

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2018-000907

241-243 E. Bay Holdings, LLC, Appellant,
v.
The City of Charleston, The City of Charleston Board of Zoning Appeals-
Zoning, Apex Real Property, LLC and East Bay 7, LLC, Respondents.

FINAL BRIEF OF RESPONDENT APEX REAL PROPERTY, LLC

WOMBLE BOND DICKINSON (US) LLP

Charles J. Baker III (S.C. Bar No. 486)
P.O. Box 999
Charleston, South Carolina 29402
(843) 722-3400
chuck.baker@wbd-us.com

Attorneys for Respondent Apex Real Property, LLC

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STATEMENT OF ISSUES ON APPEAL

- I. WAS THERE EVIDENCE IN THE RECORD FOR THE BOARD OF ZONING APPEALS TO CONSIDER CONCERNING THE IMPACT OF THE PROPOSED HOTEL'S ACCESSORY USES ON TRAFFIC AND PARKING?
- II. DOES THE STATEMENT OF ISSUES ON APPEAL IN APPELLANT'S INITIAL BRIEF LIMIT THIS APPEAL TO THE ISSUE OF THE IMPACT OF THE CONFERENCE/EVENT SPACE ON TRAFFIC AND PARKING?
- III. DID APPELLANT'S PETITION IN CIRCUIT COURT APPEALING THE BOARD OF ZONING APPEALS' DECISION FAIL TO PRESERVE THE ISSUE OF THE IMPACT OF THE PROPOSED HOTEL'S ACCESSORY USES ON TRAFFIC?

STATEMENT OF THE CASE

On July 18, 2017, the City of Charleston Board of Zoning Appeals – Zoning (“BZA”) issued a final decision approving with conditions the application of Respondent Apex Real Property, LLC (now known as Pearce Development, LLC) (“Pearce”) for a special exception for a 50-room hotel on property located on three contiguous parcels at 36 North Market Street, 5 Guignard Street and 235 East Bay Street. On August 16, 2017, the Appellant, 241-243 E. Bay Holdings, LLC (“Holdings”), filed a petition in the Court of Common Pleas for Charleston County, South Carolina, appealing the BZA’s decision. The parties filed briefs with the circuit court and, on April 16, 2018, the circuit court heard arguments concerning the issues on appeal. On May 7, 2018, Judge Roger M. Young issued an order affirming the BZA’s decision. Holdings served its Notice of Appeal on May 11, 2018.

STATEMENT OF FACTS

Pearce owns three parcels of property within the City of Charleston’s Accommodations Overlay Zone which are located at 36 N. Market Street, 5 Guignard Street and 235 East Bay Street, all zoned General Business, and which together form an L-shaped tract on which it proposes to build a 50-room hotel. The tract is bordered on the east by East Bay Street, on the

south by North Market Street, on the west by Rafer's Alley and on the north by Guignard Street. (R. pp. 138-141). Holdings owns property nearby at 241 and 243 East Bay Street on the corner of East Bay Street and Guignard Street also zoned General Business. (R. p. 116 and p. 139, Parcels marked 241 and 243).

In November 2016, Pearce submitted an application for a special exception for a 50-room hotel project on the tract. (R. pp. 87-133). At the time, Pearce had already obtained a special exception from the BZA in 2012 and 2013 for a 36-room hotel on these same properties. The 2016 proposal increased the number of hotel rooms from 36 to 50 while almost doubling the number of parking spaces. (R. p. 89). The BZA conducted a hearing on December 20, 2016, with the City staff recommending approval. (R. p. 179, lines 6-12). Tyrone Hanlan, a representative of Holdings, was present at the hearing, and the BZA received comments from him and his lawyer concerning both the cumulative effect on traffic of Pearce's proposed hotel and two other approved hotels in the immediate vicinity and the adequacy of parking. (R. p. 205, line 22 - p. 213, line 7). The BZA, however, deferred its consideration of the application to receive more input on the traffic impact on nearby Anson Street and the residential Ansonborough neighborhood. (R. p. 222, line 9 - p. 232, line 3 and p. 269, line 20 - p. 271, line 3).

The BZA held a hearing on the deferred application on January 17, 2017. The central issue at this hearing was the cumulative impact of traffic from Pearce's proposed hotel and two other recently approved hotels in the same two-block area. The BZA heard testimony from Pearce's traffic engineer, Jennifer Bihl, as well as one of the City's traffic engineers, Michael Mathis, both of whom opined there would not be a significant increase in traffic. (R. p. 287, line 7 - p. 301, line 10). Hanlan appeared again at this hearing and discussed his views on the traffic

impact of the three hotels. (R. p. 304, line 16 - p. 309, line 16). There ensued a significant amount of discussion by the BZA along with questioning of Bihl and Mathis concerning the traffic from all three hotels. (R. p. 312, line 15 - p. 345, line 1). At the conclusion of the hearing, despite the opinions of Bihl and Mathis that the project would not cause a significant increase of traffic in Ansonborough, the BZA again deferred its consideration of the application for the sole purpose of allowing Pearce and the City to consider ways to mitigate traffic in that neighborhood. (R. p. 345, line 6 - p. 349, line 7).

The BZA held its third hearing on the special exception application on July 18, 2017. Pearce presented a detailed Traffic Impact Analysis from Bihl Engineering as well as a revised proposal which, among other things, changed the hotel's traffic pattern to keep traffic off of Anson Street and out of Ansonborough. (R. pp. 358-423). The new plan moved the hotel lobby and entrance from North Market Street to the corner of East Bay Street and Guignard Street such that arriving and departing vehicles would use these streets to enter and leave the hotel premises. This change prevented vehicles leaving the hotel from traveling west on North Market Street and turning right on Anson Street and effectively eliminated any reasonable probability that hotel traffic would use Anson Street. The City staff pointed out this change in the traffic pattern to the BZA and recommended approval of the special exception. (R. p. 466, line 14 - p. 474, line 21). At the conclusion of the hearing, the motion to approve the special exception passed unanimously with two conditions: no access to the conference room from Market Street and mandatory right turn on Guignard Street for leaving hotel. (R. p. 483).

Holdings appealed the BZA's decision to the circuit court. It was discovered, however, that the recording equipment had malfunctioned and the transcript of the July 2017 hearing was incomplete. Therefore, the circuit court stayed the appeal and remanded the matter to the BZA

to reconstruct the record from the July 2017 hearing. Thereafter, the BZA requested the parties to submit affidavits concerning the evidence presented at the July hearing. (R. p. 516, line 13 - p. 518, line 20). The affidavits of James M. Wilson (counsel for Pearce) and Alice F. Paylor (counsel for Holdings) were submitted, (R. pp. 520-533), and the BZA held another hearing on January 16, 2018.

At the January 16, 2018 hearing, the BZA members confirmed that, in granting the special exception in July 2017, they had considered all parts of the special exception test and were convinced that the change in traffic pattern from North Market Street to East Bay and Guignard Streets satisfied their final concern. (R. p. 542, line 22 - p. 549, line 2).

STANDARD OF REVIEW

“The findings of fact by the board of [zoning] 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) (Supp.2012). In determining the questions on appeal, both the circuit court and the appellate court “must determine only whether the decision of the board is correct as a matter of law.” *Bevivino v. Town of Mount Pleasant Board of Zoning Appeals*, 402 S.C. 57, 62 737 S.E.2d 863, 866 (Ct. App. 2013). Therefore, a court must uphold a decision by the [board] unless there is no evidence to support it. *Town of Hollywood v. Floyd*, 403 S.C. 466, 476, 744 S.E.2d 161, 166 (2013). Further, a court can overturn the board’s decision only “if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004) (quoting *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999)).

“[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

therefor.” *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 236, 642 S.E.2d 565, 568 (2007) (quoting *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953)). As such,

[i]t 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. Nonetheless, the court will not set aside the board's view of the matter just to inject its own ideas into the picture of things.

Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (quoting *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 173, 72 S.E.2d 66, 70 (1952)).

ARGUMENTS

I. There was evidence in the record for the BZA to consider concerning the impact on traffic and parking of the proposed hotel's accessory uses which supported its approval of the special exception.

Pearce's plans for the proposed hotel included, among other things, a conference/event space and restaurant/bar units for lease to tenants. (R. pp. 365-367). Both event spaces and restaurants fall under the same category of permitted uses, known as Eating and Drinking Places, in the City of Charleston Zoning Ordinance, Article 2, Part 3 - Table of Permitted Uses. In terms of the special exception rules for accommodations uses under the zoning ordinance, these uses are considered to be accessory uses for hotels.¹ Holdings urges this Court to find that there was no evidence for the BZA to consider concerning the impact of these accessory uses on traffic and parking. This argument fails for several reasons.

In order to analyze the evidence which supported the BZA's approval of the hotel, this Court must consider the special exception requirements for hotels in their proper context. To

¹ An accessory use is “[a] use of land or of a building or portion thereof customarily incidental and subordinate to the principal use of the land or building and located on the same lot with the principal use.” Zoning Ordinance Section 54-120 (R. p. 569).

approve a hotel within the Accommodations Overlay Zone, Section 54-220 of the zoning ordinance requires the BZA to make five findings, only one of which relates to traffic: “(b) the location of the facility will not significantly increase automobile traffic on streets within residential neighborhoods.” (R. p. 595). The zoning ordinance further provides that, in making this and the other findings, the BZA shall consider information “to be provided by the applicant in site plans, floor plans, building elevations, and a detailed written assessment report to be submitted with the application.”² (R. p. 595). The relevant consideration here is “the accessory uses proposed for the facility in terms of the size, impact on parking, and impact on traffic generation.” Section 54-220(f)(7). (R. p. 595).

Pearce presented its case to the BZA three times to obtain approval of the hotel and appeared two more times to address the absence of a full record from the July 2017 hearing at which the BZA issued the approval. As such, the BZA considered the evidence supporting this special exception request on a total of five occasions.

At the last hearing to reconstruct the record in January 2018, the BZA chair noted that “the only real issue” throughout all three hearings leading up to approval had been the question of traffic going through the Ansonborough residential neighborhood and that the other prongs of the special exception test had been a “slam dunk” in favor of approval. As to the traffic question, the Board chair stated that the change in traffic pattern from North Market Street to East Bay and Guignard Streets had satisfied the BZA’s final concern. (R. p. 545, line 8 - p. 549, line 2).³

² Holdings bases its argument almost entirely on its contention that the conference/event space was not mentioned in Pearce’s written assessment or in the traffic study commissioned by Pearce. This argument misses the point. This information need not appear in every document submitted by the applicant but simply must appear in the applicant’s combined submissions. In addition, there is no requirement in the zoning ordinance that a traffic study be performed.

³ The underlying zoning for both Pearce’s properties and Holdings’ property is commercial with some industrial zoning directly across East Bay Street. (R. p. 273, lines 14-23, referencing zoning map at p. 242). The closest residential neighborhood is Ansonborough, approximately 1-2 blocks away.

Another BZA member, moreover, directly addressed the conference/event space and her consideration of that space in determining the special exception test had been met:

MS. SMITH: I remember even from the - - the previous deferral of the application that - - that I was concerned primarily and really only about the impact that the hotels would have on the Anson Street generation of traffic and that as - - as the meeting went on and - - and the - - the entrance to the project was - - was changed a little bit and **that also when they agreed to not have any access from Market Street to the conference room, that I was convinced that that portion of the test would be met by this project.**

And that was the only part of the test that I was really concerned about, and I was satisfied that with those two conditions that - - that - - that the test would be met.

(R. p. 543, line 20 - p. 544, line 9) (emphasis added).

The record before the BZA was replete with evidence concerning the impact of the entire hotel project, including the accessory uses, on traffic and parking. Not only did the BZA consider the impact from Pearce's hotel but it also considered the cumulative impact on traffic and parking from Pearce's hotel and two other 50-room hotels in the same two-block area which have been approved, but not yet built.⁴ It is plainly evident that the BZA, the applicant, and the project's opponents spent most of the time at three hearings over the course of a seven-month period discussing just that issue. The impact on traffic and parking was discussed at great length in the December 20, 2016 hearing (R. p. 201, line 5 - p. 232, line 3), in the January 17, 2017 hearing (R. p. 287, line 7 - p. 301, line 5; p. 313, line 13 - p. 349, line 2), and in the July 18, 2017 hearing (R. pp. 520 - 527).

The hotel plans submitted by Pearce to the BZA included restaurant/bar use from the start. Originally, the plans called for 8,384 square feet of restaurant/bar use. (R. pp. 89 and 97).

⁴ Pearce maintained that the BZA should not have considered the cumulative traffic impact in assessing its application since the zoning ordinance does not direct the BZA to consider cumulative effects from multiple projects. The point is that the BZA, if anything, went above and beyond its duties in assessing the impact on traffic and parking.

The application pointed out that the site of the proposed hotel previously had included two restaurants/bars with a total size of approximately 12,000 square feet with little or no parking. (R. pp. 89, 91, and 96). As such, the proposed accessory uses actually reduced the square footage of restaurant/bar space and would only serve to reduce existing traffic and parking impacts. (R. p. 91). The restaurant/bar use for the proposed hotel stayed the same at the second hearing in January 2017. (R. p. 253).

The third BZA hearing, at which the BZA finally granted approval for the hotel, occurred on July 18, 2017. In advance of the hearing, Pearce submitted a revised site plan, floor plans and a detailed written assessment as well as a Traffic Impact Analysis from Bihl Engineering, LLC based on these revised plans. (R. pp. 358-423 and pp. 437-461). The revisions moved the hotel entrance, lobby and car valet service off North Market Street to Guignard Street with the only vehicular access to and from East Bay Street to eliminate the possibility of departing vehicles turning right off North Market onto Anson Street. (R. p. 522, Para. 13 (b) and pp. 365-366). As such, the number of vehicles potentially leaving Pearce's hotel and traveling up Anson Street was reduced to zero. (R. p. 379; pp. 460-461).

The overall hotel project included the renovation of the existing, historic building at 36 North Market Street. In light of the relocation of the entrance and lobby and the elimination of a fourth floor restaurant in the East Bay Street wing of the proposed hotel, it made sense to change the location of guest rooms which originally had been planned for the second floor of 36 North Market Street. In this second floor space, the revised plans clearly showed a "conference/meeting room" measuring 4,439 square feet. (R. pp. 367 and 439). The revised plans also showed restaurant/bar use amounting to 7,395 square feet. (R. pp. 365 and 437). As such, the total square footage for accessory uses, both conference/event space and restaurant/bar

space, was 11,834, more than that proposed in the previous iteration of the plans but still less than the approximately 12,000 square feet of restaurant/bar use they were replacing on the site.⁵

The fact that the hotel's accessory uses were displacing two busy bars and restaurants in itself was sufficient evidence for the BZA to conclude that the proposed conference/event space and restaurant/bar space would have little to no impact on traffic and parking in the surrounding area. And, if that were not enough, there was additional evidence that the accessory uses were clustered along pedestrian friendly North Market Street and could be expected to be frequented by visitors on foot. (R. p. 360, para. 7).

At the July 18, 2017 hearing, the existence of the conference/event space was brought to the BZA's attention in several ways: City staff member Lee Batchelder noted the second floor of the 36 North Market Street building was shown as conference space (R. p. 484, lines 1-7); Pearce's architect, Eddie Bello, reviewed the revised plans in detail with the BZA and described the new plans for, among other things, the conference/event space, which was clearly shown in the plans (R. p. 522, para. 12); and in opposing the special exception, Holdings' lawyer told the BZA that traffic and parking related to the conference facility was one of their "main concerns" (R. p. 526, para. 16 and pp. 529 - 531, paras. 8-10, 12 and 14). The record demonstrates that the BZA was well aware of the conference facility and considered it in conjunction with the required factors under the zoning ordinance.⁶

Further, although the zoning ordinance contains no requirement for a traffic study to be conducted, the Traffic Impact Analysis from Bihl Engineering, LLC commissioned by Pearce

⁵ As pointed out earlier in this Brief, both event spaces and restaurants fall under the same category of permitted uses, known as Eating and Drinking Places, in the City of Charleston Zoning Ordinance, Article 2, Part 3 - Table of Permitted Uses.

⁶ As the circuit court noted, the BZA does not operate in a vacuum. It is common knowledge that numerous hotels in downtown Charleston have conference and event facilities as large as or larger than the room in Pearce's plans, and the BZA regularly considers applications for hotel projects that include conference and event facilities. (R. p. 5 fn. 2).

provided evidence that the entire hotel project, including accessory uses, would not have an adverse impact on traffic and parking:

Project trips associated with the proposed [Pearce] hotel will travel via East Bay Street. The detailed project traffic distribution is shown for the study area intersections in Figure 4 (Appendix). The location of the valet station will be in the garage on Guignard Street accessed via East Bay Street. **As such, it is not expected that any traffic related to the proposed development will [travel] on neighborhood roadways such as Anson Street.**

(R. p. 379, section 5.0) (emphasis added). No one, including Holdings, presented any contrary evidence. (R. p. 544, line 11 - p. 545, line 1).

Holdings' contention that the traffic study did not contemplate the conference/event space and the restaurant/bar use is just wrong. At the hearing to reconstruct the record in January 2018, Jennifer Bihl, the expert who prepared the traffic study, discussed what she had presented to the BZA at the July 2017 hearing at which the BZA had approved the hotel:

Just - - just to touch real briefly on the - - the trip generation. I know that we talked about that in detail at the July meeting and at the other - - at the other meetings before that.
And that we used the industry standard knowledge on using trip - - development of trips associated with the hotel and **the facilities associated with it** [i.e. the accessory uses].

(R. p. 556, lines 18 - 25) (emphasis added).

In addition, in terms of just parking, there was clear evidence the hotel project provided for an amount of parking spaces which was well in excess of the required minimum. The only parking requirement under the zoning ordinance is that there are two spaces for every three rooms, which for a 50-room hotel means 34 spaces. See Zoning Ordinance §54-317, Table 3.3 (R. p. 598). The application before the BZA provided for an on-site garage with 50 parking spaces, fully 16 more than was otherwise required. (R. pp. 365-366).

Finally, the BZA attached the following two conditions to its unanimous approval: “1) no access to conference room from Market Street; 2) mandatory right turn onto Guignard for leaving hotel.” (R. p. 483). The BZA added the first condition specifically to negate the possibility of impacts on traffic and parking from the conference/event space. (R. p. 543, line 20 – p. 544, line 5). As such, there can be no doubt that the BZA both heard and considered evidence regarding the potential impact of the proposed conference/event space on traffic and parking.

For all these reasons, there was evidence before the BZA from which it could have appropriately concluded that the accessory uses for conference/event space and restaurant/bar space would have a negligible impact, if any, on traffic and parking in the area surrounding the proposed hotel.

II. Holdings’ Statement of Issues on Appeal relates only to the issue of the impact of the conference/event space on traffic and parking and, therefore, this Court should not consider issues relating to other accessory uses.

Holdings’ Initial Brief contains a single Statement of Issues on Appeal alleging that the circuit court erred because “there was no evidence presented to the BZA concerning the impact of an accessory use, a conference room/event space, on parking and/or traffic.” In the heading in the Argument section of its Brief, however, Holdings purports to expand the points raised to include the impact of another proposed accessory use – restaurants/bars – on traffic and parking. In its actual argument, Holdings mentions the restaurant/bar use fleetingly but focuses on its contention of alleged lack of evidence relating to the conference/event space.⁷

“Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.” Rule 208(b)(1)(B), SCACR. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587

⁷ Holdings seeks to insert this additional issue while acknowledging that the traffic study submitted by Pearce to the BZA includes analysis of the restaurants/bars. (Appellant’s Initial Brief, pp. 8-9).

S.E.2d 691, 694 (2003) (“No point will be considered which is not set forth in the statement of issues on appeal.”); *Barnes v. Cohen Dry Wall, Inc.*, 357 S.C. 280, 592 S.E.2d 311 (Ct. App. 2003), *rev’d on other grounds*, *Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007). There is no reason to ignore this rule in this case.

III. Holdings’ Petition to the circuit court appealing the BZA’s decision restricted the issues to the impact of the accessory uses on parking and did not include their alleged impact on traffic.

An appeal to the circuit court from a zoning board of appeals must include “a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law.” S.C. Code Section 6-29-820(A). The statute makes no provision for amendment of the grounds set forth in the petition. *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004). Holdings did not appeal the issue of the conference/event space’s impact on traffic since its Petition refers only to its impact on parking.⁸ The same is true for the issue of the alleged impact of restaurants/bars on traffic.

Paragraph 15 of the Petition contains Holdings’ grounds for appeal to the circuit court. In terms of the conference/event space and restaurants and bars, it read as follows:

A. [Pearce’s] presentation stated that only valet parking for hotel guests will be provided on site and totally failed to consider the **impact of parking** for the conference center and two restaurant (sic) and two bars when the patrons and attendees were not hotel guests.

...

C. The traffic study also failed to take into consideration the impact of having a conference center and two restaurants and bars as part of the project **with no planned parking** for these venues.

⁸ The circuit court did not reach this issue because it concluded there was evidence for the BZA to consider about the conference/event space’s impact on traffic. (R. p.3 fn. 1).

(R. pp. 10-11, Paragraph 15) (emphasis added). Therefore, in terms of the accessory uses – conference/event space and restaurants/bars – Holdings necessarily limited its appeal from the BZA to the circuit court to parking issues.

The only ground of appeal submitted to the circuit court relating to traffic was in Paragraph 15(B) which stated that the traffic study failed to consider cumulative hotel traffic on Guignard Street generated by Pearce’s proposed hotel and other hotel projects already approved in the immediate vicinity. Holdings, however, did not present this issue in its brief or argument to the circuit court as a reason to reverse and remand the BZA’s decision and, therefore, the circuit court’s order did not address it. In addition, Holdings has not raised the issue in its initial brief on this appeal. As such, Holdings abandoned the only issue relating to traffic impacts, and this Court should review only whether there was evidence in the record for the BZA to consider concerning the impact of the accessory uses on parking.⁹


CONCLUSION

The question before this Court is whether there was any evidence to support the BZA’s decision to approve the special exception for Pearce’s hotel. If so, the Court must affirm. In this case, the record shows the BZA carefully considered all aspects of Pearce’s request and there was ample evidence to support the BZA’s decision. Holdings’ arguments, in effect, ask the Court to find the BZA did not give due consideration to the evidence. However, this Court cannot substitute its judgment for that of the BZA. For the foregoing reasons, the Court should affirm the decisions of the BZA and the circuit court.

⁹ Of course, as discussed earlier in this Brief, Holdings failed to preserve the issue of the impact of the restaurant/bar use on traffic or parking, and this Court’s proper review is even more limited to the issue of whether there was evidence in the record for the BZA to consider concerning the impact of the conference/event space on parking.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

A handwritten signature in black ink, appearing to read "Chuck Baker", written over a horizontal line.

Charles J. Baker III (S.C. Bar No. 486)

P.O. Box 999

Charleston, South Carolina 29402

(843) 722-3400

chuck.baker@wbd-us.com

Attorneys for Respondent Apex Real Property, LLC

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CERTIFICATE OF COUNSEL

I certify that this Final Brief is compliant with Rule 211(b) of the South Carolina
Appellate Court Rules.

WOMBLE BOND DICKINSON (US) LLP



Charles J. Baker III (S.C. Bar No. 486)

P.O. Box 999

Charleston, South Carolina 29402

(843) 722-3400

chuck.baker@wbd-us.com

Attorneys for Respondent Apex Real Property, LLC

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