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VIA E-MAIL ONLY

Laura Stewart Jordan, Esq.
City of Aiken
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Re: 525 Laurens St. SW

Dear Laura:

I hope this finds you well. My firm represents Kevin and Brittany Kisner. The Kisners are under contract with Charlie and Tara Bostwick to purchase 525 Laurens St. SW in the City of Aiken (Tax Map No. 105-12-01-006) (the “Property”). The closing of the sale has been delayed due to the City of Aiken Design Review Board’s (“DRB”) failure to act on the Kisners’ and Bostwick’s Certificate of Appropriateness application, bearing application number CERH25-004 (the “Application”).

The Application, submitted on June 27, 2024 and supplemented on October 7, 2024 and October 25, 2024, seeks approval to demolish only the rear portions of two structurally unsound barn structures and stabilize the remaining portions in landscape while preserving the front portions. The barn structures are in extremely poor condition structurally. The structural integrity of the barns has been compromised over the years due to the City’s failure to manage stormwater runoff from the nearby right of away. Current building codes prohibit reconstruction of the stables in their original form. In their current condition, the stables pose an intolerable safety hazard and liability for the Kisners and their young children. Despite there being no legal prohibition against demolishing the stables when the Application was filed, the Kisners have expressed a willingness to preserve the front portions to assuage the concerns of some in the community and to be good neighbors and stewards of the Property. The Bostwicks fully support this approach, as do many others in the community.

Despite the completed Application having been filed and accepted by the City months ago, the DRB has refused to take up the Application in violation of the Kisners’ and Bostwicks’ rights. Amazingly, this coordinated delay is due to the DRB Chair’s *own application*, originally submitted on behalf of the Historic Aiken Foundation, to change the legal status of the stables to “Landmark.”

We understand this application has been subsequently revised to seek a “Contributing” designation (“DRB Chair Application”). If this designation is granted, it would substantially impede the Kisners’ project contemplated by the Application. I understand the DRB Chair Application will be heard by the DRB at a special work session on December 17, 2024. That meeting should not go forward.

The DRB Chair Application conflicts with the procedure set forth in Section 5.2.2 of the City’s Code of Ordinances. Section 5.2.2(D) confirms City Council – not the DRB – is responsible for reviewing and adopting historical designations after a public hearing. To the extent the City relies on the procedure set forth in Section 5.2.4(A)(2), which purports to allow the DRB to delay granting a Certificate so it can determine whether a structure is historically significant, this ordinance is unenforceable for several reasons. First, Section 5.2.2(D) admits to the designation of a structure being a *legislative* function because it requires a vote of City Council. The DRB is a quasi-judicial, non-legislative body lacking authority to perform this legislative function by delegation or otherwise. *Bauer v. S.C. State Hous. Auth.*, 271 S.C. 219, 232, 246 S.E.2d 869, 876 (1978) (confirming the South Carolina Constitution prohibits the delegation of legislative authority to non-legislative bodies). Second, even if Section 5.2.4(A)(2) applies, which is denied, by its own terms the time for the DRB to make its own designation has long expired. Section 5.2.4(A)(2) states the DRB “may delay the granting of the Certificate for a period of up to 60 days from the time of the filing of the application.” The Application was filed on June 27, 2024, meaning the sixty day time period for the DRB to act has long expired. For these reasons and the reasons below, we demand the December 17, 2024 meeting be canceled, the DRB Chair Application be withdrawn, and the Application be reviewed by the DRB under the laws existing at the time of application.

Any attempt to retroactively apply the “Contributing” designation to the stables violates the Kisners’ vested rights under the “time of application rule.” The time of application rule is grounded in common sense and fundamental fairness. It provides that when there is “good faith reliance by the owner on the right to use his property as permitted under the Zoning Ordinance in force at the time of the application for a permit” a subsequently enacted ordinance cannot deprive the owner of a use that was permitted under the then existing ordinance. *Pure Oil Div. v. City of Columbia*, 254 S.C. 28, 33, 173 S.E.2d 140, 143 (1970). Last year, the South Carolina Supreme Court confirmed *Pure Oil Div. v. City of Columbia* remains good law and has not been overruled. *Ani Creation, Inc. v. City of Myrtle Beach*, 440 S.C. 266, 291 n.11, 890 S.E.2d 748 (2023). Simply put, South Carolina law prohibits local governments from changing the rules in the middle of the development review process. This is precisely what the DRB is attempting to do. The Application must be reviewed under the laws on the books at the time the Application was received, which predates any “Contributing” designation for the stables.

The DRB Chair Application also violates both the South Carolina Ethics Act and the DRB’s By-Laws. It must be withdrawn and the December 17, 2024 meeting cancelled. Putting aside for the moment whether any economic interest conflict exists under S.C. Code Ann. § 8-13-700(B), S.C. Code Ann. § 8-13-740(5) prohibits a public official from representing a party before the same body that public official serves on. I am enclosing an order from the South Carolina Ethics Commission to demonstrate how S.C. Code Ann. § 8-13-740(5) functions in practice. The DRB Chair Application was filed originally on behalf of the Historic Aiken Foundation. It is

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unclear whether the updated submission was formally filed on behalf of the Historic Aiken Foundation, but it is clear that the application is at the behest of those in the community seeking the “Contributing” designation. The DRB Chair has refused to recuse herself on matters pertaining to the Application. As a quasi-judicial board member, the DRB Chair is supposed to be a neutral decision maker – not an advocate with a personal agenda no matter how noble she believes it to be. The DRB’s legal charge is to review the Application under the laws that exist – not seek to change the laws to suit her or a third-party’s interest. Section V(J)(2) of the DRB’s By-Laws contains a procedure whereby “any individual” can lodge a formal conflict of interest claim against a board member. Please consider this letter a formal complaint under Section V(J)(2).

Finally, the Kisners’ due process rights have been violated due to the DRB’s numerous unjustified continuances of the Application in violation of the sixty-day limit found in Section 5.2.4(A)(2). These delays are part of a coordinated scheme to delay consideration of the Application until the DRB Chair and others are successful in changing the rules in the middle of the process. The DRB’s By-Laws allow for “a” continuance – not multiple continuances – in Section V(E). Moreover, there must be a rational, legitimate basis for a continuance. It goes without saying that a coordinated conspiracy to violate the Kisners’ vested rights under the time of application rule does not constitute a rational basis for multiple continuances.

The Kisners and the Bostwicks do not want a fight with the City. They are all long-time residents of Aiken and they love the City and everything that makes it special. However, the unlawful actions taken to date cannot stand. Please confirm by close of business December 16, 2024 that the DRB Chair Application has been withdrawn and the December 17, 2024 meeting is cancelled. If the meeting moves forward and the legal status of the stables is changed, that decision will be appealed to the circuit court and my client will assert all available legal and equitable claims against the City and those acting outside the scope of their official duties. The law requires the Application to be heard, under the laws existing at the time of application, at the next regularly scheduled DRB meeting. We appreciate your confirming these points. The Kisners reserve all rights.

In the event the DRB meeting nevertheless proceeds on December 17, 2024 over our objection, we ask that this letter be included in the meeting record. If you have any questions, please do not hesitate to contact me.

Respectfully,

McCULLOUGH KHAN APPEL



Ross A. Appel

Enclosures

cc: Gary Hudson Smith, III, Esq. (via e-mail)
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