THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-2695

The Town of Hollywood, Appellant/Respondent

vs.

William Floyd a/k/a Jeff Floyd,
Troy Readen, and Edward McCracken
a/k/a Eddie McCracken, Respondents/Appellants

RESPONDENTS' BRIEF OF RESPONDENTS/APPELLANTS

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

On June 14, 2007, the defendants (who, as explained later, became the plaintiffs after Judge Dennis granted summary judgment for the Town (R.O.A. p. 1) appeared before the Town of Hollywood Planning Commission for approval to subdivide a 13.2-acre parcel of real estate located on Bryan Road next to Stono Plantation. (This is the "first Planning Commission meeting.") There is no verbatim transcript of this meeting, but the Town did ask a court reporter to listen to an audio tape of the meeting and prepare a rough transcript, which is unreliable. (Supp. R.O.A. pps. 1 – 19 [Defendant's Exhibits 6, minutes, and 10 tape]) The witnesses testified about the tape's unreliability: "You could hear certain members of the commission, but you couldn't hear hardly the boys, I call them, Troy and Jeff and Eddie, couldn't hear them and you certainly couldn't hear the people that were right behind us." (R.O.A. Vol. II, p. 438 [tr. page 343]) "The tape doesn't depict it. I had never been to a town council or a planning commission meeting, and if they were all like that, I would never go back to another one, but people were speaking out of turn. They have a little tiny baby cassette player that was right in front of, I think, Mrs. Salters over there. And the people behind us, they would not shut up, and it was all we could do to even hear what was going on." (R.O.A. Vol. II, p. 624 [tr. 544]) The Town of Hollywood directed the respondents to the Planning Commission, and the Planning Commission directed the respondents back to the Town's Planning Director: "Well, this really should not have been presented to Commission by Mr. Edwards at this point. We can't blame you, because it appears to be an in-house problem. But it should not have been presented as is." Supp. R.O.A. pps. 8 – 9 [tr. pages 7-8]) "Well, you were given bad information,

sir." (Supp. R.O.A. p. 11 [tr. page 10]) As directed by the Planning Commission on June 14th, the respondents returned to the Planning Director, who approved the subdivision in two phases on June 22, 2007, and June 27, 2007, because the Town's ordinances permitted him to authorize subdivisions of fewer than ten lots without appearing before the Planning Commission. (Vol. III, R.O.A. pps. 909, 972, 974, 996, 998 [plats]) Thereafter, the respondents recorded the plat, and the Town issued two work permits on July 20, 2007, and October 4, 2007, to the landowners to clear the property. See R.O.A. Vol. II, pps. 813 and 814 [permits].

The Town of Hollywood filed this action on October 12, 2007, at case number 2007-CP-10-4559, alleging that the Town's Zoning Administrator improperly approved the defendants' subdivision plat because the Town's Ordinances required that the subdivision be approved by the Town's Planning Commission. The Town requested the court to enjoin the landowners from developing their property (R.O.A. Vol. I, p. 26 [motion for injunction]) Reserving all their rights, the parties struck that case with leave to restore to afford the defendants—the landowners—an opportunity to appear before the Planning Commission a second time to gain approval. The landowners did that on August 14, 2008, and the Town's Planning Commission took no action on the subdivision request. (This is the "second Planning Commission meeting," and there is a verbatim transcript of that hearing in the Record on Appeal at Vol. II, pages 855 - 890. [Exhibit 7]) After the second Planning commission meeting, the parties restored the case on March 29, 2010, at Case No. 2010-CP-10-2695.

The Town renewed its motion for summary judgment, which came before Judge Markley Dennis on September 7, 2010. Judge Dennis granted summary judgment for the Town,

which then left the landowners' counterclaims as the only remaining issues. Therefore, the trial court realigned the landowners as plaintiffs for trial. To avoid confusion, we will refer to the landowners as plaintiffs even though they are listed in the caption as defendants. The landowners, who became the plaintiffs, filed their answer and counterclaims on August 29, 2008, alleging a § 1983 violation of equal protection, due process, tortuous interference, *etc.*

The Town's Planning Commission includes Matt Wolfe, who lives next door to the plaintiffs' project in the private, gated community called Stono Plantation. Because he is directly impacted by the plaintiffs' subdivision, the ethical rules governing such bodies precluded him from participating. Even though he is directly affected by the subdivision, he participated, and, as demonstrated below, used his position to block the plaintiffs. Both Stono Plantation and the respondents' property have ingress and egress along the same public road called Bryan Road, a road that has existed since at least 1885. (R.O.A. Vol. II, pps. 482-483 [tr. Page 395-396]). Mr. Wolfe is personally opposed to the respondents developing thier property because he claims the proposed smaller lots will be an adverse impact on his exclusive neighborhood, which features large lots and Stono River waterfront lots. Commissioner Wolf told Anne Boone that he did not want a subdivision next to him that was "plastic, plastic, plastic." (pages 284-285 of Vol. I of the Record on Appeal [tr. Page 166-167])

At the first Planning Commission meeting on June 14, 2007, the first Planning Commission took no action on the application and directed the plaintiffs to see the Town's Planning Director, Kenneth Edwards. The Town Council Member, Annette Sausser, who appoints the Planning Commission members, attended this first Planning Commission meeting.

As attested to by every witness present, and uncontested at trial because the Town declined to call her as a witness, Town Council Member Annette Sausser introduced herself to the plaintiffs and their witnesses prior to the hearing by making a throat slashing gesture, telling them that their application will "never happen!" (See Vol. II, Record on Appeal, page440 [tr. page - 345]): "First she [Council Member Sausser] tried to identify us, are y'all here with Bryan Road or something like that, and I don't know if we spoke or if we shook our heads, and it all became a little--and then she said, It will never happen, or something like that." Anne Boone described the same incident this way: "When we were walking in, she saw us and she said, 'Are you here for the Bryan Road thing?' And we said yeah, and she—she said, 'It ain't going to happen,' and then she made a cutting motion, like this, which I was shocked." (R.O.A. Vol. I, p. 282 [tr. Page 164]) Like Comm. Wolfe, Annette Sausser was also a resident of Stono Plantation, although she sold her home on June 10, 2008.

The plaintiffs' counterclaims against the Town of Hollywood allege that the Town denied their subdivision request for improper purposes and violated the defendants' constitutional rights. On May 5, 2010, the Town filed a motion for summary judgment. On July 23, 2010, the landowners filed an affidavit in opposition to the motion for summary judgment. (Vol. III, R.O.A. p. 1172) On September 7, 2010, the Honorable R. Markley Dennis, Jr. granted the Town of Hollywood summary judgment on the issue of the subdivision. Immediately after Judge Dennis granted summary judgment, the Clerk called the case for trial. Since Judge Dennis granted summary judgment for the Town on the relief it sought, the lower trial court realigned the parties, and the landowners became the plaintiffs. The parties tried the case from September 8-13, 2010. On September 13, 2010, the jury deadlocked and informed the court

that they could not reach a verdict. After the court delivered an *Allen* charge, the jury returned a verdict against the Town for $450,000.00.

On September 22, 2010, the landowners filed a motion for reconsideration of Judge Dennis' Order Granting Summary Judgment. On September 23, 2010, the Town moved for an Order granting a new trial, which the circuit court denied by Order dated October 4, 2010. On March 11, 2011, Judge Young granted the respondents' application of attorney's fees, which the Town also appealed. On October 19, 2010, Judge Dennis denied the landowners' motion for reconsideration. The Town appealed the jury verdict on May 13, 2010, and the landowners appealed Judge Dennis' summary judgment order on May 19, 2011. As a result, the Town became the primary appellant on its appeal from a jury verdict, and the defendants became the secondary appellant on their appeal from Judge Dennis' summary judgment Order.

STATEMENT OF FACTS

The underlying facts are almost entirely uncontested. As may be seen by reference to Jeff Floyd's affidavit, which contains a summary of the material facts (Vol. III, R.O.A. p. 1172), he and two partners purchased a 13.2-acre tract located on Bryan Road. Prior to purchasing the property, they inquired of the Town as to whether the tract could be subdivided. In response to their inquiries, the Town of Hollywood directed the landowners to the Town Planning Commission. (Supp. R.O.A. p. 8 – 9 [Defendant's Exhibit 10]) They appeared before the Town Planning Commission on June 14, 2007, and the Planning Commission directed the landowners to make an application to the Planning Director, Kenneth Edwards. When they appeared before the Planning Commission on June 14, 2007, while waiting for their case to be called, as

described in more detail above, Town Council member Annette Sausser approached them and inquired if they were there on the Bryan Road matter. When they replied in the affirmative, Councilwoman Sausser drew her thumb across her neck to simulate cutting her throat and told the landowners and their witnesses: "Never happen!" For an unbiased account of this event see the testimony of Mary W. Wolf at Vol. II, R.O.A. p. 439-441 [tr. page 344-346], briefly quoted above. Another witness who was present, Anne Boone described the same incident this way:

Q. Did she [Annnette Sausser] say anything unusual to you prior to the commence[ment] of the meeting?

A. When we were walking in, she saw us and she said, Are you here for the Bryan Road thing? And we said, yeah, and she—she said, It ain't going to happen, and then she made a cutting motion, like this, which I was shocked.

. . .

Q. Did she sit with the planning commission?

A. I believe she did.

Q. What did you think about that?

A. The whole meeting was pretty confusing. It was—I thought it was improper, but I had never been to a planning zoning meeting, so—

. . .

A. This [trial] is very orderly, this trial here. Everything is rules and regulations; everybody knows what is happening. That planning zoning meeting was totally confusing. Every time the guys tried to present anything or say anything they were—this is just my opinion, obvious, but it was—the commission had decided before anybody even got there that this development was not going through and it was just—they just shot down everything these guys tried to say or do.

I was embarrassed. I was really embarrassed for them, and everybody in there was—it just wasn't'—it didn't' seem like they were running things the way meeting like that should be run.

Vol. I, R.O.A. pages 283-284 [tr. Pages 165-166])

The first Planning Commission informed the applicants that they were in the wrong place and directed them to see the Planning Director, Kenneth Edwards. After consulting with Mr. Edwards, the applicants and their engineer, Curtis Lybrand, submitted their subdivision application to Mr. Edwards in the manner instructed by him. According to Mr. Edwards, he had authority to approve any subdivision involving ten lots or less without going before the Planning Commission. Therefore, he approved the subdivision in two phases, and stamped phase 1 on June 22, 2007 and phase 2 on June 27, 2007. (Vol. III, R.O.A. pages 972 and 974) The plaintiffs then recorded the plats and proceeded to market the lots. After the Town approved the subdivision, the Town issued two permits to the plaintiffs, a logging permit on July 23 2007, and a second one on October 4, 2007 (Vol. II, R.O.A. pages 813 and 814 [plaintiffs' exhibits 8 and 9]) Once the plaintiffs were actively engaged in development, the "significant" neighbors of the

adjoining gated community persuaded the Mayor to shut down the project. See Vol. I, R.O.A. page 235 [tr. Page 117]): "This [Planning Director's recommendations] was just, like I say, a recommendation, not a requirement, and there was previous dialogue between myself and Troy, in fact, Troy Readon, and not a requirement, just thought because there by this time was a lot of uproar with different people—well, there was significant people around saying they weren't as thrilled with the subdivision." The Mayor posted an undated stop work order with no explanation, (Vol. II, R.O.A. p. 816 [Exhibit 10]), and thereafter the Town asserted for the first time that Edwards' acts were void based on the Town's ordinances that it could not produce. The plaintiffs responded the Town had no ordinances, and if it did, the Town could not produce them and refused the respondents access to them. (See Vol. II, R.O.A. p. 630 [tr. Page 550]: "According to the ordinance that we finally got, the first ordinance I had seen was the date of my deposition, and I want to say it was October of 2008 after asking them for it 100 times, but in their ordinances, they're supposed to ask for the traffic study, not us." Also: "Did you ever make an effort to go down to the Town of Hollywood and actually get a copy of the ordinance to review it? I did, and on three occasions I know that I could actually remember, one occasion we had a meeting lined up with Ed Holton and Beth Carpenter, and it was Troy and myself. And we went in there and--you know, 'cause nobody could ever tell us what we done wrong. They could not cite one ordinance that we had broken, and that was our main objective. I even made me a little questionnaire to carry in there with me to try to pinpoint where our problems were at. They told me that the town ordinances were not in any one place where they could retrieve them, and to this day, I mean--and to jump ahead, when we went to

my deposition, the copy that they had supplied you and the copy their attorney had were different." (Vol. II, R.O.A. p. 631 [tr. 551])

As set forth above, Judge Dennis granted the Town summary judgment because he found the Town's ordinances controlled, and after moving for reconsideration, the plaintiffs appealed on November 10, 2011. (Supp. R.O.A. p. 21 [Notice of Appeal])

REPLY TO APPELLANT'S ARGUMENT 1

THERE IS SUFFICIENT EVIDENCE IN THE CASE TO SUPPORT THE JURY'S FINDING OF A DENIAL OF THE PLAINTIFFS' EQUAL PROTECTION

The appellant's entire argument is based on its assertion that the present case does not contain any evidence to support a jury's finding an equal protection violation. The standard of review from a jury verdict is that the court looks at the evidence in the light most favorable to the party who obtained a verdict to determine if there is any evidence in the record to support a finding: "On appeal from a jury verdict, the evidence and any inferences to be drawn therefrom must be viewed in the light most favorable to the respondent. Our review is limited to determining if there is any evidence which reasonably tends to support the verdict." *Madden v. Cox,* 284 S.C. 574, 328 S.E.2d 108 (Ct. App. 1985); *McGaha v. Mosley*, 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984); *Elders v. Parker*, 286 S.C. 228, 322 S.E.2d 563 (Ct. App. 1985)

One thing is for certain: this case is not the traditional equal protection case because the Town of Hollywood is the only municipality brazen enough and sufficiently contemptuous of the rule of law to announce the outcome of a hearing in advance of it. Because of the egregious facts of this case, the Town of Hollywood has no factual ground on which to stake a

defense because under the facts of this case, the only argument the Town has is equivalent to a general denial. For example, it is easy to highlight the stark and gross impropriety of the Town if one simply imagines the identical exchange taking place in a different forum. For example, if the exchange took place in a court instead of a town hall, the condemnation is predictable. It is impossible to imagine a judge of the circuit court or the Court of Appeals or the Supreme Court meeting the parties in the clerk's office prior to filing and simulating a cut throat accompanied by an emphatic "Never happen!" Such a thing is supposed to be inconceivable in any branch of the government because a constitutional republic is premised upon being a government of laws rather than a government of men. The Town cannot escape these horrible facts, which provide sufficient evidence to support the jury's verdict below because the uncontested facts demonstrate that the Town denied the respondents all protection of the law. Never in the annuals of equal protection litigation has there been a case on such a stark set of facts. Likewise, there are no reported cases in which a Town announced in advance of the application that the plaintiffs' subdivision request would "never happen." When less offensive behavior tainted the process, the courts have been quick to condemn it. See the Fourth Circuit's analysis of improper political influence in *Scott v. Greenville County* 716 F.2d 1409 (4th Cir. 1983), *M.L.C. Automotive v. Town of Southern Pines*, 532 F.3d 269 (2008), and *A Helping Hand L.L.C. v. Baltimore,* 515 F.3d 356 (2008) Our Supreme Court held that rational land use decisions must be made "free from undue political influence." *I'ON v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) And finally, the United States Supreme Court held that when a landowner shows purposeful discrimination, she makes out an equal protection claim as a "class of one." *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073 (2000)

Under Title 6 of the South Carolina Code, the entire purpose of a Planning Commission and land use regulations is to take the "undue political influence" out of the process. When the Town of Hollywood appeared at the plaintiffs' initial application before the Planning Commission in the form of Councilwoman Sausser, it announced **prior to hearing the application** that it would not only deny the plaintiffs' request in the present form, but that it would deny any application by the plaintiffs to subdivide their property:

MS. SAUSSER: Yes, ma'am. Thank you for doing your job. There are so many things wrong with this. However, I will tell you this. **As a councilwoman, I don't even want 12 lots, and I'll tell you why.** You just said no to another group who had 13 acres on—what's the name of that?

COMM. WOLF: Plantation Road.

MS. SAUSSER: Plantation. You said no. Why did you say no? First of all, you've got that horrible curve right there.

COMM: Whitney's Curve.

MS. SAUSSER: Whitney's Curve.[1] We had two people die there. Did you know that? At least one, I know. Horrible accident there. The other thing is that I used to live in Stono Plantation. **And my house—behind my house was a big, huge drain, was drained from over that area. I want you to know, if you were to look at that marsh today, it's dead. There is a piece of that on my—you've seen my property—that is a dying marsh because of—it's slow.**

UNKNOWN SPEAKER: You're talking about the drainage ditch by my property over there?

MS. McCLOSSER [SAUSSER]: Uh-huh.

UNKNOWN SPEAKER: That was blocked.

MS. McCLOSSER [SAUSSER] **No, no. No, no, no, ma'am.** One behind my house –

. . .

[1] For an expert on the curve, it is surprising that neither the Planning Commission nor Town Council Member Sausser knows the name is Britton's curve. As to the "horrible wreck," the plaintiffs explained that wreck occurred as a criminal suspect fled police at high speed. Vol. II R.O.A. p. 612 – 613 [tr. 532-533]

MS. McCLOSSER [SAUSSER]: So you've got a problem with traffic. You've got a problem with the environment. That road is too small. It is very dangerous. **I cannot see—I cannot fathom somebody else coming out on Whitney Curve. I used to live there, and I know people that did. You have to look so careful.** Now, I understand DOT may, down the line, straighten out that curve. That's wonderful. However, I know DOT, and I know how fast they work. **So I would like you to know that this is not something that I am going to support.**

The other thing is, we were loud and clear from our constituents. They do not want R-1. They do not want this big growth and this development. We want to take it slow. We're going to take it methodically. And I think we need to listen to the people and (inaudible).

Supp. R.O.A. pages 13 – 15 [transcript of June 14, 2007, Planning Commission meeting] Defendant's Exhibit 10) (emphasis added)

This is a critical piece of evidence, and it is so absurd on its face, it is hard to know where to begin because it is all so egregious, so personal and so discriminatory. For example, Town Council Member Sausser says, on the one hand, Britton's curve is so dangerous that no one can exit Bryan Road safely even though just moments before she told everyone she used to live there! Either Council Member Sausser possesses extraordinary driving skills the rest of us lack, or she is so unaware of her own hypocrisy that she can adopt self-contradictory statements without suffering cognitive dissonance. She also tells the Commission that it must deny the application because "They [the constituents] do not want R-1," as if the right to develop property is contingent on popularity. Of course "the City may not defer to the wishes or objections of some fraction of the body politic." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 105 S.Ct. 3249 (1985) There, the Supreme Court rejected the neighbors' mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding" as a basis to deny use to a home for mentally disabled. First of all, as the Town of Hollywood told the respondents at the "first planning commission meeting," the Town zoned

the plaintiffs' tract R-1 to encourage the development of the very 30,000 square foot lots the plaintiffs proposed. The Town admits that the plaintiffs' subdivision application meets the Town's requirements "geometrically." (Vol. 1, R.O.A. p. 162 [tr. 44] quoted in more detail below at page 28) Since the Town's zoning was in place prior to the respondents making their subdivision application, and since the Town's zoning permits precisely the kind of project the respondents proposed, Ms. Sausser's comments are exactly the kind of "undue political influence" condemned by the U. S. Supreme Court in *Olech*, the Fourth Circuit Court of Appeals in *Scott*, *M.L.C.* and *A Helping Hand*, and the South Carolina Supreme Court in *I'ON*.

In analyzing Council Member Sausser's participation in the Planning Commission process, the Court must keep several things in mind. Ms. Sausser is a member of Town Council. As a member she appoints the Planning Commission members. The whole purpose the Planning Commission process is that the members are statutorily required to represent a "broad spectrum of society" in order to provide the mechanism for rational land development free from political pressure. (§ 6-29-340, S. C. Code) The Legislature designed the process so that commissions can decide land use in accordance with established rules. The fact that Council Member Sausser participated in the hearing before the Board to which she appoints the members, and the fact that she declares: "this is not something I am going to support," so taints the process as to be itself a denial of equal protection. This is significant evidence and sufficient to support the jury's finding below. Even the Mayor of Hollywood agrees that she should not participate in the Planning Commission process: "Q. You testified that you do not attend the planning commission meetings. A. No, I don't. Q. And the reason for that is the planning commission is supposed to act as an independent, fact finding body that is not

governed by undue political influence, correct? A. I would say yes." (Vol. II, R.O.A. pages 728 - 729 [tr. Pages 648-649])

The Town of Hollywood demonstrated disparate treatment toward respondents by denying the respondents any opportunity to participate in the process provided all other applicants. It approved more dense projects without any of the trumped up and irrational impediments thrown at the plaintiffs. See testimony of Ed Holton at Vol. I, R.O.A. p. 196 [tr. 78]):

Q. And it [Town's design standards] also provides the planning commission with a certain leeway to liberalize the rules in order to allow a developer some flexibility, if there is a benefit, correct?

A. Sure

Q. In other words, y'all's hands aren't' tied. You have a little bit of flexibility, a little bit of discretion.

A. Right.

Q. And did the town of Hollywood recently open a housing development called Holly Grove Subdivision on Baptist Hill Road?

A. yes. That's a new property for the Town.

Q. And that is one of those applications where the planning commission, in fact, did that. It relaxed the rules in order to allow a higher density project because it was deemed to be beneficial for the town, correct?

A. Let me explain that it went through its proper rezoning for a PD, which would allow certain other things, and it was going to have duplexes and therefore it will—it was going to be fine and **what the town wants to have anyway**, but it was not the restriction of a particular zoning as in RA, R1, or particular zoning districts as one home per lot. It was going to be mult-faimly, so—

Vol. I, R.O.A. pps. 196-197 [tr. 78-79]) (emphasis added)

Compare the above testimony: it was "what the Town wants to have anyway," with Ed Holton's subjective "wish list" in which he required the plaintiffs to do things he concedes are not required by the ordinance to appease the politically connected Stono Plantation residents. (Vol. II, R.O.A. p. 833 [plaintiff's exhibit 13] "This was just, like I say, a recommendation, not a requirement, and there was previous dialogue between myself and Troy, in fact, Troy Readen, and not a requirement, just thought because there by that time was a lot of uproar with different people—**well, there was significant people around saying they weren't so thrilled with the subdivision.**" (Vol. II, R.O.A. p. 234-235 [tr. 116-117]) (emphasis added) See also Vol. II, R.O.A. p. 875 [tr. Page 21]): By providing extra buffering not required by the ordinance, the landowners could placate the neighbors because "that people didn't want to see the homes going in or whatever they may be. There was an agreement that we could have some buffering between the common land, even though it's residential common—everything's R.A." (Vol. II,

R.O.A. p.875 [tr. Page 21]) This is identical to the unequal treatment condemned by the U. S. Supreme Court in *Village of Willowbrook v. Olech, supra*.

The record is clear on who these "significant people" are, and this statement all by itself is sufficient evidence to support the jury's finding of an unequal protection of the law. The Town's list of demands reads like something out of Lewis Carroll and the legal basis for the demands exists only in the unbridled discretion of its Planning Director. Here are some of the Town's demands: (1) It wanted a tree survey of stumps! (Vol. I, R.O.A. p. 230 [tr. Page 112]) (2) It wanted the plat to tie in to "align" with the Stono Plantation community road system even though Stono Plantation is a gated community in which no one can enter! (Vol. I, R.O.A. p. 232 [tr. Page 114]) (3) It wanted additional buffering not required by any ordinance as a show of "good faith" to the neighbors—including Annette Sausser and Matt Wolfe. (Vol. I, R.O.A. p. 235 [tr. Page 117]) It declined to approve engineered septic systems even though permitting for septic is a state function handled by D.H.E.C., and Hollywood is the only municipality that has a "policy" of barring engineered septic systems. Once again, the prohibition was not contained in any ordinance, but was the Town's "policy." See the testimony of the D.H.E.C. representative, Richard Threatt, at Vol. I, R.O.A. page 311 [tr. Page 193]) (4) The Town demanded traffic study even though only the Town can request a traffic study! (Vol. I., R.O.A. page 338 [tr. Page 233]. Compare this testimony with Hollywood's putative ordinances, which do not contain such a requirement. Commissioner Wolf conceded that the Town's demand for a traffic study is "discretionary," which means entirely subjective. Vol. I, R.O.A. p. 338 and 352 [tr. 233 and 247]) As Commission Wolf explained, this last factor is important because he lives there! (Vol. I, R.O.A. p. 343 [tr. 238]): "Q. You've been living there ever since [1999]? A. **Yeah,**

and that's one of the key reasons I think it's [traffic study] a critical project and something we need to take a look at, . . " (emphasis added)

All of the above is exactly why the witnesses, Colin Campbell and George Johnson, testified that dealing with the Town of Hollywood is difficult. On a scale of 1-10, Mr. Johnson gave the Town a score of "13":

Q. How would you rate your experience with the town of Hollywood on a one to ten?

A. At the time I did it, I would rate them at about a 13.

Q. And what do you attribute that to?

A. It was just a pain. I don't like having to deal with people who inflict their personal opinion into it. I like to follow a set of rules. There should be a set of rules that you follow. I'm not interested in a specific person's personal feeling about it or the fact that he may live next door to it and have some interest in it. That doesn't mean a thing to me. All I'm interested in doing is following the rules.

Vol. II, R.O.A. p. 572-573 [tr. 492-493])

When one compares Ed Holton's and Mayor Heyward's testimony about Holly Grove, Wide Awake, and other projects with the manufactured list of deficiencies, Holton's "wish list," this record is bursting at the seams with evidence of the Town's animus for the plaintiffs and its unequal application of its ordinances—if any existed. When the Town entered into a joint venture with a private developer to construct 41 units on six acres, it did not request a traffic study. See testimony of Mayor Heyward at page 726 [tr. Page 646]) Likewise, when the Town

paid 4.8 million dollars to acquire a 7.2 acre park on Trexler Avenue, it did not request a traffic study even though the Town rents the park our as a commercial enterprise for $500.00 a night and Trexler intersects 162 in nearly the same location as Bryan Road. (Vol. II, R.O.A. pages 719-720 [tr. Pages 639-640]) So the Town makes its commercial park available to hundreds of visitors, but none of that implicates any of the same concerns the Town has for the plaintiffs' 17 home development. Comparing Holly Grove and Wide Awake and viewing this record in the light most favorable to the respondents prohibits the Town from denying it discriminated against the plaintiffs. It will be interesting to see if the Town attempts to cure this obvious disparate treatment by replying that it adopts as Town policy a program of interfering with the statutory protections afforded by § 6-29-340[2] and making up the rules for every applicant that appears before it. In logic, the negation of a negation is a positive, and thus should the Town adopt this position—which is unlikely—it can hardly claim a safe harbor from constitutional violations by saying it mistreats everyone. The General Assembly requires that the Town not make an application a political process. See § 6-29-350: "No member of a planning commission may hold an elected public office in the municipality or county from which appointed." This case is the poster child for the reason for the prohibition. As a Council Member, Ms. Sausser's presence and participation in the Planning Commission intimidated members of the Planning Commission whom she appoints and insured she obtained an outcome consistent with her articulated bias, which she demonstrated emphatically by her throat cutting gesture to respondents and their witnesses prior to the hearing. There can be no better evidence of disparate treatment and purposeful discrimination on the part of the Town than the

[2] "Functions, powers, and duties of local planning commission"

contaminating actions of Councilwoman Sausser, which clearly meets the burden of demonstrating and proving an "arbitrary and purposeful discrimination." This Court articulated the necessary elements for an equal protection violation in 2009:

> Further, one seeking to show discriminatory enforcement in violation of the Equal Portion Clause must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced. See *State v. Solomon*, 245 S.C. 550, 574 S.E.2d 818, 831 (1965)
>
> *Harbit v. City of Charleston*, 382 S.C. 383 675 S.E.2d 776 (Ct. App. 2009)

The record in this case contains abundant evidence of the factors to be considered in evaluating the sufficiency of the evidence for an equal protection violation:

> Several factors have been recognized as probative of whether a decision making body was motivated by a discriminatory intent, including: (1) evidence of a "consistent pattern of actions by the decision making body disparately impacting members of a particular class of persons," (2) historical background of the decision, which may take into account any history of discrimination by the decision making body or the jurisdiction it represents; (3) the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and (4) contemporary statements by decision makers on the record or in minutes of their meetings. See *Arlington Heights* v. 429 U.S. at 266-68, 97 S. Ct. at 564-65, *Talbert*, 648 F2d at 929.
>
> *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 818 (4th Cir. 1995)

Each *Sylvia* factor is present in this case. First, there is overwhelming evidence of a "consistent pattern" of discrimination aimed at the respondents. The United States Supreme Court held that in land use cases, discrimination against a single person is sufficient to make out an equal protection violation. See *Olech v. Village of Willowbrook*, 528 U.S. 562, 120 S.Ct. 1073, (2000). Second, the record in this case contains abundant evidence of a discriminatory

historical background throughout the plaintiffs' application process. For example, Commissioner Wolf has a direct stake in the outcome of the process and should have been barred by ethical principles from participating. As quoted above, he referred to the respondents' application as "plastic, plastic, plastic." (Vol. I., R.O.A. p. 285 [tr. P. 167]) and describes justice as being mere "legalese." (Vol. I, R.O.A. p. 428 [tr. Page 326]) Instead of stepping aside from deliberation in a case in which he had a direct stake, he used his position as a member of the commission to hold the plaintiffs' project hostage. (See colloquy with Commissioner Wolf quoted on the next page.) Likewise, Annette Sausser is not only a member of Town Counsel, but also was a resident of the neighboring gated community at the time of the plaintiffs' application. In addition, everyone else on Bryan Road has received his or her subdivision request. (See Vol. III, R.O.A. p. 998 [plaintiffs' Exhibit 41]) The only Bryan Road subdivision the Town of Hollywood has ever denied is the respondents' application because Matt Wolfe and Councilwoman Sausser have both stated their personal animosity for the project. (See Vol. II, Record on Appeal, pages 869 [tr. August 14, 2008 page 15] Defendant's Exhibit 9]:

> COMM. WOLFE: The other issue is we've recommended a road study from D.O.T. Bryan Road is one of the most dangerous roads in Hollywood. Because I live there and I live—I leave my windows open at night all winter. I've called 911 twice from my bed. And one of the three accidents on that road in the last 18 months a person was killed.
>
> . . .

In all of this process, we've—you know—because we've seen you all before, and I was wondering: Have you made any efforts at all just to talk to the people in the Stono Plantation neighborhood and, perhaps, maybe, you know, discuss potential—could there be a compromise reached in terms of reducing the density?

. . .

The point is—is has anybody from the group here representing the development even suggested sitting down with the Stono Planation area and say, look, is there something we can do, you know, on the density to make it more reasonable?

. . .

That's because the road is not a county road, and there's some issues there. The reason I felt incumbent upon, perhaps, to have discussion is because the road is anise. And Stono Plantation maintains that road.

. . .

But as far as I know, the road is not a county road, and the Stono Plantation owners have paid for the maintenance of that road for the last 25 years.

Vol. II, R.O.A. pps. 878, 880, 881 [August 14, 2008, transcript pages 24, 26, 27]

As for elements 3 and 4, the actions of Councilwoman Sausser a powerful public official with appointment authority over the Planning Commission, acting beyond the scope of her authority and ethical obligations as an elected official demonstrated conduct proving beyond

any doubt the Town's purposeful discrimination toward the respondents. This fact alone is sufficient evident to support the jury's finding that the Town treated the plaintiffs differently from all other similarly stationed developments, especially where Ed Holton and Mayor Heyward both testified the Town relaxed the rules for the Holly Grove development, which has a higher density. The inference is clear: because the privileged residents of Stono Plantation are not directly affected by Holly Grove, it gets relaxed rules, while the plaintiffs get the stringent Holton "wish list" that imposes requirements on the plaintiffs that are not found in the Town's land development ordinances. This is clear evidence of discriminatory intent. Moreover, the Town of Hollywood must concede that Councilwoman Sausser's participation is both a "significant departure from normal procedure" and a "contemporary statement by a decision maker on the record." (See *M.L.C. Automotive v. Southern Pines*, 532 F.3d 269 (4th Cir. 2008) and *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983). In *A Helping Hand v. Baltimore,* the Fourth Circuit, quoting Scott repeated the factors to be considered:

> Indications that a governmental body's action is arbitrary, unreasonable and not substantially related to a legitimate governmental inters include, but are not limited to, one, the action is tainted with fundamental procedural irregularity. Two, the action is targeted at a single party. Three, the action deviates from or is inconsistent with the defendant's regular practices.
> *A Helping Hand, ibid.*, quoting *Scott v. Greenville County.*

Likewise, *Scott* at page 1419 held that: "Arbitrariness, abuse of discretion, caprice or unfairness giving rise to a constitutional claim has been found by other courts in various forms of official permit processing actions. For example, in *Cordesco Development Corp. v. Vasquez*, 539 F.2d 256, 260 (1st Cir.) *cert. den.* 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed.2d 586 (1976), the First Circuit affirmed a ruling that local officials had committed a constitutional violation by singling

out a permit applicant for adverse treatment due to 'illegitimate official or at least, personal motives.' Such 'purposeful discrimination' against a particular individual was held to violate the Constitution even where no recognized class-based or invidious discrimination was involved." This record contains abundant evidence of improper "personal motives" the jury used in concluding the Town violated the Developer's equal protection rights.

The United States Supreme Court held in *Olech v. Village of Willowbrook*:

> In *Esmail v. Macrane*, 53 F3 176 (7th cir. 1995), we held that the equal protection clause provides a remedy when "a powerful public official picked on a person out of sheer vindictiveness." *Id* at 178.

It is impossible to find a clearer expression of vindictiveness than that exhibited by Annette Sausser and Matt Wolf. The overwhelming and unchallenged evidence in this case demonstrates that the Town of Hollywood denied the respondent's equal protection for reasons wholly unrelated to the "rational development of land free from undue political influence." *I'ON, supra*. When Councilwoman Sausser told respondents their subdivision would "never happen," along with her emphatic physical punctuation, even before the plaintiffs had entered the hearing room, the Town deny the respondent's equal protection. The Town denied respondents a fair hearing that it provides to all others. The Town Council Member's unlawful presence on the dais exceeds the scope of her authority as a City Councilwoman and violated the statutory protections afforded by § 6-29-340 (Powers and duties of the Planning Commission). As an appointing official of the Planning Commission her presence and participation were meant to intimidate the members of the Planning commission and insure that she obtained the outcome consist with her articulated bias. The Town has never subjected

another applicant to such purposeful discriminatory intent, and thus the record contains sufficient evidence for the jury to return a verdict.

Reply to Argument II

The lower court did not abuse its discretion in awarding attorney's fees.

In order to make an award of attorney's fees under § 15-77-300, the trial court must find: 1) the party seeking the award was the prevailing party; 2) the state agency acted without substantial justification; and 3) that no special circumstances make an award unjust. [Citations omitted] The trial court's decision to award or deny fees under § 15-77-300 will not be disturbed on appeal absent an abuse of discretion. *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006). An agency acts with "substantial justification" within the meaning of the statute when its position has a "reasonable basis in law or fact." *Cornelius* at page 539. Here, the Town did not act with substantial justification because it misused its municipal powers to harass the plaintiffs and thwart their application and did not avail itself of what it asserts is its own administrative procedure.

The entire basis of the appellant's claim here is that the Town was justified in defending the equal protection claim. The Town argues, "the Court should have denied the award of attorney's fees under § 15-77-300 because clearly the Town was justified in taking the positions that it did throughout this litigation—despite the fact the fact that it did not prevail on one of the constitutional claims asserted by the developers. " Brief at pages 16-17. First of all, if the Town stands before this Court and adopts Council Member Sausser's and Commissioner Wolf's actions as legitimate exercises of municipal authority, it will be astonishing. More likely than

not, the Town will argue that the activities of Sausser and Wolf were improper and regrettable, but ultimately not material. This rationalization is unpersuasive for several reasons. The first reason is that it is logically indefensible. Any government can rationalize any act as the history books teach us. Second, the argument is unpersuasive for several factual reasons. First, the Town must concede that it should not prejudge applications before hearing them. There is no substantial justification in denying citizens a right to equal protection of its laws. The whole purpose of the "second planning commission meeting" was to cure the infirmity of the first, but instead, the record shows that the "second planning commission meeting" only continued the abuse through Comm. Wolf's unethical extortion comments quoted above on page 22 and Planning Director Holton's "wish list" (R.O.A. Vol. II, p. 833), containing requirements not found in the Town's putative ordinances. Second, the Town concedes that Council Member Sausser's participation in the "first planning commission meeting" was improper. Third, it will concede that Comm. Wolf's participation in both was improper, especially where the Town admits that the plaintiffs' subdivision request met all the "geometric" requirements of the Town:

Q. In fact, the lots as they're laid out meet all the requirements of the town of Hollywood, do they not?

A. Geometrically.

Vol. I, R.O.A. p. 162 [tr. Page 44])

It will, however, deny the Town itself was engaged in the wrongdoing for reasons we have yet to hear. In other words, it is one thing to assert that the Town had "substantial justification" for treating the plaintiffs the way it did, and another thing to point to some evidence in the record

that supports the Town's assertion. The Town does an excellent job making the assertion, but fails to identify any evidence of its good faith toward the plaintiffs. Lastly, it must admit that in adopting its legal position, it deliberately ignored its own administrative remedy provided by § 6-29-1150 that governs an appeal of the decision of the Town's Planning Director. It is highly contradictory to hold the plaintiffs to exacting standards from which it exempts itself. Rather than following the statutory prescription for a remedy, this record shows that the Town of Hollywood adopted an *ad hoc* process designed specifically to thwart the applicants at every stage. Thus, when the respondent writes on page 3 of its brief:

> The Town Code of ordinances do not give the Zoning Administrator authority to approve a final subdivision plat without approval from the Planning Commission, (Brief at page 3),

the Town glosses over the evidence that the Town had no ordinances, and if it did, then the Town was obligated to abide by the statutory procedure described therein and required by state law. Instead of suing the plaintiffs and beginning this litigation, the Town should have appealed its Planning Director's decision to its own Board of Zoning Appeals. Even though the respondents concede that this would have been a futile act for them given Hollywood's demonstrated bias against them, the Town cannot claim here that it should escape the reach of § 15-77-300 because it had a "reasonable basis in law or fact." There is no reasonable basis in law or fact for what the Town of Hollywood did to these respondents, and without the benefit of § 15-77-300, no citizen will ever be in a position to stand up for himself or herself against the tyranny of unbridled government action.

Furthermore, the Court should uphold the award of attorney's fees to force the Town to deal honestly with applicants. The Town has an articulated animosity for landowners who seek legal advice in response to the Town's actions, and this alone punctures the Town's argument that it had substantial justification in adopting the policy it did. Mr. Holton testified it was "surprising" that the plaintiffs sought legal counsel:

Q. Are people allowed to hire a lawyer and appear before the planning commission?

A. Certainly.

Q. Is there anything improper about that?

A. In general, no. But—

Q. But in some cases, yes?

A. No, no, not in some cases, but it seemed like there was a while back we had a conversation where we wanted to have lawyers stay out and have the plaintiffs and the town to work things out, but the, again, you [counsel] showed up at this meeting and did all the talking.

Q. And this was improper in your view?

A. Not improper, but surprising.

Vol. I, R.O.A. pages 174-175 [tr. 56-57]

The entire testimony of the Town's current Planning Director demonstrates the Town's lack of substantial justification throughout this entire process. Nowhere is the Town's deplorable

conduct more succinctly summarized than in its Planning Director's testimony on page 191, Vol. I [tr. Page 73] of the Record on Appeal:

Q. Okay. So let me show you what has been marked as Plaintiffs' Exhibit 27. Is plaintiffs' Exhibit 27 the appropriate regulations that I just asked you about?

A. Yes, sir.

Q. Okay. Now, for three years now y'all have neither disapproved, approved, or conditionally approved Jeff Floyd, Troy Readen, Eddie McCracken's plat; it's tabled, correct?

A. That's right, trying to work with them, telling them what they need.

Q. Tell them what they need. Let's talk about that because it's in the transcript what they need. They need a traffic study, right?

A. Planning commission has it to—can make a request for a traffic study, so—

Q. And the traffic study has to be requested by the town of Hollywood, right?

A. From the planning commission, yeah.

Even though the Town's putative ordinances say that subdivision regulations are automatically approved if the planning commission takes no action on it for 60 days, we are now almost five years later, and the Town has still never requested a traffic study. (See R.O.A. Vol. III, page 977 for the Town's putative subdivision ordinances [Exhibit 28]) The reason is because the traffic study—like everything else the Town threw at the plaintiffs—is a pretext. The purpose of § 15-77-300 is to level the playing field and allow citizens to challenge unlawful

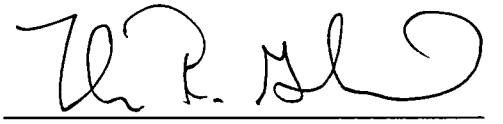
government conduct and this record demonstrates that the lower court did not abuse its discretion in making the award.

Conclusion

For the reasons stated above, the respondents respectfully submit that the record in this case contains sufficient evidence on which a jury could find a constitutional violation. Likewise, the lower court did not abuse its discretion in awarding attorney's fees. The verdict below should be affirmed.

Respectfully submitted,

July 16, 2012



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge
R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-2695

The Town of Hollywood..... .....Appellant/Respondent,

vs.

William Floyd a/k/a Jeff Floyd,
Troy Readen, and Edward McCracken
a/k/a Eddie McCracken .....Respondents/Appellants.

CERTFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b) *SCACR*.

July 16, 2012

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