



**Town of Hilton Head Island
Board of Zoning Appeals
Special Meeting
Wednesday, December 14, 2016 – 4:00 p.m.
Hilton Head Island Library – Large Meeting Room
AGENDA**

1. **Call to Order**
2. **Pledge of Allegiance to the Flag**
3. **Roll Call**
4. **Freedom of Information Act Compliance**
Public notification of the Board of Zoning Appeals meeting has been published, posted and mailed in compliance with the Freedom of Information Act and the requirements of the Town of Hilton Head Island Land Management Ordinance.
5. **Welcome and Introduction to Board Procedures**
6. **Approval of Agenda**
7. **Unfinished Business**
Hearing
Motion to Reconsider APL 1006-2016: ArborNature LLC and Adam Congrove are requesting that the Board of Zoning Appeals reconsider their decision to uphold the decision of the Official related to APL 1006-2016.
8. **New Business**
9. **Board Business**
10. **Adjournment**

Please note that a quorum of Town Council may result if four or more Town Council members attend this meeting.



LAW OFFICE OF
CHESTER C. WILLIAMS, LLC

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Chester C. Williams
ALSO MEMBER LOUISIANA BAR

Thomas A. Gasparini
ALSO MEMBER CALIFORNIA BAR
(Inactive)
ALSO MEMBER OHIO BAR
(Inactive)

23 September 2016

Teri B. Lewis, AICP
LMO Official
Town of Hilton Head Island
One Town Center Court
Hilton Head Island, SC 29928

**Via Email and
Hand Delivered**

RE: ArborNature, LLC Application for Appeal APL-001006-2016 (the "Appeal")
– Our File No. 01802-001

Dear Teri:

On behalf of our client, ArborNature, LLC, in accordance with Article XI, Section 1 of the Rules of Procedure of the Board of Zoning Appeals (the "BZA"), we enclose herewith a Petition for Reconsideration of the Appeal.

We are filing this Petition today because we feel compelled to do so, notwithstanding the fact that the five day filing in the BZA Rule Article XI, Section 1(2) does not expire until tomorrow. Typically, one would expect that when a filing deadline falls on a weekend or legal holiday, then the filing period is extended to the next regular business day; however, based on the peculiar time calculation method in LMO Section 16-10-101.D.1, the reverse is applicable, and you have taken the position that the filing period for this Petition is shortened to the immediately prior business day, *i.e.*, today.

We understand from our telephone conversations today with you and Brian Hulbert that upon the filing of this Petition, you intend to amend the agenda for the Monday 26 September 2016 BZA meeting to include consideration of this Petition by the BZA at the meeting on Monday, based on BZA Rule Article XI, Section 1(4), which states that a Petition for Reconsideration shall be presented to the BZA at the next regular scheduled meeting following the filing of the Petition after compliance with the public notice requirements for a BZA public meeting per the LMO. We object to being required to present this Petition to the BZA on Monday because it is evident that BZA Rule Article XI, Section 1(4) does not take into consideration such timing as is applicable to this particular Appeal. While the timing of BZA Rule Article XI, Section 1(4) would not normally present a hardship to an appellant whose application was heard and decided by the BZA at a regular scheduled



meeting, because the BZA's decision on the Appeal was rendered at a special meeting held just four days ago, the timing of BZA Rule Article XI, Section 1(4) and its requirement that this Petition be presented to the BZA on Monday does present a clear hardship for our client in this case.

We have prepared this Petition based on the best information available to us at this time; however, we have not had sufficient time since this past Monday to obtain a transcript from our court reporter of the many hours of testimony at the 19 September 2016 BZA hearing on the Appeal, and it is only fair that we have a reasonable opportunity to review that transcript before arguing this Petition for Reconsideration. Therefore, we ask that the hearing on this Petition be scheduled for the 24 October 2016 meeting of the BZA in order to afford us sufficient time to prepare fully for a hearing on this Petition.

We also object to the amendment of the agenda for the 26 September 2016 meeting of the BZA to include this Petition on the grounds that such an amendment does not comply with the minimum public meeting notice requirements of SC Code Section 30-4-80.

Please let us know if you or any members of the BZA have any questions or comments regarding this Motion, or if we may otherwise be of assistance.

With best regards, we are

Very Truly Yours,

LAW OFFICE OF CHESTER C. WILLIAMS, LLC

This signature is an electronic reproduction

Chester C. Williams

CCW/

Enclosure

cc: Mr. and Mrs. Adam Congrove
C. Glenn Stanford, Esq.
Thomas C. Taylor, Esq.
Brian E. Hulbert, Esq.
Nicole Dixon, CFM

<p>STATE OF SOUTH CAROLINA</p> <p>COUNTY OF BEAUFORT</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>BEFORE THE BOARD OF ZONING</p> <p>APPEALS OF THE TOWN OF</p> <p>HILTON HEAD ISLAND, SC</p> <p>APPLICATION FOR APPEAL</p> <p>APL-001006-2016</p>
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PETITION FOR RECONSIDERATION

This Petition for Reconsideration (this “Petition”) is made by ArborNature, LLC (the “Appellant”) pursuant to Article XI, Section 1 of the Rules of Procedure for the Board of Zoning Appeals (the “BZA”) of the Town of Hilton Head Island (the “Town”) in connection with Application for Appeal APL-001006-2016 (the “Appeal”), and is submitted by the Appellant to the BZA to seek reconsideration of the decision rendered by the BZA on 19 September 2016 in the Appeal upholding the determination made by Teri B. Lewis, AICP in her letter of 13 May 2016 to Adam Congrove (the “Determination”). The motion to uphold the Determination passed by a 4-1 vote of the BZA.

I. INTRODUCTION

The Appeal seeks to either reverse the Determination, or direct Mrs. Lewis to advise the Appellant as to the action necessary to correct the alleged violation of the Town’s Land Management Ordinance (the “LMO”) that resulted in the Determination.

On 19 September 2016, the BZA held a hearing on the Appeal. Presentations were made by the Town Staff and the Appellant, and following questions and discussion, a motion was made and seconded to deny the Appeal. That motion passed by a 4-1 vote.

II. RECONSIDERATION

Article XI of the Board of Zoning Appeals Rules of Procedure adopted 27 July 2015 (the “BZA Rules”) provides for reconsideration of any decision made



under Section 16-2-104(T) of the LMO.¹ Any Petition for Reconsideration must be filed with the LMO Administrator² within five (5) days of the date of the hearing.³ The Petition for Reconsideration must to be in writing, and it must state with particularity the points alleged to have been overlooked or misinterpreted by the BZA.⁴

This Petition is timely filed, and sets forth with particularity the points that the Appellant believes were overlooked or misinterpreted by the BZA.

III. BASES FOR RECONSIDERATION

The Appellant submits there are at least five separate bases for this Petition.

A. THE STIPULATION

The BZA ignored or improperly discounted the sworn testimony, under oath, of Mrs. Lewis, the LMO Official, and Anne Cyran, a Senior Planner for the Town, contained in the Stipulation to Agreed Facts and Law for the Appeal Application of ArborNature, LLC (the “Stipulation”).⁵ The Stipulation is an agreement between the Town and the Appellant with regard to the matters contained therein, and, as Glenn Stanford, the Chairman of the BZA, stated at the beginning of the BZA’s hearing on the Appeal, is binding on the BZA for purposes of the Appeal. Therefore, the BZA must accept the contents of the Stipulation as settled matters of fact and law. Those facts, which are undisputed by any testimony at the hearing on the Appeal, and are not subject to rebuttal, include:

¹ See BZA Rules Article XI, Section 1.

² With the adoption of the current version of the LMO on 07 October 2014, the LMO Administrator is now known as the LMO Official.

³ See BZA Rules Article XI, Section 2.

⁴ See BZA Rules Article XI, Section 3.

⁵ The Stipulation is included in the record of the Appeal



1. Ms. Cyran, issued a written determination, appealable to the BZA, dated 05 January 2010 to Adam Congrove that states, “Based upon the allowed uses for Tract A, staff confirms that composting and wood grinding operations are in accordance with the Town of Hilton Head Island Land Management Ordinance.”
2. Some three years later, Ms. Cyran sent an email to Mr. Congrove in which she again confirmed that “composting and wood grinding operations are permitted uses on Tract A.”
3. Mrs. Lewis testified under oath that the grinding of trees and logs on the Appellant’s property is a permitted use on the Appellant’s property, not as an accessory use but rather as part and parcel of the permitted principal use of the property for a wholesale landscape nursery with a landscape contractor’s office under the applicable zoning and the requirements of the LMO.
4. Mrs. Lewis testified under oath that the LMO contains no provision or requirement that prevents or prohibits the Appellant from accepting or receiving trees and logs from third parties for grinding on the Property.

Taken together, these stipulated facts, which Mrs. Lewis acknowledged under oath long after she wrote the Determination, directly address the issue brought before the BZA by the Appeal: Is the Appellant’s business being operated in conformance with the LMO? If the grinding of trees and logs is permitted on the Appellant’s property, and the LMO does not prohibit the Appellant from accepting or receiving trees and logs from third parties for grinding on the Property, then, based on the Stipulation and the sworn testimony at the hearing on the Appeal, the Appellant is operating its business on the Property in conformance with the LMO.

There is no doubt that, as stipulated, the Appellant is permitted by the applicable zoning to grind trees and logs on its property. Such being the case, it is irrelevant to the LMO who does that grinding. If grinding is permitted, it can be done by the Appellant, or it can be done by a



contractor hired by the Appellant; and it can be done using a large grinder, a small grinder, a portable grinder, or any type of grinder.

The unchallenged stipulated facts on these points requires that the Appeal be resolved in favor of the Appellant.

The Stipulation also makes it clear that under LMO Section 16-2-103.R.6, all “written interpretations shall be binding on subsequent decisions by the [LMO] Official in applying the same provisions of [the LMO] in the same circumstances.” Therefore, the Town has acknowledged that the 05 January 2010 determination by Ms. Cyran is binding on future determinations on the same facts. The Appeal presented the same facts as the 05 January 2010 letter from Ms. Cyran. The BZA cannot disregard the binding nature of Ms. Cyran’s determination, and, in fact, and in law, the BZA’s decision on the Appeal was required to be consistent with that earlier determination.

The BZA simply is not free to disregard undisputed, stipulated facts, particularly without stating why it has, or has not, taken those facts into account in its decision. Doing so constitutes a misinterpretation of the undisputed facts and law applicable to the Appeal. Therefore, the Appellant submits that the BZA must grant this Petition, and reconsider and grant the Appeal.

B. THE NATURE OF THE APPELLANT’S BUSINESS

The Town’s witnesses and Mrs. Lewis testified at the hearing that, in their opinions, the nature of the Appellant’s business has changed over the years; however, those witnesses, including Mrs. Lewis, did not, and could not, offer any credible, competent evidence to support their opinions.

Without doubt, the Appellant’s business has become more active over the years, but that increase in activity is not a legitimate reason to declare that the Appellant’s use of its property has become nonconforming with the LMO. The LMO contains no restrictions on the time of operation of the Appellant’s business, nor does it contain any limits on the volume of the Appellant’s business.



In his closing remarks, Chairman Stanford stated, “I have a note that ArborNature, that Mr. Congrove testified that the nature of his business has changed some over the years”. However, a review of the audio recording of the hearing on the Appeal shows that during Mr. Congrove’s testimony, in response to David Fingerhut asking, “So would it be fair to say that since January 5, 2010 the circumstances of your business have somewhat changed?”, Mr. Congrove stated, “Honestly, no. They are pretty much similar to what it’s been for however many years.” With all due respect to Chairman Stanford, the Appellant believes he inadvertently misstated Mr. Congrove’s testimony, and used that misstatement as a reason to uphold the Determination.

If the Appellant can legally grind trees and logs on its property, it necessarily follows that the Appellant can, and indeed, must, dispose of the wood chips that result from the grinding. It is difficult to understand how, if the Appellant can legally grind trees and logs on its property, then the method of disposal of the resulting wood chips affects how the Appellant’s business is classified. The Appellant can sell the wood chips as mulch, sell the wood chips for other uses, or simply haul the wood chips to the Hickory Hill landfill site and pay to throw them away. In any event, the Appellant must have a method or methods of removing the wood chips from its property. The fact that it has several different ways of disposing of the wood chips does not mean that the nature of its business has changed, or has somehow become nonconforming.

The Determination was based on two assertions by Mrs. Lewis about the Appellant’s use of its property, *i. e.*, the delivery of trees to the Appellant’s site for grinding by a site clearing company other than the Appellant, and that the area of the property being used for grinding was significantly larger than that of the permitted wholesale landscape nursery.

Mrs. Lewis since then agreed under oath and in the Stipulation that there is no prohibition in the LMO against the Appellant accepting or receiving trees and logs from third parties for grinding on the property. Clearly, if there is no prohibition against the Appellant accepting or



receiving trees and logs from third parties for grinding on the property, then it is legal for the Appellant to do so.

Further, the Determination's reference to the portion of the property being used for grinding was likely based on the grinding of trees and logs on the property being an "accessory use" of the property that overshadowed the permitted principal use of the property, a position that Mrs. Lewis has since disavowed. She now acknowledges, as stated in the Stipulation, that the grinding of trees and logs on the Appellant's property is permitted on the property as part of the permitted use of the property as a wholesale landscape nursery with a landscape contractor's office.

Given the Stipulation, Mrs. Lewis' position as stated in the Determination seems to have changed substantially. That change in Mrs. Lewis's position was apparently overlooked by the BZA at its hearing on the Appeal. Therefore, the Appellant asks that the BZA grant this petition and reconsider the Appeal

C. TESTIMONY AT THE HEARING

The BZA cannot legally base its decision on the Appeal on the testimony of the witnesses called by the Town. Even though two of the Town's witnesses testified as to some matters they observed on the Appellant's property, none of those witnesses provided any credible testimony as to the day to day operation of the Appellant's business, and how that business has changed over the years, other than to say that they think it has increased over the years, that they did not like it, and that it was wrong to allow the Appellant to continue in business on its property.

In his closing remarks, Chairman Stanford noted that Wayne Johnson testified that the nature of the Appellant's business has changed dramatically, but Mr. Johnson's testimony was, for the most part hearsay testimony, which was noted by Chairman Stanford.

Ben Ham, one of the Town's witnesses, testified that he has personally observed large timber trucks bringing logs to the Appellant's



property; however, Mr. Congrove testified that no logs are delivered to the property by large timber trucks; instead, the large timber trucks seen by witnesses on the property were actually transporting large logs away from the property.

Mr. Congrove's uncontradicted testimony is that approximately ninety percent of the trees and logs that arrive on the Appellant's property are the result of the Appellant's landscape contract business, and that the grinding of trees and logs was only about ten percent of the Appellant's business. No witness offered by the Town, including Mrs. Lewis, refuted Mr. Congrove's testimony on those points. Yet, it is clear that at least some members of the BZA simply chose not to believe Mr. Congrove's testimony. For example, Jerry Cutrer stated in his closing remarks that he found Mr. Congrove's testimony on the trees and logs arriving at the Appellant's property hard to believe.

None of the Town's witnesses are qualified by training, profession, or experience to provide relevant evidence that addressed any of the issues raised by the Appeal. In addition, while the Town's witnesses testified that they were annoyed by the Appellant's use of its property, they did not offer any evidence regarding noncompliance by the Appellant with the applicable zoning and the LMO. At best, the testimony of the Town's witnesses was nothing more than anecdotal evidence.

The testimony of the Town's witnesses, while perhaps emotionally appealing, should not have been afforded the weight that it clearly was given by the four members of the BZA who voted to uphold the Determination. There was no testimony offered by the Town with regard to whether the operations of the Petitioner violated the provisions of the LMO other than the Stipulation, which concedes that the Appellant's use of its property for grinding of trees and logs does not violate the LMO.

As recently as 19 February 2016, in an email to Ric Fisher, after a site visit to the Appellant's property the previous day, Mrs. Lewis stated, "I found that based on the addition of an area with plants and trees offered for sale and three large mulch bins Mr. Congrove is now in conformance with the zoning for the property." This finding of



conformance was based on Mrs. Lewis's previously stated criteria for a wholesale landscape nursery, that to be classified as such, the business must offer for sale plants, pavers, pots, mulch, and the like. Those are objective criteria that can be easily understood and followed by an operator of a wholesale landscape nursery. However, there was no testimony at the BZA hearing on the Appeal that the Appellant is no longer stocking such items for sale. Instead, Mrs. Lewis, when questioned by Mr. Taylor simply stated, "I don't believe it functions as a wholesale landscape nursery and what I would classify as a landscape contractor's office. It really appears to be a tree service business." Mrs. Lewis did not, and could not, offer any objective reason why she now thinks the Appellant's business is "a tree service business", which itself is a use that is not defined in the LMO.

The record of the BZA hearing on the Appeal is devoid of any credible evidence whatsoever that the Appellant's use of its property violates the LMO, other than Mrs. Lewis' statements of opinion unsupported by facts that the property no longer appears to be what she would consider a wholesale landscape nursery.

Because the decision of the BZA is contrary to the credible, competent evidence and sworn testimony, without any explanation by the BZA of its reasoning for its decision, the BZA has either overlooked some of, or misinterpreted some of, the testimony at the hearing on the Appeal, and the Appellant asks that the BZA grant this Petition and reconsider the Appeal.

D. LMO VIOLATION

The Appellant argued in the Appeal that the Determination, if correct, evidences a violation of the LMO by the Appellant, which, under LMO Section 16-8-105.C, requires that the LMO Official inform the Appellant of the action necessary to correct the violation.

The BZA, in exercising its appellate review authority over decisions of the LMO Official, has "all the powers of the [LMO] Official".⁶ Therefore,

⁶ See LMO Section 16-2-103.T.4.d.i.02.



it is incumbent on the BZA to provide the direction the Appellant requires in order to correct any violation of the LMO that resulted in the Determination. The BZA overlooked its obligation to provide the required direction to the Appellant. Therefore, the Appellant asks that the BZA grant this Petition and do so.

E. THE NOTICE OF ACTION

The Appellant received a Notice of Action of the BZA's decision on the Appeal by certified mail on 22 September 2016. A copy of that Notice of Action is attached to this Petition as **Exhibit A**. It does not contain any findings of fact or conclusions of law.

Section 6-29-800(F) of the Code of Laws of South Carolina (1976), part of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, requires that all final decisions and orders of the BZA must be in writing and be permanently filed in the office of the BZA as a public record, and that all findings of fact and conclusions of law must be separately stated in final decisions or orders of the BZA, which must be delivered to parties of interest by certified mail. Further, LMO Section 16-2-103.T.4.d.ii, regarding appeals of administrative decisions and written interpretations of the LMO to the BZA, requires that the BZA's final decision on an appeal "shall be in writing and shall include findings of fact and conclusions of law separately stated."

At the hearing on the Appeal, the BZA did not address the Appellant's requests for findings of fact contained in the application for the Appeal and for specific decisions concerning the Appellant's operations and the LMO, nor did it do so in the Notice of Action.

The motion by Mr. Cutrer, seconded by Mr. Fingerhut, to uphold the Determination did not include any reference to findings of fact or conclusions of law, and the Notice of Action likewise does not. Therefore, on its face, the Notice of Action is defective, and is insufficient to document the BZA's decision on the Appeal.



The Appellant deserves to know, and has the right to know, the facts and law that form the basis of the BZA's decision to uphold the Determination. Because the BZA overlooked its obligation to state the required findings of fact and conclusions of law necessary to support its decision to uphold the Determination in the Notice of Action, or misinterpreted its obligation to do so, the Appellant asks that the BZA grant this Petition and reconsider the Appeal.

IV. CONCLUSION

In light of the Stipulation, the Appeal presented a straightforward issue of compliance with the requirements of the LMO. The Stipulation provided all of the facts required for the BZA to reach a decision. The BZA is required to find the facts contained in the Stipulation, and is also bound by the agreements of the Town and the Petitioner concerning matters of law in the Stipulation. It is clear from the decision of the BZA on the Appeal that the BZA failed to adopt the facts set forth in the Stipulation and, accordingly, reached an incorrect decision on the Appeal.

The Stipulation also makes it clear that Mrs. Lewis has disavowed the bases for the Determination, which was also overlooked by the BZA at the hearing of the Appeal.

The only credible, competent testimony sufficient to form a basis for the BZA's decision on the Appeal was that of the Stipulation and the Appellant's witnesses. That testimony was uncontroverted, and should have been given full weight by the BZA.

If the Appellant is in violation of the LMO, it deserves to know what action is necessary to correct that violation.

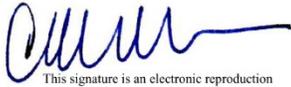
Neither the motion to uphold the Determination nor the Notice of Action on the Appeal contain the required findings of fact and conclusions of law.

This Petition provides the BZA with the opportunity to correct the record and decide the Appeal based upon the Stipulation, the uncontradicted credible



testimony at the hearing, and the requirements of the State Enabling Act and the LMO.

Respectfully submitted on behalf of the Appellant on 23 September 2016.



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Exhibit A to Petition (2 Pages)



TOWN OF HILTON HEAD ISLAND COMMUNITY DEVELOPMENT DEPARTMENT

One Town Center Court

Hilton Head Island, SC 29928

843-341-4757

FAX 843-842-8908

BOARD OF ZONING APPEALS NOTICE OF ACTION

Case #:	Name of Development:	Public Hearing Date:
APL1006-2016	ArborNature LLC	September 19, 2016

Parcel or Location Data:	Applicant	Agent
R510 008 000 0275 0000	Adam R. Congrove	Adam R. Congrove

Brief Description:

Staff has received an Appeal from Chester C. Williams on behalf of Adam Congrove and ArborNature LLC. The appellant is appealing staff's determination, dated May 13, 2016, that the Appellant's use of the property is not in conformance with the zoning for the subject property.

BZA Action:

At their meeting on September 19, 2016, the Board voted to deny APL1006-2016 and uphold the determination of the LMO Official.

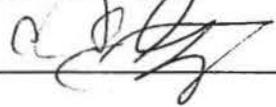
Appeal To Circuit Court:

If you believe the Board erred in its decision, you have the right to appeal the decision to Circuit Court. You have two options to appeal to Circuit Court:

1. You may file a petition with the clerk of court in and for the county, in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within 30 days after the decision of the Board is mailed (South Carolina Code of Laws 6-29-820A). The mailing date of this decision is **September 20, 2016.**

2. You may file a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with South Carolina Code of Laws Section 6-29-825. Any notice of appeal and request for pre-litigation mediation must be filed within 30 days after the decision of the board is postmarked.

Chairman of BZA:



Date:

9/19/16

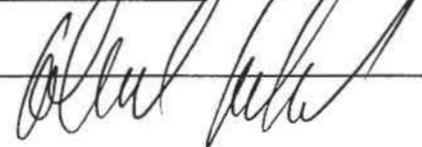
Maker of Motion:



Date:

9/19/16

Second to Motion:



Date:

9/19/2016

Note: This decision must be delivered to the parties of interest via certified mail.