

FINGER, MELNICK & BROOKS, P.A. ATTORNEYS AT LAW

TERRY A. FINGER •
THOMAS L. BROOKS
TYLER A. MELNICK
BENJAMIN T. SHELTON
E. RICHARDSON LaBRUCE

Of Counsel:
ANNE C. MARSCHER *□
ARTHUR F. ANDREWS†□

35 Hospital Center Common, Suite 200 (29926)
Post Office Box 24005
Hilton Head Island, South Carolina 29925
(843) 681-8802 Facsimile
(843) 681-7000 Telephone
erlabruce@fingerlaw.com

Also admitted in:
* Georgia
† New York

□ Court Certified Mediator
• Court Certified Arbitrator / Mediator

July 26, 2016

Via E-Mail Only (kicard@townofbluffton.com)

Mr. Kevin Icard, Planning Director
TOWN OF BLUFFTON – PLANNING DEPARTMENT
Post Office Box 386
Bluffton, South Carolina 29910

**Re: Application for Restaurant Use – 194 Goethe Road; Bluffton
James C. Fraser, Jr.; R611-039-000-0159-0000
Our File No. 1935.001 – Town of Bluffton**

Kevin:

We have been asked to render an opinion regarding an application for the establishment of a restaurant at 194 Goethe Road in Bluffton, South Carolina (TMS No. R611-039-000-0159-0000) (herein, the “*Property*”) submitted by Mr. James C. Fraser, Jr. From my review of the Bluffton Zoning Map, the property is currently zoned Residential General. According to Table 4-3 of the UDO, restaurants are not a permitted use in the Residential General Zoning District. Nevertheless, Mr. Fraser argues that the use of the Property as a restaurant would constitute a legal nonconformity in accordance with Section 7.2.1 of the UDO and Section 6-29-730 of the South Carolina Code of Laws, 1976, as amended, due to the fact that the Property has been periodically used as a restaurant since approximately 1993. Further, Mr. Fraser argues that he has vested rights to operate his property as a restaurant.

ABANDONMENT OF NONCONFORMING USE

A nonconforming use is essentially a use that was legal at one time but which has since become impermissible due to subsequent modifications to the applicable zoning ordinance. In 1984, Mr. Fraser petitioned the Town for a zoning variance for the purpose of building a restaurant on the Property. From the minimal information available to us, it appears the variance was denied. In 1993, at Mr. Fraser’s request, the Property was rezoned from General Residential to Mixed Use II for the express purpose of the operation of a restaurant on the Property. Therefore, beginning in 1993, the use of the Property for a restaurant was legal. Thereafter, in 2002, the Town rezoned the Property to General Residential. At that point, upon Town Council rezoning the Property as General Residential, the use of the Property as a restaurant became a “legal nonconformity.”

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Nevertheless, it is my understanding that no action has been taken since 2002 to develop a restaurant on the Property.

In accordance with the South Carolina Local Government Comprehensive Planning Act, the scope and duration of nonconformities are to be established at the local government level. According to the current iteration of the UDO, a legal nonconformity can continue in perpetuity until such nonconformity is abandoned, however, such nonconformity cannot be expanded or enlarged by any means. *See* UDO, Section 7.5.1. Further, Section 7.5.2.A of the UDO defines abandonment of a legal nonconformity as the cessation of that particular use for a period of one-year or more. Unfortunately, it is often difficult to determine whether a legal nonconforming use has, in fact, been abandoned. The UDO vests ultimate decision making power in determining whether a use has been abandoned in the UDO Administrator. Section 7.5.2.B of the UDO states:

The UDO Administrator shall have the authority to determine if a legal nonconforming use has been abandoned for a period of one year or more. In making such a determination, the UDO Administrator shall consider all of the facts and circumstances regarding the nonconforming use, including, but not limited to the following:

- 1. If steps have been taken by the property owner to resume the nonconforming use;*
- 2. If utility services such as water, gas, and electricity, to the property have been disconnected;*
- 3. If equipment or fixtures which are necessary for the operation of the nonconforming use have been removed from the property;*
- 4. If structures on the property have fallen into disrepair, as defined by the Town or Bluffton Building Ordinance;*
- 5. If signs advertising the nonconforming use have been removed from the property;*
- 6. If any applicable Town business licenses for the nonconforming use have expired or have not been renewed;*
- 7. If activities generally associated with the nonconforming use are no longer observed on the Property; and,*
- 8. Other actions which, in the opinion of the UDO Administrator, demonstrate an intention on the part of the owner to abandon the nonconforming use.*

Notably, the ordinance requires the UDO Administrator to consider all of the above-listed factors before making a determination. Ultimately, whether a nonconforming use has been abandoned is a question of fact. The burden of proving that the use had not been abandoned is on the Property owner. UDO, Section 7.3. It is my understanding that the use of the Property as a restaurant terminated over a decade ago and the vast majority of the above-quoted factors weigh in favor of determining abandonment. As the goal of the Town's abandonment ordinance is to

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ultimately bring all nonconforming properties within Bluffton into compliance with the UDO, it is my opinion that the Town Code, absent sufficiently compelling factors in the Owner's favor, would demand a determination of abandonment. The failure to find abandonment after a decade of non-use would effectively undermine the integrity of the abandonment ordinance.

TERMINATION OF VESTED RIGHTS

In 2002, Mr. Fraser argued that the 2002 rezoning by the Town did not prohibit him from developing a restaurant on the Property. In a letter dated December 5, 2002, the Town attorney agreed. Under the South Carolina Vested Rights Act, which has been incorporated into the Town Code in Section 1.1.15.B, subsequently adopted ordinances do not apply to vested development approvals, such as a site specific development plan or a phased development plan. S.C. Code § 6-29-1510, *et seq.* Essentially, the Vested Rights Act protects a developer's site plan from subsequently enacted ordinances for a period of two-years from the date of approval. Notably, I am unaware of any development plans submitted by the Owner or approved by the Town. Regardless, assuming that development plans were approved on or about 2002, since the development was never commenced during the duration of the vested rights two-year period, nor were any extensions requested, the vested rights for the development of a restaurant on the Property, if any, have expired. To find that vested rights continue in perpetuity would render zoning amendments and modifications powerless.

ISSUES RELATED TO REZONING NOTICE

Although there are allegations that Mr. Fraser was not properly notified of the rezoning, the Code severely limits challenges to rezoning applications if not brought within 60 days of Town Council approval. S.C. Code Ann. § 6-29-760(d).

For these reasons, it is my opinion that the Property owner has failed to establish a legitimate basis for the approval of a restaurant on the Property. If you have any questions, please do not hesitate to contact me.

With best regards, I am,

Very truly yours,

/s/ E. Richardson LaBruce

E. Richardson LaBruce

FINGER, MELNICK & BROOKS, P.A.

Cc: Mr. Marc Orlando (*e-mail only*)
Mr. Pat Rooney (*e-mail only*)
Mrs. Heather Colin (*e-mail only*)
Terry A. Finger, Esquire (*e-mail only*)

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