

Grant Walraven
Grant Walraven, Clerk
Gordon County, Georgia

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

TINY HOUSE HAND UP, INC.,)
)
Plaintiff/Petitioner,)
v.)
)
CITY OF CALHOUN, GEORGIA; JAMES)
F. PALMER, individually and in his official)
capacity as mayor of Calhoun; CALHOUN)
CITY COUNCIL; and GEORGE)
CROWLEY, RAY DENMON, AL)
EDWARDS, and JACQUELINE)
PALAZZOLO, individually and in their)
official capacities as members of the)
Calhoun City Council,)
)
Defendants/Respondents.)

CIVIL ACTION FILE
NO. _____

**COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF,
AND ATTORNEYS' FEES AND PETITION FOR WRIT OF CERTIORARI**

Plaintiff Tiny House Hand Up, Inc. brings this complaint for declaratory and injunctive relief and petition for writ of certiorari against Defendants the City of Calhoun, Georgia; the Mayor of Calhoun, James F. Palmer; the Calhoun City Council; and the members of the Calhoun City Council, George Crowley, Ray Denmon, Al Edwards, and Jacqueline Palazzolo. All individual Defendants are sued in their official and individual capacities. Plaintiff hereby alleges as follows:

INTRODUCTION

1. This lawsuit seeks to vindicate the constitutional right of property owners to use their property in a way in which it has traditionally been used. For generations, residents in Calhoun, in Georgia, and around the country have built and lived in modestly sized cottage homes. These traditional homes provide an important housing option for the community because

they are more affordable than the recent trend of building ever larger homes, support a simpler, uncluttered lifestyle, and are environmentally friendly. But that traditional option is no longer available in the City of Calhoun, which has banned smaller homes from being built within city limits.

2. Plaintiff Tiny House Hand Up, Inc., or THHU, seeks to build a community of smaller, charming, Southern-style cottages on undeveloped land that it owns in Calhoun, Georgia. These homes would be 1–2 bedroom cottages with between 540 and 600 square feet of living space that THHU would use to further its mission of helping hardworking people from around Calhoun and Gordon County achieve their dreams of homeownership. THHU has building plans, financial backing from a local bank, and contractors at the ready.

3. Only the Defendants stand in the way of THHU’s project moving forward. Defendant City of Calhoun’s (the “City”) zoning code bans single-family homes from being built within city limits if they have less than 1,150 square feet of interior floor area (the “Minimum Floor Area Requirement”), effectively banning smaller homes and making it impossible for THHU to build the types of affordable cottages necessary for it to fulfill its mission.

4. But it should not be illegal to build a small home. Forcing people to build and live in unnecessarily large homes does not serve any legitimate government interest. Smaller homes are perfectly healthy and safe: while zoning codes regulate the use of land, building codes provide standards for constructing safe buildings, and the cottages THHU wants to build would comply with all state and local building code requirements. Nor would building smaller homes impact other typical zoning concerns such as traffic or density; to the contrary, building smaller homes designed for 1 or 2 people would result in less traffic and density. The only reason to ban

smaller homes is to artificially inflate housing costs and exclude hardworking residents who do not make enough money to afford a larger home, which are not legitimate government interests.

5. The City's irrational ban on homes smaller than 1,150 square feet thus denies THHU due process of law, in violation of Article I, Section I, Paragraph I of the Georgia Constitution, because it does not bear a substantial relationship to the public health, safety, or general welfare. This Court should therefore declare that the Minimum Floor Area Requirement is unconstitutional both as applied to THHU and on its face, and enjoin the City from enforcing the requirement. Alternatively, or in addition, this Court should grant a Writ of Certiorari and find that the Defendants' denial of THHU's application for a variance from the Minimum Floor Area Requirement was based on errors of law and was not supported by substantial evidence.

PARTIES

6. Plaintiff Tiny House Hand Up, Inc. is a 501(c)(3) nonprofit corporation incorporated under the laws of Georgia and with its principal office in Calhoun, Georgia. THHU's mission is to help hardworking people from Calhoun and surrounding Gordon County achieve their dreams of homeownership by building communities of charming, affordable, Southern-style cottages. THHU is led by executive director Cindy Tucker, who resides in Gordon County, Georgia.

7. THHU owns a parcel of approximately 7.9 undeveloped acres at the intersection of Beamer Road and Harris Beamer Road (the "Property" or the "King Corner Property"). The property was donated to THHU for the express purpose of helping with affordable housing. The Property is currently zoned R-1B.

8. Defendant City of Calhoun is a municipal corporation organized under the laws of the State of Georgia and located within Gordon County, Georgia.

9. Defendant James F. Palmer is the mayor of the City of Calhoun and a resident of Gordon County. He is sued individually and in his official capacity as mayor.

10. Defendant the Calhoun City Council, together with the mayor, are vested with all powers of the City of Calhoun and together constitute the legislative body of the City. Calhoun Charter § 2-201. The City Council, together with the mayor, also exercise final authority about whether to amend the Zoning Ordinance of the City of Calhoun (the “Zoning Code”) and whether to grant a variance from the provisions of the Zoning Code. Zoning Code, art. VI, § 6.6 & art. XIV, § 14.1.

11. Defendants George Crowley, Ray Denmon, Al Edwards, and Jacqueline Palazzolo are members of the Calhoun City Council and residents of Gordon County. They are sued individually and in their official capacities as council members.

12. The mayor and the councilmembers have ultimate authority regarding the passage and repeal of provisions in the zoning ordinance. Zoning Code, art. XIV, § 14.1.

13. The mayor and the councilmembers together have ultimate authority whether to grant or deny a variance from the terms of Calhoun’s Zoning Code, and, in their role as sole members of the Board of Zoning Appeals, have final authority over enforcement of the Zoning Code. Zoning Code, art. VI, § 6.6, art. XII, § 12.1, & art. XIV, § 14.1.

JURISDICTION AND VENUE

14. This action arises under Article I, Section I, Paragraph I of the Georgia Constitution (Due Process of Law), O.C.G.A. §§ 9-4-1 to -10 (Declaratory Judgments), and O.C.G.A. §§ 5-4-1 to -20 (Writ of Certiorari).

15. The official actions giving rise to this lawsuit, including the enactment of the Minimum Floor Area Requirement, the enforcement of this requirement, and the denial of

Plaintiff's variance, occurred in Gordon County, and the Property that was the subject of Plaintiff's variance application and Defendants' denial of the variance application is in Gordon County.

16. Venue is proper in this Court because at least one defendant resides in Gordon County. Ga. Const., art. VI, § II, paras. III, VI; O.C.G.A. § 9-10-30.

STATEMENT OF FACTS

THHU Forms To Promote Homeownership and Address Housing Affordability

17. The lack of affordable housing is an increasingly pressing problem across the United States and in Georgia.

18. The City of Calhoun and surrounding Gordon County are no exception. The average income in Calhoun is significantly lower than the national average and the rate of poverty is significantly higher. According to 2019 data, poverty in Calhoun is more than twice the national average, and the rate of homeownership is 36% lower than the national average. And according to 2014–2018 data from the U.S. Department of Housing and Urban Development, almost 20% of homeowners and 40% of renters in the Calhoun metropolitan area live in unaffordable housing, measured as a proportion of their income.

19. In July 2016, a group of residents who were concerned about increasing poverty and unaffordable housing formed THHU to promote homeownership and address housing unaffordability in Calhoun and surrounding Gordon County. Cindy Tucker began volunteering with THHU in 2018 and became its executive director in July 2019.

20. THHU initially sought to build and rent “tiny homes”—often defined as homes with less than 400 square feet of floor area. For example, an early idea was to build a

community of 10- by 30-foot homes, most of which would be rented out, with two homes reserved for emergency housing and one reserved for a property manager.

21. After further research and consideration, Cindy and others at THHU eventually decided that, instead of “tiny homes,” the best way for THHU to advance its mission would be to build a community of Southern-style cottage housing and to sell each home outright rather than to rent it.

22. By “cottage,” THHU means a smaller single-family home, often with pitched roofs and ornamental accents that invoke a sense of quaint, rustic charm consistent with their agrarian origins. In the South, with its warmer climate, the style often includes an outdoor living space such as a covered porch.

23. The smaller, Southern-style cottages that THHU seeks to build are similar to the types of homes people in Georgia and throughout the South have lived in for generations.

24. The smaller size of a cottage home is a key feature. Smaller homes cost significantly less to build because they require fewer materials and have lower labor costs.

25. Smaller cottage homes are a ground-up community solution to the problem of affordable housing. Smaller homes are inherently more affordable and thus can be sold at their market value to financially responsible first-time homebuyers and working-class residents.

26. Because smaller cottage homes can be sold at their market value while still being affordable, they do not depend on acquiring limited government funds or subsidies to build affordable housing. Instead, THHU promotes its mission of building affordable, Southern-style cottage-housing developments through multiple private outlets. It has a thrift store that sells donated items to raise money and where members of the community can learn more about THHU’s mission. And THHU has hosted fundraising concerts to raise money for and support its

mission. THHU also benefits from volunteers and those willing to provide their services at a discount.

27. Unfortunately, THHU cannot build affordable, Southern-style cottage-housing developments in the City of Calhoun because the City's Minimum Floor Area Requirement has effectively banned these types of smaller homes from being built within city limits.

Calhoun's Zoning Code Bans Smaller Homes

28. The City of Calhoun was incorporated in 1852. Upon information and belief, for its first 149 years, Calhoun did not have a Minimum Floor Area Requirement.

29. On information and belief, the City of Calhoun enacted the Minimum Floor Area Requirement on August 13, 2001. The Zoning Code defines "Floor area" as follows: "The sum of the horizontal areas of each floor of a building, measured from the exterior walls or from the centerline of walls separating two buildings. The floor area measurement is exclusive of areas of unfinished basements and attics, attached garages, or space used for off-street parking or loading, breezeways, and enclosed and unenclosed porches and patios, and accessory structures." Zoning Code, art. III, § 3.2(27).

30. The Zoning Code establishes three districts for single-family homes: R-1, R-1A, and R-1B. Single-family homes are not permitted in areas designated for multi-family housing or for commercial or industrial uses. Zoning Code, art. VII, §§ 7.4.1, 7.5.1, 7.6.1, 7.7.1, 7.8, 7.9, 7.10, 7.11, 7.12.

31. R-1 is the most restrictive residential district for single-family homes. It permits just one home per acre, and each home must have at least 1,800 square feet of floor area.

32. R-1A is the second-most restrictive residential district for single-family homes. It permits just two homes per acre, and each home must have at least 1,400 square feet of floor area.

33. R-1B is the least restrictive residential district for single-family homes. It permits just three homes per acre, and each home must have at least the Minimum Floor Area Requirement of 1,150 square feet of floor area.

34. Single-family homes also may be built in “planned residential developments” in accordance with plans submitted to and approved by the City Council, but the City confirmed on August 26, 2020, that the R-1B requirements for minimum floor areas apply to single-family developments in those districts. Relatedly, single-family homes may be built in a handful of areas zoned as agricultural districts that do not directly regulate home sizes, but those are limited and subject to stringent restrictions concerning the size and shape of the building site.

35. The combination of these zoning classifications means that while many districts require much larger homes, the Minimum Floor Area Requirement of 1,150 square feet applicable to the R-1B districts operates as the city-wide minimum permissible size for single-family homes.¹ In other words, all homes in the City must be at least 1,150 square feet. Thus, the City has effectively banned small homes from being built throughout the entire city.

THHU’s Proposed “Cottages at King Corner” Project

36. THHU now seeks to fulfill its mission to create affordable housing through its proposed project called, “The Cottages at King Corner.”

¹ In practice, the City may demand even larger homes as a condition of granting a variance. For example, in October 2003, when a property owner wanted some minor variances for a planned neighborhood of homes, the City Council only granted the variance on the condition that the owner insert covenants requiring all homes to have at least 1,400 square feet, even though the property’s R-1B zoning permitted homes with 1,150 square feet or more.

37. The project would take place at the intersection of Beamer Road and Harris Beamer Road, on 7.9 acres of land that is currently undeveloped. The land was donated to THHU in November 2019. The land was initially zoned as industrial. THHU successfully applied to rezone the Property to R-1B in June 2021.

38. The area around the Property includes a mix of undeveloped land, light manufacturing facilities, warehouses, a motocross track, a technical school, single-family homes, and a mobile home park, some of which can be seen in the following map:



39. THHU proposes to start with a community of six affordable, Southern-style cottages on the Property, which it hopes to eventually grow to include between about 20 to 40 homes.²

40. Each cottage would have 1–2 bedrooms and would have between 540 and 600 square feet of floor area.³ THHU anticipates that each home can be sold for less than \$95,000. An example of the type of cottage THHU seeks to build can be seen in the following picture and floorplan:



² The property currently would accommodate about 23 homes under the City’s lot size requirements. In previous conversations with THHU, City officials have expressed support for more homes on the property, up to 5 homes per acre, if the homes are sufficiently large. Although THHU would prefer to build more homes if permitted to do so, it is not challenging the lot size requirements and will proceed with the King Corner project even if subject to the existing lot size requirements.

³ Per how the City calculates square footage, the porches are not included in the calculation of 540 to 600 square feet.



41. THHU also plans to include lots of greenspace and to promote a community atmosphere among the cottages.

42. THHU is ready to build. They have housing plans, support from a financial institution to finance mortgages, and contractors at the ready.

Calhoun Rebuffs THHU’s Efforts To Build Smaller Homes

43. But THHU cannot currently build these homes on the property because they are smaller than the City of Calhoun’s Minimum Floor Area Requirement. THHU’s proposed homes are between 540 and 600 square feet, while Calhoun mandates that single-family homes on this property contain at least 1,150 square feet.

44. Between about 2016 and 2021, Cindy Tucker and others on behalf of THHU held multiple conversations with officials from the City of Calhoun about THHU’s efforts to build smaller, affordable homes. Each time, the City indicated that THHU could not proceed because of the Minimum Floor Area Requirement.

45. For example, on August 26, 2020, the Calhoun city administrator informed Cindy that the Mayor and City Council had discussed THHU's efforts and concluded that "The City's ordinances concerning single family homes requires a minimum of 1,150 square feet. As you can see, to allow a tiny home community would take a significant rewrite of the housing ordinances," and that "right now, there does not seem to be support for a major rewrite to include dwelling units in the 400-600 square foot range." The city administrator reiterated that "again, there are concerns about the square footage proposal."

46. These statements were consistent with other statements from City officials to THHU, reiterating that the City would not allow THHU to build homes smaller than 1,150 square feet.

Calhoun Denies THHU's Variance Requesting Permission To Build Smaller Homes

47. On August 30, 2021, THHU applied for a variance from the Minimum Floor Area Requirement to permit it to build homes between 540 and 600 square feet at the King Corner Property.

48. On October 7, 2021, the Zoning Advisory Board held a public hearing on THHU's variance application. The Zoning Advisory Board does not have the power to grant or deny variance applications, but it makes findings and recommendations to the City Council, which has final authority. Zoning Code, art. XIII, § 13.2. Defendant councilmember Jacqueline Palazzolo is also a member of the Zoning Advisory Board.

49. Although THHU has received enthusiastic support from the community at large, a handful of comments at the October 7, 2021, Zoning Advisory Board hearing urged the Board to recommend denying the variance based on impermissible factors. For example, some comments indicated that the variance should be denied in order to prevent lower income people who could

afford smaller cottage homes from living in the area. Other comments suggested that the type of people who could afford the cottage homes are pre-disposed to criminal activity and should be excluded on that basis.

50. Ultimately the Zoning Advisory Board sent the variance application on to the Mayor and City Council without making any recommendation.

51. On October 11, 2021, the Defendants held a public hearing on THHU's variance application. The mayor and councilmembers have ultimate authority over whether to grant or deny a variance application. Zoning Code, art. VI, § 6.6.1.

52. After hearing public comments that building housing that people with lower incomes could afford would lead to issues with littering and trash as well as problems with so-called "riff raff," and that permitting smaller homes would lead to lower property prices, Defendants denied THHU's variance application.

53. THHU currently cannot build its planned community of affordable, Southern-style cottage homes at the King Corner Property. But for the Minimum Floor Area Requirement, THHU would be able to move forward with the King Corner Project. The Minimum Floor Area Requirement is directly impeding THHU's mission of promoting home ownership and alleviating the crisis of unaffordable housing.

Calhoun's Ban On Smaller Homes Does Not Promote the City's Interests In Health Or Safety

54. The cottage homes that THHU seeks to build are perfectly healthy and safe and otherwise comply with local ordinances.

55. More generally, there is nothing about building a smaller home that affects health and safety.

56. The health and safety of buildings, including single-family homes, are regulated by Calhoun’s building code (Calhoun Code of Ordinances, ch. 18, art. II), which adopts Georgia’s State Minimum Code (*id.*; O.C.G.A. § 8-2-20(9)). Georgia, in turn, adopts with certain amendments the standardized International Residential Code for One- and Two-Family Dwellings (IRC) published by the International Code Council (*id.* § 8-2-20(9)(B)(i)(I), (VI)).

57. The purpose of Calhoun’s building code and the IRC is to establish standards for building one- and two-family dwellings that will “safeguard the public health and safety.” *Overview of the International Residential Code (IRC)*, Int’l Code Council, <https://www.iccsafe.org/products-and-services/i-codes/2018-i-codes/irc/>.

58. Calhoun’s building code and the IRC recognize that there is not any minimum size necessary for a home to be safe and healthy. Instead, they require only that certain “habitable rooms” have a certain amount of space, and that certain items such as electrical panels and bathroom fixtures have a certain amount of space around them. *See* IRC §§ R307, E3405.

59. Before 2015, the IRC required homes to contain at least one habitable room that was 120 square feet or larger.

60. In 2015, the IRC recognized that the minimum area of 120 square feet for at least one room “was not based on scientific analysis or on identified safety hazards” and had “no demonstrable life-safety benefit.” Int’l Code Council, Notes on 2015 Amendments to IRC R304.1.

61. The Calhoun building code and the IRC now require only that each habitable room “shall have a floor area of not less than 70 square feet” and “shall be not less than 7 feet” wide. IRC § R304. The International Code Council specifically concluded that this room size

was sufficient for occupants to move about and use the habitable space as intended. International Code Council, Notes on 2015 Amendments to IRC R304.1.

62. The cottages that THHU seeks to build will comply with all requirements of the Calhoun building code, including the requirements with respect to minimum floor areas.

63. The cottages that THHU seeks to build are healthy and safe. Indeed, because they are smaller and provide quicker access to exits in case of an emergency, they are safer than the larger homes that THHU would be permitted to build as of right.

64. People across the United States and Georgia live in houses and apartments smaller than Calhoun's Minimum Floor Area Requirement without any adverse health or safety impacts.

65. Indeed, many people in Calhoun live in homes smaller than Calhoun's Minimum Floor Area Requirement. Many such homes were built before Calhoun banned smaller homes and are grandfathered in under the current Zoning Code.

Calhoun's Ban On Smaller Homes Does Not Promote Other Traditional Zoning Interests

66. Calhoun also does not have any legitimate interest in maintaining the Minimum Floor Area Requirement or in blocking THHU's proposed community of smaller cottage homes. Municipal zoning power is limited to requirements that bear a substantial relationship to public health, safety, or general welfare. But Calhoun's Minimum Floor Area Requirement does not bear a substantial relationship to any of these purposes. In addition to bearing no relationship to public health or safety, the ban does not promote other interests that are sometimes invoked to justify zoning restrictions, such as density, traffic, aesthetics, or property values.

67. Density and Traffic: The size of a home is separate from the size of the lot, how many people live in a given area, or how close homes are to each other, so Calhoun's ban on smaller homes does not impact density or traffic. To the contrary, by building homes with fewer

bedrooms, THHU's proposed cottages will result in less traffic than the larger homes that THHU is permitted to build as of right.

68. Aesthetics and Property Values: It is not clear that a municipality may enact a zoning restriction solely to regulate aesthetics or property values, but even if it may do so, Calhoun's ban on smaller homes does not promote those interests. Small homes can be beautiful and large homes can be ugly. If anything, the beautiful, Southern-style cottages THHU wants to build would improve the aesthetics of the area surrounding the property, which consists of a manufacturing facility and warehouses, among other uses.

69. Indeed, until the property was rezoned in June 2021 at THHU's request, THHU could have by right used the property for a manufacturing plant, truck terminal, scrap metal processor, lumberyard, or automobile service station. Zoning Code art. VII, § 7.11.

70. The only purpose for Calhoun's Minimum Floor Area Requirement is to prevent smaller, more affordable homes from being built, thereby excluding people who might be able to afford less expensive homes from living in Calhoun. This is consistent with comments made to THHU over the years by city officials and members of the public opposed to THHU's efforts.

71. But excluding lower income people is not a permissible zoning objective. Instead, prohibiting the construction of smaller homes and requiring that larger, more expensive homes be built in order to exclude lower income people is an illegitimate and exclusionary purpose.

INJURIES TO PLAINTIFF

Prospective Harms Due To Calhoun's Ban On Smaller Homes

72. THHU currently cannot use its King Corner Property to build the homes of its choosing, abridging its inherent right to use its property in a reasonable manner that does not interfere with anyone else's enjoyment of their property.

73. THHU's mission is to help hardworking residents of Calhoun and surrounding Gordon County achieve their dreams of homeownership by building affordable, Southern-style cottage homes.

74. But THHU cannot build affordable, Southern-style cottages in Calhoun because such homes are not permitted by the Minimum Floor Area Requirement.

75. The homes that THHU would be required to build to comply with the City's Minimum Floor Area Requirement are larger than what THHU wants to build, and would impede THHU's mission of promoting homeownership by building inherently affordable, smaller cottages.

76. THHU received a donation of undeveloped land expressly for the purpose of building smaller, affordable homes.

77. But THHU cannot use the donated land for its intended purpose of building smaller, affordable homes because smaller homes are not permitted by the Minimum Floor Area Requirement. Increasing the size of the homes to comply with the Minimum Floor Area Requirement would increase the cost of each home by about \$65,000 to \$90,000.

78. But for the Minimum Floor Area Requirement and Calhoun's ban on small homes, THHU would be able to build its proposed Cottages at King Corner.

79. But for the Minimum Floor Area Requirement and Calhoun's ban on small homes, THHU would not have had to incur the time and expense to apply for a variance from the Minimum Floor Area Requirement.

80. But for the Minimum Floor Area Requirement and Calhoun's ban on smaller homes, THHU would be able to pursue its mission of helping hardworking residents of Calhoun and surrounding Gordon County achieve their dreams of homeownership by building affordable cottage housing.

Harms Due To Calhoun's Denial Of THHU's Variance Application

81. THHU is prepared to begin building its community of smaller, Southern-style cottage homes at the King Corner Property, but it cannot do so under Calhoun's current Zoning Code unless Defendants grant a variance lowering the Minimum Floor Area Requirement for the King Corner Property.

82. THHU applied for a variance for the King Corner Property, but Calhoun denied the application.

83. But for Defendants' denial of THHU's variance application, THHU would be able to build its proposed Cottages at King Corner.

CAUSES OF ACTION

COUNT I (Due Process)

84. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 83.

85. Georgia's constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law." Ga. Const., art. I, § 1, para. I.

86. A zoning restriction comports with due process of law only if it bears a “substantial relationship” to the public health, safety, or general welfare. *Barrett v. Hamby*, 235 Ga. 262, 265, 219 S.E.2d 399 (1975).

87. Banning smaller homes from being built does not bear a substantial or even a rational relationship to the public health, safety, or general welfare and thus denies due process of law.

88. Banning homes with less than 1,150 square feet of floor area from being built does not bear a substantial or even a rational relationship to the public health, safety, or general welfare and thus denies due process of law.

89. Prohibiting THHU from using its King Corner Property to build affordable, Southern-style cottages with 1–2 bedrooms and 540 to 600 square feet of floor area does not bear a substantial relationship to the public health, safety, or general welfare and thus denies due process of law.

90. Calhoun’s other ordinances, including its building code, are sufficient to protect public health, safety, and general welfare. The only purpose served by Calhoun’s ban on smaller homes is to abridge property owners’ right to decide what type of home they want to build and live in, unnecessarily inflate the cost of building a home, and impermissibly exclude hardworking residents who cannot afford larger homes.

91. Georgia’s Constitution also protects inherent rights that are not specifically enumerated. Ga. Const., art. I, § 1, para. XXIX. People have always had the inherent right to use their property in a reasonable manner that does not interfere with anyone else’s enjoyment of their property, and people have long exercised this right by choosing to build and to live in smaller homes. Calhoun’s ban on small homes also violates this inherent right.

92. But for Calhoun's Minimum Floor Area Requirement, THHU would be able to build its planned community of smaller, Southern-style cottages on its Property at King Corner.

93. Calhoun's Minimum Floor Area Requirement is unconstitutional both as applied to THHU and its Property at King Corner and on its face.

COUNT II
(Writ of Certiorari)

94. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 83.

95. On August 30, 2021, THHU applied for a variance from the Minimum Floor Area Requirement for the Property, permitting homes between 540 to 600 square feet to be built. On October 11, 2021, Defendants held a quasi-judicial public hearing on THHU's variance application and denied the application.

96. THHU has complied with O.C.G.A. § 5-4-5 by submitting as Exhibit A an affidavit of indigency pursuant to O.C.G.A. § 5-4-5(c). All costs accrued in the proceedings below have been paid, but THHU is a non-profit organization that depends on the generosity of its donors for funding, and it cannot afford to pay the costs or give security without diverting funds that its donors have given it to bring affordable housing to Calhoun.

97. Calhoun's Zoning Code provides that a variance may be granted if one of four conditions exist with respect to a piece of property. Zoning Code, art. VI, § 6.6.1. Those conditions are: "1. There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape or topography; 2. The application of this ordinance to the particular piece of property would create an unnecessary hardship; 3. Such conditions are peculiar to the particular piece of property involved; 4. Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of this

ordinance, provided, however, that no variance may be granted for a use of land or building or structure that is prohibited by this ordinance.” *Id.* Defendants committed an error of law by denying THHU’s variance application without considering whether at least one of the four conditions existed.

98. Defendants’ denial of THHU’s variance also was not supported by substantial evidence because three of factors that would have supported granting the variance were satisfied, each one of which would have been sufficient for the variance to be granted.

99. First, Defendants erred when they concluded under these circumstances that the Minimum Floor Area Requirement does not create an “unnecessary hardship” that would support granting the variance application. Zoning Code, art. VI, § 6.6.1(2). THHU met this requirement because it received a donation of the Property at issue for the express purpose of building affordable housing. Yet THHU’s proposed affordable housing is banned by Calhoun’s Minimum Floor Area Requirement. The Minimum Floor Area Requirement thus effectively prevents THHU from pursuing its philanthropic mission and from using the donated land consistent with the purpose for which it was donated.

100. Second, Defendants erred when they concluded that there are not conditions that “are peculiar to the particular piece of property involved.” Zoning Code, art. VI, § 6.6.1(3). Several features of the property, such as its express donation for the purpose of building smaller affordable homes, its ownership by a nonprofit organization with the resources and expertise to develop affordable housing in a beneficial matter, and its location in an area where it would not impact traffic or conflict with the warehouses, manufacturing facilities, single-family homes, and undeveloped land located nearby, are peculiar to the specific property at issue in the variance application.

101. Third, Defendants erred when they failed to conclude that granting the variance “would not cause substantial detriment to the public good,” Zoning Code, art. VI, § 6.6.1(4), because there was no evidence whatsoever of any detriment to the public good, and instead there were only impermissible assumptions of the harm that would occur if certain types of people are not excluded from owning homes in the community. Defendants similarly erred because the proposed development of beautiful, Southern-style cottages would not cause any detriment to the existing mixed-use area of warehouses, manufacturing, single-family homes, and undeveloped land and would not otherwise negatively impact any traditional, legitimate zoning concerns.

102. In addition to the four factors that govern when a variance application may be granted, the Calhoun Zoning Code requires that all zoning decisions, including decisions whether to grant a variance, shall use the eight standards set forth in section 14.5 of the Calhoun Zoning Code. Defendants committed an error of law because their denial of THHU’s variance on October 11, 2021, did address, consider, or make any findings with respect to any of the factors required by the Zoning Code.

103. Defendants’ denial of THHU’s variance also is not supported by substantial evidence because, had Defendants considered the standards set forth in Section 14.5, they would have supported granting rather than denying the variance.

104. First, THHU’s proposed cottage homes are “suitable in view of the use and development of adjacent and nearby property,” Zoning Code, art. XIV, § 14.5(1), and Defendants erred to the extent that they did not rely on this factor to grant THHU’s variance application.

105. Second, THHU’s proposed cottage homes would not “adversely affect the existing use or usability of adjacent or nearby property,” Zoning Code, art. XIV, § 14.5(2), and

Defendants erred to the extent that they did not rely on this factor to grant THHU's variance application.

106. Third, the King Corner Property does not have "a reasonable economic use as currently zoned," Zoning Code, art. XIV, § 14.5(3), because the existing zoning requires THHU to build homes that would be significantly larger and cost \$65,000 to \$90,000 more per home than it wants to build. Moreover, the King Corner Property is situated next to a manufacturing facility that makes it less suitable for larger residential homes but better suited for a cottage-housing development with smaller homes and significant greenspace that would separate the community from its industrial neighbors. Defendants erred to the extent that they did not rely on this factor to grant THHU's variance application.

107. Fourth, THHU's proposed cottage homes would not cause "excessive or burdensome use of existing streets, transportation facilities, utilities or schools," Zoning Code, art. XIV, § 14.5(4); to the contrary the proposed smaller homes would lead to less use of existing streets, facilities, utilities, and schools than the currently permitted larger homes. Defendants thus erred to the extent that they did not rely on this factor to grant THHU's variance application.

108. Fifth, THHU's proposed cottage homes would not require any material or unusual capital improvements in the area, Zoning Code, art. XIV, § 14.5(5). To the contrary, it would require fewer capital costs than the larger homes that THHU is currently allowed to build. Defendants thus erred to the extent that they did not rely on this factor to grant THHU's variance application.

109. Sixth, THHU's proposed cottage homes are "in conformity with the policy and intent" of Calhoun's land use plan, Zoning Code, art. XIV, § 14.5(6). THHU's proposed cottages are similar to the larger homes that they are already permitted to build except for the

immaterial fact that they are smaller. The homes also would contribute to affordable housing in the community and provide for additional housing options. Defendants thus erred to the extent that they did not rely on this factor to grant THHU's variance application.

110. Seventh, "existing or changing conditions affecting the use and development of the property," Zoning Code, art. XIV, § 14.5(7), support granting the variance, because the King Corner Property is situated next to a manufacturing facility that makes it less suitable for larger residential homes but better suited for a cottage-housing development with smaller homes and significant greenspace that would separate the community from its industrial neighbors. Defendants thus erred to the extent that they did not rely on this factor to grant THHU's variance application.

111. Eight, there are "other factors relevant to balancing the interest in promoting the public health, safety, morality or general welfare," Zoning Code, art. XIV, § 14.5(8), including that the proposed cottages are essentially identical to the houses that are already permitted except smaller, the cottages would contribute to housing affordability and increase the variety of housing options in the area, and because THHU is a nonprofit organization with the ability to develop the property in an effective and thoughtful manner, and thus Defendants erred to the extent that they did not rely on this factor to grant THHU's variance application.

112. Apart from the factors set forth in Calhoun's Zoning Code, Defendants also erred when they denied THHU's variance application based on irrelevant and impermissible factors such as a desire to exclude people who can afford smaller homes and assumptions that such people would be predisposed toward crime.

113. Defendants erred when they denied THHU's variance application even though the Minimum Floor Area Requirement is unconstitutional both facially and as applied to THHU's Property. THHU raised both claims in its variance application.

114. Defendants' denial of THHU's variance application was contrary to law and was not supported by substantial evidence and thus the certiorari should be sustained reversing Defendants' denial of the variance and entering final judgment entered in favor of THHU.

COUNT III
(Attorneys' Fees and Litigation Expenses)

115. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 114.

116. In denying Plaintiff's variance application, and by enacting and enforcing the unconstitutional Minimum Floor Area Requirement, Defendants have acted in bad faith, have been stubbornly litigious, and have caused Plaintiff THHU unnecessary trouble and expense.

117. Pursuant to O.C.G.A. § 13-6-11, Plaintiff THHU is therefore entitled to recover its expenses of litigation, including attorneys' fees and costs. Pursuant to O.C.G.A. § 5-4-16, Plaintiff THHU is entitled to costs paid to obtain certiorari and costs in the superior court.

RELIEF REQUESTED

Plaintiff respectfully requests that the Court grant the following relief:

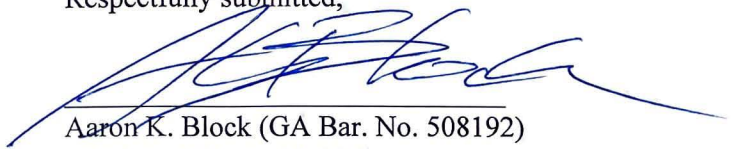
- A. Declare that the City of Calhoun Zoning Code, Article VII, Section 7.3.3 and Article VIII, Section 8.1, setting forth a 1,150 square foot "Minimum Floor Area Requirement" for homes in the R-1B district, violates Article I, Section I, Paragraph I of the Georgia Constitution as applied to Plaintiff and its King Corner Property.
- B. Declare that the City of Calhoun Zoning Code, Article VII, Section 7.3.3 and Article VIII, Section 8.1, setting forth a 1,150 square foot "Minimum Floor Area Requirement"

for homes in the R-1B district, facially violates Article I, Section I, Paragraph I of the Georgia Constitution.

- C. Enter an injunction barring Defendants from enforcing the City of Calhoun Zoning Code, Article VII, Section 7.3.3 and Article VIII, Section 8.1, setting forth a “Minimum Floor Area” for homes in the R-1B district, against Plaintiff with respect to the King Corner Property.
- D. Enter an injunction barring Defendants from enforcing the City of Calhoun Zoning Code, Article VII, Section 7.3.3 and Article VIII, Section 8.1, setting forth a “Minimum Floor Area” for homes in the R-1B district, in all its applications.
- E. In addition, or in the alternative, grant a Writ of Certiorari to the City of Calhoun to certify and send to the Superior Court of Gordon County the record of all proceedings on Plaintiff’s application for a variance, sustain the certiorari, reverse the City of Calhoun’s denial of Plaintiff’s variance application, and return this matter to the City with instructions to grant the variance;
- F. Award Plaintiff its reasonable attorneys’ fees and costs in this action pursuant to O.C.G.A. §§ 13-6-11, 9-4-9, and 5-4-16; and
- G. Order such further relief as the Court deems just and proper.

Dated: October 26, 2021

Respectfully submitted,



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* Motion for admission *pro hac vice* forthcoming