

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FOR THE FIFTH JUDICIAL CIRCUIT
	)	
Elizabeth Souder,	)	C/A No: 2025-CP-40-07466
	)	
Petitioner/Appellant,	)	
	)	
vs.	)	
	)	
	)	
City of Columbia, and Columbia Board of	)	
Zoning Appeals,	)	
	)	
Defendants/Respondent.	)	
_____	)	

INITIAL BRIEF OF RESPONDENT CITY OF COLUMBIA

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STATEMENT OF ISSUES ON APPEAL

- I. Whether banning a home based swim instructor from teaching in their pool which is not enclosed as required by the zoning ordinance is a violation of the Equal Protection clause of Article I, Section 3 of the South Carolina Constitution.
- II. Whether Columbia's police powers, preserved by the South Carolina Constitution and the Home Rule Act, extend to the use of residential property as a home business.
- III. Whether the Columbia Board of Zoning Appeals acted lawfully in upholding the interpretation of the Uniform Development Ordinance by the Columbia Zoning Administrator.

STATEMENT OF THE CASE

By way of simple introduction, this matter has two (2) cases pending in the Fifth Circuit Court of Appeals, an action for injunctive relief in Civil Action 2025-CP-40-02432 (Action for Injunctive Relief), and the appeal of a decision by the Columbia Board of Zoning Appeals (hereinafter referred to as the “board” or as “BOZA”) which is pending under Civil Action 2025-CP-40-07466, (Zoning Appeal).

This case began with the filing of a Summons and Complaint against the City of Columbia in Civil Action Number 2025-CP-40-02432 on April 14, 2025. That complaint alleged causes of action for a Declaratory Judgment and requesting an order stating: (1) that Swim Columbia is in the profession of teaching and therefore exempt from business licensing; (2) an Outdoor pool surrounded by a fence is enclosed for purposes of city ordinances; (3) zoning violations must be specific and not vague; (4) that the City must follow prescribed due process; (5) that the City must serve the second violation prior to enforcement; (6) that the City must bring violations before the Court for adjudication prior to penalizing the business. Ten (10) days later, on April 25, 2025, the Summons and Complaint was amended.

On April 28, 2025, the Petitioner also filed a Motion for a Temporary Restraining Order and Preliminary Injunctive Relief asking the Court, *inter alia*, to allow her to continue operating her swimming lessons in her backyard pool without a business license. The pleadings were served on the City of Columbia on April 29, 2025. A second amended complaint was filed on June 26, 2025 adding a cause of action for Estoppel.

A hearing on the temporary restraining order was scheduled for July 9, 2025¹.

In anticipation of the hearing, the City determined some of the procedural difficulty in the case was due to the fact that no formal interpretation of the ordinance in question in this matter had ever been issued. Because this dispute was more than thirty (30) days old, the Petitioner had no ability to elevate the matter to the Board of Zoning Appeals, the appropriate body to hear the matter.

Therefore, on July 9, 2025, the Zoning Administrator issued a formal Interpretation stating that an outdoor pool with only a fence is not a “fully enclosed, lawfully approved structure which is accessory to the residential use”. This formal interpretation was served on the Petitioner in person on the same day, and that had the effect of resetting the clock for her to be able to appeal the decision to the Columbia Board of Zoning Appeals.

The Petitioner timely appealed the Zoning Administrator’s decision to the Board of Zoning Appeals on August 8, 2025. The BOZA heard the appeal on September 4, 2025 and voted to affirm the Written Interpretation. A final order of the board’s decision was mailed to the Petitioner on October 6, 2025, and she timely appealed that decision in Civil Action 2025-CP-40-07466 (the present case) on November 3, 2025. .

On November 22, 2025, the Petitioner filed a motion for leave to amend the complaint in the Action for Injunctive Relief for a third time. This motion sought to add additional parties and conform the complaint to the BOZA appeal filed on November 3, 2025. While there was consent to some of the proposed amendments, there was disagreement regarding the appropriate parties to the action. After a hearing before the Honorable Chris Taylor, the Petitioner was

¹ That hearing was not held because the Honorable Daniel Coble informed the parties in open court that he had a conflict in the matter and could not hear the case or rule upon it.

granted the right to amend the complaint to add the BOZA to the case as a party-defendant and to bring both cases in conformity each to the other. The third amended Summons and Complaint was filed on February 13, 2026.

The action for injunctive relief was designated as a complex case by the Chief Administrative Judge on February 26, 2026 and assigned to the Honorable Thomas McGee, III. On April 1, 2025, the BOZA Appeal was also assigned by the Chief Administrative Judge to Judge McGee. Following a hearing on April 2, 2026, the action for injunctive relief was stayed pending the resolution of the Zoning Appeal.

STANDARD OF REVIEW

Pursuant to the “South Carolina Local Government Comprehensive Planning Enabling Act of 1994”, the Petitioner, considering herself aggrieved by the decision of the Columbia Board of Zoning Appeals, may appeal from the decision of the board to the Circuit Court in and for the County, by filing with the clerk of the court a petition in writing setting forth plainly, fully and distinctly why the decision is contrary to law. S.C. Code Ann. §6-29-820(A). The filing of the appeal does not *ipso facto* act as a supersedeas of the board’s decision. S.C. Code §6-29-830(B). The findings of fact of the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence. S.C. Code Ann. §6-29-840.

The court hearing the appeal must *only* determine whether the decision of the board is correct as a matter of law. S.C. Code Ann. §6-29-840.

A municipal ordinance is a legislative enactment and is presumed to be constitutional. *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity

of their application *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965). Courts must make every presumption in favor of the constitutionality of a legislative enactment. *McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) (per curium) (quoting *City of Rock Hill v. Harris*, 391 S.C. 149, 154, 705 S.E.2d 53, 55 (2011)). Thus, courts may only declare a municipal ordinance unconstitutional “when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.” *Id.* at 504, 719 S.E.2d at 663 (quoting *Harris*, 391 S.C. at 154, 705 S.E.2d at 55).

More specifically, “The Court will not overturn the action of the City if the decision is fairly debatable because the City's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision.” *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *see also Rush*, 246 S.C. at 276, 143 S.E.2d at 531 (explaining the Court must exercise “carefully and cautiously” its power to declare a challenged ordinance invalid on the basis that the ordinance unreasonably impaired or destroyed a constitutional right). Thus, when a local city council enacts a zoning ordinance after considering all of the relevant facts, the Court should not disturb the council's action unless the council's findings were arbitrary and capricious or had no reasonable relation to a lawful purpose. *Rush*, 246 S.C. at 276, 143 S.E.2d at 531; *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999); *see also Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425

The exercise of police power under a municipal ordinance is subject to judicial correction only if the action is arbitrary and has no reasonable relation to a lawful purpose. A municipal ordinance is a legislative enactment and is presumed to be constitutional. The burden of proving the invalidity of a municipal ordinance is on the party attacking it.. This State's constitution

provides that the powers of local governments should be liberally construed. *See* S.C. Const. art. VIII, § 17.

The burden of establishing the invalidity of a zoning ordinance is on the party attacking it to establish by clear and convincing evidence that the acts of the city council were arbitrary, unreasonable, and unjust. *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 278–79, 890 S.E.2d 748, 754–55 (2023). A municipal ordinance is a legislative enactment and is presumed to be constitutional. *McMaster v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 719 S.E.2d 660, 275 Ed. Law Rep. 434 (2011)

STATEMENT OF FACTS

The City disagrees with the Statement of Facts propounded by the Petitioner. Many of the facts are self-serving statements which are unsubstantiated, save for the allegations made in the many filings. References to self-serving statements in previous filings are not before this Court.

The City would rely on the facts set forth in the Exhibits identified in the Exhibit List filed by the Petitioner on November 3, 2025, the Order of the Board of Zoning Appeals, any Exhibits filed in this Appeal by any party, and the transcript of the hearing before the Board of Zoning Appeals on September 4, 2025.

ARGUMENTS:

I. Equal Protection Violation

a. *The Petitioner is not a member of suspect classification.*

The Petitioner has raised the argument that she is being denied the equal protection of the law because her business is not being handled the same way as a home daycare would be handled under the Uniform Development Ordinance of Columbia.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The South Carolina Constitution provides a similar right upon its citizens. “The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” Article I, Section 3.

Where, as here, there is no suspect or quasi-suspect class and no fundamental right is involved, zoning ordinances should be tested under the ‘rational basis’ standard.

The South Carolina Constitution provides that no “person shall be denied the equal protection of the laws.” S.C. Const. art. I, § 3. “The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment.” *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995); *see also Sloan v. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 481, 636 S.E.2d 598, 613 (2006) (“A crucial step in the analysis of any equal protection issue is the identification of the pertinent class....”).

Not all classifications are unconstitutional, however, for “[t]he equal protection clause only forbids irrational and unjustified classifications.” *Luckabaugh*, 351 S.C. at 147, 568 S.E.2d at 351 (quotation omitted). So long as the statute “does not implicate a suspect class or abridge a fundamental right, the rational basis test is used” to determine whether the classification falls into the prohibited group. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004).

A classification will survive rational basis review when it bears a reasonable relation to the legislative purpose sought to be achieved, members of the class are treated alike under similar circumstances, and the classification rests on a rational basis. *Bodman v. State*, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013)

Under rational basis review, the Equal Protection Clause is satisfied so long as (1) there is a plausible policy reason for the classification; (2) the facts on which the classification is based rationally may have been considered to be true by the decision maker; and (3) the relationship of the classification to the goal is not so attenuated as to render the distinction arbitrary or irrational. *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *see also Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004)

A party challenging a legislative enactment under rational basis review “must negate every conceivable basis which might support” the enactment and, therefore, has a “steep hill to climb.” *Bodman v. State*, 403 S.C. 60, 69–70, 742 S.E.2d 363, 367–68 (2013). *Ani Creation, Inc. v. City of Myrtle Beach Bd. of Zoning Appeals*, 440 S.C. 266, 285, 890 S.E.2d 748, 757–58 (2023).

To prevail under the rational basis standard, a claimant must show similarly situated persons received disparate treatment, and that the disparate treatment did not bear a rational relationship to a legitimate government purpose. *Town of Hollywood v. Floyd*, 403 S.C. 466, 744 S.E.2d 161 (2013). Different treatment of people in different circumstances under the law is not a violation of the Equal Protection clause. “Under the rational basis test, the Court must determine: 1) whether the law treats similarly situated entities differently; 2) if so, whether the legislative body has a rational basis for the disparate treatment; and 3) whether the disparate treatment bears a rational relationship to a legitimate government purpose.” *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 293–94, 737 S.E.2d 601, 608 (2013).

The Petitioners only argument is that she is not being treated the same way as a Home Daycare. The most obvious flaw with this argument is the two business types are not the same and can be treated differently, as will be more fully discussed *infra*.

b. The Petitioner's comparison to home daycares is illusory; daycares are regulated activities requiring state licensing and inspections. Home daycares are not similarly situated.

In her brief, the Petitioner leans heavily on the presumption that a home daycare would be exactly the same as her business, but it is not. They are not comparable.

The Petitioner wishes the Court to believe that all home occupations stand in equal footing simply because they would fall under the auspices of §17-4.3(d)(6) of Columbia's Uniform Development Ordinance in the *Code of Ordinances of the City of Columbia*. That simplistic view does not suffice in this case.

First of all, a home daycare is not a "home occupation" under UDO §17-4.3(d)(6). They are regulated under the UDO by §17-4.3(d)(5) "Family Child Care Home". That ordinance provides that a Family Child Care Home comply with §17-4.3-(d)(6), but there is a further requirement for a designated loading and unloading area (UDO §17-4.3-(d)(5)(d), and for a fenced outdoor play area (UDO §17-4.3(d)(5)(d).

The requirement of the UDO for "Home Occupations" that the "*The home occupation shall be conducted entirely within the principal structure or within a fully enclosed, lawfully approved structure which is accessory to the residential use*" UDO §17-4.3(d)(6)(f). While the children may go outside to play, that would only be for a portion of the day and the remainder of the time would be inside the home. But the Family Child Care Home requirements contemplate that. There is literally no part of the Petitioner's Swim School which

can take place indoors. The comparison is not the same.

Secondly, the traffic of a home daycare would not be the same. While the Petitioner's Swim School has children coming and going throughout the day in an ongoing exchange of students, a home daycare would have the children dropped off in the morning, and picked up in the afternoon. The traffic burden on the neighborhood would be insignificant. By her own admission, the Petitioner was required to alter her driveway because of the number of cars dropping off and picking up swim students from her swim school. Petitioner's Appeal, ¶13. But the Family Child Care Home Ordinance addresses this concern by requiring a loading and unloading area. The Home Occupation Ordinance does not.

Finally, and most importantly, Home Daycares of the type which would be subject to the same ordinance as the Petitioner are highly regulated businesses with a licensing requirement by the State of South Carolina. *"Family Childcare Home" means a facility within a residence occupied by the operator in which childcare is regularly provided for no more than six children, unattended by a parent or legal guardian, including those children living in the home and children received for childcare who are related to the resident caregiver"* S.C. Code Ann. §63-13-810(A). *"An operator of a family childcare home shall register with the department [of social services] within six months of June 13 1977."* S.C. Code Ann. §63-13-810(B). *"Operators and caregivers of licensed family childcare homes are held to the standards in Sections 63-13-420 and 63-13-430 regarding criminal convictions and Central Registry and sex offender checks."* S.C. Code Ann. §63-13-810(C).

There is an entire regulatory structure for these daycares. Found in the *South Carolina Code of Regulations*, Chapter 114, "Department of Social Services" sub article I is the

regulation of Day Care Facilities, and includes home daycares. Specifically, S.C. Code of Reg. §114-530 through §114-537 provides regulations regarding: registry requirements and procedures; staffing requirements; qualifications of staff and management; recordkeeping; program and supervision requirements; physical site requirements²; health, sanitation and safety guidelines; and other important topics related to child care. The regulated nature of the Child Care industry is reflected in the UDO because a “Family Child Care Home” is required by UDO §17-4.3-(d)(5)(b) to “Be licensed by the State as a Licensed Family Child Care Home.”

The Petitioner’s Swim School is not comparable to a home daycare in anyway. The UDO for a Family Child Care Home, as an accessory use to a single-family dwelling, requires that it comply with the requirements of UDO §17-4.3(d)(6), as the Petitioner is, but has many additional requirements, including regulations for outdoor areas to play.

§17-4.3(d)(5)(e): Include a fenced outdoor play area of not less than 500 square feet that is: (1) Located to the side or rear of buildings; (2) Completely enclosed by a fence that is at least four feet in height; (3) Safely segregated from parking, loading, or service areas; and (4) Not operated for outdoor play activities after 8:00 P.M.;

§17-4.3(d)(5)(f): Screen any outdoor play areas adjacent to a residential lot line by a six-foot solid fence or wall; and

§17-4.3(d)(5)(g): Locate outdoor play equipment not closer than 20 feet from any residential lot line.

If there was a comparison to be made with Home Daycares and Ms. Souder’s Swimming School, it is that Daycares are more highly regulated by the City and the State, not less.

² S.C. Code of Reg §114-535(C)(3) “Access to swimming pools and wading pools shall be controlled by a device or method that promotes safety of children, including a latch, lock, protective fence, protective cover, or other device or method which enhances child safety.”

If the Court were to determine that Ms. Souder is allowed to engage in her Swimming School in a residential neighborhood with children, she invites more regulation. There is no provision in the law to ensure that Ms. Souder keeps her pool clean. There is no provision in the law which provides that she has safety devices available to her in case of emergency. There is no requirement that she report any signs of abuse and neglect. All of this is addressed by the state regulations regarding Family Child Care Homes.

c. The Petitioner is the only person seeking a home based swimming school in her backyard.

One of the fatal flaws in the Petitioner's argument that she was denied equal protection is that she is the only business in the City asking to conduct swimming lessons in a backyard pool in a residential neighborhood. If she could show that other swimming schools were allowed to operate out of the owner's backyard in a residential area, she might be able to show treatment which was disparate on some arbitrary or disparate grounds. Unfortunately, that is not possible. She is the only business of her type in the City of Columbia. Further, the record is devoid of any comparables to show she was treated differently than someone else.

Again, as the *Bodman* Court stated: "*The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment.*"

Throughout her appeal and her brief, the Petitioner refers to the "ban" or "ban on outdoor businesses". But the reality is that Ms. Souder is free to operate Swim Columbia from her home as a home based business. She just cannot conduct the swim classes in her pool. She would be able to conduct her classes at any number of public or private pools in the City of Columbia, or in Richland County. If her student's family has a pool, she can travel to that pool

and engage in swimming lessons. She is only restricted from conducting the swimming classes she wants in her own pool.

If Ms. Souder were to amend her business license application to state that she runs Swim Columbia out of her home and travels to her students to conduct swimming lessons, with the home being the base of management for her business, then the requirements of UDO §17-4.3(d)(6) would be satisfied.

But let's assume, for a moment, that Ms. Souder is correct and that the City has to provide her with a business license because her business is analogous to a family home daycare that teaching children to swim in her backyard must be accommodated. The City would be free to step in and make sure that there are minimum safety standards for that pool, that the pool is adequately maintained, that safety devices are nearby and available in case of emergency, that there is an accessible landline to call first responders in case of a medical emergency, that she must comply with state statutes regarding mandatory reporting of signs of abuse and neglect.

The more pragmatic approach is to allow her swimming school to operate in pools which are legally maintained and inspected, or owned by her students, rather than the City (a) turn a blind eye to the dangers of an unregulated pool or (b) create a plan for the regulation of this one sole business. But it appears from this appeal that Ms. Souder wants to be free to operate her business with no safeguards or restrictions like the many safety issues addressed by the regulation of Family Child Care Homes.

Ms. Souder wants to be a rule of one.

II. Substantive Due Process Violation

- a. A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property.*

Early on in this dispute, there might have been an argument that the Petitioner was denied due process because the procedural position of the case was not formal. There had been Notice of Violations, but there had not been any administrative action to enforce those. However, the issuance of the formal Written Interpretation of the Zoning Administrator resolves that problem by allowing her an opportunity to be heard, and appeal rights which are being exercised at this very moment.

No person shall be deprived of property without due process of law. U.S. Const. amend XIV, § 1; S.C. Const. art. I, § 3. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). The standard for reviewing all substantive due process challenges to state statutes or municipal ordinances, including economic and social welfare legislation, is whether the ordinance bears a reasonable relationship to any legitimate interest of government. *Id.* at 430, 593 S.E.2d at 470. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917, 923 (2004).

It is well settled in South Carolina that zoning is founded in a municipality's police power and that zoning matters are presumptively valid. A municipality has the power to enact regulations for the purpose of preserving the health, safety, welfare, and comfort of dwellers in urban centers. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 92–93, 596 S.E.2d 917, 921

(2004).

The Petitioner relies, *inter alia*, on *Painter v. Town of Forest Acres*, 231 S.C. 56, 97 S.E.2d 71 (1957). In that case, the Town of Forest Acres passed an ordinance requiring all business to close at midnight and they could not reopen until six o'clock in the morning. (6:00 a.m.). The Supreme Court found the ordinance unreasonable on its face due to the fact that many businesses would be affected by this time restriction.

But in *Denene*, the Supreme Court clarified that case did not stand for a blanket prohibition of regulation of business. “*No one has an unfettered right to pursue a business detrimental to the public health, safety, and welfare*” *Id.*

It is incumbent on the Zoning Administrator to make formal written interpretations of the zoning ordinances when appropriate. Chapter 17 of the *Code of Ordinances of the City of Columbia* is the “Unified Development Ordinance” [UDO]. Both the UDO and all of the written interpretations of the Zoning Administrator are publicly available for review on the City’s website. <https://planninganddevelopment.columbiasc.gov>

Article 4 of the UDO outlines the City’s “Use Regulations” as a function of the City’s Police Powers. Article 4 is very comprehensive and outlines the requirements for the use of properties within the City Limits³.

b. The Petitioner can still operate her business out of her home, but she cannot engage in swimming lessons in backyard pool without being fully enclosed.

As we discussed, *supra*, one of the misconceptions of this case is the Petitioner is unable

³ The City of Columbia is the largest city in the State of South Carolina by area.

to operate a home based business by which she teaches children how to swim. She is completely allowed to engage in the business of teaching swimming, but her own pool is not zoned for this business. She is able to conduct this business in the pool of a customer, in a pool at a country club, at a public pool operated by the Parks Department of either the City or the County.

c. The Petitioner has failed to show the decision of the Zoning Administrator was arbitrary and capricious.

For a Court to determine that it should invalid the decision of a municipality's zoning decisions, the Court must determine the City acted in an arbitrary and capricious manner.

The decision is “arbitrary” if it was governed by no fixed rules or standards. *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct. App. 1985). “We note the lower court charged arbitrary meant “not governed by any fixed rules or standards.” This definition was derived from *Deese v. South Carolina State Board of Dentistry*, 286 S.C. 182, 332 S.E.2d 539 (Ct.App.1985). This definition applied in *Deese* is appropriate for reviewing the conduct of agencies” *Taylor v. Nix*, 307 S.C. 551, 555–56, 416 S.E.2d 619, 621 (1992).

Andrew Livengood issued a Written Interpretation in this matter knowing full well that it would be publicly available and binding upon future decisions by the Zoning Administrator. In his July 9, 2025 Interpretation, Mr. Livengood stated:

A structure, according to §17-9.4 Definitions, “means anything constructed or erected, the use of which requires location on the ground, or attachment to something having location on the ground, including mobile homes, travel trailers, signs, mobile signs, tubs, swimming pools or other bathing facilities, portable signs and antennas...”, thus both a swimming pool and a fence are considered structures. However, while an outdoor swimming pool is a structure, it is not a fully enclosed structure, even when surrounded by other structures such as buildings, walls, or

fences to provide a barrier as required by the International Residential Code. A house is a fully enclosed structure, having at least four walls and a roof. Similarly, a garage is a fully enclosed structure while the garage door is down. A carport is not a fully enclosed structure, nor are either a gazebo or a pergola fully enclosed structures. Likewise, lacking a roof or walls, an outdoor pool is not a fully enclosed structure. A home occupation is an accessory use of a dwelling unit, and per the purpose and intent statement for accessory structures and uses (§17-4.3(a)(1)), they must "...comply with the standards set forth in this section to reduce potentially adverse impacts on surrounding lands". The standards for a home occupation collectively require that such a use be inconspicuous, and provide additional context to interpret what is meant by a fully enclosed structure. Petitioner's Exh. M.

At the hearing, Mr. Livengood again explained his reasoning for the interpretation:

But of course, my job as zoning administrator is to look at the zoning ordinance and what it's asking for me to do. And certainly in making an interpretation, I need to look at the specific parts where we're talking about the home occupation. And if you look at the component parts of the home occupation, it describes a scenario where it is, from all outward appearances, a home, and it is not a business. It does allow you to hang your hat, so to speak, inside a home. Matter of fact, our old ordinance, which has been amended over time, and this is not our old ordinance. And I would even go to the extent of saying, I'm glad that our current ordinance gives a lot more leeway to allow more activities. But again, the intent is, you live in a neighborhood, you drive by, you're not aware that somebody is conducting a business at the location. And so when the thing says, when the home occupation ordinance says it shall be conducted entirely within the principal residence, which is the first part it says, then it says, or a fully-enclosed, lawfully permitted structure. And a pool is a structure and a fence is a structure. A fence encloses a yard. A yard is not a structure. Right. But -- so we're talking about two different structures here which serve their own purposes. And -- and certainly, you know, the appellants talked about the building code and how the building code requires that a fence be -- sorry -- a pool be enclosed. Yes, that is a requirement of the building code, but that's -- that is a separate ordinance. What we are looking at is, in fact, that swimming pool, is that a situation where it is indoors? And is it fully enclosed in that sense? And it is not. BOZA Hearing Transcript, Page 23, Line 21 - Page 25, Line 7

Mr. Livengood, the Zoning Administrator, made an informed decision to apply the UDO's

definition of a “structure” from §17-9.4 and apply it to the Home Occupations ordinance §17-4.3-(d)(5) which states: “*The home occupation shall be conducted entirely within the principal structure or within a fully enclosed, lawfully approved structure which is accessory to the residential use, ...*”

By applying the rules to this unique situation, Mr. Livengood could not be acting “arbitrary”. He was simply applying the rules before him. And the Board of Zoning Appeals agreed.

Pursuant to the power and duties of the Board of Zoning Appeals to review administrative decisions and determinations (§ 17-2.S(u)), we have heard the testimony and reviewed the appellant's request for administrative appeal, and find that the Zoning Administrator did not err in his determination that a fenced-in outdoor pool is not a "fully enclosed, lawfully approved structure which is accessory to the residential use" for the purpose of the standards for a Home Occupation contained within § 17-4.3(d)(6) of the Unified Development Ordinance. The Board rules that the Zoning Administrator's decision be upheld, in whole, based on clear and substantial evidence in the record. Petitioner's Exhibit A

There is no evidence in the record that the Zoning Administrator acted in disregard to established rules (arbitrary) or in a fickle and impulsive manner (capricious) in this matter. Importantly, even if this Court believes that Mr. Livengood is *wrong* in his interpretation, that is insufficient to overturn the decision of the Board of Zoning Appeals. He must have acted with no regard to the facts and the law, which is not the case here.

d. The City has a legitimate interest in the integrity and peaceful coexistence of residential neighborhoods.

The Unified Development Ordinance was passed by Columbia City Council on August 19, 2019. Under UDO §17-4.3, the UDO regulates “Accessory Uses and Structures” of property.

When it comes to specific accessory uses and structures, the UDO specifically sets standards for §17.4-3(d)(1) Accessory Dwelling Units; §17.4-3(d)(2) Automated Teller Machines; §17.4-3(d)(3) Community Gardens; §17.4-3(d)(4) Drive-Through Facilities; §17.4-3(d)(5) Family Child Care Homes; §17.4-3(d)(6) Home Occupations; §17.4-3(d)(7) Outdoors Displays of Merchandise; §17.4-3(d)(8) Solar Energy Conversion Systems; §17.4-3(d)(9) Outdoor Storage Systems; §17.4-3(d)(10) Swimming Pools; §17.4-3(d)(11) Pick-Up Windows; and §17.4-3(d)(12) Pedestrian Pick-Up Windows. These topics cover a wide array of accessory uses of property, whether zoned residential or commercial.

Each of the uses are regulated in the various districts with varying standards. Consider the Accessory Use/Structure Table for the Base Zoning Districts:

TABLE 17-4.3(B)(5): ACCESSORY USE/STRUCTURE TABLE FOR BASE ZONING DISTRICTS																											
P = PERMITTED BY RIGHT													S = ALLOWED AS SPECIAL EXCEPTION							BLANK CELL = PROHIBITED							
Accessory Use/Structure	Residential Districts										Mixed-Use, Activity Center, and Corridor Districts								Institutional and Campus				Industrial Districts			Use-Specific Standards	
	T/C	LL-R	RSF-1	RSF-2	RSF-3	RD	RD-MV	RM-1	RM-2	MU-1	MU-2	NAC	CAC	RAC	OI	DAC	GC	MC	INS-GEN	INS-U/M	INS-ZOO	INS-T/U	U	HI	EC		
Accessory dwelling unit	C	C	C	C	C	C	C	C	C	C	C															Sec. 17-4.3(d)(1)	
Automated teller machine (ATM)		C								C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	Sec. 17-4.3(d)(2)
Community garden	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	Sec. 17-4.3(d)(3)
Drive-through facility – Personal Service/Retail Sales											C	C	C	C	C	C	C										Sec. 17-4.3(d)(4)
Drive-through facility – Other											S			S	C		C				C	C	C	C	C	C	Sec. 17-4.3(d)(4)
Family child care home (as accessory to a single-family dwelling)			C	C	C	C	C	C	C	C																	Sec. 17-4.3(d)(5)
Home occupation	C	C	C	C	C	C	C	C	C	C	C		C	C	C	C	C	C	C	C					C		Sec. 17-4.3(d)(6)
Outdoor display of merchandise (as accessory to a retail sales use or wholesale sales)									C	C	C	C	C	C	C	C	C	C			C		C	C	C		Sec. 17-4.3(d)(7)
Solar energy conversion system (small-scale)	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	Sec. 17-4.3(d)(8)
Storage, outdoor	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	Sec. 17-4.3(d)(9)
Swimming pool	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	C	Sec. 17-4.3(d)(10)
Pick-up Window											C	C	C	C	C		C										Sec. 17-4.3(d)(11)
Pedestrian Pick-up Window											C	C	C	C	C	C	C	C							C		Sec. 17-4.3(d)(12)

Source: UDO §17-4.3-(b)(4)

The City of Columbia has a legitimate interest in regulating the types of uses of property existing in various Residential Districts, including RSF-1, in which the subject property is located. A comprehensive development plan is a valid exercise of the City’s police power.

III. *The City never declared the Petitioner's swimming school a nuisance.*

In the Petitioner's brief, she puts forth the proposition that "The ban exceeds the City's police power because the City cannot make a lawful business a nuisance by merely declaring it to be such." The Petitioner bases this on *Painter v. Town of Forest Acres* which is discussed *supra*.

The *Painter* decision was issued in 1957, prior to the Home Rule amendment to the South Carolina Constitution. S.C. Const Art. VIII, §7. Then in 1975, the legislature passed the "Local Government Act" which decentralized local government and transferred authority over budgets ordinances and administrative structures from state legislative delegations to elected municipal and county councils.

"This Court concludes that by enacting the Home Rule Act, S.C. Code Ann. § 5-7-10, et seq. (1976), the legislature intended to abolish the application of Dillon's Rule in South Carolina and restore autonomy to local government. We are persuaded that, taken together, Article VIII and Section 5-7-30, bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long as such regulations are not inconsistent with the Constitution and general law of the state."

Williams v. Town of Hilton Head Island, S.C., 311 S.C. 417, 422, 429 S.E.2d 802, 805 (1993)

S.C. Code §5-7-30 is the State Statute which confers authority on municipalities. It specifically allows municipalities to "abate nuisances". The City of Columbia has the authority to declare a property's use a nuisance based upon a structure set forth in the Code of Ordinances of the City of Columbia. See *Code of Ordinances of the City of Columbia (SC) Chapter 8*,

Article II “Nuisances”. That section of the City Code outlines the definition of a nuisance, the types of nuisances and, most importantly, the procedural mechanism for naming a property or use as a nuisance. But nuisance law is not part of this case. To date, no official of the City of Columbia has sought to declare the Petitioner’s property or swimming school a public “nuisance”.

IV. *The issue of whether the City is estopped from taking a position is not before the Court on appeal.*

The Board of Zoning appeals specifically did not make any conclusions of law or findings of fact on whether the City was equitably estopped in this matter.

CONCLUSION:

In this matter, the decision of the Board of Zoning Appeals should be upheld. There is no constitutional argument that the equal protection clause of either the United States or South Carolina Constitutions were violated. The Petitioner is not a member of suspect classification so the City would only need to show a rational basis to a legitimate governmental interest to survive. The Petitioner’s comparison of her swimming school to a home daycare is misplaced; as a regulated industry, daycares are allowed to have outdoor activities due to their state licensing and inspections and higher standards. Finally, the Petitioner is the only person seeking a home based swimming school in her backyard.

There is no Substantive Due Process Violation in this matter. A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property. The Petitioner can still operate her business out of her home, but she cannot engage in swimming lessons in backyard pool without being fully enclosed. The Petitioner has

failed to show the decision of the Zoning Administrator was arbitrary and capricious. The City has a legitimate interest in the integrity and peaceful coexistence of residential neighborhoods.

On further grounds, the City never declared the Petitioner's swimming school a nuisance and the issue of equitable estoppel is not before this Court.

Respectfully submitted,

THE CITY OF COLUMBIA

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