November 8, 2007

The Board of Zoning Appeals for the Town of Sullivan's Island met on the above date at Town Hall, all requirements of the Freedom of Information Act having been satisfied.

Present were: Jay Keenan, Chairman
Brian Hellman
Jimmy Hiers
Susan Middaugh
Alice Paylor
Betsy Richardson
Bachman Smith

The October 11, 2007 minutes were unanimously approved.

Chairman Keenan administered the oath to all applicants and participants.

Kerns, Barbara. **1026 Middle Street**. Appeal of Zoning Administrator denial of permit to complete unfinished space; variance to finish space previously designated on approved drawings. Chairman Keenan asked Zoning Administrator Kent Prause to present. Mr. Prause stated the applicant came before the Board last month, and the Board deferred a decision due to lack of information. At the last meeting, Mr. Prause stated the applicant had submitted a set of plans under the old Chapter 21 provisions on which a permit was issued. The plans did not show portions of the building being finished. Mr. Prause's interpretation of the applicable provisions of the zoning code from the new Chapter 21 that allow the use of the old chapter 21 provisions, was such that whatever was approved for the permit under the old provisions was locked into. In the alternative, the applicant asked for a variance to finish off the extra square footage that is already inside the building, under the roof. It is not changing the footprint of the structure. What was unknown at the last meeting was how much principal building square footage that it had. According to the plans they had submitted, there was 3,159 square feet of what is called principal building coverage area and that is the footprint of the building that would be exclusive of porch and steps, etc. which would be heated space. Based on the size of the lot, the Zoning Administrator had informed the Board that they were allowed as a matter of new provisions of the ordinance, 4,025 square feet. Also, the Design Review Board has the ability to present a 25% modification based upon findings of neighborhood compatibility that would add an additional 1,006 square feet for a total of 5,031 square feet in total if they went to the DRB and got their approval for this 25% modification. Since the last meeting, Building Official Randy Robinson did some calculations with the plans upon which the permit was issued, and he determined a figure of 4,149 feet roughly of principal building square footage. The applicant wants to finish off a portion of the building that amounts to about 672 square feet, that is the middle portion in between the two wings. There is also as represented to Mr. Prause by the applicant's attorney tonight, an additional approximately 440 square feet under the wing that is on the right side as you face the building that is currently labeled on the plans as existing attic and mechanical. If those two are added together, that is another 1,112 square feet. If you add that to the existing 4,149, it totals 5,261 square feet. That total is 230 square feet over what the DRB can even allow if they granted a full 25% modification. If the applicant can lose 230 square feet in the area labeled attic/mechanical, then the DRB could grant the 25% modification and they would be able to finish it. However, if they want to finish off the extra 230 square feet, that would involve either a finding on the Board's part that the Zoning Administrator has made an error in interpreting what the Ordinance says or that the Board finds the Zoning Administrator made a

correct decision, but that they meet the variance test and are entitled to a variance for the additional 230 square feet. Actually, the applicant has not gone to the Design Review Board to get the extra 25%, so it would be whatever the DRB could give them, plus the 230 square feet.

Susan Middaugh asked for clarification of what is already finished heated enclosed space. Randy Robinson completed an inspection of the property. Mr. Robinson stated that the entire 4,149 allowed on the building permit has been used, and that there is also an area that has been framed in that was not permitted, but it was approved by the DRB. At that time the DRB was only looking at the exterior of the structure. At the time when the DRB reviewed the plans, the new ordinance was not in place, so they were reviewing it under the old ordinance which did not have a square footage limitation.

Chairman Keenan asked for Attorney Bill Barr to present. Mr. Barr stated for the record, the matter got sidetracked at the last meeting between what was built/not built, and what was permitted/not permitted; therefore he asked designer Layne Nelson from Herlong Associates to come tonight to answer questions. Mr. Barr distributed a copy of the plan. He stated he is arguing the interpretation of the code, and the interpretation in connection with the new vested rights statute. Mr. Barr stated it is his understanding that the Zoning Administrator's interpretation from 21-7 states if you build under the old code then you have to commence consistent with the terms and conditions of the building permit and/of the zoning ordinance under which the building permit was issued. It should be interpreted as issued under the old code, because discussion is shifting between the old code which had no heated square footage requirement to the new code with a square foot requirement.

The permit issued is basically for a total area of new construction of 3,159 sq ft. The permit was issued at a time when the requirement under Section 28M of the Code provided that you could not have more than 15 percent of the platted lot covered. The Code also provided at 21-28M (b) what the definition of an enclosed building was. It includes heated and air conditioned portions of structures and also other enclosed portions of the structures that are sheltered from the elements and that may be used for living space. Mr. Barr presented photographs to the Board that although they are not called "heated space" or "bedroom" or "bathroom" or "den" on the plans, they are sheltered from the elements and they may be used for a living space. The difference between the old code and the new code is that enclosed building area was measured basically by the footprint – 3,159 sq ft. If this house had a flat roof on it, almost 6,200 sq ft could be built within the footprint under the old code. Under the new code, building is limited to the heated space square footage. If these plans when submitted, had the wording "bedroom", "den," or "future expansion" on there instead of "attic" or "mechanical", the applicant would not be here. Mr. Barr inquired if there were any restrictions to having heated and cooled attic space. He submitted that when a builder and owner move walls, that does not require the builder and owner to come back to the Town and ask for an amendment to the building permit. Mr. Barr also did not think that there are restrictions that an owner could not partition the attic space into sections to allow for the true mechanical to be shielded from the rest of the attic, and then to break up the room into other potentially usable space. Randy Robinson responded that living space generally has sheetrock

or wood walls, and it would have electrical, mechanical, and plumbing. The electrical would be required to be certain distances apart. If an owner wishes to heat/cool an attic, he has only allowed one electrical receptacle on either side of the attic, with a switch at the top of the

stairs, and a minimal amount of lights. There is a difference between attic space and living space.

Mr. Barr stated that there is another provision in this Code that says the old code and the new code can not be co-mingled. They are asking the Board to interpret the plans under the old code as if the new code did not even exist. The vested rights statute basically states in Section 16-29-1560 that regardless of whether there are any changes in the zoning code, it provides that if a municipality by July 2005 has not passed a vested rights ordinance, then the Town is governed by the State statute. The State statute states that when there is substantial governmental approval, in this case, building permitting and Design Review Board, the person has a two year right to finish his project under the current conditions of that substantial governmental approval. It further states that he has the right to have up to three one-year extensions of that permit. Mr. Barr stated the Kerns are not going to meet their Feburary 08 building deadline, and unless the permit can be extended administratively under the vested rights statute, then they will be back to this Board in February asking for the building permit to be extended.

Jimmy Hiers inquired as to the definition of enclosed principal dwelling square footage. Mr. Barr stated Section 21-28 M (1) (f) states enclosed principal building coverage is the area or footprint covered by the enclosed portion of the principal structure and attached accessory structures measured from the exterior of the wall studs, but excludes structures and accessory buildings which are not heated and readily useable as living space, but which are attached to the principal and accessory structures; porches measured form the eave drip line, decks measured from the footprint of the foundation, and stairs measured from the footprint of the foundation.

Bachman Smith inquired if the old ordinance or new ordinance controls under the vested rights act. Mr. Prause responded that those issues were under the case law under the previous concept of vested rights, it has to be approved pursuant to a site-specific development plan which is a development plan submitted to a local governing body by a landowner describing with resonable certainty the types and density of uses which would include heated amount of square footage in a house.

Chairman Keenan stated the issue is should the old ordinance or the new ordinance be used in this case. It was clearly permitted under the old ordinance. A variance would not be required under the old ordinance.

Motion was made by Alice Paylor, seconded by Bachman Smith, to overturn the decision of the Zoning Administrator because the permit was issued under the old ordinance and under the old ordinance they could have built out everything that was on their footprint.

Discussion: Jimmy Hiers stated, as an example, suppose an owner was issued a permit, had begun construction, and construction was not finished. Now today, they want to add more space under the old permit. He stated this issue is very unique because they have an existing footprint that does not have to be expanded; however, he does not want just anyone to be able to amend a building permit.

Kent Prause stated that if the Board rules that if owners that have taken a permit out under the old Chapter 21 provisions are entitled to a vested right to complete their work, it will not come before the Board; the matter will come to him and the Building department.

Chairman Keenan called for the question. Susan Middaugh requested the motion to be repeated.

Motion was restated by Alice Paylor. Motion was made by Alice Paylor, seconded by Bachman Smith, to overturn the decision of the Zoning Administrator because the permit to the Kerns back in February 2006 allowed them to build within their footprint and finish out the space; therefore, they have a vested right to finish out the space that is within that permit, carried unanimously.

Jeffrey Harris, 1801 I'on Avenue, variance for two driveways. Chairman Keenan asked Zoning Administrator Prause to present. Mr. Prause stated the zoning ordinance states that all improved ingress/egress access to lots shall be limited to one per lot, they should not be placed on the street frontage in which no parking is allowed, and they shall not displace public parking spaces. He added that it appears from the submitted drawings that the applicant maintains there is an asphalt apron on one side of the lot, but it appears from the photograph that they pull up on the grass and park the cars on this lot. That is fine because the ordinance just limits improved driveways to one. Improved means all driveways except natural grass or lawn areas. Their intention is to improve the driveway access points. The other aspect is the ordinance also defines the parking area. Parking is an accessory use and it should be located 20 feet behind the primary façade of the principal building. It defines parking as the placement of a vehicle or equipment at a location for 30 or fewer days. They could have a driveway on Station 18 that goes in a parking area that is 20 feet behind the primary façade of the principal building. The Board did previously give special exception approval to have two residences on one lot because of the historic nature. That area of Station 18 is very heavily used for public parking. The displacement of public parking is in direct conflict with the ordinance. The driveway should be placed on a street where public parking will not be displaced.

Sheila Wertimer, landscape artichtect, stated that because of the distinct character of the lot, the four hardship tests have been met. To recap, she stated this lot is different and unique, so the Board would not be creating a negative precedence. Historically, the lot has had two residences with two separate parking spaces, although both driveways were not improved. When they began planting, they ran into three inches of asphalt. There were two, albeit, unrecorded, impervious surfaces. They propose to create pervious parking, and shell would be put down to replace the current asphalt. Because there are two existing spaces that existed previously, they are petitioning to keep one, and move the other one to I'on Avenue. Although this would result in the loss of one parallel parking space, two lateral spaces will be created. In addition, there are two historic grand live oak trees, and to drive through the lot would be a detriment to the trees. Also, because the volume of traffic is so high in that area, her client is afraid that if it is left as just grass, it will actually be inviting the public to pull in there and park.

Justin Ferrick of Beau Clowney Design, architect for the project, gave a brief history. There is currently a non-conforming existing condition with two houses on the property. They received approval to remove the non-historic house off the property, and a new main building will be built, using the smaller house as an accessory structure.

Alice Paylor questioned if the two driveways were legal when they were installed. Mr. Prause stated if they were legal when the provisions were set in place, they would be a non-conforming use; however, he had no knowledge concerning those driveways. Randy Robinson stated he thinks that ROC was put in after the ordinance was adopted, but he is not sure. He said there was an asphalt cut somewhere in their location.

Susan Middaugh stated they could drive off I'on Street onto grass where the easement is, to a concrete driveway/parking area. Alice Paylor added that if they do not improve between the property line and the street, then they do not need a variance.

Jimmy Hiers stated he was concerned about owners of lots with two homes coming before the Board to request an additional driveway if this variance is granted. He would prefer the applicant come up with one official driveway and one unofficial driveway by placement or landscaping.

Jeff Harris, owner of the property, stated that the two houses have two existing driveways. One was not just an asphalt curb cut; it went eight feet into the property. The other is shell and gravel, although grass has now grown up through it.

Motion was made by Brian Hellman, seconded by Alice Paylor, to approve what has being presented as a relocation of a non-conforming use as it decreases the extent of the non-conformity; including the fence, carried by a vote of 6-1, with Jimmy Hiers casting the negative vote.

There being no further business to come before the Board, the meeting was adjourned.

Respectfully submitted,

Ellen McQueeney

Approved:

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Date: _____