authorities.....                                                                                                                                                                                                                                                                                                                    | iii |
| Statement of Issues on Appeal.....                                                                                                                                                                                                                                                                                                           | 1   |
| Statement of the Case.....                                                                                                                                                                                                                                                                                                                   | 1   |
| Standard of Review .....                                                                                                                                                                                                                                                                                                                     | 9   |
| Argument.....                                                                                                                                                                                                                                                                                                                                | 11  |
| I.    The Circuit Court committed error of law in substituting its own judgment for<br>that of the BZA's in finding that Unit B, a non-conforming structure with a<br>non-conforming residential use on the second floor, could be structurally<br>expanded.....                                                                             | 11  |
| II.   The Circuit Court committed error of law in substituting its own judgment for<br>that of the BZA's in finding that the BZA acted arbitrarily, capriciously, and abused<br>its discretion in determining that Unit B is properly classified as an accessory<br>structure with a non-conforming residential use on the second floor..... | 15  |
| Conclusion.....                                                                                                                                                                                                                                                                                                                              | 19  |

## **TABLE OF AUTHORITIES**

### **CASES**

|                                                                                                                                |           |
|--------------------------------------------------------------------------------------------------------------------------------|-----------|
| <u>Austin v. Bd. of Zoning Appeals</u> , 362 S.C. 29, 33, 606 S.E.2d 209, 211(Ct. App. 2004).....                              | 9, 18, 19 |
| <u>Christy v. Harleston</u> , 266 S.C. 439, 223 S.E.2d 861 (1976).....                                                         | 13, 14    |
| <u>Clear Channel Outdoor v. City of Myrtle Beach</u> , 372 S.C. 230, 236, 642 S.E.2d 565, 568 (2007).....                      | 10, 18    |
| <u>Furr v. Horry County Zoning Bd. of Appeals</u> , 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014).....                | 10        |
| <u>Heilker v. Zoning Board of Appeals for the City of Beaufort</u> , 346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001)..... | 10        |
| <u>Historic Charleston Found. v. Krawcheck</u> , 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994).....                   | 14        |
| <u>Rest. Row Assocs. v. Horry Cnty.</u> , 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).....                                   | 9         |

### **STATUTES**

|                             |   |
|-----------------------------|---|
| S.C. Code §6-29-840(A)..... | 9 |
|-----------------------------|---|

### **ORDINANCES**

|                              |              |
|------------------------------|--------------|
| TOSI Ordinance § 21-149..... | 14           |
| TOSI Ordinance § 21-150..... | 3, 6, 10, 12 |
| TOSI Ordinance § 21-151..... | 3, 6, 12, 13 |
| TOSI Ordinance § 21-203..... | 16, 17       |

## **STATEMENT OF THE ISSUES ON APPEAL**

- I. Did the Circuit Court err in substituting its judgment for that of the BZA's in finding that Unit B, a non-conforming structure with a non-conforming residential use on the second floor, could be structurally expanded?
- II. Did the Circuit Court err and misapply the applicable standard of review in substituting its view of the facts to find that Unit B is a second principal building instead of affirming the fully supported finding of the BZA that Unit B is an accessory structure?

## **STATEMENT OF THE CASE**

Respondent Paul Boehm ("Boehm") initiated an appeal from a final order of the Town of Sullivan's Island's Board of Zoning Appeals ("BZA") dated April 10, 2014 (the "April 10, 2014 order") (**R. pp. 141-167**). The April 10, 2014 order was based in part on the BZA's threshold decision that the one of the structures at issue ("Unit B") was an accessory structure with a nonconforming residential apartment on the top floor. (**R. pp. 166-167**).

By order filed November 24, 2014, the Circuit Court remanded the matter to the BZA with instructions to make additional findings of fact to support its decision that Unit B was an accessory structure with a nonconforming residential use on the second floor. (**R. pp. 2-3**). In accordance with the Circuit Court's order, the BZA held a public meeting on January 8, 2015, unanimously adopted six additional specific findings of fact supporting its prior decision, and memorialized the findings in an order issued on February 12, 2015. (**R. pp. 11-12**).

After the BZA issued its additional findings of fact, Boehm renewed his appeal of the BZA's decision.<sup>1</sup> On April 7, 2015, the Circuit Court held a hearing on Boehm's appeal

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<sup>1</sup> Boehm's appeal of the BZA's April 10, 2014 order proceeded under case number 2014-CP-10-2623, the renewed appeal, was assigned case number 2015-CP-10-1103.

from the BZA's February 12, 2015 order. See (R. pp. 613-621). By order filed on May 4, 2015, the Circuit Court ruled that none of the BZA's findings supported the BZA's decision in the April 10, 2014 order that Unit B containing a second-floor residence was a "garage" or an "accessory structure" as defined by the Town of Sullivan's Island (the "Town" or "TOSI) zoning ordinance; that the building at issue was instead a principal building under the zoning ordinance; and that the BZA's conclusion was arbitrary, capricious, not based on the law and an abuse of discretion. (R. pp. 4-10). The Circuit Court further ruled that the building at issue was a non-conforming principal building under the zoning ordinance and determined that Boehm should be allowed to make certain structural additions to the building, even though it was nonconforming. (R. pp. 4-10).

On May 11, 2015, Appellants received written notice of entry of the order filed on May 4, 2015. (R. pp. 29-37). On June 4, 2015, Appellants timely served their notice of intent to appeal the Circuit Court's order filed on May 4, 2015. (R. pp. 29-37).

### **FACTS**

This appeal involves two structures on Boehm's property located at 2720 Goldbug Ave. One of the structures, Unit B, has a garage on the ground level, with an apartment located above the garage, See e.g., (R. p. 176) (Certificate of Occupancy issued November 20, 1989 for "Apartment Above Garage"); (R. p. 141). The other structure is a "slat house," immediately adjacent to Unit B. See e.g., (R. p. 141). The other structure on the property, which is not subject to this appeal, is the principal residential building.

The BZA's April 10, 2014 order included three rulings of the BZA affirming three decisions of the Town's Zoning Administrator (the "Zoning Administrator"). See (R. pp. 141-167). Specifically, the BZA's April 10, 2014 order: (1) affirmed the denial of a request

to increase the roof height of Unit B by two feet; (2) affirmed the issuance of a stop work order for construction work beyond the scope of the work illustrated on a building permit; and (3) affirmed the issuance of violations related to the alteration of the slat house. (R. pp. 141-167). The background of each of the rulings, the BZA proceedings, and the Circuit Court rulings are discussed in detail below.

**I. The Zoning Administrator's denial of request to increase the roof height of Unit B by two feet:**

The Town's Zoning Administrator denied Boehm's request for a building permit to increase the height of the roof of Unit B by two feet. (R. pp. 214-218). (e-mail chain between Boehm and the Zoning Administrator discussing the denial of the request). In denying the request, the Zoning Administrator found, based upon the Certificate of Occupancy from 1989 and his observation of the design features of Unit B, that Unit B is not a second principal building located on a single parcel, but rather a retrofitted space within an accessory structure. (R. pp. 214-218). In his e-mail correspondence to Boehm, the Zoning Administrator explained as follows: "Because accessory structures are permitted a maximum height of 18 feet, the detached garage/unit is already exceeding the maximum height allowed (22-24 feet), and therefore would not allow your requested height increase of two feet." (R. p. 217). The Zoning Administrator specifically cited zoning ordinance sections 21-150.B and 21-151.B, which provide in pertinent part that "[a] Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspect" and that "[s]tructural alterations, including enlargements, are permitted if the structural alteration does not increase the extent of nonconformity." See (R. p. 217) (citing TOSI Ordinances §§ 21-150.B and 21-151.B); see also TOSI Ordinances §§ 21-150 and 21-151 (R. pp. 600-601 and R. p. 602). After explaining that the structure

was nonconforming, and that the applicable sections of the zoning ordinance do not permit an increase of the nonconforming aspect of a nonconforming structure, the Zoning Administrator decided to deny the request for the permit because “[r]aising the roof’s overall height, well over the allowed 18’ feet, is an increase in the extent of the nonconformity.” (R. p. 217).

**II. The Zoning Administrator’s issuance of a stop work order because the roof addition being constructed went beyond the scope of the building permit that had been issued:**

Boehm applied for a building permit to do certain renovations to Unit B. On February 14, 2013, the Town approved the permit as noted on the plans for “roof over stairs t[o] walk *only*.” (R. pp. 137-140) (Residential Permit # 2013-2510 with attached plans noting scope of approval) (double emphasis added).

The Town’s Building Department staff conducted an inspection of Unit B on January 13, 2014, to ensure compliance with Building Permit # 2013-2510. (R. pp. 201-211) (letter from the Zoning Administrator discussing stop work order, with enclosures). After this inspection, the Chief Building Official issued a stop work order for “exceeding scope of work” authorized by the building permit. (R. p. 352). The building permit authorized only the construction of a stairway overhang along Unit B’s second story outside access and rear walkway. Despite the permits limitation in scope, the construction work in progress at the time of the inspection included an overhang support system located outside of the permitted area of construction as illustrated on the drawings. (R. pp. 201-202). The Zoning Administrator’s letter to Boehm advised that the unpermitted posts that had been installed outside of the permitted area of construction needed to be relocated to

the location shown on the permitted plans or revised engineer plans needed to be resubmitted for zoning and building staff review. (R. pp. 201-202).

**III. Violations issued by the Zoning Administrator on February 3, 2014:**

At the time the Zoning Administrator issued the stop work order, the Zoning Administrator also cited Boehm for other zoning and building code violations related to Unit B and the adjacent slat house. These violations all related to other unpermitted construction performed on the slat house and Unit B.

Specifically, the Zoning Administrator issued violations for (1) connecting the slat house to Unit B; (2) removing of a portion of the handrail on the second story rear walkway of Unit B, which allowed this connection; (3) constructing anchored, wooden benches on the roof of the slat house; and (4) installing anchored planters on the roof of the slat house; and (5) installing additional slats/plats on the roof of the slat house. (R. pp. 201-211). All five of the violations for unpermitted construction work relate to Boehm's unpermitted work in connecting the slat house to Unit B to expand and outfit Unit B's second story deck area. See (R. pp. 201-211).

**IV. Boehm's Appeal of the Zoning Administrator's decisions to the BZA**

Boehm appealed all three of these decisions of the Zoning Administrator to the BZA. The BZA held a public hearing on March 13, 2014, on the three appeals. (R. pp. 141-167). The minutes of the public hearing were transcribed and made a part of the BZA's April 10, 2014 order. See (R. p. 141) (stating in the written order that "[t]he attached Minutes as Reported by NCRA Registered Professional Reporter Ronda K. Blanton serve as an accurate representation of the public meeting held on March 13, 2014."). The transcript of the meeting indicates that the public hearing lasted approximately two hours

(6pm-8pm); two witnesses testified; twenty-one exhibits were introduced; and public comments were invited and made by members of the public. **(R. pp. 141-167).**

After allowing exhaustive arguments and comments on Boehm's appeals, the BZA unanimously denied the appeal to overturn the Zoning Administrator's decisions, finding that (1) Unit B was an accessory structure with a nonconforming residential apartment on the top floor and (2) all three of the issues on appeal concerned the expansion of the nonconforming use structure. **(R. pp. 166-167)** (BZA members discussing that the threshold decision is whether Unit B is a nonconforming accessory structure, and voting unanimously that it is such a structure and that such that an expansion of the nonconforming use is prohibited by the Zoning Ordinance). The BZA's April 10, 2014 order described the Zoning Administrator's decisions it affirmed as follows:

1. Increase of roof height: request made to raise the roof by two feet, violating Sec. 21-150 and Sec. 21-151.
2. Expansion of a deck area: Violations were issued for the following (violating Sec. 21-150 and Sec. 21-151):
  - The construction of benches and planters on top of the slat house.
  - Removal of a handrail required for elevated walkway.
  - Establishment of a permanent connection of the slat house to the rear deck when previous permits required the slat house remain free standing.
3. Building footprint expansion: (violating Sec. 21-150 and Sec. 21-151).  
Staff issued approval of permits to extend a roof over the steps and rear walkway. The contractors went outside of this permitted area of construction effectively expanding the building footprint.

**(R. p. 141).**

V. **Boehm's Appeal to the Circuit Court, remand to the BZA, and the BZA's additional findings of fact supporting the determination that Unit B is an accessory structure with a nonconforming residential use on the second floor.**

Boehm appealed the BZA's decision to the Circuit Court, which remanded the matter to the BZA with instructions to make additional findings of fact to support its decision that the structure at issue was an accessory structure with a nonconforming residential use on the second floor. See (R. pp. 2-3). In accordance with the Circuit Court's order, the BZA held a public meeting on January 8, 2015 and unanimously adopted six additional specific findings of fact. See (R. pp. 11-12). In an order issued February 12, 2015, the BZA memorialized its additional specific findings as follows:

1. The certificate of occupancy for the upstairs living quarters issued November 20, 1989 classified the apartment as an apartment above garage. This certificate of occupancy refers to the structure as a garage and the apartment as being above the garage. This prior classification of the structure as a garage with an apartment unit above it supports the Board's finding that the structure is a non-conforming accessory structure. It shows that the structure is an accessory structure with a non-conforming, but approved, apartment use on the second floor.
2. The inspection ticket issued November 20, 1991 approved the use of apartment over garage. This document shows a request and approval of the use of the apartment over the garage. This prior classification of the structure as a garage and the approval of the use of the second floor as an apartment unit support the Board's finding that the structure is a non-conforming accessory structure. It shows that the structure is an accessory structure with a non-conforming, but approved, apartment use on the second floor.
3. The May 15, 2001 survey of 2720 Goldbug Avenue issued by John E. Wade, Jr., RLS, identifies the structure as garage with apartment. The survey identifies the owner of the property at the time of the survey as Paul Boehm, the applicant. The Board finds that the identification of the building on this survey as a garage with an apartment is further support for the Board's finding that the structure is a non-conforming accessory structure. The survey does not identify the structure as a residence, dwelling, house, principal building or apartment. The survey identifies the structure as a garage, noting that the garage structure includes an apartment. The survey

shows that the building is an accessory structure with a non-conforming, but approved, apartment use.

4. The design of the structure, which can be readily observed by reference to the photographs, drawings, documents and testimony in the record, is that of a garage that has an apartment on top. There are two garage doors on the front of the structure, which open to the bays. The only entrance to the apartment above the garage is the staircase on the exterior right side of the structure. The structure is designed for the private storage of cars, boats, trailers, lawn equipment or other recreational items. While there is an apartment on the second story of the structure, the Board finds that these design characteristics of the structure are further support for the Board's finding that the structure is a non-conforming accessory structure. It shows that the structure is an accessory structure with a non-conforming, but approved, apartment use on the second floor.
5. The applicant agreed in his testimony before the Board that the structure is comprised of a garage on the first floor and an apartment on the second floor. The applicant characterized the structure as a dwelling with a garage below it, but did not dispute that the first floor was indeed a garage. In fact, a real estate listing from the applicant's real estate company described the first floor of the secondary structure as follows: "a garage for two cars, a storage/workshop area for your favorite hobbies. Instead of cars put a pool table and ping pong table in the garage." When asked about this listing, the applicant continued to characterize the structure as a dwelling with a garage below it. However, the Board finds that this testimony provides additional support for the Board's finding that the structure is a non-conforming accessory structure and rejects the applicant's subjective classification of the structure.
6. The Board finds that the structure at issue and use of the structure as a garage with a non-conforming apartment on the second story is customarily incidental to the principal use in building located on the lot, a principal building used as a residence. The Board recognizes the structures on the lot are now part of a condo regime, but finds that the establishment of the condo regime does not convert an accessory structure into a second principal building.

**(R. pp. 11-12).**

After the BZA issued its additional findings of fact, Boehm renewed his appeal of the BZA's decision. On April 7, 2015, the Circuit Court held a hearing on Boehm's appeal from the BZA's February 17, 2015 order. **(R. pp. 4-10).** By order filed on May 4, 2015,

the Circuit Court ruled that none of the BZA's findings supported the BZA's decision that the building containing a residence was a "garage" or an "accessory structure" as defined by the zoning ordinance; that 2720B is a principal building under the zoning ordinance and that the BZA's conclusion is arbitrary, capricious, not based on the law and an abuse of discretion. (R. pp. 4-10). The Circuit Court further ruled that Unit B is a non-conforming second principal building under the zoning ordinance, and concluded that Boehm should be allowed to make additions and renovations to Unit B, even though it was non-conforming. (R. pp. 4-10). This appeal followed.

### **STANDARD OF REVIEW**

The Supreme Court of South Carolina has summarized the standard of review in zoning appeals as follows:

It is a well settled proposition of zoning law that *a court will not substitute its judgment for the judgment of the board*. The court may not feel that the decision of the board was the best that could have been rendered under the circumstances. It may thoroughly disagree with the reasoning by which the board reached its decision. It may feel that the decision of the board was a substandard piece of logic and thinking. None the less, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (quotation marks and citation omitted)(double emphasis added). See also Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) ("... [A] decision of [the BZA] will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion."). The governing statute imposes the same limited standard of review: "...The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, ... In determining the questions

presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.” S.C. Code §6-29-840(A).

This standard of review recognized that the decisions of those charged with interpreting and applying zoning ordinances “should be given some consideration and not overruled without cogent reason therefore.” Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 236, 642 S.E.2d 565, 568 (2007); see also Furr v. Horry County Zoning Bd. of Appeals, 411 S.C. 178, 184, 767 S.E.2d 221, 224 (Ct. App. 2014), *certiorari granted by*, 2015 S.C. LEXIS 198, \*1 (May 20, 2015). For example, in Heilker v. Zoning Board of Appeals for the City of Beaufort, this court determined the inquiry of whether a proposed activity constituted “use” within the context of zoning was a question of fact and stated the following:

In zoning matters, this [c]ourt is obligated to apply the extremely narrow standard of review . . . . The local zoning boards, and not the courts, are the primary entities responsible for the planning and development of our communities.

A “use” in the zoning context is “the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained.” A determination by a zoning board that a particular purpose or activity does or does not constitute a “use” is a finding of fact.

In the case sub judice, we rule the [c]ircuit [c]ourt erred in supplanting the Zoning Board’s finding of fact that Heilker’s outdoor display of indoor merchandise was not a nonconforming “use.”

346 S.C. 401, 412, 552 S.E.2d 42, 48 (Ct. App. 2001).

## ARGUMENT

**I. The Circuit Court committed error of law in substituting its own judgment for that of the BZA's in finding that Unit B, a non-conforming structure with a non-conforming residential use on the second floor, could be structurally expanded.**

The Circuit Court ruled that Unit B was a non-conforming structure under the zoning ordinance. (R. pp. 4-10). Specifically, the Court held that Unit B “is a nonconforming principal building” because there is a larger principal building on the lot and Sec. 21-150(F) of the Town’s zoning ordinance provides that “[i]n the event that two or more Principal Buildings occupy a single lot, said occupancy shall constitute a non-conforming use. One structure shall be designated conforming and the other(s) shall be non-conforming. . . .”<sup>2</sup> (R. p. 8).

Having concluded that Unit B was a second principal building with a non-conforming residential use, rendering Unit B a non-conforming structure under the zoning ordinance, the Circuit Court should have affirmed the BZA’s decision that Boehm could not expand Unit B by raising the roof height (expanding the interior volume of the non-conforming apartment); connecting the slat house to Unit B and adding seating to the roof of the slat house for use by the residents of Unit B; and extending the roof of Unit B over the staircase, outside of the permitted area. As found by the BZA, these structural alterations increased the extent of the nonconformity and were to be prohibited. (R. p. 141); (R. pp. 166-167).

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<sup>2</sup> As explained in section II below, the Circuit Court erred in finding that Unit B was a nonconforming second principal building and should have affirmed the BZA’s decision that Unit B was an accessory structure with a legal nonconforming residential use on the second floor.

By ordinance, non-conforming structures cannot be expanded except to decrease the extent of the non-conformity and non-conforming uses cannot be expanded except to eliminate or reduce the non-conforming aspects. See TOSI Ordinance § 21-151(B)(1) (**R. p. 602**) (stating that “[s]tructural alterations, including enlargements, are permitted unless the structural alteration does not increase the extent of nonconformity.”); TOSI Ordinance § 21-150(B) (**R. pp. 600-601**) (stating that (“[a] Nonconforming Use shall not be expanded except to eliminate or reduce the nonconforming aspects.”). Instead, of precluding the proposed additions and expansions of Unit B under the restrictive ordinances above, the Circuit Court ruled that these additions to the nonconforming structure were “merely improvements to the existing one dwelling and will not increase the extent of the nonconformity.” (**R. p. 9**).

The Circuit Court committed legal error in finding that even though Unit B was a non-conforming structure, Boehm was not precluded from making these substantial alterations to the structures. As stated above, the BZA’s decision that the proposed structure alterations would expand the extent of the non-conformity should not have been reversed by the Circuit Court unless the decision was arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion. Here, nothing in the record suggests that the BZA’s decision was unsupported.

The Circuit Court impermissibly substituted its own judgement for that of the BZA. In its order, the Circuit Court did not find that the BZA’s determination that the proposed expansion of Unit B would increase the extent of the non-conformity was abusive or

arbitrary<sup>3</sup>. Rather, the Circuit Court simply disagreed with the BZA and substituted its own judgement for that of the BZA:

Under Sec. 21-151 of the Zoning Ordinance, “structural alterations, including enlargements, are permitted if the structural alteration does not increase the extent of nonconformity.” The nonconformity of 2720B is that it is a second residence on the lot. None of Mr. Boehm’s requests will increase the extent of nonconformity, because they are merely improvements to the existing one dwelling and will not increase the extent of the nonconformity. The Court concludes that the Town should issue to Mr. Boehm the permits needed to raise the roof and extend the roof over the existing stairs and walkway and should withdraw its Order to remove the furniture on the slat house roof, because there is no provision of the Zoning Ordinance prohibiting furniture on a slat house roof.

(R. p. 9). In reviewing the BZA’s determination that Unit B could not be expanded in the manner proposed by Boehm, because the proposed structural alterations would have the effect of increasing the non-conformity, the Court was required to give the BZA the deference provided for in the well-established standard of review. Instead, the Circuit Court simply substituted its own judgement for that of the BZA.

Additionally, the Circuit Court’s decision is an incorrect interpretation of the zoning ordinance, rendering meaningless the provision of the zoning ordinance which curtails the expansion of non-conformities. The Supreme Court recognized the need to enforce local land use ordinances which preclude the expansion or rebuilding of non-conforming uses or non-conforming structures in Christy v. Harleston, 266 S.C. 439, 223 S.E.2d 861 (1976). In that case a landowner sought to rebuild an aging garage for continuation of its non-conforming use of the property as a garage. Id. Interpreting local

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<sup>3</sup> The Circuit Court did find that the BZA’s finding that Unit B was an accessory structure was arbitrary and an abuse of discretion, but the Court made no such findings with respect to the BZA’s determination that the proposed expansions were the expansion of a non-conforming use/structure.

land use ordinances of the City of Charleston which similarly limited the expansion of any non-conformity, the Supreme Court found as follows:

A perusal of the relevant sections of the ordinance, particularly the above section, convinces us that the lower court's conclusion that the ordinance permits the construction of a new structure to be used for an existing nonconforming use is erroneous. An existing structure, being used for a permissible nonconforming use, may only be altered to assure safety.

\* \* \*

*To allow the landowner to demolish a building and replace the same for a continued nonconforming use is completely inconsistent with both sections quoted hereinabove.*

The interpretation which Christy seeks in this action *would allow nonconforming uses to be extended indefinitely, merely by replacing the buildings. Such is entirely inconsistent with the general intention of the zoning ordinance.*

Id., at 442-443, 223 S.E.2d at 863 (double emphasis added). While Christy involved the demolition and reconstruction of a structure housing a non-conforming use, rather than the expansion of a structure housing a non-conforming use, the reasoning and analysis applies with equal force to this case. Allowing the expansion of Unit B in a way that increases the residential aspect of Unit B is prohibited by the Town's zoning ordinance and is against the policy of reducing non-conformities. See TOSI Ordinance § 21-149 (B) (**R. p. 599**) ("... it is the general policy of the Town to allow uses, structures, signs, lots and other situations that came into existence legally, in conformance with then-applicable requirements, to continue to exist and be put to productive use, but to bring as many aspects of such situations into compliance with existing regulations as is reasonably possible."); See also generally, Historic Charleston Found. v. Krawcheck, 313 S.C. 500, 504, 443 S.E.2d 401, 404 (Ct. App. 1994) (recognizing, as stated in Christy, that "the intention of

all zoning laws, as regards a nonconforming use of property, is to restrict and gradually eliminate the nonconforming use.”).

Here, the Circuit Court committed error of law in finding that Unit b, a non-conforming structure housing a non-conforming residential use on the second floor could be expanded. The Circuit Court’s order should be reversed because the decision is incorrect as matter of law and further reversed because the Circuit Court impermissibly substituted its own findings for those of the BZA that were fully supported by the record.

**II. The Circuit Court committed error of law in substituting its own judgment for that of the BZA’s in finding that the BZA acted arbitrarily, capriciously, and abused its discretion in determining that Unit B is properly classified as an accessory structure with a non-conforming residential use on the second floor.**

The BZA determined that Unit B was an accessory structure with a non-conforming residential use on the second floor. See e.g., (R. p. 141) (stating that Unit B is a “nonconforming garage (structure)” and affirming the denial of the permit). The BZA specifically identified the facts supporting its decision that Unit B is an accessory structure under the zoning ordinance. See (R. p. 11-12) (additional findings of facts supporting the conclusion that Unit B is an accessory structure with a nonconforming residential use on the second floor).

The BZA’s factual determinations that serve as the basis of its conclusion that Unit B was a non-conforming accessory structure were based upon the factual record presented at the BZA hearing and contained in the BZA’s and Zoning Administrator’s files concerning the appeals. Based on the facts in the record, the BZA found that Unit B was properly classified as an accessory structure under the zoning ordinance. The zoning ordinance defines accessory structure as “[a] . . . structure subordinate to the Principal

Building on a lot and used for purposes customarily incidental to the main or principal use or building and located on the same lot.” See TOSI Ordinance § 21-203 (R. pp. 605-612).

Here, the BZA made the finding, based on the factual record, that the structure was a free standing garage with a non-conforming residential apartment on the second floor. Under the zoning ordinance, a garage is either (1) “*[a]n accessory building*” or (2) a “portion of a Principal Building.” See TOSI Ordinance § 21-203 (R. pp. 605-612) (double emphasis added). The BZA determined that Unit B was an accessory structure, in part, because of several prior classifications of the structure as a garage. See (R. pp. 11-12, ¶¶ 1-3) (citing prior historical identifications of the entire structure as a garage). The BZA also relied on the design of the structure to support its decision that the garage structure was an accessory structure, rather than a portion of a principal building. See (R. pp. 11-12, ¶4) (“The design of the structure, which can be readily observed by reference to the photographs, drawings, documents and testimony in the record, is that of a garage that has an apartment on top. There are two garage doors on the front of the structure, which open to the bays. The only entrance to the apartment above the garage is the staircase on the exterior right side of the structure. The structure is designed for the private storage of cars, boats, trailers, lawn equipment or other recreational items. While there is an apartment on the second story of the structure, the Board finds that these design characteristics of the structure are further support for the Board’s finding that the structure is a non-conforming accessory structure.”)

The BZA also considered Boehm’s testimony at the hearing regarding the structure — Boehm agreed that the structure is comprised of a garage on the first floor and an apartment on the second floor. See (R. pp. 11-12, ¶4). The BZA also pointed to a real

estate listing from the Boehm's own real estate company describing the first floor of Unit B as follows: "a garage for two cars, a storage/workshop area for your favorite hobbies. Instead of cars put a pool table and ping pong table in the garage" as additional support for the finding that the structure is a nonconforming accessory structure. See (R. pp. 11-12, ¶5).

The BZA's decision that Unit B is properly classified as an accessory structure, i.e., garage with apartment over it, was not unsupported and not incorrect as a matter of law. It is undisputed that Unit B includes a garage and an apartment. The garage, under the zoning ordinance can be either an accessory structure or part of a principal building. The BZA found that the garage in this case was an accessory structure and that the apartment above it was a non-conforming residential use of the accessory structure.

This Circuit Court's decision ignores the BZA's findings of fact and relies solely upon the non-conforming aspect of Unit B, the residential use, to change the classification of Unit, finding that Unit B should be classified as a principal building because the principal use of the lot is residence and "[b]ecause 2720B contains a residence, it cannot be a garage. Because it contains a residence, it must be a principal building." (R. p. 8).

In addition to the fact that the Circuit Court's decision ignores the BZA's findings of fact and relies solely upon the non-conforming aspect of Unit B for its classification of the structure as a nonconforming second principal building, it is worth noting that Unit B as a whole fails to meet the zoning ordinance definition of a dwelling because there is not free access through the entire structure by all members of the family—the ground level garage and the second floor apartment have separate exterior entrances. See TOSI Ordinance § 21-203 (R. pp. 605-612) (defining "Dwelling" as "[a] building or portion of

a building arranged or designed to provide living quarters for a single family, *with no structural features impeding free access throughout the entire structure* by all members of the family.” (emphasis added)); (R. pp. 11-12, ¶ 4) (“The only entrance to the apartment above the garage is the staircase on the exterior right side of the structure.”). The Circuit Court ignored this in finding that because there was an apartment Unit B it was residential and a non-conforming second principal building.

The BZA’s finding that Unit B is an accessory structure is supported by the record. Its decision was not incorrect as a matter of law and should have been affirmed by the Circuit Court, and this Court. See Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) (providing the applicable standard of review). Therefore, this Court should reverse the Circuit Court’s decision because the BZA’s decision was not incorrect as a matter of law.

Instead of affirming the BZA’s that was no incorrect as a matter of law, the Circuit Court impermissibly engaged in a *de novo* review of the facts and the law and reached its own conclusion. The Circuit Court’s order gives lip service to the standard of review, finding that the BZA’s decision was arbitrary and capricious, but the Circuit Court simply dismissed the BZA’s finding of facts by stating that none supported its decision, without any cogent reason for rejecting the BZA’s decision. See Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 236, 642 S.E.2d 565, 568 (2007) (noting that the decisions of those charged with interpreting and applying zoning ordinances “should be given some consideration and not overruled without cogent reason therefore.”). In determining that Unit B was a second principal building, the Circuit Court wrongfully substituted its judgement for that of the BZA.

Even though the BZA's factual findings were fully supported by the record, the Circuit Court determined that none supported the decision that Unit B was an accessory structure:

The BZA made six findings, all of which determined that 2720B contained an apartment which is a residence or a dwelling under the Zoning Ordinance. None of these findings supported the BZA's decision that the building containing a residence was a "garage" or an "accessory structure" as defined by the Zoning Ordinance.

(R. p. 7). The Circuit Court found that under its interpretation of the definitions in the zoning ordinance, Unit B should be classified as a principal building because the principal use of the entire lot is residential and "[b]ecause 2720B contains a residence, it cannot be a garage. Because it contains a residence, it must be a principal building." (R. p. 8).

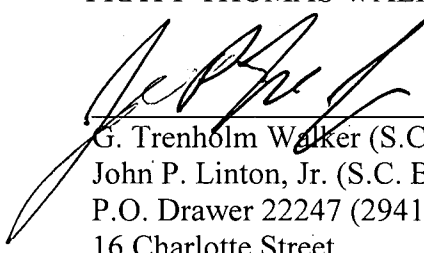
As stated above, the Circuit Court disregarded the BZA's analysis and substituted its own, in finding that Unit B should have been treated as a second principal building, rather than an accessory structure. The Circuit Court adopted Boehm's view of the facts rather than the BZA's—prohibited by the standard of review that requires deference to the findings of fact made by the BZA. See Austin, at 33, 606 S.E.2d at 211.

### **CONCLUSION**

For the reasons stated above, the Circuit Court's decision should be reversed.

Respectfully Submitted,

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January 5, 2016  
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2015-001230

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SC Court of Appeals

Town of Sullivan's Island Board of Zoning Appeals  
And Town of Sullivan's Island,

Appellants,

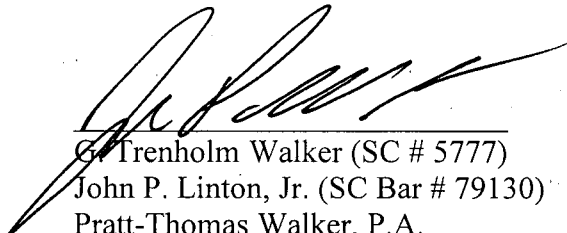
v.

Paul Boehm,

Respondent.

CERTIFICATE OF COUNSEL

Appellants, by and through the undersigned attorneys, certify that the Final Brief  
complies with Rule 211(b), SCACR.

  
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January 5, 2016