IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

TINY HOUSE HAND UP, INC.,	)	
	)	
Plaintiff/Petitioner,	)	Civil Action File
v.	)	
	)	No. 21-CV-71784
CITY OF CALHOUN, GEORGIA, JAMES F. PALMER, individually and in his official capacity as mayor of Calhoun, CALHOUN CITY COUNCIL, and ED MOYER, RAY DENMON, AL EDWARDS, and JACQUELINE PALAZZOLO, individually and in their official capacities as members of the Calhoun City Council,	)	ORAL ARGUMENT REQUESTED
	)	
Defendants/Respondents.	)	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Tiny House Hand Up, Inc. respectfully moves this Court for summary judgment on Counts I and II of its Complaint. Tiny House Hand Up challenges the City of Calhoun's prohibition on building homes smaller than 1,150 square feet as unconstitutional under Georgia's Due Process Clause. Ga. Const. art. I, § 1, para. I. Tiny House Hand Up also challenges the denial of its application for a zoning variance allowing it to build homes that are 540 to 600 square feet, because the denial was not based on substantial evidence. As set forth more fully in the attached Supporting Memorandum of Points and Authorities, as well as the concurrently filed Statement of Material Facts Not in Dispute and Statement of Theories of Recovery, the affidavits and exhibits, its verified complaint, Defendants/Respondents' answer, and the record from the variance application, Tiny House Hand Up has demonstrated that it is entitled to summary judgment because there are no genuine issues of material fact regarding Counts I and II. Tiny House Hand Up is therefore entitled to judgment as a matter of law.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Tiny House Hand Up, Inc. was formed by a group of concerned local residents for one reason: to stop talking about the affordable housing crisis and start doing something about it. The goal is to offer a "hand up" to hardworking people with steady but modest incomes who are priced out of the current housing market. Tiny House Hand Up wants to accomplish that goal by building beautiful, smaller cottage homes that, given their smaller size, will be naturally affordable at market rates for more people: younger people looking for starter homes, blue collar workers, and retirees on a fixed income.

One thing stands in its way: The City of Calhoun's zoning code bans smaller homes with under 1,150 square feet of floor area (and requires them to be even bigger in some areas). Tiny House Hand Up tried negotiating with the City but was rebuffed.[1] It applied for a zoning variance but was denied. Tiny House Hand Up could have built a warehouse, factory, or truck terminal on its land without asking anyone's permission. It could have built big homes. But smaller, beautiful cottages were forbidden for no reason except the City's preference for larger, more expensive homes.

This Court should grant summary judgment on Tiny House Hand Up's claim that the ban on smaller homes is unconstitutional. Under Georgia's Due Process Clause, zoning restrictions must bear a substantial relationship to public health, safety, or general welfare. The undisputed facts here, however, show that banning smaller homes serves no legitimate public purpose. Smaller homes are as safe and healthy as larger homes, if not more so. The community needs access to smaller, more affordable homes. And banning smaller homes does not advance any of

[1] Unless noted, this memorandum refers to Defendants/Respondents collectively as the City.

the City's identified interests in zoning regulations (like controlling density), as confirmed by the sworn testimony of the City's designated representative. (Argument Part I).

The Court should also reverse the denial of Tiny House Hand Up's variance application. The threadbare record below contains no support for the denial, no consideration of the relevant factors for zoning decisions, no findings of fact, and no votes. Instead, the record only reveals unsubstantiated fears about the kinds of people who might live in less expensive homes. That was not a sufficient basis to deny the variance, and this Court should therefore reverse that decision and order the City to grant the variance. (Argument Part II).

STATEMENT OF FACTS

I. Tiny House Hand Up forms to help tackle affordable housing in Calhoun.

The availability of affordable housing is a problem, both nationwide and around Gordon County and the City of Calhoun. (Statement of Undisputed Material Facts (SUMF) ¶ 1). After witnessing this problem firsthand in their community, a concerned group of local residents decided to try to do something about it. (*Id.* ¶ 2). They formed Plaintiff Tiny House Hand Up, Inc., a nonprofit dedicated to helping alleviate the affordable housing crisis around Gordon County and the City of Calhoun. (*Id.*). As the name implies, Tiny House Hand Up's goal is to give a "hand up": By focusing on smaller homes, Tiny House Hand Up seeks to provide options that are naturally affordable at market rates, without a government subsidy. (*Id.* ¶ 3).

Tiny House Hand Up initially tried a few different concepts, but in 2019 it focused its mission on cottage homes. (SUMF ¶ 4). Other groups helped residents with low incomes who needed subsidized housing. But Tiny House Hand Up saw a need for residents with modest incomes who still struggled to afford a home. (*Id.*). Tiny House Hand Up could help fill that need by building a beautiful community of small but charming one- or two-bedroom homes with covered porches. (*Id.*). The cottages would not be "tiny homes" as that term is often used,

meaning homes smaller than 400 square feet. (*Id.* ¶ 5). But at 500 to 600 square feet, they would cost far less to build than comparable larger homes, making them naturally affordable at market rates to workers with more modest incomes and younger people looking for a starter home. (*Id.* ¶¶ 5–6). The cottages would also appeal to people who prefer a smaller space for other reasons: retirees whose children have grown up, people who want to reduce their environmental footprint, minimalists, or others who prefer the simplicity of a smaller home. (*Id.* ¶ 7).

The plans took a big step forward in late 2019, when Tiny House Hand Up received the King Corner property: 7.9 acres of donated land at the corner of Harris Beamer Road and Beamer Road. (SUMF ¶ 8). The land was zoned for light industrial uses, like warehouses, truck terminals, lumberyards, and light manufacturing. (*Id.* ¶¶ 10–11). A mixture of manufacturing, commercial and wholesaling businesses, and undeveloped land surrounds the land on most sides. (*Id.* ¶ 9). There's a mobile home across the street to the south, and a subdivision of single-family homes sits across the street from the northwest corner. (*Id.*). There was no reason to think that a collection of charming cottages would cause any problems.

With land to build on, Tiny House Hand Up began making concrete plans for its proposed community: the Cottages at King Corner. It was raising money, identifying contractors, and selecting housing plans. (SUMF ¶ 13). It had everything it needed to further its mission of providing the community with smaller, more affordable homes. Unfortunately, one thing stood in its way: the City of Calhoun's zoning code bans single-family homes smaller than 1,150 square feet. (*Id.* ¶ 14).

II. Calhoun bans building homes smaller than 1,150 square feet.

At a general level, building a new home requires complying with two sets of requirements: the building code and the zoning code. Tiny House Hand Up's proposed cottage

homes would comply with the building code—requirements that ensure the cottages would be safe and healthy. But they are forbidden under the City's zoning code.

A. The City of Calhoun's building code does not prohibit smaller homes.

Building codes ensure that buildings are safe and healthy for their intended uses. (SUMF ¶ 16). They do this by mandating specific characteristics based on the building and its intended use—everything from a house to a shopping center to a high-rise. (*Id.*). For one- and two-bedroom homes, for example, the building code will dictate how close they can be to other homes based on the fire rating of the exterior walls. (*Id.*). The building code establishes these technical requirements by drawing on national and international expertise from building professionals, architects, and regulators to determine what is necessary for the building to be safe and healthy. (*Id.* ¶ 17).

In most of the United States, single-family homes like Tiny House Hand Up's proposed cottages are subject to the International Residential Code, or IRC. (SUMF ¶ 18). Georgia has also adopted the 2018 version of IRC (with some minor amendments) and made it and other standard building codes mandatory statewide, including in Calhoun. (*Id.* ¶ 19); O.C.G.A. §§ 8-2-20(9)(B)(i), 8-2-25(a). Local governments cannot use less stringent building codes, but there is a statutory process for imposing stricter requirements "based on local climatic, geologic, topographic, or public safety factors." O.C.G.A. § 8-2-25(c). Calhoun has not invoked this statutory process. (SUMF ¶ 20).

The smaller cottages that Tiny House Hand Up wants to build will comply with the IRC and other applicable building codes. (SUMF ¶ 21). The IRC itself does not mandate a minimum home size. (*Id.* ¶ 22). In both larger and smaller homes, certain rooms like bedrooms and living rooms must have at least 70 square feet of floor area. (*Id.*). And those spaces must be at least 7 feet wide; a bedroom can't be long and narrow like a hallway. (*Id.*). As long as the home

complies with those and other requirements in the IRC, the home—regardless of its size—is safe and healthy. (*Id.* ¶¶ 24–26).

Indeed, the health and safety of smaller homes is widely accepted. National authorities on building and public health say so. (SUMF ¶¶ 22–23). Smaller homes are common throughout Georgia and the broader region, both in the many jurisdictions that do not ban them and among homes that pre-date bans in jurisdictions that do. (*Id.* ¶ 29). It is even common for jurisdictions to *cap* the sizes of certain homes, like accessory dwelling units, at 400 to 800 square feet. (*Id.*). There is no evidence that any of these homes in these many jurisdictions have had any issues with health and safety related to their overall size. (*Id.* ¶¶ 29–31). And for fire safety, the two things that matter most are notification from a smoke alarm and the time and distance to exit the home. (*Id.* ¶ 27). For those critical factors, smaller homes perform as well as or better than larger homes, because occupants are inherently always close to the alarm and exits. (*Id.* ¶ 28). In short, homes smaller than 1,150 square feet, including the cottage homes that Tiny House Hand Up wants to build, are as safe and healthy as larger homes, if not more so. (*Id.* ¶¶ 21–32).

B. The City of Calhoun's zoning code bans smaller homes.

A zoning code seeks to separate incompatible uses of land by dividing land into zones and districts. (SUMF ¶ 33). Each district typically then has two sets of restrictions. First, there are "use" restrictions, listing how land in that district is allowed to be used (*e.g.*, as a single-family residence versus an office building). (*Id.*). Second, there are "bulk and area" restrictions, which seek to ensure that buildings are consistent with the allowed use (*e.g.*, requiring single-family homes to be a certain distance from the property lines). (*Id.*).

Many zoning codes, both in Georgia and regionally, don't prohibit smaller homes. (SUMF ¶ 29). And for much of its history, neither did Calhoun's zoning code. (*Id.* ¶ 34). Before 2001, Calhoun's zoning code restricted many areas to single-family homes, and dictated the size

of the lots, the width of the lots, and how far the home had to be from the property lines. (*Id.* ¶ 35). But as long as the home stayed within those bounds and was safe and healthy, single-family homes could be any size the property owner wanted. (*Id.*).

There is no evidence that allowing property owners to choose the size of their homes caused any tangible problems in Calhoun or anywhere else. (SUMF ¶ 37). But it did cause controversy. In zoning hearings over the years, existing homeowners routinely complained about proposals to build modestly sized homes and requested that the City mandate "more expensive housing." (SUMF ¶¶ 38–58). And when homebuilders needed permission for other aspects of their plans, they often had to overcome opposition by agreeing to increase the size of their homes or by promising that the homes would be too expensive for certain people, like refugees. (*Id.* ¶¶ 53–54, 57). But even though the City could deny permission to build things like duplexes or to use smaller lots, it could not directly address complaints that the homes built on those lots might not be as big and expensive as existing homeowners preferred. (*Id.* ¶ 36).

That changed when the City revamped its zoning code in August 2001. (SUMF ¶ 59). For the first time, the zoning code mandated how large a single-family home had to be, depending on the zoning classification. R-1 was the most exclusive district: homes there had to be at least 1,800 square feet. Next was R-1A, mandating at least 1,400 square feet. (*Id.*). Finally, under § 7.3.3 of the Zoning Code (and repeated at § 8.1), the R-1B district permitted the smallest single-family homes anywhere in the City of Calhoun: 1,150 square feet. (*Id.*). Those restrictions remain the same today. (*Id.*).[2]

[2] The amendments also permitted single-family and multi-family homes in a new "Planned Development District," or PRD, which gave the City discretion to allow different arrangements of homes and other buildings based on a property owner's detailed plan for developing the property. (SUMF ¶ 61). Single-family homes in PRD districts were subject to the same 1,150 minimum floor area requirement that applied in R-1B districts. (*Id.*).

The combined effect of these minimum floor area requirements is to ban single-family homes smaller than 1,150 square feet from being built anywhere in Calhoun. Because of that ban, Tiny House Hand Up cannot build its proposed cottage homes on its King Corner property or anywhere else in the City of Calhoun. (SUMF ¶ 62). At best, it could submit a variance application asking the mayor and city council for permission to build homes smaller than 1,150 square feet. It has done so but that application was rejected for reasons unsupported by substantial evidence. *See infra* pp. 8-12; Argument, Part II.

III. The City rejects Tiny House Hand Up's request to build smaller homes on the King Corner property.

As Tiny House Hand Up was developing its plans to build cottages, it discussed its efforts with city officials. (SUMF ¶¶ 63–64, 69). Through these discussions, Tiny House Hand Up understood that there was flexibility on some requirements, like the number of allowed homes and the minimum lot sizes. (*Id.* ¶ 63). Tiny House Hand Up's desire to build smaller cottages, however, remained a sticking point. (*Id.*).

After a pause due to the pandemic, Tiny House Hand Up tried to resume discussions with city officials in August 2020. (SUMF ¶ 64). By that time, however, it was too late. Members of a prominent family of developers with land near King Corner had already personally reached out to the city administrator and mayor to oppose the project. (*Id.* ¶¶ 65–66). The city administrator expected another prominent developer with nearby land to oppose the project, too. (*Id.* ¶ 67). In a city work session shortly afterward, the city administrator warned the mayor and council that they could expect continued opposition to allowing smaller, less expensive single-family homes to be built on the King Corner property. (*Id.*). By the time Tiny House Hand Up had reached out, the mayor and council had already confirmed that there was no support for the project. (*Id.* ¶ 68). The city administrator's response to Tiny House Hand Up explained that the mayor and council

had "concerns about the square footage proposal," that the project "would not be allowed" under the zoning code, and there "d[id] not seem to be support" for amending the code to allow the proposed cottages. (*Id.* ¶ 69).

After the mayor and council shot down the King Corner proposal, Tiny House Hand Up tried to make what progress it could in 2021. In March, Cindy Tucker asked the city administrator if they could "at least try to make progress on getting the property rezoned," while still "try[ing] to figure out a way to address the minimum square footage issue." (SUMF ¶ 70). After all, if the land could not be zoned for single-family homes to begin with, then the question about smaller homes would be moot. And the city administrator confirmed that Tiny House Hand Up could go forward with rezoning. (*Id.* ¶ 71). In May 2021, Tiny House Hand Up applied to rezone the King Corner property from Industrial-G (allowing truck terminals, warehouses, and the like without the City's permission) to R-1B (allowing it to instead build single-family homes). (*Id.* ¶¶ 11, 72). The City's internal review confirmed that R-1B zoning was "consistent with the future land use map for the area," and that there were no concerns with traffic, utilities, or police and fire service. (*Id.* ¶ 72). In June 2021, the mayor and council unanimously approved rezoning the property to R-1B. (*Id.* ¶ 73).

In August 2021, Tiny House Hand Up applied for a variance from the last remaining obstacle to its King Corner project: the minimum floor area requirement's ban on homes smaller than 1,150 square feet. (SUMF ¶ 74). The application specifically asked for permission to build cottages with 540 to 597 square feet of floor area each. (*Id.*). Because of the earlier resistance to its efforts, Tiny House Hand Up did not seek a variance from any of the other bulk and area

requirements. (*Id.* ¶ 75).[3] Thus, even if the variance were granted, Tiny House Hand Up would remain bound by the remaining R-1B requirements like density (3 homes per acre), lot sizes (10,000 square foot lots), and setbacks. (*Id.* ¶¶ 75–76).

The application explained that Tiny House Hand Up wanted to build a community of modestly sized cottage homes that would be affordable to financially responsible workers who otherwise might be priced out of the local housing market. (SUMF ¶ 77). Tiny House Hand Up emphasized that it planned to build beautiful cottages that would be a positive contribution to the area. (*Id.*). The application also provided examples of the types of cottages that Tiny House Hand Up planned to build, like the following:

(*Id.* ¶ 78).

As with the rezoning application, the City's internal review of the variance application indicated no problems with traffic or utilities. (SUMF ¶ 79). The Fire Department asked that the

[3] At times, Tiny House Hand Up's executive director mistakenly referred to building 30 to 32 homes based on what would comply with the minimum lot size, even though the separate density restriction limited the neighborhood to 23 homes.

homes only use electrical appliances rather than gas or wood-burning appliances, and even though there was no basis for that condition, Tiny House Hand Up had no objection to complying. (*Id.* ¶¶ 80–81).

For its part, the Police Department representative had found an online story about potential crime in Seattle near some "tiny" homes, but that turned out to be an article about that city's only "low barrier" homeless shelter (meaning it was open to drug and alcohol users) that happened to house its residents in tiny homes. (SUMF ¶ 82). The shelter was maybe associated with increased crime rates in the area. (*Id.*). Or maybe not (the reported rates may have reflected an unrelated, large theft ring that had just been busted). (*Id.*). Either way, there was no connection between a neighborhood of homeowners with modest incomes and mortgages, on the one hand, and a low barrier homeless encampment, on the other. (*Id.*). The Police Department also pointed to potential concerns that would arise if there were more units than expected (although the zoning code limited that number), or if Tiny House Hand Up used an unknown building standard (although the IRC and other applicable building codes would still apply). (*Id.* ¶ 84).

The variance application next went before the Zoning Advisory Board, which recommends whether to grant or deny variances. (SUMF ¶ 85). Two prominent local developers—the same ones the city administrator had warned the mayor and council back in August 2020 would oppose the project, who had been providing "feedback" "loud and clear to the elected members of the city council" and Zoning Advisory Board, and one of whom wanted to buy the King Corner property for himself—attended and opposed the variance application. (*Id.* ¶¶ 65–67, 86–87). Another member of the public expressed concern about "who will be in the homes." (*Id.* ¶ 86). After hearing this information, no one on the Board was willing to vote for a

recommendation for or against the variance. (*Id.* ¶ 88). That was unusual and reflected the board members' concerns about potential criticism or controversy if they took a public stand on the issue. (*Id.* ¶ 89).

The variance application's last stop was a hearing before the mayor and council, who would ultimately decide whether to grant or deny the variance. (SUMF ¶ 90). And just as the City had routinely heard complaints over the years about smaller or less expensive homes being built, this hearing was dominated by animosity toward smaller, less expensive homes and the kinds of people who might live in them:

- One of the prominent developers who had personally discussed the matter with the mayor the previous summer, and who wanted to buy the land for himself, stated: "My biggest concern is the fact that you're going to put these ***very, very small houses into a neighborhood area***, and it's going to hurt the value of the surrounding homes[.]" (SUMF ¶ 91 (emphasis added)).
- Another speaker: "[I]f they put the[m] little tiny houses in all this big neighborhood and we're all in bigger houses, the first thing I'm thinking of is ***they're going to be priced less***. Then it's going to bring everybody's value down." (SUMF ¶ 92 (emphasis added)).
- Another speaker: "But they're keying on a low-income housing. Okay. And they're keying on a hundred thousand dollar homes. So you think of low income, how are they going to keep up with everything -- a trash pickup and this and that -- and then it's not going to cause ***more issue[s] and more riff-raff than what we're already dealing with***, because it is bad in that area." (SUMF ¶ 93 (emphasis added)).

After hearing these comments, no one on the city council was willing to vote for or against the variance. (SUMF ¶ 95). The application therefore died "for lack of a motion" without a vote. (*Id.*). As with the Zoning Advisory Board's unwillingness to vote, this was unusual. (*Id.* ¶ 96). As before, it reflected a desire as "elected officials" who have been "put on the hot seat" to "walk the line the best they can" and "make as few people mad as they can," by avoiding a public stand on a politically contentious issue. (*Id.* ¶ 96).

In denying the variance, the mayor and council did not hold any public discussion or deliberation. (SUMF ¶ 97). They did not address the standards in the zoning code that are supposed to guide decisions to grant or deny a variance. (*Id.*). And they did not make any factual findings. (*Id.*).

IV. Discovery confirms that banning smaller homes does not serve any legitimate governmental interest and instead harms the public.

After its variance was denied, Tiny House Hand Up filed this lawsuit to vindicate its substantive due process right to use its property in a normal, traditional way: to build homes, including the kinds of smaller homes that people have always lived in. Tiny House Hand Up already knew that its efforts had been stymied by opposition to less expensive homes and the "riff raff" who would purportedly live there. Since then, discovery has only confirmed that banning smaller homes does not serve any legitimate public interest.

At every turn, the City's own planning documents advised it to facilitate building smaller, less expensive homes that more residents could afford to purchase. This was clear from the beginning, when the City first banned smaller single-family homes in 2001. As part of those amendments, the City solicited expert feedback from the regional planning authority, which specifically highlighted potential concerns related to "a lack of affordable housing for sale to low and moderate-income persons and families." (SUMF ¶ 98). The planning agency suggested

incentivizing developers to "build a certain number of homes for sale at a lower price range." (*Id.*). Instead, the City made it harder to build such homes.

The City's own comprehensive plans agreed. In 2007, the City prepared a comprehensive plan to guide its policy decisions and vision for the future. (SUMF ¶ 99). Highlighting the need for "additional workforce housing," the plan recommended taking steps that would permit "reduced house sizes," and pledged to "support opportunities for low-to-moderate income families to move into affordable owner-occupied housing." (*Id.* ¶¶ 99–100). The updated 2018 plan also stressed the need for a "wide range of quality, affordable housing options," including starter homes and alternative, smaller housing styles. (*Id.* ¶¶ 101–03). The City's plan explained that "[s]maller, more efficient homes are also becoming more desirable." (*Id.* ¶ 102). And it observed that new subdivisions failed to include homes at a variety of home sizes and prices, forcing entry-level purchasers to buy older homes in need of renovation. (*Id.*). The City therefore concluded that it should encourage building new homes with "varying sizes and prices." (*Id.*).

The City also could not identify any legitimate interests that are advanced by its minimum floor area requirements. Instead, it could only identify general interests that are related to the general concept of "bulk and area" requirements (like density limitations, minimum lot sizes, and setbacks), and insisted that the requirements "work together" to advance those interests. (SUMF ¶¶ 128–30). But none of those requirements have even a superficially plausible connection to the size of individual single-family homes: concerns about "pay[ing] for two fire departments" due to inadequate cooperation between local governments; or worries about traffic and parking because driveways are "too short." (*Id.* ¶ 111). If anything, mandating larger homes directly impedes some of the City's purported interests, like the need "maintain green space" on private land to ensure "production of oxygen." (*Id.* ¶¶ 111, 122).

The City also confirmed in testimony that there's no evidence that the minimum floor area advances any of its proffered interests. Asked if the City could point to any of those interests that, "separate and apart from the other bulk and area requirements[, were] being advanced by the minimum floor area requirement," the City's designated representative admitted there were none. (SUMF ¶ 129). The City further admitted that it cannot "articulate any issues Calhoun would have with achieving any of these [proffered] interests" in the absence of the minimum floor area requirement. (*Id.* ¶¶ 130–31).

Far from advancing a legitimate purpose, the record confirms that the minimum floor area requirement harms the public. The availability of affordable housing remains a problem in Georgia and nationwide. (SUMF ¶ 1). The additional cost of a larger home versus a smaller home can often determine whether the home is within reach for workers with modest incomes or retirees with fixed incomes. (*Id.* ¶¶ 105-06; *see also* ¶¶ 98, 102–03). Prohibiting smaller homes therefore risks locking many people out of the housing market altogether. (*Id.* ¶ 107). This hurts younger people and first-time home buyers looking for starter homes, and it can be particularly harmful to seniors on fixed incomes. (*Id.*). Even apart from affordability, a variety of housing types and sizes are needed for families with different sizes. (*Id.* ¶ 108). Allowing smaller homes to be built serves an important need for smaller households or people who just prefer less space. (*Id.*). And allowing people who want to downsize to do so frees up larger homes for larger families. (*Id.* ¶ 109). The whole community benefits. (*Id.*).

STANDARD OF REVIEW

Substantive Due Process (Count I): On Tiny House Hand Up's claim that the City's minimum floor area requirement is unconstitutional, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c)). When a motion for summary judgment is supported by evidence, the adverse party "may not rest upon mere allegations or denials," and instead "must set forth specific facts showing that there is a genuine issue for trial." *Id.* § 9-11-56(e).

Denial of Variance (Count II): On Tiny House Hand Up's claim that the mayor and council erroneously denied its variance application, the scope of review is "limited to all errors of law and determination as to whether the judgment or ruling below was sustained by substantial evidence." O.C.G.A. § 5-4-12(b) (2022).[4] Under this standard, questions of law are considered de novo. *Clayton County v. New Image Towing & Recovery, Inc.*, 351 Ga. App. 340, 343, 830 S.E.2d 805, 808 (2019). Courts "apply the any-evidence standard when reviewing issues of fact." *Id.*

ARGUMENT

I. Banning homes smaller than 1,150 square feet violates Georgia's Due Process Clause.

Tiny House Hand Up is entitled to summary judgment on its constitutional claim for declaratory and injunctive relief. (Verified Compl. Count I). Under Georgia's Due Process Clause, zoning restrictions must bear a substantial relation to the public health, safety, morality, or general welfare. This requires evidence that the restriction is reasonably necessary to advance a specifically identified interest. (Subsection A). Banning smaller homes flunks that standard, because the evidence shows that it does not advance any legitimate interests in any context.

[4] The relevant statutory provisions were repealed as of July 1, 2023, but only as to petitions "filed in superior or state court on or after such date." 2022 Ga. Laws Act 875 § 3-1 (H.B. 916).

(Subsection B). At a minimum, the ban is unconstitutional as-applied to Tiny House Hand Up's property. (Subsection C).

A. Zoning restrictions must bear a "substantial relation" to public health, safety, or general welfare.

Private property rights play a central role in Georgia's constitutional order.[5] And for as long as there has been a right to private property, it has included the right to build a home on one's land.[6] People in Georgia and nationwide have always used their land for housing, including for smaller, modest homes. (*E.g.*, SUMF ¶¶ 29, 34).

These longstanding property rights are subject to zoning regulations enacted under the government's police power. *See Barrett v. Hamby*, 235 Ga. 262, 265, 219 S.E.2d 399, 402 (1975). But Georgia's Due Process Clause limits those regulations. Ga. Const. art. I, § 1, ¶ I. When the right to use private property "confronts the police power under which zoning is effected, due process guarantees act as a check against the arbitrary and capricious use of that police power." *Diversified Holdings, LLP v. City of Suwanee*, 302 Ga. 597, 611, 807 S.E.2d 876, 888 (2017). "[T]he balance the law strikes is that a zoning classification may only be justified if it bears a substantial relation to the public health, safety, morality, or general welfare." *Avant v. Douglas County*, 253 Ga. 225, 226, 319 S.E.2d 442, 443 (1984) (quoting *Barrett*, 235 Ga. at 265, 219 S.E.2d at 402); *see also Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465,

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[5] *See, e.g.*, *GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*, 306 Ga. 829, 842–44, 834 S.E.2d 27, 37–38 (2019) (Peterson, J., concurring) (describing history and Georgia Constitution's "wide range of complementary protections for private property rights"); *Fincher Rd. Invs., LLLP v. City of Canton*, 334 Ga. App. 502, 504, 779 S.E.2d 717, 719 (2015) ("Suffice it to say, private property rights are among the most basic of human rights, and it is the charge of the courts to defend them vigilantly." (quotation marks and citations omitted)).

[6] *See* 2 William Blackstone, *Commentaries* *4–5 (describing earliest uses of property for housing); 3 William Blackstone, *Commentaries* *216–17 (property owner's right to "erect what he pleases upon the upright or perpendicular of his own soil").

465, 254 S.E.2d 846, 847 (1979) (zoning restrictions cannot be "unreasonable, arbitrary or capricious, and … the means adopted must have some real and substantial relation to the object to be attained").

Under Georgia's "substantial relation" inquiry, a plaintiff challenging a zoning restriction must initially provide "clear and convincing evidence" that the restriction is "insubstantially related to the public health, safety, morality, and welfare." *Gradous v. Bd. of Comm'rs of Richmond Cnty.*, 256 Ga. 469, 471, 349 S.E.2d 707, 709–10 (1986). "The burden then shifts to the [governing authority] to justify the zoning." *DeKalb County v. Flynn*, 243 Ga. 679, 680, 256 S.E.2d 362, 363 (1979). This "must be shown by 'clearly more than "any" evidence.'" *Id.* (quoting *Barrett*, 235 Ga. at 265 n.1, 219 S.E.2d at 402 n.1). Georgia's Due Process Clause "requires more than a talismanic recitation of an important public interest." *Raffensperger v. Jackson*, 316 Ga. 383, 396, 888 S.E.2d 483, 495 (2023).[7] Rather, the restriction must be "reasonably necessary to advance a specific health, safety, or welfare concern" identified by the government. *Id.* at 397, 888 S.E.2d at 496.[8]

B. The ban on smaller homes is facially unconstitutional because it is unrelated to public health, safety, or general welfare in any context.

The City's ban on homes smaller than 1,150 square feet is facially unconstitutional because it "operates unconstitutionally in a large fraction of the cases in which it applies." *State v. Jackson*, 269 Ga. 308, 312, 496 S.E.2d 912, 916 (1998); *see Blevins v. Dade Cnty. Bd. of Tax Assessors*, 288 Ga. 113, 118, 702 S.E.2d 145, 150 (2010) (law facially invalid if it "lacks a

[7] *Raffensberger* challenged an occupational license, but it drew guidance from "due process challenges to statutes in other contexts," including a zoning case. 316 Ga. at 388–90, 888 S.E.2d at 490–91 (citing *Rockdale County v. Mitchell's Used Auto Parts, Inc.*, 243 Ga. 465, 465, 254 S.E.2d 846, 847 (1979)).

[8] The City concedes that banning smaller homes is unrelated to morality. (SUMF ¶ 104).

plainly legitimate sweep" (quoting *Smith v. Baptiste*, 287 Ga. 23, 39 (2010) (Nahmias, J., concurring specially))); *see also OS Advert. Co. of Ga., Inc. v. Rubin*, 263 Ga. 761, 762–63, 438 S.E.2d 907, 909–10 (1994), *overruled on other grounds by Ashkouti v. City of Suwanee*, 271 Ga. 154, 516 S.E.2d 785 (1999) (remanding for determination of facial constitutional challenge to zoning restriction). The undisputed evidence here shows that there is no justification for ever banning homes smaller than 1,150 square feet from any location where single-family homes may be built (and certainly not within any area zoned R-1B). This Court should therefore hold that Calhoun's ban on smaller homes (in Zoning Code § 7.3.3) is facially unconstitutional under Georgia's Due Process Clause.

1. Banning smaller homes is unrelated to public health, safety, or welfare.

Under the first step of the "substantial relation" inquiry, the undisputed facts confirm that banning homes smaller than 1,150 square feet does not bear a substantial relation to public health, safety, or general welfare. To begin, the City's zoning code on its face shows that its minimum floor area requirements are not even trying to address health and safety. Otherwise, homes between 1,150 and 1,399 square feet (allowed in R-1B districts) would not be banned in R-1A and R-1 districts. (SUMF ¶¶ 59–60). And homes between 1,400 and 1,799 square feet (allowed in R-1B and R-1A districts) would not be banned in R-1 districts. (*Id.*). Whatever the reasons for mandating that homes have a certain size in one part of town and a different size in another part of town, it has nothing to do with health and safety.

The undisputed facts here further confirm that smaller homes are just as safe and healthy, if not more so, than larger homes. (SUMF ¶¶ 16–32). Smaller homes, including the cottages that Tiny House Hand Up wants to build, comply with the applicable building codes that are designed to protect health and safety. (*Id.* ¶¶ 16, 21–26). Countless people in Georgia and nationwide live

in smaller homes, and that has not caused any health or safety issues. (*Id.* ¶¶ 29–31). Indeed, it is common for jurisdictions to ***require*** certain homes, such as accessory dwelling units, to be in the 400 to 600 square foot range. (*Id.* ¶ 29).[9]

The undisputed facts also show that banning smaller homes does not bear a substantial relation to general welfare. (SUMF ¶¶ 98–109). At a fundamental level, that's because, other than the size itself (and by extension, cost), there's no meaningful difference between a smaller single-family home and a larger single-family home. There's no potential for conflicting uses (like putting a factory next to a house), because they both involve the same use: single-family residences. (*Id.* ¶ 76). They're both built the same way (on-site with a foundation), with the same materials, and based on the same building codes. (*Id.* ¶¶ 18–19). They're subject to the same lot size and density requirements. (*Id.* ¶ 76). And larger and smaller homes alike have the potential to be elegant and beautiful, or tacky and crude, or bland and forgettable. Nothing justifies singling out homes smaller than 1,150 square feet.

The record also shows that banning smaller homes is not about the general welfare, but the private desires of incumbent homeowners that new homes be as expensive as possible. Time and again, the City heard calls to mandate larger and more expensive homes. (SUMF ¶¶ 38–58). And the City heeded the call. Yet addressing concerns that existing homes "will have to start keeping company with a growing number of smaller, less expensive … houses … does not foster or promote the general welfare." *C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 573 Pa. 2, 26, 820 A.2d 143, 158 (2002) (internal quotation marks omitted).

[9] Additionally, when regulating the health and safety of buildings, local jurisdictions in Georgia are bound by the statewide building codes. O.C.G.A. §§ 8-2-20, -25. The City cannot impose more stringent health and safety requirements without first invoking specific statutory procedures and making findings about unique local conditions. *Id.* Because the City has not done that (SUMF ¶ 20), it cannot rely on health and safety rationales to defend its restriction.

Rather than advancing general welfare, banning smaller homes only harms the community. There is a critical need for more affordable housing, and banning smaller homes makes that problem worse. (SUMF ¶¶ 1, 105–07). There is also a need for a greater variety of housing options, including smaller homes for first-time homebuyers, smaller families, and downsizing retirees. (*Id.* ¶¶ 108–09). Indeed, the City's own comprehensive planning documents have repeatedly stressed the need to encourage and facilitate the construction of smaller homes. (*Id.* ¶¶ 98–103). The City should have heeded its own advice rather than unnecessarily banning smaller homes.

2. Banning smaller homes does not advance any of the City's identified interests, nor can the City even articulate how its ban does so.

Under the second step of the "substantial relation" inquiry, the City must identify specific interests that are advanced by restricting smaller homes, and there must be evidence that the restriction is reasonably necessary to advance those interests. *Flynn*, 243 Ga. at 680, 256 S.E.2d at 363; *Raffensperger*, 316 Ga. at 396, 888 S.E.2d at 495. The City has identified eleven interests that it alleges support the minimum floor area requirement. (SUMF ¶ 110).[10] But the evidence shows that banning smaller homes—as opposed to other restrictions, like limits on density or maximum lot coverage—does not actually advance any of those eleven interests. (*Id.* ¶ 118). As the City's designated representative testified, the City cannot "articulate any issues Calhoun would have with achieving any of these eleven interests" in the absence of the minimum floor area requirement. (*Id.* ¶ 131).

[10] Those interests are: (1) compliance with DCA approved comprehensive plan; (2) statutory service delivery and intergovernmental coordination; (3) compliance with State dictated building codes and requirements; (4) population; (5) economic development; (6) adequate housing; (7) natural resources; (8) community tax payer funded infrastructure, facilities and services and responsible spending of taxpayer funding; (9) transportation, streets and traffic control; (10) public health and safety; and (11) responsible and governed land use.

This is generally clear from the City's descriptions of the interests, which are straightforwardly about other types of zoning restrictions, not minimum home sizes, such as an interest in coordination to prevent "duplication" of public services; an interest in controlling "density of homes in a particular district"; issues after a bankrupt company closed "an entire factory overnight"; the need for "setback controls" to ensure "production of oxygen"; concerns about traffic and parking problems because "driveways built by the developer were too short"; an interest in ensuring "whether these streets are capable of handling UPS delivery vehicles"; an interest in setting the "[p]roper distance between structures and fire hydrants"; and interests in ensuring that the "new public park will not be sitting next to the industrial poultry grower." (SUMF ¶ 111). A closer look further confirms that banning smaller homes is unrelated to these asserted interests:

"(1) compliance with DCA approved comprehensive plan": The City has asserted an interest in creating and following a comprehensive plan approved by the Georgia Department of Community Affairs (DCA). (SUMF ¶ 112). But neither the DCA nor the comprehensive planning process require local governments to ban smaller homes, and local jurisdictions can comply with DCA-approved plans without banning smaller homes. (*Id.*). And the City's own comprehensive plans have directed it to encourage the availability of smaller homes, not ban them. (*Id.* ¶¶ 98–103). The City's ban on smaller homes frustrates rather than advances this interest.

"(2) statutory service delivery and intergovernmental coordination": The City has asserted an interest in coordinating with the county and other local governments about which governments provide which services in specific areas of the county. (SUMF ¶ 113). That has

nothing at all to do with the sizes of individual single-family homes. (*Id.* ¶¶ 114–15). Banning smaller homes does not advance this interest.

"(3) compliance with State dictated building codes and requirements": The City has asserted an interest in complying with Georgia's statewide building codes. (SUMF ¶ 116). But those building codes do not address the overall size of homes. (*Id.* ¶¶ 22–23). Homes well under 1,150 square feet (and well under the 540 to 600 square feet cottages that Tiny House Hand Up wants to build) comply with the statewide building codes. (*Id.* ¶¶ 23–26). Meanwhile, if this were truly necessary to advance a legitimate interest, the City would not also ban homes larger than 1,150 square feet from R-1A areas (if they are under 1,400 square feet) and from R-1 areas (if they are under 1,800 square feet). Banning smaller homes does not advance this interest.

"(4) population": The City has asserted an interest in ensuring the population grows in a safe, reasonable, and responsible manner by controlling the number of homes that are built. (SUMF ¶ 117). But the minimum floor area requirement does not limit the number of homes that are allowed to be built. The "maximum density" requirement (3 homes per acre) and minimum lot size requirement (10,000 square feet) directly address this concern. (*Id.* ¶ 118). If anything, smaller homes with fewer bedrooms are more likely to have fewer residents than larger homes with more bedrooms. Banning smaller homes does not advance this interest.

"(5) economic development": The City has asserted an interest in developing economic development strategies. (SUMF ¶ 119). But there is, again, no evidence that banning smaller homes furthers that interest. (*Id.* ¶¶ 129–31). To the contrary, the City's own comprehensive plans have directed it to encourage smaller homes that are affordable to workers with modest incomes and desired by many younger buyers. (*Id.* ¶¶ 98, 100–03). Banning smaller homes has nothing to do with this interest.

"(6) adequate housing": The City has asserted an interest in ensuring that housing is adequately designed, built and occupied. (SUMF ¶ 120). But both larger and smaller homes are subject to the same building code requirements that address health and safety. (*Id.* ¶¶ 15, 18–19). Smaller homes are just as safe and healthy—if not more so—than larger homes. (*Id.* ¶¶ 22–32). And there is a pressing need for precisely the kinds of homes that the minimum floor area requirement bans. (*Id.* ¶¶ 1, 100, 102–03). Banning smaller homes does not further this interest.

"(7) natural resources": The City has asserted an interest in protecting the water supply and maintaining green space to ensure the plant life necessary for aesthetics and oxygen production. (SUMF ¶ 121). But requiring a larger home to be built on a given lot directly frustrates this interest: smaller homes necessarily occupy less green space than larger homes, and they have a lighter environmental footprint. (*Id.* ¶ 122). Thus, banning smaller homes does not further this interest.

"(8) community tax payer funded infrastructure, facilities and services and responsible spending of taxpayer funding": The City has asserted an interest in adequately locating things like fire stations and police departments based on population, providing adequate access for emergency services, and planning to responsibly spend funds on public goods and services. (SUMF ¶ 123). But that has nothing to do with the sizes of individual homes. (*Id.* ¶¶ 129–131). Therefore, banning smaller homes does not advance this interest.

"(9) transportation, streets and traffic control": The City has asserted an interest in the design of new residential streets. (SUMF ¶ 124). But new homes will be subject to the same requirements for street design regardless of their size. (*Id.* ¶ 125). Banning smaller homes has nothing to do with this interest.

"(10) public health and safety": The City has asserted an interest in ensuring that buildings are safe, in preparing for increased crime that may follow increased population density, and in avoiding traffic problems. (SUMF ¶ 126). But smaller and larger homes are subject to the same building code requirements, and smaller homes are just as safe as larger homes. (*Id.* ¶¶ 15, 18–19, 22–32). The minimum floor area requirement also does not control population growth or density (and in turn, traffic), which is directly controlled instead by the density limits and minimum lot size requirements. (*Id.* ¶ 118). Banning smaller homes does not further this interest.

"(11) responsible and governed land use": Finally, the City has asserted an interest in planning for the "different types of land uses permitted" and separating incompatible uses (like putting a park next to an industrial poultry grower). (SUMF ¶ 127). But smaller and larger single-family homes are both the same "use," and the City will have already determined that the proposed single-family residential use is appropriate for that property. (*Id.* ¶¶ 72, 76). Banning smaller homes has nothing to do with this interest, either.

In sum, the undisputed facts in the record confirm that banning smaller homes does not advance any of the City's purported interests. At bottom, that's because a home is a home, regardless of its size. Banning homes simply because they are too small is unreasonable and is therefore facially unconstitutional under Georgia's Due Process Clause.

C. The ban on smaller homes is unconstitutional as applied to Tiny House Hand Up's property.

Even if banning homes smaller than 1,150 square feet is not facially unconstitutional, it is still unconstitutional as applied to Tiny House Hand Up's property. Applying the ban on smaller homes to the King Corner property does not advance any of the City's purported interests

because, as just described, the ban does not advance those interests anywhere. But banning smaller homes is especially unjustified as applied to the King Corner property.[11]

First, Tiny House Hand Up wants to build beautiful cottages in an area surrounded by industrial uses, commercial buildings, and undeveloped land. (SUMF ¶ 9). There's a mobile home across the street, a manufacturing facility next door, and a motocross track down the street. (*Id.*). Even if the City had a legitimate interest in keeping smaller homes away from some areas, there's no interest in doing so here. *See Guhl v. Holcomb Bridge Rd. Corp.*, 238 Ga. 322, 323, 232 S.E.2d 830, 832 (1977) (considering "existing uses and zoning of nearby property" as factor in as-applied analysis (citation omitted)).[12]

Second, the previous zoning that applied to the King Corner property further cements the arbitrariness of banning smaller homes there. When Tiny House Hand Up received the donated land in 2019, it was zoned for industrial uses. (SUMF ¶ 10). Without asking anyone's permission, Tiny House Hand Up could have built a light manufacturing facility, a truck terminal, a warehouse, a lumberyard, or a gas station on its King Corner property. (*Id.* ¶ 11). No

[11] In rezoning cases that challenge "a restriction on land use," courts sometimes look to whether the classification "presents a significant detriment to the landowner." *Diversified Holdings*, 302 Ga. at 612, 807 S.E.2d at 889. Tiny House Hand Up is not challenging the classification of its property for single-family residential use, so that requirement does not appear to apply here. In any event, as a nonprofit whose sole mission is to build smaller, more affordable homes, the City's ban on building smaller, more affordable homes is a significant detriment. (SUMF ¶¶ 14, 62).

[12] To the extent relevant, the other factors *Guhl* considered further support Tiny House Hand Up. Looking at the extent to which infringing on Tiny House Hand Up's property rights "promotes the health, safety, morals, or general welfare of the public," or the "relative gain to the public, as compared to the hardship imposed upon the individual property owner," *id.*, supports Tiny House Hand Up, because banning smaller homes does not benefit the public and in fact harms the public. *See, e.g.*, *supra* Argument Part I.B. And though *Guhl* phrases one of the factors as the extent to which property values "are diminished by the particular zoning restrictions," *id.*, it is notable that the restriction here completely blocks Tiny House Hand Up from using its property for the purpose for which Tiny House Hand Up exists. *See supra* note 11.

one was bothered by that. (*Id.* ¶ 12). If building a truck terminal or factory would not have caused issues with neighboring properties, it is hard to see why a collection of beautiful cottage homes would.

Finally, the absence of any legitimate interest in forbidding smaller homes on the King Corner property "raise[s] the inevitable inference that the disadvantage imposed is born of animosity." *Romer v. Evans*, 517 U.S. 620, 634 (1996). Tiny House Hand Up's proposal, for instance, was criticized because the homes were "going to be priced less," leading to questions about "who will be in the homes," and answers that they would be "low income," with "more issue[s] and more riff-raff." (SUMF ¶¶ 86, 92, 93). Similar sentiments were common over the years. (*Id.* ¶¶ 38, 40–42, 45, 49, 57). Yet "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating" smaller homes differently than larger homes. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (holding that restriction on group homes for people with mental disabilities violated equal protection).[13] These negative attitudes put the Zoning Advisory Board and the mayor and council on the "hot seat," and as "elected officials," they tried "to walk the line the best they can" and "make as few people mad as they can." (SUMF ¶ 96). They did that by taking the "unusual" step of refusing to even vote on Tiny House Hand Up's request to build smaller homes. (*Id.* ¶¶ 96–97). That may have been politically savvy, but it underscores the absence of constitutionally sound reasons for banning smaller homes (and for denying the variance application).

[13] *See also Catherine H. Barber Mem'l Shelter, Inc. v. Town of N. Wilkesboro*, 576 F. Supp. 3d 318, 340–41 (W.D.N.C. 2021) ("unsubstantiated fears," "rumors," and "[p]rivate biases" were "impermissible basis" for zoning restriction); *Burstyn v. City of Miami Beach*, 663 F. Supp. 528, 537 (S.D. Fla. 1987) ("fear and prejudice" about elderly residents did not support height and location restrictions on congregate living facilities for seniors).

Smaller homes shouldn't be illegal anywhere homes are allowed to be built. But even if banning some smaller homes might pass constitutional muster in some places, the undisputed facts here confirm that banning beautiful cottage homes from the King Corner property does not. The Court should therefore hold, at a minimum, that the City's minimum floor area requirement violates Georgia's Due Process Clause as applied to Tiny House Hand Up's property.

II. The denial of Tiny House Hand Up's variance application is not supported by substantial evidence.

Tiny House Hand Up is also entitled to judgment on its certiorari claim. (Verified Compl. Count II).[14] This claim challenges the denial of Tiny House Hand Up's application for a variance from the minimum floor area requirement of 1,150 square feet. Under O.C.G.A. § 5-4-12(b) (2022), the Court determines whether the denial is based on substantial evidence. Because the review of factual issues is limited to the record below, this section cites only to the certified Record filed on December 1, 2021 (Dkt. No. 24).

Under the Calhoun Zoning Code, the mayor and council may grant a variance from the terms of the Zoning Code if "one or more" of the following conditions exist:

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;

[14] Even if this Court decides that the minimum floor area requirement is unconstitutional (making a variance from that requirement unnecessary), it may want to decide both issues to facilitate resolution of any potential appeals. *Cf. Catherine H. Barber Mem'l Shelter*, 576 F. Supp. 3d at 328 n.1 (for that reason, deciding both that the zoning permit was erroneously denied and that permit requirement was unconstitutional).

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.

(Zoning Code § 6.6.1, Record Ex. D at 13–14). The Zoning Advisory Board also holds a public hearing on the variance application and "shall present [its] findings and recommendations" to the City Council. (Zoning Code §§ 13.2, 13.3.3, Record Ex. D at 71–72).

After the public hearing on the application, the mayor and council (or the Zoning Advisory Board) "will discuss in open meeting the zoning application request among themselves," and then "[a]fter discussion and deliberation," they may approve or deny the request. (Zoning Code §§ 14.2.3.11 to -12, Record Ex. D at 74). In making their decision or recommendation, the mayor and council and the Zoning Advisory Board "shall use" the Zoning Code's "Standards for considering zoning decisions" to "ensure that zoning matters are made on the basis of a record." (*Id.* § 14.5, Record Ex. D at 75–76).

Tiny House Hand Up's application showed that it met each of the four independent grounds for granting a variance. It explained, for instance, that the minimum floor area created an "unnecessary hardship" by prohibiting the types of cottage homes that Tiny House Hand Up exists to build and "making it impossible for [it] to fulfill its mission." (Variance Application 5, Record Ex. A). It also explained that granting the variance "would not cause substantial detriment to the public good or impair the purposes and intent of this ordinance," because the area already had a large variety of different uses, adding "a neighborhood of beautiful cottage homes" to that area would only enhance the area, and the homes would comply with all applicable building codes. (Variance Application 2, 5, Record Ex. B). In support of the

application, Tiny House Hand Up's representatives also explained that they planned to build normal homes in common use, which would just happen to be smaller than other homes in Calhoun (although the same size as homes found in many other communities). (Zoning Advisory Board Minutes § 6.A.j, .*l*, .t, Record Ex. B). They also confirmed that purchasers would need to have the income or assets for a mortgage loan, and that the homes would serve as starter homes and appeal to blue collar workers and retirees. *Id.*

The "Standards for considering zoning decisions" also supported Tiny House Hand Up. An applicant does not have to satisfy all of them (Zoning Code § 14.5, Record Ex. D at 75–76), but to the extent they were relevant, they went Tiny House Hand Up's way: the variance would "permit a use that is suitable in view of the use and development of adjacent and nearby property" (*id.* at 75), because it involved the ***same*** use as before (single-family homes). It would not "adversely affect the existing use or usability of adjacent or nearby property" (*id.*), because simply using smaller structures would not impact nearby uses, which were mostly industrial, commercial, or undeveloped. And simply taking the existing use (again, single-family homes) and making them smaller could not conceivably "result in a use which will or could cause an excessive or burdensome use of existing streets, transportation facilities, utilities or schools." (*Id.*). Nor would allowing smaller homes impact the "capital costs for capital improvements to serve the area" (*id.*), because smaller homes would not change the costs and because most of those costs are paid by the property owner anyways. (Zoning Advisory Board Minutes § 6.A.d, .e, Record Ex. B). The variance was also "in conformity with the policy and intent of the land use plan" (Zoning Code § 14.5, Record Ex. D at 75), because the land had already been found appropriate for single-family homes, and the City's comprehensive plans have long called for allowing smaller, less expensive homes to be built. And the "interest in promoting the public

health, safety, morality, or general welfare" (*id.* at 76), supported a variance that would help fill a critical need for affordable homes, starter homes, and more housing options.

The mayor and council nevertheless denied the variance application. Yet nothing in the record supports that decision—because the record is wholly silent on the merits of the application. Neither the mayor and council nor the Zoning Advisory Board engaged in any "discussion or deliberation" about the application after the hearings closed. (Zoning Advisory Board Minutes § 6.A.u-.v, Record Ex. B; City Council Meeting Minutes 13, Record Ex. C). They did not address even a ***single*** "[s]tandard[] for considering zoning decisions" to ensure that the decision would be "made on the basis of a record." (Zoning Code § 14.5, Record Ex. D at 75–76). They did not make a ***single*** finding of fact. Indeed, they didn't even find that the variance should be denied. Not a single member of the Zoning Advisory Board or the City Council was willing to even cast a vote either way. The best they could do was to silently deny the application by letting it "die[] for lack of a motion." (Zoning Advisory Board Minutes § 6.A.v, Record Ex. B; City Council Meeting Minutes 13, Record Ex. C (same)); *cf.* Aff. of Joseph Gay Ex. A (Calhoun 30(b)(6) Dep. (Worley Vol. II) 94:4–5 ("by their actions, it does deny for lack of a motion")).

That complete absence of evidence cannot support the decision below. As one sister court recently put it, "Silence is not sufficient." *Diagne v. City of S. Fulton*, No. 24-cv-10646, 2024 Ga. Super. LEXIS 5012, at *8 (Fulton Cnty. Super. Ct. Dec. 16, 2024). In that case, other than one council member briefly explaining her vote to deny a special use permit, the council "said nothing, wrote nothing, found nothing." *Id.* at *4, *9. Like the denial here, the "spare record" did not address most of the factors the council there was required to consider. *Id.* at *8–10. And like here, there was "no record of the basis for their decision. Just an arbitrary 'No.'" *Id.* at *9. (But

unlike here, the council there at least voted.) On the plaintiff's petition for review, the Superior Court held that the meager record could not support the city's denial, and it ordered the city to immediately grant the special use permit. *Id.* at *11. A similar result is warranted here.

Moreover, to the extent the record sheds any light on the City's decision, it reveals only improper reasons for the denial: "mere negative attitudes, or fear," which "are not permissible bases" for a zoning decision. *City of Cleburne*, 473 U.S. at 448. There was an unsubstantiated suggestion that smaller, less expensive homes might be associated with crime. (Zoning Advisory Board Minutes § 6.A.h, Record Ex. B). There was concern about "who will be in the homes." (*Id.* § 6.A.s). There were suggestions that smaller homes needed to be closer to "doctors" and "medical treatment" in the downtown area (City Council Meeting Minutes 12, Record Ex. C)—but no reason to think that, for instance, a younger person buying a starter home or a blue-collar worker has any unique need to live close to medical care. There were accusations that, compared to "nicer homes … in the area … these low income homes would be hard for the families to keep up and cause more issues in the area." (*Id.* at 13).

Stripped to its core, that's all the record of the variance proceeding below supports: opposition to homes because they might have "low income" residents living too close to "nicer homes." (*Id.*). It wasn't even true—the proposed cottages targeted people with more modest incomes, like young first-time buyers or retirees, not low-income residents. (Variance Application 2, 5, Record Ex. A; Zoning Advisory Board Minutes § 6.A.l). Yet just the specter of "low income" homes was enough to sink Tiny House Hand Up's application. Those "rumors and fear" and "private biases," however, were not a constitutionally permissible basis to deny Tiny House Hand Up's right to use its private property (*see supra* p. 26 & n.13), and "so cannot sustain the City's action." *Diagne*, 2024 Ga. Super. LEXIS, at *11 (unconstitutional interest in

restricting pursuit of lawful occupation could not sustain denial of special use permit to open braiding business).

In sum, the Zoning Advisory Board was supposed to present findings and recommendations. It didn't. The City Council was supposed to discuss and deliberate. It didn't. It was supposed to consider the list of zoning standards in its own ordinance. It didn't. And it was supposed to at least *vote* on the application. It didn't do that either. In short, the City did none of the things that might have created a record capable of supporting a variance denial—which means, necessarily, that the variance should be granted. This Court should therefore sustain the petition for a writ of certiorari, reverse the decision below, and order the City to grant Tiny House Hand Up's variance.

CONCLUSION

For the above reasons, this Court should grant summary judgment on Tiny House Hand Up's claim that banning homes smaller than 1,150 square feet violates Georgia's Due Process Clause. It should also sustain Tiny House Hand Up's certiorari claim, reverse the denial of Tiny House Hand Up's variance application, and order the City to grant the variance.

Dated: January 17, 2025

/s/ Aaron K. Block

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2025, the foregoing Plaintiff's Motion for Summary Judgment and *Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment,* as well as *Plaintiff's Statement of Material Facts Not in Dispute and Statement of Theories of Recovery*, along with the Affidavits of Cindy Tucker, Susan Brown, Expert Eric Kronberg, and Joseph Gay with accompanying exhibits were filed electronically via the Court's electronic filing system, and were served by email on the following counsel of record:

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