THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No.:2022-000092
Case No.: 2021-CP-10-4196

Crescent Homes, SC, LLC,.....Appellant,

v.

City of Charleston Board of Zoning Appeals-Zoning,.....Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On March 29, 2021, Appellant Crescent Homes SC, LLC applied for a building permit to construct a home with two stories of living space over an unfinished, unheated drive-under garage in the Avenue of Oaks subdivision in the City of Charleston. (R. pp. 30-32.)[1] The City of Charleston denied the building permit on April 15, 2021 via an email from a planning staff member. (*Id.* at p. 43.) According to the City, the garage was considered a story because the home was located in Flood Zone X, which thereby caused the proposed design to exceed the 2 ½ story height limitation in the SR-1 zoning district. (*Id.*)

On May 17, 2021, Crescent Homes submitted to Respondent City of Charleston Board of Zoning Appeals (the "BZA") an appeal of the City's denial of the building permit for 1012 Avenue of Oaks based on the City's interpretation that the home's designed drive-under garage area is a "story," as defined by the City's zoning code. (*Id.* at pp. 8-9.)

The appeal was heard at the BZA's meeting on June 15, 2021. (*Id.* at pp. 2-7, 134-158.) During this meeting, the BZA granted a variance to allow 1012 Avenue of Oaks and eight other lots within the same neighborhood to exceed the 2 ½ story height limitation in the SR-1 zoning district. (*Id.*) Due to this variance, the BZA deferred deciding Crescent Homes' appeal of the denial of the building permit for 1012 Avenue of Oaks at the June 15th meeting. (*Id.* at pp. 157-158.)

[1] The citation to the Record herein references the record on appeal filed by the BZA with the Circuit Court.

Following the BZA meeting on June 15, 2021, Crescent Homes requested that the BZA decide its appeal despite the granting of the variance because the issue of whether a drive-under garage constitutes a "story" is one that would continue to recur and, therefore, was not mooted by the variance. (*Id.* at pp. 177-204.) At its meeting on August 3, 2021, the BZA, after considering the merits, denied Crescent Homes' appeal of the denial of building permit for 1012 Avenue of Oaks. (*Id.* at pp. 206-218.)

Crescent Homes then timely appealed that decision to the Circuit Court on September 9, 2021 by filing a notice of appeal, pursuant to S.C. Code Ann. § 6-29-820. (Notice App. (Circuit Ct.).) Pursuant to a consent motion filed by the parties, the Charleston Homebuilders Association was granted leave to file an amicus curiae brief on December 30, 2021. (Consent Mot. Leave Participate Amicus Curiae; Order Granting Leave Participate Amicus Curiae.) Following submission of the record on appeal on December 24, 2021, the BZA filed its brief in support of its decision on January 4, 2022. The Charleston Home Builders Association filed its amicus brief in support of the Appellant on January 4, 2022, and Crescent Homes filed its brief in support of the appeal on January 6, 2022. (Resp. Memo. Support; Amicus Curiae Brief; App. Brief)

Oral arguments were held on January 6, 2022 in front of The Honorable Paul M. Burch. (Hr. Tr. pp. 1-19.) During oral argument, Judge Burch asked no questions and made no comments. (*Id.*) At the conclusion of oral argument, Judge Burch requested that the parties' counsel submit proposed orders within ten days. (*Id.* at p. 18.) The parties submitted proposed orders shortly thereafter. (App. Prop. Order;

Resp. Prop. Order.) On January 18, 2022, Judge Burch issued his order affirming the BZA's decision. (Order.) In issuing the order, Judge Burch adopted the BZA's proposed order verbatim without making any modifications. Crescent Homes then timely filed its notice of appeal on January 26, 2022. (Notice App. (Ct. App.).)

STATEMENT OF FACTS

Crescent Homes is the owner and builder of residential lots in the Avenue of Oaks subdivision in Charleston. (R. p. 10.) The BZA is a quasi-judicial body created by the City, which is authorized to hear and decide appeals of alleged errors in a determination of a zoning official's decision in the enforcement of a zoning ordinance. S.C. Code Ann. § 6-29-800(A)(1).

Avenue of Oaks is in zoning district SR-1, and it was developed subject to the cluster development requirements under Zoning Code §§ 54-299.11, *et seq.* (R. p. 8.) Under the City's zoning code, cluster developments are intended to "[u]tilize creative and flexible site design" and "[p]rovide a mixture of lot sizes and housing options within a development." Zoning Code § 54-299.11.

Avenue of Oaks is adjacent to the marshland of Oldtown Creek, which is a relatively low area with a higher risk of flooding. (R. p. 10.) The final plat of Avenue of Oaks, with 42 developable lots, was approved by the City in March 2020. (*Id.* at pp. 15-17.) At the time the final plat was approved, all residential lots were in Flood Zones AE-14 or AE-13, which are special flood hazard areas under Code § 27-105. (*Id.)*

In the SR-1 zoning district, the maximum height for structures is 35' and 2 ½ stories. Zoning Code § 54-301. Under Zoning Code § 54-120, "story" is defined as "that portion of a building included between the surface of any floor and the surface of the next floor above, or if there be no floor above, then the space between such and the ceiling next above it." Although the City has not always interpreted this term consistently, the City's Planning Department recent interpretation of "story" has not included unfinished drive-under areas if such areas are within a flood zone. (R. p. 19.)

Based on that interpretation, Crescent Homes designed 22 of the lots with drive-under garages and two stories of living space over the drive-under garages. (*Id.* at p. 11.) Of those, 13 lots had already received building permits from the City before the events giving rise to this appeal occurred. (*Id.*)

In January 2021, the United States Federal Emergency Management Agency's revised flood maps for Charleston County became effective pursuant to City Ordinance No. 2020-140. (*Id.*; Ordinance No. 2020-140.) Under the new flood maps, 25 of the lots in Avenue of Oaks are now within Flood Zone X, and the other 17 lots are now within Flood Zone AE-11. (R. pp. 11, 28-29.) Of the 25 lots that are now within Flood Zone X, 11 lots were planned to utilize the design with drive-under garages but did not have building permits. (*Id.*)

On March 29, 2021, Crescent Homes applied for a building permit for 1012 Avenue of Oaks. (*Id.* at pp. 30-32.) The permit application included a schedule of building plans depicting the proposed home design. (*Id.* at pp. 35-41.) The building

plans show two-stories of living space supported by piers and over a drive-under garage that serves as the home's foundation. (*Id.*) The building plans also show that the drive-under garage is unfinished and unheated. (*Id.*) The garage's sides and rear have louvered wood exterior walls, and the front of the home has two garage doors surrounded by brick exterior walls covering the piers. (*Id.*) The proposed design did not exceed the 35' height limitation for the SR-1 zoning district. (*Id.* at pp.142, 145, 153.)

On April 15, 2021, an associate planner for the City emailed Crescent Homes to provide notice that the proposed design for 1012 Avenue of Oaks did not comply with applicable zoning requirements. (*Id.* at p. 43.) According to the planner, "[T]he proposed design has a drive under in an X flood zone. This would make the house 3 stories and therefore non-conforming to the SR-1 regulations. Please revise for zoning approval." (*Id.*)

On May 17, 2021, Crescent Homes submitted to the BZA its appeal of the City's denial of the building permit for 1012 Avenue of Oaks based on the City's interpretation that the home's designed drive-under garage area is a "story," as defined by the City's zoning code. (*Id.* at pp. 8-9.)

The appeal was heard at the BZA's meeting on June 15, 2021. (*Id.* at pp. 2-7, 134-158.) During this meeting, the BZA granted a variance that allowed 1012 Avenue of Oaks and eight other lots within the same neighborhood to exceed the 2 ½ story height limitation in the SR-1 zoning district. (*Id.*) Due to this variance, the BZA deferred deciding Crescent Homes' appeal of the denial of the building permit for 1012

Avenue of Oaks at the June 15th meeting. (*Id.* at pp. 157-158.) However, the BZA ultimately denied Crescent Homes' appeal at its meeting on August 3, 2021. (*Id.* at pp. 206-218).

On September 9, 2021, Crescent Homes appealed the BZA's decision to the Circuit Court, pursuant to S.C. Code Ann. § 6-29-820. Oral arguments were held on January 6, 2022 in front of The Honorable Paul M. Burch. (Hr. Tr. pp. 1-19.) During oral argument, Judge Burch asked no questions and made no comments. (*Id.*) At the conclusion of oral argument, Judge Burch requested that the parties' counsel submit proposed orders within ten days. (*Id.* at p. 18.) The parties submitted proposed orders shortly thereafter. (App. Prop. Order; Resp. Prop. Order.) On January 18, 2022, Judge Burch issued his order affirming the BZA's decision. (Order.) In issuing the order, Judge Burch adopted the BZA's proposed order verbatim without making any modifications. Crescent Homes then timely filed its notice of appeal on January 26, 2022. (Notice App. (Ct. App.).)

STANDARD OF REVIEW

A court hearing an appeal from a board of zoning appeals must determine "whether the decision of the board is correct as a matter of law." S.C. Code Ann. § 6-29-840(A). Under this standard, the court must treat a zoning board's findings of facts in the same manner as a finding of fact by a jury. *Id.* However, "issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) (citing *Mikell v. Cty.*

of Charleston, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009). Furthermore, courts need not show any deference to the rulings below on novel issues of law. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000). A decision of a zoning board "will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Rest. Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

ARGUMENT

I. *The zoning ordinance's definition of "story" is ambiguous, and therefore, the Circuit Court erred in refusing to apply the rules of statutory construction.*

This appeal involves the interpretation of the City's zoning ordinance, specifically the definition of "story" under Zoning Code § 54-120. "If [an ordinance's] language is plain and unambiguous, there is no occasion for employing rules of statutory interpretation." *Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals*, 423 S.C. 169, 186, 813 S.E.2d 874, 881 (Ct. App. 2018). However, if the ordinance is ambiguous and subject to more than one meaning, then the rules of statutory construction must be applied to determine the ordinance's meaning. *McInnis v. Estate of McInnis*, 348 S.C. 585, 592, 560 S.E.2d 632, 636 (Ct. App. 2002) ("If a statute is ambiguous, the court must construe its terms in accordance with the rules of statutory construction.").

Under the rules of statutory construction, courts must "review a zoning ordinance to give it a practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers." *Boehm,* 423 S.C. at 184, 813 S.E.2d at 881. The ordinance's language must be construed in context, and "the meaning of

particular terms in a statute may be ascertained by reference to words associated with them in the statute. The language must also be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Id.*

In analyzing zoning ordinances, courts should be guided by the 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.

Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 13, 776 S.E.2d 753, 759 (2015). Furthermore, zoning ordinances must be construed "to allow people to use their property so as to realize its highest utility" when the ordinances are drafted so that people do not have a clear understanding as to what they are permitted to do with their property. *Kean/Sherratt P'ship by Keane v. Hodge*, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct. App. 1987).

In this case, these rules of statutory construction apply because the term "story" is ambiguous as it is susceptible to two or more different meanings. *See Hopper v. Terry Hunt Constr.*, 373 S.C. 475, 482, 645 S.E.2d 162, 166 (Ct. App. 2007) (stating that a term is ambiguous if it is susceptible to at least two different meanings). As evidenced by the City's interpretation, "story" can have two different meanings insofar as the definition can both include and exclude a drive-under garage. According to the City, a drive-under garage located in a special flood zone is not a

"story," but a drive-under garage located outside of a flood zone is considered a "story." Thus, "story" is susceptible to two different meanings and is, therefore, ambiguous.

The ambiguity of the term "story" is also confirmed by legal resources and decisions from courts in other jurisdictions that have ruled that "story" does not include unfinished or uninhabitable spaces. For example, Ballentine's Law Dictionary defines "story" as "[a] habitable space between two floors of a building." Ballentine's Law Dictionary, 3rd Ed., p. 1221. In fact, several courts have defined "story" consistently with this definition, thereby requiring a story to consist of habitable space. *See Biber v. O'Brien*, 138 Cal. App. 353, 360 (1st Dist. Ct. App. 1934) ("A story has been defined as the habitable space between two floors."); *Hunter v. Narragansett Electric Lighting Co.*, 50 R.I. 196, 199, 146 A. 624, 625 (1929) ("A story is defined in Webster's Dictionary as the habitable space between two floors."); *BCH Dev., LLC v. Lakeview Heights Addition Prop. Owners' Assoc.*, No. 05-17-01096-CV, 2019 Tex. App. LEXIS 4170, at *17 (Tex. Ct. App. 5th Dist. May 21, 2019) ("The term 'story' refers to the habitable space between two floors."). Under this definition, "story" would not include the designed drive-under garage for 1012 Avenue of Oaks, which is unfinished and not habitable.

Based on this ambiguity, the Circuit Court should have applied the rules of statutory construction. However, its order denying Crescent Homes' appeal fails to address whether the term "story" is ambiguous and whether the rules of statutory construction apply. In fact, the Circuit Court summarily denied the appeal by

adopting the BZA's proposed order verbatim, without making any independent findings of fact or conclusions of law.

During oral argument, the Circuit Court asked no questions and made no substantive comments about the arguments of counsel. (Hr. Tr. pp. 1-19.) At the conclusion of the argument, the Circuit Court requested that each party submit proposed orders without giving any guidance about its thoughts on the issues in dispute. (*Id.* at p. 18.) Promptly after the proposed orders were submitted, the Circuit Court issued an order denying the appeal by adopting verbatim the BZA's proposed order without any modification. (Resp. Prop. Order; Order.)

These actions create the perception, if not clearly demonstrate, that the Circuit Court failed to engage in a meaningful and independent consideration of the issues in this appeal. As one federal court of appeals stated:

> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are the tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

Bright v. Westmoreland, 80 F.3d 729, 732 (3d Cir. 2004); *see also, Petrovic v. AMOCO Oil Co.*, 200 F.3d 1140, 1150 (8th Cir. 1999) (stating that "verbatim adoption of proposed findings of fact and rulings of law ought ordinarily to be avoided, as such a practice can obfuscate the extent to which the order was the product of personal analysis and interpretation by the trial judge").

By adopting the BZA's proposed order verbatim and without modification, the Circuit Court disregarded the applicable rules of statutory construction. Had the Circuit Court applied the applicable rules of construction, it would have determined that Crescent Homes' interpretation of "story" is correct and that the BZA's was wrong, as explained in more detail below.

II. *The Circuit Court erred by construing the definition of "story" inconsistently with other related provisions of the City's ordinances*.

The Circuit Court's interpretation of "story" as including unfinished drive-under garages is in error because it is inconsistent with other provisions of the City's ordinances that are related to the same subject and advance the same purposes as the zoning ordinance. In adopting this interpretation, the Circuit Court violated the rule of statutory construction that holds that language in a statute or ordinance must "be read in a sense [that] harmonizes with its subject matter and accords with its general purpose." *Boehm*, 423 S.C. at 184, 813 S.E.2d at 881.

As stated above, the zoning code defines "story," in pertinent part, to mean "that portion of a building included between the surface of any floor and the surface of the next floor above." Zoning Code § 54-120. Therefore, whether a drive-under garage constitutes a "story" necessarily depends on whether the garage is or contains a "floor." Although the City's zoning ordinance does not define "floor," City Council defined that term in its stormwater management ordinance. Thus, the City's stormwater management ordinance provides the best guidance as to whether a drive-under garage in a flood zone has a "floor," and, thus, a "story."

In the stormwater management ordinance, the surface of an unfinished drive-under garage is not a "floor." This ordinance defines "floor" to mean "the top surface of an enclosed area in a building (including basement) i.e., top slap in concrete slab construction or top of wood flooring in wood frame construction. *The term does not include the floor of a garage used solely for parking vehicles*." Zoning Code § 27-103 (emphasis added). Furthermore, the stormwater ordinance further defines "lowest floor" as not including unfinished garages or enclosures. "An unfinished or flood resistant enclosure, usable solely for parking vehicles, building access, or storage in an area other than a basement area is not considered a building's lowest floor, provided that such enclosure is not built so as to render the structure in violation of the applicable non-elevated design requirements of this article." *Id.*

Here, the drive-under garage designed for 1012 Avenue of Oaks does not fall within the definitions of "floor" or "lowest floor" because it meets the express criteria for exclusion. It is an unfinished garage that is only partially enclosed and designed solely for parking vehicles and storage. Therefore, it is not a "floor," and consequently, it is not a "story."

When confronted with this argument on appeal below, the Circuit Court refused to apply the definition of "floor" from the City's stormwater management ordinance for the purpose of interpreting the term "story" as used in the zoning ordinance. According to the Circuit Court, the purposes of the stormwater ordinance and zoning ordinance are different, and thus, "there is no reason to borrow a

definition from a different ordinance for a different word." (Order p. 2.) This rationale is mistaken.

Contrary to how the Circuit Court characterized it, interpreting the zoning and stormwater management ordinances consistently is not "borrowing." Instead, the rules of statutory interpretation compel courts to determine the meaning of an ambiguous term or provision in a statute or ordinance by looking to other related statutes and ordinances for guidance. *See, e.g., Mathis v. Hair*, 358 S.C. 48, 53, 594 S.E.2d 851, 854 (2003) (considering definitions of term in other statutes to determine statutory term's meaning); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (looking to how ambiguous term is used in analogous statutes); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (interpreting statutory term consistently with how term was defined in similar statutes); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."). The rationale underlying this rule of statutory construction is consistent with the rule of statutory interpretation that a statute or ordinance "must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

In this regard, the Circuit Court erred in determining that the stormwater management and zoning ordinances are different and should not be construed together. Contrary to the Circuit Court's conclusion, the purposes of the stormwater

and zoning ordinances are related and overlap. While zoning codes have many purposes, those purposes expressly include "protect[ing] and preserv[ing] . . . ecologically sensitive areas;" "regulat[ing] . . . the uses of buildings, structures and land for . . . protection against flood;" "secur[ing] safety from . . . flood;" and "further[ing] the public welfare." S.C. Code Ann. § 6-29-710(A)(4), (5), (7), and (8). Likewise, the purpose of the City's stormwater management ordinance is to "protect, maintain, and enhance water quality and the environment of the city and the short-term and long-term public health, safety, and general welfare of the citizens of the city;" "minimize property damage . . . [from] increased stormwater runoff and related pollutant loads associated with both future development and existing developed land;" "reduce the effects of development on land;" and "reduce local flooding." City Code § 27-6(a).

Because the stormwater management and zoning ordinances advance similar and interrelated goals, they should be construed consistently with one another as a harmonious whole to fulfill their common purposes. Conversely, interpreting the stormwater management and zoning ordinances inconsistently, as the Circuit Court did in this case, undermines those common purposes. By interpreting "story" in a way that conflicts with the stormwater management ordinance's definition of "floor," the Circuit Court is effectively discouraging homeowners and builders from utilizing designs that are specifically intended to mitigate the risks posed by stormwater runoff and flooding, which conflicts with the purposes of both the stormwater management and zoning ordinances.

Also, contrary to the Circuit Court's suggestion, the fact that 1012 Avenue of Oaks is no longer in Flood Zone AE does not justify the inconsistent interpretation of the stormwater management and zoning ordinances. As the recent history with this particular property shows, flood zones change. A property that is not in a flood zone today may be in a flood zone in one, five, or ten years from now, especially considering the ever-increasing risks from climate change and sea rise. In any case, 1012 Avenue of Oaks remains in Flood Zone X and is situated next to a marsh, and thereby, subject to increased risk from flooding.

Given the interrelated purposes of the stormwater management and zoning ordinances, the Circuit Court erred in determining that it is "inappropriate to try to reconcile the two ordinances." Instead, established canons of statutory construction support the two ordinances being construed consistently to ensure that their respective purposes are fulfilled rather than undermined. Therefore, the Circuit Court's decision below should be reversed.

III. The Circuit Court erred by construing the definition of "story" to the detriment of property owners and their ability to realize their properties' highest use.

By adopting the City's interpretation of "story," the Circuit Court has effectively limited the rights of property owners and homebuilders to realize their properties' highest utility, while also interfering with their ability to utilize innovative designs that are both aesthetically attractive and protective from flooding. Thus, the Circuit Court's interpretation of "story" violates the substantive rule of statutory interpretation holding that zoning statutes or ordinances "must be liberally construed for the benefit of the property owner" and "should not be impliedly

extended to cases not clearly within their scope and purpose." *Helicopter Solutions,* 414 S.C. at 13, 776 S.E.2d at 759.

As explained above, the term "story" is susceptible to multiple interpretations as to whether a drive-under garage is included within its definition, and it is, therefore, ambiguous. When confronted with this ambiguity, the Circuit Court should have applied the rule of statutory construction favoring a liberal interpretation for the benefit of property owners. Because excluding a drive-under garage from the meaning of "story" would benefit property owners by expanding their options as to the design and floor space of their homes, the Circuit Court should have adopted this interpretation. Its failure to do so was in error, and its decision should be reversed accordingly.

IV. The Circuit Court's interpretation of "story" is arbitrary and capricious because it conflicts with the purposes, design, and policy of the City's zoning ordinance and has no rational relationship to a lawful purpose.

In addition to being contrary to the intended and ordinary meaning of "story," the Circuit Court's interpretation of that term is arbitrary and capricious and has no rational relationship to a lawful purpose. "Arbitrary" means "based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; done capriciously or at pleasure, without adequate determining principle, nonrational; not governed by any fixed rules or standards." *Hatcher v. South Carolina Dist. Council of Assemblies of God*, 267 S.C. 107, 117, 226 S.E.2d 253, 258 (1976).

Here, the City's interpretation of "story" approved by the Circuit Court is arbitrary and capricious because it is based on an arbitrary distinction of whether the home is in a certain flood zone when there is nothing in definition of "story" that allows such a distinction. The City approved building permits for other houses with drive-under garages in Avenue of Oaks on lots that were in Flood Zones AE-14 and AE-13 prior to the issuance of the new FEMA flood maps. In so doing, the City did not consider the drive-under garages on those lots to be a story, thereby concluding that the proposed design did not exceed the 2 ½ story maximum height in the SR-1 zoning district. Now, however, the City takes the position that a drive-under garage is a story if it is located on a lot in Flood Zone X.

Yet nothing in the definition of "story" or any other zoning provision suggests that the term's meaning changes based on the location of a flood zone. In fact, the definition does not use the term "flood zone" in any manner. As a result, if a drive-under garage is not a story when it is in a flood zone, there is nothing in the Zoning Code that renders it a story when it is outside of a flood zone. Put simply, the definition of "story" has one statutory meaning, and the City's attempt, ratified by the Circuit Court, to give two inconsistent meanings is not based on any fixed rule or standard.

As further evidence of the arbitrary and capricious nature of this interpretation, the City's planning department has never articulated in writing which specific flood zones or conditions permit a drive-under garage to be excluded from the definition of "story." Instead, the definition appears to be determined on the whims

of the City's planning department, which has failed to provide property owners with a clear understanding of what criteria apply for determining whether a drive-under garage constitutes a "story." This type of decision making is the epitome of arbitrariness that cannot be tolerated under the rule of law.

Furthermore, the City's interpretation of "story" to exclude some – but not all – drive-under garages from its meaning has no rational relationship to any lawful purpose. Prior to the appeal to the Circuit Court, the City never explained the purpose of excluding drive-under garages located in non-flood zones from the meaning of "story." And restricting the use of drive-under garages with two stories of living space above them in the SR-1 zoning district does not advance any of the purposes of zoning ordinances as set forth in S.C. Code Ann. § 6-29-710(A).

While the Circuit Court explained that a "zoning limit on the number of stories is intended to limit the size and mass of the structure," the interpretation of "story" to exclude drive-under garages in certain locations does not fulfill that intent. Instead, the limitation on the size and mass of the structure is instead accomplished by the City's height restriction of 35' in the SR-1 zoning district. For example, Crescent Homes could permissibly build a two and a half story home with no garage that is 35' high on 1012 Avenue of Oaks, which would be the exact same size as the two-story home with a drive-under garage that the City has denied. Thus, the City's interpretation of "story" does not seek to regulate the size of the home; it merely regulates the design and use of a drive-under garage.

Moreover, there is no legitimate purpose of regulating drive-under garages in this fashion. To be sure, the City's interpretation does not prohibit drive-under garages, as they are allowed in the SR-1 zoning district so long as there is only one story of living space above them. Put another way, Crescent Homes can build on 1012 Avenue of Oaks the following types of homes: (1) a one-story home that is 35' high with no drive-under garage; (2) a home with one-story of living space over a drive-under garage that is 35' high; and (3) a two-story home with no drive-under garage that is 35' high. But it cannot build, under the City's interpretation of "story," a two-story home over a drive-under garage that is 35' high, unless, of course, the flood maps are changed so that 1012 Avenue of Oaks is once again in Flood Zone AE.

The disparate treatment of these different home designs of the same approximate size and mass cannot be explained by any rational purpose or standard. Indeed, neither the City nor the Circuit Court has articulated any purpose of zoning ordinances enumerated in S.C. Code § 6-29-710 served by their interpretation. As a result, the interpretation of "story" to include drive-under garages (but only when outside of a flood zone) is arbitrary and capricious and does not advance any legitimate purpose of zoning ordinances. *See Builders Service Corp. v. Planning & Zoning Comm'n of the Town of East Hampton*, 208 Conn. 267, 545 A.2d 530 (1988) (ruling that minimum floor area requirement was not rationally related to any legitimate purpose of zoning); *Builders League of South Jersey v. Westampton Township*, 188 N.J. Super. 559, 457 A.2d 1252 (N.J. Super. Ct. 1983) (holding that minimum floor space requirements did not relate to any permissible zoning purpose);

122 Main Street Corp. v. Brockton, 323 Mass 646, 84 N.E.2d 13 (1948) (holding that minimum height requirement was not within scope of act authorizing zoning regulations).

Instead of advancing the purposes of the zoning ordinance, the City's interpretation of "story" undermines some of the underlying purposes of zoning ordinances, which include "to regulate . . . the uses of buildings, structures and land for . . . protection against flood" and "to secure safety from fire, flood, and other dangers." § 6-29-710(A)(5) and (7). As discussed above, Avenue of Oaks borders a marsh and is in a flood zone. Although the new flood map indicates the flooding risk is less than previously determined under the prior flood map, that risk has not been eliminated. The elevated design that utilizes drive-under garages helps protect property and residents from flooding risk. This fact was recently recognized by the City in its Dutch Dialogues efforts, which encourages using elevated designs to protect the City's residents and their property not just from flooding today but also from the uncertain but growing threats from climate change and sea-level rise in the future. (R. pp. 44-55.) By interpreting "story" to include drive-under garages, the City is discouraging homebuilders and homeowners from using this design feature, thereby increasing the threat to safety and property from flooding. This interpretation is contrary to the purposes of the zoning ordinance and the City's other recent efforts to protect its residents and their property from flooding.

Any interpretation of "story" that is dependent upon the location of a flood zone is especially contrary to the purpose of the zoning ordinance because it is short-

sighted and does not reflect the growing threat of climate change and sea-level rise. Indeed, South Carolina law requires that zoning ordinances "must be for the general purpose of guiding development in accordance with existing and ***future*** needs." S.C. Code Ann. § 6-29-710(A) (emphasis added). Yet the Circuit Court's interpretation effectively assumes that the flood zones of today will be the flood zones of tomorrow. Recent history has proven that assumption to be incorrect. By discouraging homebuilders and buyers from utilizing the elevated drive-under garage design, the Circuit Court's interpretation endangers the property of the City's residents, thereby undermining the purposes of the zoning ordinance.

The Circuit Court summarily dismissed these "policy" arguments by claiming that it was the responsibility of Charleston City Council – and not the courts – to determine in which circumstances drive-under garages should be allowed. (Order p. 2.) The Circuit Court erred in disregarding these policy considerations for multiple reasons.

First, Crescent Homes did not ask the Circuit Court – and is not asking this Court – to usurp or override City Council's legislative discretion. Instead, this case involves whether an unelected administrative official's interpretation of an ambiguously defined term in the zoning ordinance is correct as a matter of law. When disputes over the meaning of ambiguous statutes or ordinances arise, it is the courts' distinct province to determine their meaning.

Second, the decisions of South Carolina courts make clear that courts must consider the policy implications of dueling interpretations of a zoning ordinance in

dispute. As this Court declared in *Boehm*, courts "review a zoning ordinance to give it a 'practical, reasonable and fair interpretation consonant with the purposes, design, and **policy** of the lawmakers.'" *Boehm*, 423 S.C. at 184, 813 S.E.2d at 881 (quoting *Vulcan Materials. Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 491, 536 S.E.2d 892, 898 (Ct. App. 2000)) (emphasis added). Therefore, not only was the Circuit Court permitted to consider the policy implications of the City's interpretation of "story," it was required to do so.

The Circuit Court erred when it failed to consider the so-called "policy" arguments made by Crescent Homes. If it had done so, it would have been clear that the BZA and City's interpretation of "story" does not advance the policy of the zoning ordinance but instead undermines it. Therefore, the Circuit Court erred in affirming the BZA and the City's interpretation of "story," and its decision should be reversed.

CONCLUSION

Based on the foregoing discussion and analysis, Crescent Homes respectfully requests that the Court reverse the Circuit Court's order denying the appeal and rule that the term "story" does not include drive-under garages.

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March 16, 2022
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No.:2022-000092
Case No.: 2021-CP-10-4196

Crescent Homes, SC, LLC,.....Appellant,

v.

City of Charleston Board of Zoning Appeals-Zoning,.....Respondent.

PROOF OF SERVICE

This is to certify that I have this day served counsel for the Respondent in the foregoing matter with a copy of the ***Initial Brief of Appellant*** and ***Designation of Matter to be Included in the Record on Appeal*** via electronic mail only, addressed as follows:

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March 16, 2022

VIA EMAIL ONLY
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

Re: Crescent Homes SC, LLC v. City of Charleston Board of Zoning Appeals-Zoning
Appellate Case No.: 2022-000092
MVA File No.: 048043.000000

Dear Ms. Kitchings,

With regard to the above-referenced matter, please accept the following for filing in the above matter:

1. Initial Brief of Appellant Crescent Homes SC, LLC;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

By copy of this letter, I am serving Respondent's attorney with a copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal.

Thank you for your assistance with this matter. If you have any questions or concerns, please don't hesitate to contact me.

Sincerely,

E. Brandon Gaskins

EBG/llp

Enclosures: As Stated.

cc: Timothy A. Domin, Esquire *(via e-mail only)*