

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS**

JUDGMENT IN A CIVIL CASE

CASE NO. 2022-CP-10-2298

William Calfee, Jr. and _____

Town of Awendaw, South Carolina and _____

Save Cape Romain, LLC
PLAINTIFF(S)

Pulte Home Company, LLC
DEFENDANT(S)

Submitted by: Ellis R. Lesemann, Esquire, Attorney for Town of Awendaw, South Carolina	Attorney for : <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED** (*CHECK REASON*): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN** (*CHECK REASON*): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

Planning Commission (the “Planning Commission”) for the purpose of considering and voting upon subdivision applications, *inter alia*. The powers and duties of the Planning Commission include the ability to establish “planned development districts” in order to “achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that will result in improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces.” *See* S.C. Code Ann. § 6-29-740.

More than sixteen (16) years ago, on December 7, 2006, the Town established a planned development district (the “Planned Development District”) that included the subject Property through the enactment of Ordinance No. 06-21 (the “Planned Development Ordinance”). (R. pp. 162 – 163.) The establishment of the Planned Development District, which was not challenged at the time, resulted in the amendment of the underlying zoning classification for the Property from “Agriculture General (AG)” to “Planned Development (PD).” (*Id.*) The adoption of the Planned Development District, which authorized the development of up to 400 single-family residences on lots of varying sizes, was not appealed or otherwise challenged.

Although the Planned Development District was established in 2006, it was not until last year that the Town received an application for approval of a preliminary (subdivision) plat. Respondent Pulte Home Company, LLC (“Pulte”), who is presently under contract to purchase the Property from the owner, the White Family Partnership, L.P, was the first applicant to submit a preliminary plat application.² The application was received and reviewed by the Town’s planning

² It is noted that the property owner, whose has interests that would be affected by any declaratory judgment issued in this action, was not named as a party by Appellants. *See* S.C. Code Ann. § 15-53-80 (“[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”)

staff, who ultimately recommended approval of the application with a detailed set of conditions that were set forth in a written memorandum that was presented to the Planning Commission. (R. 164-167). On April 18, 2022, the Town's Planning Commission approved the proposed preliminary plat for 204 single-family residential lots to be completed in two phases.

Although the allowed uses of the Property stayed the same, the approved preliminary plat (the "Preliminary Plat") has 196 *fewer* residences than were allowed in the "Conceptual Master Plan" for the Planned Development District when it was originally established back in 2006. (R. p. 83) One reason for the difference is that one portion of the Planned Development District, a 64.3-acre parcel designated as TMS # 644-00-00-024 and referred to as "Parcel B," was subsequently sold to the federal government and is presently managed by the U.S. Fish and Wildlife Service as open space. As a result, the Preliminary Plat covers a smaller footprint, with less residences, and a lower density of units per acre than what could have been proposed. (R. pp. 164 – 165.)

Section 10.3.4 of the Town's Zoning Ordinance addresses the requirements and process for a preliminary plat application for approval by the Planning Commission. Pulte's application included: (i) a completed application form (R. pp. 32 and 40); (ii) a plat of survey of the subject property (R. pp. 97 – 111); (iii) a concept plan (R. pp. 160 – 161); and (iv) a site analysis identifying the most significant environmental, historic, cultural, and natural resources. (R. pp. 95 – 96; pp. 118 – 159.) The Planned Development Ordinance passed in 2006 relating to the Property contemplated this same process, as it requires that subdivision phases and plans be submitted to the Planning Commission for approval.

Following internal review of the application, the Town held two public hearings relating to the application before the Planning Commission. The first was on March 21, 2022, when the

action was deferred, and the second was on April 18, 2022, when the Preliminary Plat was approved. Public notice for the March 21, 2022, meeting was published in the *Post and Courier* on March 4, 2022, and posted on the Town's website. (R. pp. 3 – 4; pp. 261 – 262.) The decision regarding the Preliminary Plat was deferred to the April 2022 meeting. The Town then published notice of the Planning Commission's April 18th meeting in the *Post and Courier* on April 5, 2022, as well as on the Town's website. (R. pp. 91 – 93.)

At the time of the meeting on April 18, 2022, there were seven (7) members serving on the Planning Commission. Six (6) members of the Planning Commission voted on the Preliminary Plat, which was approved by a vote of 5-1. (R. p. 174.) Lewis White, a member of the Planning Commission who owns an interest in the White Family Partnership, L.P., recused himself from the vote.³ The Preliminary Plat was approved with the seventeen (17) conditions that were recommended by the Town's Planning Staff, specifically Interim Planning Director Mark Brodeur. These conditions included obtaining necessary approvals from all federal, state, and local agencies, such as SCDOT, DHEC/OCRM, as well as obtaining additional review and approvals relating to stormwater, sewage and wastewater, light pollution, and environmental impacts. (R. pp. 165 – 167.) As noted above, the Preliminary Plat did not involve any request to change the underlying use, modify the zoning classification, add additional units, or increase the overall density.

³ The Town's records indicate that Lewis White signed a recusal form prior to the Planning Commission's meeting concerning the Property in which he indicated that he owns or has vested interests in the Property. Mr. White did not attend the March 21, 2022 meeting or the April 18, 2022 meeting and did not participate in the Planning Commission's vote to approve the Preliminary Plat. (R. p. 89 – 90, p. 174, p. 260.)

CONCLUSIONS OF LAW

The appeal in this matter is governed by the “any evidence” standard. *See Kurschner v. City of Camden Plan. Comm’n*, 376 S.C. 165, 656 S.E.2d 346 (2008) (applying “any evidence” standard to planning commission’s denial of subdivision application). Under the any evidence standard, “[b]y statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it.” *Id.*, at 173, 656 S.E.2d at 351; *see also Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995) (decision should not be reversed unless there is no evidentiary support or the board committed an error of law).

This deference is well-founded. Under South Carolina law, “[t]he authority of a municipality to enact zoning ordinances, restricting the use of privately owned property is found in the police power.” *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 296, 737 S.E.2d 601, 609 (2013). In the context of zoning decisions, “[t]he governing bodies of municipalities clothed with authority to decide residential and industrial districts are better qualified by their knowledge of the situation to act upon these matters than are the courts, and their decisions will not be interfered with unless there is a plain violation of the constitutional rights of citizens.” *Harbit v. City of Charleston*, 382 S.C. 383, 390, 675 S.E.2d 776, 780 (Ct. App. 2009), *as amended* (May 4, 2009). To apply a different standard of review would be contrary to the legislature’s intent to authorize and grant local planning commissions broad discretion in the area of local planning. *Kurschner*, 376 S.C. at 174, 656 S.E.2d at 351.

The Court must decide the appeal based on the record, which is sufficiently complete in this case.⁴ The Planning Commission's approval of the Preliminary Plat was a proper exercise of discretion that complied with the Town's Ordinances, the 2006 PD, and the Comprehensive Plan. *See Kurschner*, 376 S.C. at 172, 656 S.E.2d at 350 (a municipal planning commission's approval or rejection of a subdivision application is "an exercise of discretionary authority.").

I. The Challenge to the 2006 Planned Development Ordinance is Untimely

The challenges to the Planned Development District and the Planned Development Ordinance are untimely, and significantly so. Under South Carolina law, any challenge to a zoning amendment such as the creation of a planned development district must be brought within sixty (60) days of the decision of the governing body:

No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.

See S.C. Code Ann. § 6-29-760. As noted above, the Town's establishment of the Planned Development District occurred more than sixteen (16) years ago. As such, the deadline for Appellants (or anyone) to challenge the Town's decision has long since passed and must be

⁴ The Court notes the objection of Appellants regarding the completeness of the record. The Town filed the initial Record on Appeal on June 21, 2022, which was approximately seven (7) months prior to the hearing. Appellants did not make any contemporaneous objection to the completeness of the record, nor did Appellants file any additional items allegedly missing from the Record on Appeal. On January 18, 2023, the Town supplemented the Record on Appeal. In the days leading up to the hearing, Appellants lodged an objection to the completeness of the record, but again did not file any items allegedly missing. Appellants have also failed to show that the unspecified items they suggest should be added to the record would have a potential impact on the outcome of this appeal in light of the any evidence standard. For these reasons, this Court believes that the objection of Appellants is untimely, waived, and without adequate support to justify imposing further delay to the resolution of this proceeding.

refused. Otherwise, the zoning decisions of local governments would never be settled, which would unduly interfere with the proper and necessary exercise of local police power as well as the property rights and reasonable expectations of property owners.

II. The Planning Commission's Decision is Supported by Evidence

Furthermore, as it relates to the approval of the Preliminary Plat by the Planning Commission, the Court finds that there is evidence in the record to support the decision and, therefore, affirms that decision. *See Town of Hollywood v. Floyd*, 403 S.C. 466, 476, 744 S.E.2d 161, 166 (2013) (“By statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it.”). The Record on Appeal contains materials that were considered by the Planning Commission in approving the Preliminary Plat, including the March 21, 2022 Agenda Packet (R. pp. 29 – 87) and public comments, as well as the April 18, 2022 Agenda Packet (R. pp. 94 – 173) and public comments. These Agenda Packets included the Planned Development Ordinance, Pulte’s application, the concept plans and site analysis, the Staff Memorandum, the Staff Report, and other materials. Additionally, the transcript of the April 18, 2022 meeting of the Planning Commission reflects that the opposition lodged by members of the community was heard and received. (R. pp. 263 – 335). However, neither the existence nor the extent of opposition itself negates the fact that there is evidence to support the Planning Commission’s decision in the record. The Planning Commission was within its right, and its discretion, to approve the Preliminary Plat.

Under the applicable standard, the existence of any evidence to support the decision requires it to be affirmed, unless the decision was: (i) controlled by an error of law; (ii) the result of arbitrary or capricious action; or (iii) an abuse of discretion. The approval was not arbitrary, as the Preliminary Plat conforms to the existing zoning adopted by the Town in 2006. The residential

lots to be created are consistent with those that were contemplated in the original Conceptual Master Plan. Although Appellants suggest that the Preliminary Plat is inconsistent with the Town's Comprehensive Plan, this argument is misplaced for two reasons. First, it is the specific and current zoning of the Property, rather than the generalized Comprehensive Plan, that determines whether a preliminary plat is compliant with the type and intensity of use that is allowed. The Town's Planning Commission acted within its authority when it granted Preliminary Plat approval of the proposed subdivision of lots on the Property based on the existing zoning classification set forth in the Planned Development Ordinance. The Planning Commission considered the lot sizes, setbacks, and open space when approving the Preliminary Plat, and considered and addressed issues relating to traffic and access on Bull Island Road and environmental impacts of the project. For these reasons, the Planning Commission's approval of the Preliminary Plat will not be disturbed by this Court.

III. Appellants' Claim for Declaratory Judgment is Also Denied

Appellants have also asserted a claim for declaratory judgment. As an initial matter, the Court notes that Appellants cannot circumvent the applicable "any evidence" standard or the timing requirements of S.C. Code Ann. § 6-29-760 for challenging zoning decisions simply by framing their action as one for "declaratory judgment." Ultimately, the Court is convinced that this action is an attempted "collateral attack" upon the Planned Development Ordinance and the Planned Development District that comes far too late for the Court to entertain it. As noted above, both local governments and property owners (and potential buyers such as Pulte) must be able to rely on the validity of settled zoning decisions without the uncertainty that would be created if the underlying zoning could be entirely disrupted some decades later.

Although parties may seek declaratory judgments, it is also true that such declaratory judgments can be refused in a number of situations. *See, e.g.*, S.C. Code § 15-53-70 (stating that “[t]he court may refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding”). Certainly, such circumstances are present here. A reversal of the Planning Commission’s approval of the Preliminary Plat that reflects an allowed use and an allowed number of residential units at an allowed density would only serve to throw all of the parties into an unjustified and protracted state of uncertainty. Not allowing the Property to be used for its allowed use would be an inappropriate exercise of the Court’s powers. In this regard, granting declaratory judgment would only serve to increase the controversy, rather than terminate it.

Additionally, the alleged environmental or traffic implications arising from the approval of a preliminary plat are not appropriate topics for declaratory judgment, as these issues are themselves the subject of separate and independent administrative review by agencies other than the Town, such as the South Carolina Department of Health and Environmental Control or the South Carolina Department of Transportation. The applicable administrative reviews, some of which have not even been initiated, cannot be circumvented through an “omnibus” challenge brought in the circuit court under the guise of a request for declaratory relief. *See Garris v. Governing Bd. of the South Carolina Reinsurance Facility*, 319 S.C. 388, 461 S.E.2d 819 (affirming dismissal of declaratory judgment where there was no final order or any showing that final agency decision would not provide adequate administrative remedy). For these reasons, the Court finds that Appellants’ request for declaratory judgment is inappropriate and should therefore be denied.

IV. The Public Misconduct Allegations Are Not Appropriate for Declaratory Relief

Appellants argue that the decision of the Planning Commission should also be invalidated due to alleged conflicts of interest by current and former members of the Planning Commission in violation of the Ethics, Government Accountability and Campaign Reform Act of 1991, S.C. Code § 8-13-100, *et seq.* (the “Ethics Reform Act”). *See* S.C. Code § 8-13-700 (“No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a family member, an individual with whom he is associated, or a business with which he is associated.”).

The Ethics Reform Act provides the remedies for breaches of ethical standards by a public official. *See* S.C. Code § 8-13-700. Under South Carolina law, a claim for declaratory judgment will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances. *See, e.g., Bank of Augusta v. Satcher Motor Co.*, 249 S.C. 53, 152 S.E.2d 676 (1967). In this case, the Court believes that the appropriate avenue for Appellants to assert their claims for alleged misconduct by public officials is the one that the General Assembly has provided, as opposed to a declaratory judgment proceeding in which the public officials who were alleged to have engaged in the challenged conduct are not even named as parties. This Court sees no basis for circumventing the existing process or jurisdiction of the State Ethics Committee in this regard.

It does not appear that Appellants have taken any steps to avail themselves of the processes or remedies that are available to address alleged violations of the Ethics Reform Act prior to filing this appeal and petition for declaratory judgment.⁵ Furthermore, to the extent that the Ethics Reform Act would even allow for a private citizen to seek declaratory relief, the action would

⁵ The Court is making no suggestion that such efforts are merited.

certainly have to include the individual public officials at which it is directed. Appellants did not name the public officials alleged to have engaged in misconduct, which is an additional reason why the claim for declaratory relief is defective.

Furthermore, the allegations themselves are unsubstantiated. It appears to be undisputed that Mr. White actually did not participate in the discussion or vote on the Preliminary Plat. Although this Court has jurisdiction to potentially invalidate a vote by a municipal body under certain circumstances, this would occur based upon a showing that the requisite number of votes to support would not exist but for the vote(s) determined to be improper. *See Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999). As stated above, the Preliminary Plat was approved by a 5-1 vote. Although Appellants allege that Mr. White engaged in improper communications with other Planning Commission members, “pressuring” them to vote yes, Appellants provide zero evidence in support of this allegation, much less the type of evidence that might allow this Court to take the drastic action that Appellants request.

Mr. White’s interest in the Property is a matter of public record and was disclosed prior to the Planning Commission’s meeting concerning the Property. (R. p. 89 – 90, p. 174, p. 260.) As it stands, the Town’s vote to approve the Preliminary Plat occurred during a duly noticed public meeting at which a quorum of disinterested Planning Commissioners was present. For these reasons, Appellants fail to present sufficient basis for the Court to accept or grant the requested declaratory relief.

V. ***The Allegations Relating to Compliance with the Freedom of Information Act Do Not Warrant Reversal***

Appellants also request that the Court invalidate the Town’s approval of the Preliminary Plat as a result of alleged deficiencies in the Town’s responses to requests under the South Carolina Freedom of Information Act. An alleged failure to provide a response to a request for documents

does not invalidate decisions taken by a municipality's governing body or commission. A failure to respond within the applicable timeframe within Section 30-4-40 simply means that the disclosure at the time and place of access which the party requested is deemed approved. *See* S.C. Code §30-4-30(c); *see also Litchfield Plantation Co. v. Georgetown Cnty. Water & Sewer Dist.*, 314 S.C. 30, 32, 443 S.E.2d 574, 575 (1994) (holding that under § 30-4-30(c) failure to respond within fifteen days means the disclosure of non-exempt material at the time and place of access which the party requested is deemed approved). From a review of the Petition, it does not appear that Appellants are seeking additional documents. There is no actual claim for a violation of the South Carolina Freedom of Information Act. Rather, it is raised as another one of the several reasons why the Court should disrupt zoning rights that have been in place since 2006, which the Court declines to do.

In terms of compliance with notice requirements, the Court finds that the public hearings conducted in March and April of 2022 were properly noticed. The Notice of Public Hearing provided by the Town stated the time, date, and location of the hearing, along with the tax map numbers. The Notices informed the public that “[a]ny interested party may be heard either orally [or] in writing at the public hearing.” Both the March and April public hearings were advertised in the Post & Courier. (R. p. 91; pp. 261-262.) Accordingly, the Court finds that the Town complied with the requirements established by the South Carolina Freedom of Information Act with respect to records and public meetings.

V. ***Under the Circumstances, Further Discovery Is Unwarranted Prior to the Issuance of the Court's Decision***

Appellants request that the Court delay its decision in this matter in order to allow for further investigation and discovery, including taking testimony from members of the Planning

Commission regarding their reasons for voting to approve the Preliminary Plat. (*Pet.*, at ¶ 21; ¶ 47.) This argument fails for several reasons.

First, as to the appeal, there is nothing that would be uncovered in discovery that can transform an untimely appeal of zoning decisions made in 2006 into a timely appeal. Secondly, in the context of an appeal, the Court is sitting in reviewing capacity that does not permit consideration of additional evidence that was not before the Planning Commission. Therefore, further discovery would be improper and inadmissible in the context of this Court's review of the Planning Commission's decision to approve the Preliminary Plat.

With regard to Appellants' request for declaratory relief, further discovery would not cure the underlying defects with the claim that the Court has outlined above, including: (i) the Court's right to refuse a request for declaratory judgment when granting the relief would not terminate the controversy; (ii) the absence of several parties from this action who either have a personal interest in the underlying zoning of the Property or are the subject of the misconduct allegations; (iii) failure to exhaust administrative remedies; and (iv) the additional reasons why the request for declaratory relief is improper.

Furthermore, the type of discovery that Appellants appear to contemplate is not available to them under South Carolina law. The individual members of the Planning Commission cannot be compelled to testify in a civil action relating to their motive, rationale, or thoughts in taking a certain action. *See Horry Tel. Co-op., Inc. v. City of Georgetown*, 408 S.C. 348, 759 S.E.2d 132 (2014) (finding that trial and deposition testimony of individual city council members concerning their respective motivations for denying certificate of franchise authority was improperly admitted over the city's objection). The subjective thoughts of an individual member of the Planning Commission would not invalidate the approval of the Preliminary Plat. *See S.C. Dep't of Nat. Res.*

v. Town of McClellanville, 345 S.C. 617, 625, 550 S.E.2d 299, 303–04 (2001) (“Even if the members of Town Council secretly harbor a hope that the permit fee will reduce the number of people who use the facilities, this subjective desire would not invalidate an otherwise valid ordinance.”). As to any hypothetical discovery that would be allowable, the Court notes that Appellants did not take any steps to obtain it prior to this matter being set for a hearing. For these reasons, Appellants’ request to delay the resolution of this proceeding is denied.

VI. *Appellants Are Not Entitled to Pre-Litigation Mediation Under the S.C. Code § 6-29-1150*

Appellants’ request for pre-litigation mediation is denied as a matter of law because only “property owners” are given the option of seeking pre-litigation mediation in addition to an appeal under Section 6-29-1150(D)(2). *See* S.C. Code § 6-29-1150(D)(2) (“A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155.”); *see also* *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm’n*, 426 S.C. 97, 101, 825 S.E.2d 721, 723 (Ct. App. 2019) (noting that, for purposes of statutory interpretation, a property owner is the owner of land that is the subject of a commission decision). Because neither Appellant is a property owner of the land that is the subject of the Planning Commission’s decision, Appellants are not entitled to pre-litigation mediation.

IT IS SO ORDERED that the appeal of the Planning Commission's approval of the Preliminary Plat is **DENIED** and the request for Declaratory Judgment is also **DENIED**. Based on this decision, the Planning Commission's approval of the Preliminary Plat is **AFFIRMED**.

IT IS SO ORDERED.

The Honorable R. Keith Kelly
Presiding Judge, Charleston County Court of
Common Pleas

_____ 2023

_____, South Carolina



Charleston Common Pleas

Case Caption: William Calfee Jr , plaintiff, et al VS Awendaw Town Of

Case Number: 2022CP1002298

Type: Order/Form 4

It is so Ordered.

s/ R. Keith Kelly - 2165