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.

FINAL REPLY BRIEF OF APPELLANT

E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Attorney for Appellant
Crescent Homes SC, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENTS

I. The City's ordinances and prior interpretations of "story" demonstrate its ambiguity.

To avoid having the term "story" interpreted in accordance with the rules of statutory construction, the BZA argues that "story," as defined in the City's zoning code, is unambiguous. The BZA mistakenly arrives at this conclusion by engaging in fallacious reasoning and disregarding the testimony of the City's zoning official who admits that he has consistently interpreted "story" to have different meanings. The Court should not be fooled.

The BZA claims that the definition of story, which is "[t]hat portion of a building included between the *surface of any floor* and the surface of the next floor above," is not ambiguous because the "area between the surface of the garage floor and the next floor above it counts as a story per the definition." (Resp.'s Br. p. 4.) Yet this argument assumes that the garage is a "floor" without proving it. According to the Oxford English Dictionary, "floor" may mean (1) "the lower surface of a room, on which one may walk," or (2) "all the rooms or areas on the same level of a building; a story." Presumably, the BZA, in its argument, is using the second sense of the term because the first sense would be redundant, i.e. the "surface of the garage surface." In which case, the BZA effectively argues that (1) a floor is story; (2) a garage is a floor; and (3) therefore, a garage is a story. This line of reasoning improperly begs the question.

Contrary to what the BZA would have the Court believe, the analysis is not so simple as evidenced by the City's own ordinances. As discussed in both parties' briefs,

the City's stormwater management ordinance expressly excludes garages from the definition of "floor" and "lowest floor." *See* Zoning Code § 27-103. While the BZA may argue that the stormwater management ordinance does not apply to this case, the mere fact that the City has defined "floor" to not include garages shows that the term is ambiguous because it is susceptible to differing meanings. And if "floor" is ambiguous with respect to whether its meaning includes garages, then, by extension, the term "story" is also ambiguous because the zoning code's definition of that term uses and, thus, necessarily depends on the meaning of "floor."

The ambiguity of "story" is also demonstrated by the City's own history of interpreting the term. The BZA readily admits that the City's zoning administrator sometimes interprets "story" to include drive-under garages, and at other times, interprets the term to exclude drive-under garages. In its initial brief, the BZA attempts to minimize the zoning administrator's inconsistent interpretations by characterizing it as merely giving some homes "a pass on counting unfinished drive-under-the-homes garages as a story." (Resp. Br. p. 10.) While the BZA claims that such differential treatment is "reasonable," it cites to no ordinance provision that empowers the zoning administrator to disregard a purportedly "unambiguous" term defined in the zoning code. Thus, the different interpretations given by the zoning administrator can only be explained if the term is ambiguous.

To be sure, this conclusion is supported by the zoning administrator's own sworn testimony during the first BZA meeting in June 2021. During that meeting, the zoning administrator repeatedly referred to the City's "interpretation" of "story"

as sometimes including drive-under garages and sometimes excluding them. (R. pp. 207-208.) He explained that "[t]hese ground levels that are outside of a flood zone are in effect, in our opinion, a story. If they are in a flood zone they are not a story . . ." (R. p. 208.) Regardless of the reasonableness of this opinion, there can be no doubt that a term is ambiguous if it can be interpretated to have two contradictory meanings.

The BZA attempts to convince the Court to disregard the zoning administrator's differing interpretations by arguing that Crescent Homes lacks standing to raise the issue. In support of that argument, the BZA relies on *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 200, 669 S.E.2d 337 (2000). But that case is not applicable here.

In *ATC South*, the South Carolina Supreme Court ruled that a business does not have standing to challenge a local government's approval of a competitor's rezoning application. There is nothing in that case that supports the proposition that a party appealing an unfavorable decision of a zoning administrator is precluded from relying on the administrator's prior interpretations of the zoning code as evidence of the code's ambiguity or the arbitrariness of the administrator's later decision.

In any event, Crescent Homes does not highlight the zoning administrator's varied interpretations of "story" to complain that others have received better treatment. Instead, these interpretations are addressed to demonstrate that the zoning administrator is making distinctions that have no basis in the text of the zoning code, which proves the arbitrariness of his decision making.

More importantly, the zoning administrator is prohibited from interpreting the zoning code in such an inconsistent manner. S.C. Code Ann. § 6-29-720(B) requires that all zoning "regulations must be uniform for each class or kind of building, structure, or use throughout each district." Here, the City and the BZA are clearly violating this provision by treating some drive-under garages in the SR-1 zoning district as a story, while considering other drive-under garages in the same district as not a story. Put simply, there is nothing uniform about the City's interpretation and application of the term "story." To avoid this inconsistency and ensure that the definition of "story" is applied uniformly, the Court should construe the term liberally for the benefit of property owners to not include drive-under garages. *See Helicopter Solutions, Inc. v. Hinde*, 414 S.C. 1, 13, 776 S.E.2d 753, 759 (2015) (providing that ambiguous zoning ordinances must be liberally construed for the benefit of the property owner).

II. This appeal is an exception to the mootness doctrine because the underlying issue is capable of repetition, and it should be decided to guide Crescent Homes' future building activities in the City.

The BZA seeks to avoid a decision on the merits of this appeal by arguing that the matter is moot. Although the BZA granted a variance for 1012 Avenue of Oaks, it also denied Crescent Homes' appeal on the merits after Crescent Homes argued that the case should be decided under the exceptions to the mootness doctrine. (R. pp. 235-236.) Therefore, the BZA should not be permitted to evade appellate review when it knowingly issued a decision under such exceptions.

According to the South Carolina Supreme Court, a "case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017). However, the Supreme Court has also recognized the following three exceptions to the mootness doctrine:

> First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.

Id. (citations omitted). In this case, these exceptions apply.

First, the issue of whether the City's interpretation of "story" is correct is capable of repetition and will likely evade review as demonstrated by the numerous variances that Crescent Homes has been forced to seek because of the City's and BZA's interpretation of "story." Also, Crescent Homes intends to use the drive-under garage design in other planned developments in Charleston beyond Avenue of Oaks, such as Central Park, Twin Lakes, and Oak Bluff. (R. pp. 348-349.)

Second, a decision on this issue will affect future developments and have collateral consequences for Crescent Homes and the City. As stated above, Crescent Homes desires and intends to utilize the drive-under design for future developments in the City. (*Id.*) This design is preferred by consumers not only because it protects against flooding, but also because it maximizes use of lot space and provides the most

efficient home product. The demand for this design ensures that the issue is not going away, and it makes little sense to delay resolution any longer, as it is certain that the issue will be subject to further appeal, litigation, and administrative review if it is not decided in this appeal.

These arguments were made previously to the BZA, and in response, the BZA implicitly agreed that the case fell under the exceptions to the mootness doctrine by issuing a decision on the merits, despite previously granting a variance to 1012 Avenue of Oaks. This Court should agree that the exceptions to the mootness doctrine apply, and it should not allow the BZA to evade judicial review.

CONCLUSION

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

s/E. Brandon Gaskins
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Attorney for Appellant
Crescent Homes SC, LLC

June 8, 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.

CERTIFICATE OF APPELLANT'S COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

s/E. Brandon Gaskins
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Attorney for Appellant
Crescent Homes SC, LLC

June 8, 2022
Charleston, South Carolina

RECEIVED
Jun 08 2022
SC Court of Appeals

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 ***Final Reply Brief of Appellant*** via electronic mail only, addressed as follows:

Timothy A. Domin, Esquire
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
tdomin@clawsonandstaubes.com

Attorney for Respondent City of Charleston Board of Zoning Appeals-Zoning

s/E. Brandon Gaskins
E. Brandon Gaskins (S.C. Bar No. 73274)
Moore & Van Allen PLLC
78 Wentworth Street
Charleston, SC 29401
Telephone: (843) 579-7000
Facsimile: (843) 579-7099
brandongaskins@mvalaw.com

Attorney for Appellant
Crescent Homes SC, LLC

June 8, 2022
Charleston, South Carolina