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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

The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No.: 2018-CP-10-3307
Appellate Case No. 2019-000125

The Charleston County School District.....Appellant,

v.

Charleston County, South Carolina; The Charleston County Board of Zoning Appeals; and Joel Evans in his capacity as Director of the Charleston County Zoning and Planning Department.....Respondents.

Appellate Case No. 2019-000125

PETITION FOR REHEARING BY APPELLANT THE CHARLESTON COUNTY SCHOOL DISTRICT

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Charleston County School District (the "CCSD") hereby petitions for rehearing of the Court of Appeals' decision in this appeal, namely Unpublished Opinion No. 2021-UP-449 (the "Opinion"), heard on November 3, 2021 and filed on December 15, 2021.

Respectfully, the Opinion overlooks and misapprehends (1) the correct legal authority governing what triggered the CCSD's thirty-day period to appeal the "Site Plan Revocation" and (2) the nature and ripeness of the CCSD's appeal of the "Accessory Use Reinterpretation."[1]

[1] The "Site Plan Revocation" and "Accessory Use Reinterpretation" are defined herein.

For the reasons discussed herein, the CCSD respectfully requests that this Court grant its petition for rehearing, vacate the Opinion, and reverse the Circuit Court's and the BZA's orders consistent with the CCSD's arguments on appeal.

Law / Analysis

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322, (2001). Respectfully, the CCSD submits that the Court overlooked and misapprehended key elements of the CCSD's arguments regarding the timeliness and ripeness of the CCSD's first-level appeal to the Charleston County Board of Zoning Appeals (the "BZA").

1. The Opinion erroneously states that Section 3.13.3 of the ZLDR, not S.C. Code Ann. § 6-29-800(B), controls the CCSD's appeal to the BZA and concludes that the time to appeal commenced on the date of the Site Plan Revocation – not when the CCSD received "actual notice."

This appeal derives from the Charleston County Planning Director's (the "Director") decision to revoke a site plan issued to the CCSD for a school bus parking lot on the James Island Elementary School property. On February 7, 2017, the Director gave final approval to this site plan, which depicts thirty-five school bus parking spots (the "Site Plan Approval"). (R. p. 478, 499 – 509). By unsigned letter dated February 28, 2018 and addressed to ADC Engineering, the Director rejected the CCSD's request for a one-year extension and revoked the Site Plan Approval for allegedly failing to satisfy certain conditions (the "Site Plan Revocation").[2] (R. p. 478, 511). On April 18, 2018, the CCSD appealed the Site Plan Revocation to the BZA by filling out a form

[2] The CCSD argues on appeal that the ZLDR does not authorize the Director to place on one-year expiration on site plan approvals or require the demonstration of, among other things, a "hardship" to gain additional time. The Opinion does not address the CCSD's substantive arguments over the validity of the Site Plan Revocation because of the Opinion's conclusion that the CCSD's appeal was untimely.

made available by the Planning Department and submitting same to the Director. (R. p. 479, 514 – 517).

The Opinion concludes that the CCSD's appeal to the BZA was untimely because it was filed more than thirty days after the date printed on the Site Plan Revocation. The CCSD has maintained throughout this appeal that the thirty-day period to appeal the Site Plan Revocation commenced when it received "actual notice" of the decision. S.C. Code Ann. § 6-29-800(B). Whether the date of the decision or actual notice of the decision starts the clock is no small matter – it is outcome determinative in this case. Unfortunately, the Opinion overlooks and misapprehends the controlling legal authority governing when the time period to appeal the Site Plan Revocation commenced.

The Opinion cites Sections 3.7.8 and 3.13.3 of the Charleston County Zoning and Land Development Regulations (the "ZLDR") in support of its holding that the date printed on the Site Plan Revocation starts the thirty-day appeal clock.

Article 3.7 of the ZLDR governs "Site Plan Review." (R. p. 87, 93 – 94). Section 3.7.8 provides that "[a]ppeals shall be processed in accordance with the procedures of Article 3.13 of this Chapter."[3] (R. p. 94). Section 3.13.3 reads, in full, as follows:

§3.13.3 Application Filing; Timing

Applications for Appeals of Administrative Decisions on zoning-related matters shall be submitted to the Planning Director on forms available in the Planning Department. Appeals of Administrative Decisions to grant or deny a Zoning Permit shall be filed within 30 calendar days from the date of the Administrative Decision.

Effective on: 11/20/2001, as amended

(R. p. 101).

[3] Section 3.7.8, which references Article 3.13, is not rendered meaningless by concluding, as the CCSD urges this Court to do, that the second sentence of Section 3.13.3 does not apply to this appeal by its express terms. Article 3.13 governs other aspects of the administrative appellate process – other than timing. For example, the first sentence of Section 3.13.3 addresses the form to use to initiate an appeal to the BZA and where the form should be submitted. The County has never maintained the CCSD failed to comply with the first sentence of Section 3.13.3.

The Opinion cites only the second sentence of Section 3.13.3 to support its holding that the date printing on the Site Plan Revocation starts the thirty-day appeal clock and the CCSD's appeal was untimely. The second sentence of Section 3.13.3 establishes an appeal deadline thirty days from "the date of the Administrative Decision to grant or deny a **Zoning Permit**." (Emphasis added). This means the Opinion presumes that the Site Plan Revocation constitutes an "Administrative Decision to grant or deny a Zoning Permit." This is erroneous, as a matter of law, because the CCSD appeal does not involve a "Zoning Permit" – it involves a site plan related challenge.

The second sentence of Section 3.13.3 does not apply to this case. By its express terms, the second sentence of Section 3.13.3 only applies to "Administrative Decisions to grant or deny a **Zoning Permit**." (Emphasis added). A Zoning Permit and a Site Plan approval are entirely distinct land development approvals under the ZLDR. Article 3.7 governs "Site Plan Review" and Article 3.8 of the ZLDR governs "Zoning Permits." (R. p. 87). A site plan provides a two dimensional, engineered visual depiction of a development on a particular piece of property. A Zoning Permit, on the other hand, constitutes the County's written approval of a specified use on a particular site.

The second sentence of Section 3.13.3 addresses *only* what triggers the time to appeal Zoning Permits – not site plan approvals. Charleston County Council, by adding specific language concerning Zoning Permits, expressed a clear legislative intent for Section 3.13.3 to only apply to Zoning Permit appeals – not appeals over any of the other myriad land development approvals under the ZLDR.

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed

in light of the intended purpose of the statute." *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id*. Thus, we must follow the plain and unambiguous language in a statute and have "no right to impose another meaning." *Id*. Therefore, since the express language of Section 3.13.3 pertains only to Zoning Permit appeals – and this case is not a Zoning Permit appeal – the Opinion's reliance in this language in the ZLDR is misplaced and constitutes an error of law.[4]

The CCSD's position throughout this appeal has been that S.C. Code Ann. § 6-29-800(B) controls the timing of its Site Plan Revocation appeal – not Section 3.13.3. This statute provides that appeals to the BZA "must be taken within a reasonable time, as provided by the zoning ordinance . . . **If no time limit is provided**, the appeal must be taken within thirty days from the date the appealing party has received **actual notice** of the action from which the appeal is taken." (Emphasis added).

As mentioned, the ZLDR lacks any language governing what commences the time period to appeal site plan related decisions. The second sentence of Section 3.13.3 applies only to Zoning

[4] The second sentence of Section 3.13.3 must be carefully parsed and strictly construed against the County. This Court has held time and again that land use regulations, such as the ZLDR, must be strictly construed in favor of property rights and property owners. In *Helicopter Solutions, Inc. v. Hinde*, this Court observed that:

> It is a well-founded principle of law that "statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner.

414 S.C. 1, 13, 776 S.E.2d 753 (Ct. App. 2015) (citing *Purdy v. Moise*, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953)); *Keane v. Hodge*, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct. App. 1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize its highest utility.")

Permits – not site plans. Therefore, S.C. Code Ann. § 6-29-800(B) controls, as far as site plan related appeals go, because "no time limit is provided" in the ZLDR. Therefore, the statutory default rule proscribed by S.C. Code Ann. § 6-29-800(B) governs this appeal.

Whether S.C. Code Ann. § 6-29-800(B) or Section 3.13.3 applies is outcome determinative on the timeliness of the CCSD's Site Plan Revocation appeal to the BZA. If Section 3.13.3 controls, which it does not, the CCSD's appeal is untimely because it was filed more than thirty days after the date printed on the Site Plan Revocation. However, if S.C. Code Ann. § 6-29-800(B) applies, then the issue of when the CCSD acquired "actual notice" of the Site Plan Revocation becomes a fact question of utmost import.

As extensively briefed by the CCSD, there is no evidence in the record that the CCSD received "actual notice" of the Site Plan Revocation on the same date it was issued. The Site Plan Revocation is not addressed to the CCSD, and there is no evidence it was ever mailed or otherwise conveyed directly to the CCSD.[5] (R. p. 478, 510 – 511). The only evidence in the record even suggesting when the CCSD received notice of Site Plan Revocation is the meeting attended by County and the CCSD personnel on March 19, 2018. (R. p. 479). The CCSD timely filed its appeal on April 18, 2018, exactly thirty days later. (R. p. 479). Therefore, the CCSD's appeal of the Site Plan Revocation complies with S.C. Code Ann. § 6-29-800(B).

Given the foregoing, this Court should reverse its conclusion that the CCSD's appeal of the Site Plan Revocation was untimely. This will enable, for the first time ever in this appeal, an on the merits review of the Site Plan Revocation and whether it complies with the ZLDR.

[5] As noted in the CCSD's briefs, "constructive notice" and "actual notice" are materially distinct concepts under South Carolina law. *Anderson v. Buonforte* 365 S.C. 482, 492, 617 S.E.2d 750, 755 (Ct. App. 2005) ("[c]onstructive notice and actual notice are not one and the same."). Therefore, whether and to what extent the CCSD's agent, York Dilday with ADC Engineering, possessed knowledge of the Site Plan Revocation is not dispositive of when the CCSD possessed "actual notice" for the purposes of S.C. Code Ann. § 6-29-800(B). *Independence National Bank v. Buncombe Professional Park, LLC*, 411 S.C. 605, 769 S.E.2d 663 (2015) ("The rule is that a principal has constructive notice of all the material facts which its agent, while acting in the scope of his authority, receives notice.").

2. The Opinion misapprehends the nature of the CCSD's appeal of the Director's Accessory Use Reinterpretation and erroneously concludes it is unripe.

The Opinion states that "the District asserts the Planning Director additionally denied the extension request for the Project based on a 'reinterpretation' of the definition of accessory use." This mischaracterizes the nature of the CCSD's appeal. The CCSD's appeal of the Site Plan Revocation and the appeal of the Director's Accessory Use Reinterpretation are distinct appeals over separate decisions made by the Director.[6] The latter is not a hypothetical, unripe dispute with the County, as the Opinion concludes. Rather, it is an appeal from the Director's final and definitive ruling that only fifteen – not the original thirty-five – school bus parking spots would be permitted at James Island Elementary.

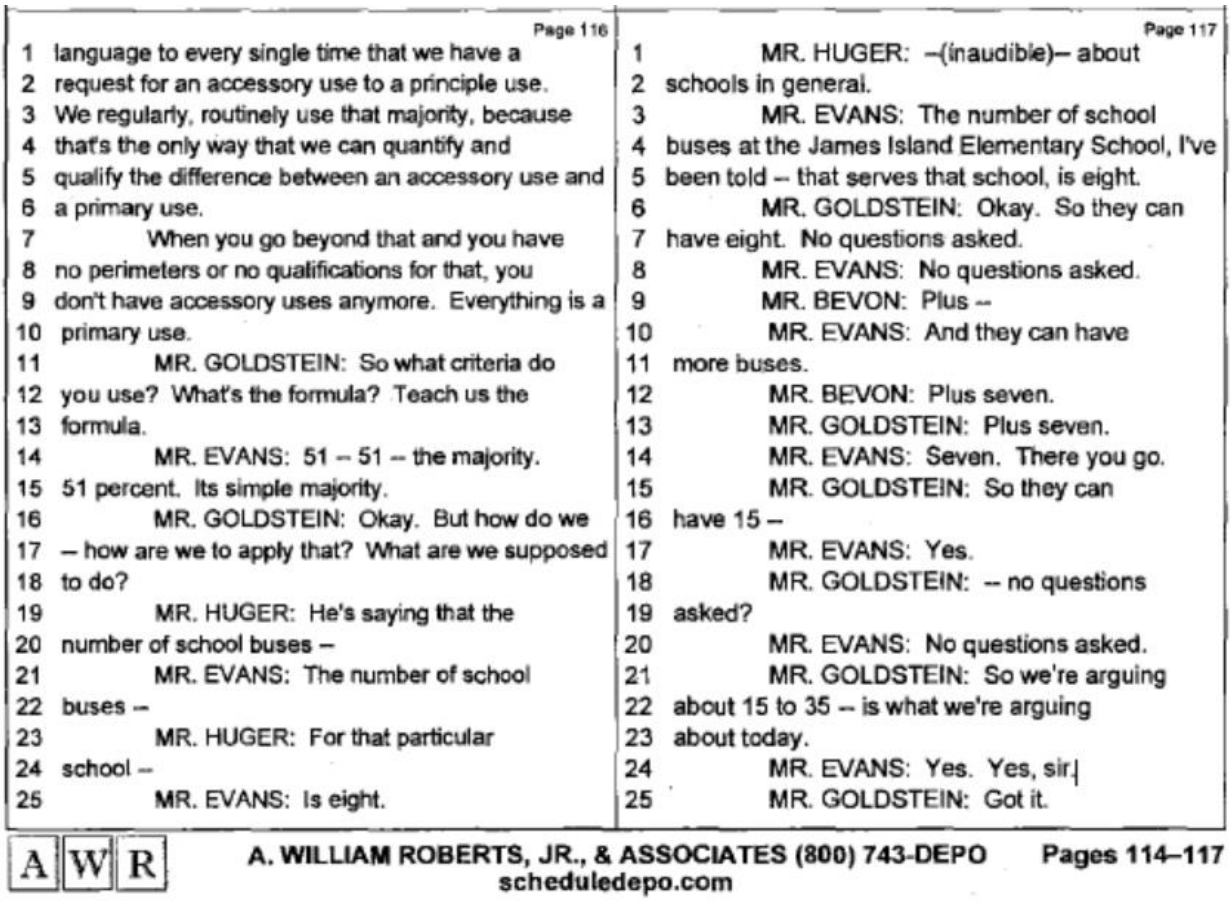
On March 19, 2018, the Director met with CCSD representatives at County headquarters to discuss the ongoing permitting disputes regarding the school bus parking lot at James Island Elementary. (R. p. 479). At the meeting, the Director explained to the County that the thirty-five school bus parking spots, depicted on the Site Plan Approval, would no longer be permitted on the site due to his reinterpretation of "accessory use" in the context of school bus parking on school grounds (the "Accessory Use Reinterpretation"). The Director shared with the CCSD his March 13, 2018 e-mail to Councilmember Anna Johnson, further clarifying his new interpretation. (R. p. 479, 512 – 513) ("March 19, 2018: The Planning Director meets with CCSD staff and gives them a copy of the March 13, 2018 e-mail/written interpretation.").

The Director's e-mail reads, in relevant part, as follows: "On parcels with a legally operating school, school bus parking lots shall be allowed as an accessory use to the school *provided that the majority of the bus parking is to serve the school facility on the subject property*."

[6] While these decisions are distinct issues on appeal, it remains the CCSD's position that the Accessory Use Reinterpretation ripeness the Site Plan Revocation for purposes of making the CCSD an "aggrieved party" possessing standing to appeal and initiating the thirty-day period to appeal.

(R. p. 479, 512 – 513) (Emphasis added). Since only eight school buses serve James Island Elementary itself, the Director informed the CCSD at the March 19, 2018 meeting that a maximum of fifteen school bus parking spots would be allowed on site. This was twenty fewer spots than previously permitted via the Site Plan Approval on February 7, 2017.

The Director confirmed the Accessory Use Reinterpretation as applied with finality to the James Island Elementary School at the June 4, 2018 BZA hearing. The following excerpt from the hearing transcript leaves no room for doubt:



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language to every single time that we have a request for an accessory use to a principle use. We regularly, routinely use that majority, because that's the only way that we can quantify and qualify the difference between an accessory use and a primary use.

When you go beyond that and you have no perimeters or no qualifications for that, you don't have accessory uses anymore. Everything is a primary use.

MR. GOLDSTEIN: So what criteria do you use? What's the formula? Teach us the formula.

MR. EVANS: 51 -- 51 -- the majority. 51 percent. Its simple majority.

MR. GOLDSTEIN: Okay. But how do we -- how are we to apply that? What are we supposed to do?

MR. HUGER: He's saying that the number of school buses --

MR. EVANS: The number of school buses --

MR. HUGER: For that particular school --

MR. EVANS: Is eight.

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MR. HUGER: --(inaudible)-- about schools in general.

MR. EVANS: The number of school buses at the James Island Elementary School, I've been told -- that serves that school, is eight.

MR. GOLDSTEIN: Okay. So they can have eight. No questions asked.

MR. EVANS: No questions asked.

MR. BEVON: Plus --

MR. EVANS: And they can have more buses.

MR. BEVON: Plus seven.

MR. GOLDSTEIN: Plus seven.

MR. EVANS: Seven. There you go.

MR. GOLDSTEIN: So they can have 15 --

MR. EVANS: Yes.

MR. GOLDSTEIN: -- no questions asked?

MR. EVANS: No questions asked.

MR. GOLDSTEIN: So we're arguing about 15 to 35 -- is what we're arguing about today.

MR. EVANS: Yes. Yes, sir.

MR. GOLDSTEIN: Got it.

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(R. p. 412).

The Opinion erroneously concludes that the Accessory Use Reinterpretation was unripe for appeal because "the interpretation would be applied to any *future applications* for site plan

approval for the Project." (Emphasis in Original). The facts in the record do not support this conclusion. The Director twice issued a final ruling that only fifteen school bus parking spots would be allowed at the James Island Elementary School property *specifically* – first, at the March 19, 2018 meeting with the CCSD and, second, at the June 4, 2018 BZA hearing. There is nothing hypothetical or prospective about the Accessory Use Reinterpretation and its impact on the CCSD's plans for a centralized school bus parking lot on James Island. This was a final decision and denial of a thirty-five-spot school bus parking lot on the James Island Elementary property.

The Accessory Use Reinterpretation is ripe for appeal under South Carolina law. *Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006) ("[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review."). The Accessory Use Reinterpretation is neither contingent, hypothetical, nor abstract. The Accessory Use Reinterpretation was a final decision by the Director confirming the specific number of school bus parking spots (fifteen) allowed on a specific property (James Island Elementary School).

The Accessory Use Reinterpretation is an exemplar of a final zoning administrator decision ripe for appeal under South Carolina law. S.C. Code Ann. § 6-29-800(A)(1) (empowering the BZA "to hear and decide appeals where it is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance"); Section 3.13.1, ZLDR ("The Board of Zoning Appeals shall be authorized to hear and decide appeals only on zoning-related matters where it is alleged there is an error in any order, requirement, decision or determination made by an administrative official in the administration or enforcement of any of the zoning-related regulations of this Ordinance.")

These controlling authorities do not require a futile permit application to be submitted and summarily denied to ripen an appeal. After the Accessory Use Reinterpretation was relayed to the CCSD, both at the March 19, 2018 meeting and the June 4, 2018 BZA hearing, it was clear beyond a shadow of a doubt that a permit application depicting thirty-five school bus parking spots would be outright denied by the Director.

South Carolina law does not require the CCSD to have pursued a vain and futile application for a thirty-five spot school bus parking lot after being informed twice the Director would reject this plan. The general rule is that administrative remedies must be exhausted absent circumstances excusing application of the general rule. *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 442 S.E.2d 582 (1994); *Andrews Bearing Corp. v. Brady*, 261 S.C. 533, 201 S.E.2d 241 (1973). "A general exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that a pursuit of them would be a vain or futile act." *Moore v. Sumter County Council*, 300 S.C. 270, 273-74, 387 S.E.2d 455, 458 (1990) (citing 82 Am.Jur.2d Zoning and Planning § 332 at 903 (1976)). Futility, however, must be demonstrated by a showing comparable to the administrative agency taking "a hard and fast position that makes an adverse ruling a certainty." *Thetford Properties IV Ltd. P'ship v. U.S. Dep't of Hous. and Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990). The Opinion suggests the CCSD should have pursued an obviously vain and futile act.

When the BZA hears a zoning administrator appeal its review is *de novo*, and its final order constitutes a final decision on the merits for the purposes of appeal. *Clear Channel Outdoor v. City of Myrtle Beach*, 602 S.E.2d 76, 79 (S.C. Ct. App. 2004) (board exercises "substantial power" with "[f]ew restrictions" and is authorized to apply the ordinance as dictated by the facts before it). "[T]he board of appeals may . . . reverse or affirm, wholly or in part, or may modify the order,

requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit." S.C. Code Ann. § 6-29-800(E).

Here, the BZA's final decision on the "accessory use" question, which holds "the Planning Director's decision stands," supplants and supersedes the Director's determination. (R. p. 466). The BZA's final decision is, therefore, ripe for appeal under South Carolina law. S.C. Code Ann. § 6-29-820(A) ("A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law.")

The County and the BZA's conduct further supports the ripeness of the CCSD's appeal of the Accessory Use Reinterpretation. The County and the BZA allowed this issue to go before the BZA. If the appeal was unripe under the ZLDR or S.C. Code Ann. § 6-29-800(A)(1), then the County or the BZA could have refused to hear the appeal or dismissed it as unripe. This did not happen. Of course, the BZA heard the CCSD's appeal of the Accessory Use Reinterpretation and sided with the Director on the merits.

Not once in this litigation has either the County or the BZA taken the position that the Accessory Use Reinterpretation appeal was unripe. Therefore, the ripeness of the CCSD's appeal is confirmed both under the law of the case doctrine and through the County's acquiescence on this issue throughout the litigation. *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("[An] unchallenged ruling, right or wrong, is the law of the case and requires affirmance."); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513,

514 (1994) ("[An appellant who] fails to provide arguments or supporting authority for his assertion . . . is deemed to have abandoned [the] issue.").

The CCSD's appeal of the Accessory Use Reinterpretation was ripe under both S.C. Code Ann. § 6-29-800(A)(1) and Section 3.13.1 of the ZLDR. Therefore, this Court should reverse its determination that the CCSD's appeal of the Accessory Use Reinterpretation was unripe, take up the merits of whether the Accessory Use Reinterpretation was correct on the merits, and conclude that the CCSD's position (which was the Director's original position) complies with the ZLDR's test for evaluating an accessory use, namely the "customary, incidental, and subordinate" test.

Conclusion

The Opinion overlooks and misapprehends both the correct time period trigger for appealing the Site Plan Revocation and the ripeness of the CCSD's appeal of the Accessory Use Reinterpretation. The CCSD respectfully requests the Court vacate the Opinion, grant the CCSD's petition for rehearing, and issue a new opinion reversing the Circuit Court's and BZA's orders on appeal.

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PROOF OF SERVICE

I, Alicia M. Terwilliger, paralegal at McCullough ▪ Khan ▪ Appel, hereby certify that a true and correct copy of the Petition for Rehearing by Appellant The Charleston County School District was served upon counsel for the Respondents in the above-captioned matter, via email and by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, this 13th day of January, 2022, addressed as follows:

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s/Alicia M. Terwilliger
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Mount Pleasant, South Carolina

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PROOF OF SERVICE

I, Alicia M. Terwilliger, paralegal at McCullough ▪ Khan ▪ Appel, hereby certify that a true and correct copy of the Petition for Rehearing by Appellant The Charleston County School District was served upon counsel for the Respondents in the above-captioned matter, via email and by causing a copy of same to be deposited in the United States Mail, first class postage prepaid, this 13th day of January, 2022, addressed as follows:

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