

TOLL FREE: 1(800) 313-2546
FACSIMILE: (843) 494-5536

POULIN | WILLEY ANASTOPOULO

AKIM A. ANASTOPOULO (SC)
ERIC M. POULIN (SC)(GA)(NC)(CA)
ROY T. WILLEY, IV (SC)(KY)(NJ)

REPLY TO ANN STREET OFFICE
CLD@AKIMLAWFIRM.COM

Commercial Litigation Division

February 14, 2023

Sent via Email to ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Matthew Zetz v. Daniel Island Community Foundation, et al.*
Case No.: 2022-001385

RECEIVED
Feb 14 2023
SC Court of Appeals

BLAKE G. ABBOTT (SC)(NC)
CONSTANCE ANASTOPOULO (SC)*
A. ELLIOTT HUGER BARROW, JR. (SC)*
HANNA K. BATHRICK (NC)
BRADLEY BURGESS (SC)
MATTHEW J. BURGESS (SC)
JOSHUA P. CANTWELL (SC)
CHASE H. COBLE (SC)
RALPH JAMES D'AGOSTINO III (DC)
ERICA M. DOBRICH (SC)
PAUL DOOLITTLE (SC)
JACQUELINE A. DUFOR (SC)
HERB F. GLASS (SC)(GA)
LANE D. JEFFERIES (SC)
NIKIRA M. LAFRANCE (NC) (SC)
ANGELINE LARRIVEE (NJ) (SC)
RYAN A. LOVE (SC)(NC)
STEPHANIE L. MASCELLA (SC)
FREDRICK J. MOGAB (SC)(NE)
LAUREN E. MOORE (SC)
JESSICA S. NELSON (SC)
J.C. NICHOLSON (SC)
JULIA K. PIRILLO (WV)
REBECCA A. RAYNER (OH)(SC)
INDIA D. SHAW (SC)(DC)
ANDREW D. SMITH (SC)
JOSEPH E. THOENSEN (SC)
BRADLEY TINGER (SC)

*OF COUNSEL

Dear Ms. Kitchings:

On February 8, 2023, the South Carolina Supreme Court decided *Walbeck v. I'On Co., LLC*, No. 2019-000968, 2023 WL 1809318 (S.C. Feb. 8, 2023), a case concerning developers' dishonest, self-dealing failure to turn common areas over to a homeowners' association. The Court's decision affirmed in part and reversed in part the Court of Appeals' 2019 decision, *Walbeck v. I'On Co., LLC*, 426 S.C. 494, 503, 827 S.E.2d 348, 352 (Ct. App. 2019).

Appellant had cited the Court of Appeals' opinion in his initial brief (pp. 12–13) for the following proposition: if a developer has either superior voting power over a property owners' association or the right to appoint association board members and veto association action, the developer may have enough control over the association to create a fiduciary relationship.

The Supreme Court's February 8, 2023 decision supports this interpretation. Specifically, the Supreme Court stated that “[d]evelopers owe fiduciary duties to homeowners and homeowners' associations regarding common areas,” and explained that a fiduciary relationship is not necessary “extinguished” “when a Developer turns over control of the HOA to its members by relinquishing its superior voting power.” *See Walbeck*, 2023 WL 1809318, at *7, *7 n.11 (citing *Goddard v. Fairways Dev. Gen. Partn.*, 310 S.C. 408, 414–15, 426 S.E.2d 828, 832 (Ct. App. 1993)). Rather, a developer's duties “stem from developer control of the entity, the ongoing nature of construction, and the transfer of common areas,” *id.* at *7 n.11 (citing *Concerned Dunes West Residents, Inc. v. Georgia–Pacific Corp.*, 349 S.C. 251, 260, 562 S.E.2d 633, 638 (2002)); thus, because the developers in *Walbeck* “maintained consistent veto authority over the board” (an authority they did not use, *Walbeck*, 426 S.C. at 516–17, 827 S.E.2d at 359), “continued construction . . . past the 2009 conveyance, and delayed the transfer of the disputed property,” their fiduciary obligations remained, *Walbeck*, 2023 WL 1809318, at *7 n.11. In addition, the Court

MAILING: 32 Ann Street, Charleston, South Carolina 29403

Charleston, SC | North Charleston, SC | Columbia, SC | Florence, SC | Greenville, SC | Myrtle Beach, SC
Charlotte, NC | Lumberton, NC | Wilmington, NC (Appt. Only)

held that for derivative-suit purposes, any attempt to make a formal demand of the HOA's directors "would have been futile in light of the Developers' remaining control of the HOA through its veto power." *Id.* at *9.

Respectfully submitted,

s/Angeline Larrivee

c: Kenneth Michael Barfield, Esq.
Diane Summers Clarke, II, Esq.