EXHIBIT A

TO

GREENVILLE COUNTY PLANNING COMMISSION'S NOTICE OF APPEAL

(March 31, 2023 Order)

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Marcelo Torricos, as Trustee of the John W. Beeson Irrevocable Trust II FBO James H. Beeson dated August 5, 2021, Appellant, v. The Greenville County Planning Commission, Respondent.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT CASE NO. 2022-CP-23-4704 **ORDER VACATING AND REMANDING THE PLANNING COMMISSION'S JULY 27, 2022 DENIAL OF THE LANGFORD HILLS PRELIMINARY SUBDIVISION APPLICATION**

This matter comes before the Court for hearing on the appeal of Marcelo Torricos, as Trustee of the John W. Beeson Irrevocable Trust II FBO James H. Beeson dated August 5, 2021 (the "Trust" or the "Appellant") of a decision of the Greenville County Planning Commission (the "Planning Commission" or the "Respondent") to deny the preliminary subdivision application of the Langford Hills Subdivision. Present before the court were Marcelo Torricos, Luke Burke, and Alex Stalvey of the Bannister, Wyatt, and Stalvey Law Firm on behalf of the Appellant. Present on behalf of the Respondent was Boyd B. Nicholson, Jr. of the Haynesworth Sinkler Boyd Law Firm.

BRIEF PROCEDURAL HISTORY

This is an appeal of the Planning Commission's decision at a public hearing on July 27, 2022. The Planning Commission sent written notice of its decision to Appellant on August 2, 2022. Landowner filed it Notice of Appeal, Appeal, Request for Pre-Litigation Mediation, and Request for Declaratory Judgment on August 26, 2022. The Planning Commission filed their Response to Appeal on October 24, 2022. The parties attempted pre-litigation mediation pursuant to S.C. Code §§ 6-29-1150 and 6-29-1155 and reached an impasse. This hearing followed.

SUMMARY OF ARGUMENTS

The Court reviewed and considered the pleadings, the record on appeal, the briefs filed by the Trust and the Planning Commission, and the arguments of counsel.

The Appellant in this matter raised three principal issues. First, that the Planning Commission's use of the Greenville County Comprehensive Plan (both in terms of density and its call to reduce septic tank usage) (the "Comprehensive Plans") to deny the Appellant's preliminary subdivision application was arbitrary and not supported by law. Second, that the Planning Commission's use of Judge Letitia Verdin's June 3, 2022 order in the matter of *Mark III Properties, LLC v. The Greenville County Planning Commission* (2022-CP-23-1106) was not supported by law, was used arbitrarily, and used in a manner that is an abuse of discretion. Lastly, that the Planning Commission acted without legal support, acted arbitrarily, unreasonably, and abused its discretion when it denied the Appellant's preliminary subdivision application "for all other reason[]s set forth previously."

In response, the Respondent argued several points. First, the Respondent argued that the Appellant's appeal should be denied based on *res judicata* or alternatively, collateral estoppel. Second, the Respondent argued that the record on appeal contains ample evidence, or at least, some evidence, to support the Planning Commission's denial of the Applicant's preliminary subdivision application.

STANDARD OF REVIEW

In an appeal from a decision of a planning commission, the circuit court must uphold the decision if there is any evidence to support it. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 173, 656 S.E.2d 346, 351 (2008). The circuit court must refrain from substituting its judgment for that of the planning commission, even if the court disagrees with the decision.

Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). However, the circuit court may overturn the decision of a planning commission if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the commission abused its discretion. *Id.*

RULING

A. The Comprehensive Plan.

As to the first issue concerning the Planning Commission's use of the Comprehensive Plan (both in regard to density and the use of septic tanks) as a basis for denying the Appellants preliminary subdivision, the court finds that the Planning Commission acted arbitrarily, without legal support, and abused its discretion.

First and foremost, the Comprehensive Plan is not law, but merely an uncodified, advisory document for the County. The authority for local governments in South Carolina to undertake planning and to adopt zoning and land development regulations is granted by the General Assembly to local planning commissions pursuant to the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the "1994 Act"). In order for a local government to adopt zoning and/or land development regulations, local planning commissions are required, by law, to develop and maintain a comprehensive plan. S.C. Code Ann. § 6-29-510. "The local planning commission shall develop and maintain a planning process which will result in the systematic preparation and continual re-evaluation and updating of those elements considered critical, necessary, and desirable to *guide* the development and redevelopment of its area of jurisdiction." *Id.* (emphasis added).

The Comprehensive Plan itself gives direction for its use: "Plan Greenville County casts a twenty-year *vision* for the continued improvement and growth of Greenville County.

As a statutorily required comprehensive plan, once adopted, this plan will provide the basis for evaluating land development proposals in the unincorporated county and will serve as the *foundation* for *future land use and development regulations*." Plan Greenville County, Page 9 (emphasis added).

Furthermore, the Comprehensive Plan states that, "a comprehensive plan is a *guiding* policy document that reflects a community's vision for its future…" and that, "[t]his plan is intended to be accessible to the general public; at the same time, it provides technical *guidance* and is a *foundation* for other planning related documents, such as *zoning and land development regulations*. Plan Greenville County, Page 10 (emphasis added).

After a comprehensive plan has been adopted by a planning commission, a local planning commission can prepare and recommend the adoption of land development regulations and zoning ordinances to governing bodies, such as elected county councils. S.C. Code Ann. § 6-29-1130(A). The elected county councils can then enact land development regulations and ordinances, including zoning ordinances, based on a planning commission's recommendations.

It is these regulations and ordinances enacted by a county council, along with State statutes, that regulate a planning commission's consideration of whether to approve or disapprove subdivision projects. Once land development regulations and zoning ordinances are adopted by the County, those regulations and zoning ordinances (where applicable) become the law guiding approval or denial of a project at the planning commission level. By using the Comprehensive Plan as a basis for denial, the Planning Commission elevated the Comprehensive Plan to the same level of requirement as statutes passed by the General Assembly, and zoning ordinances and land development regulations passed by County

Council. Such elevation of the Comprehensive Plan by the unelected Planning Commission is improper.

It is not lost upon the court that we are dealing with in this appeal is a preliminary subdivision application and not a final application for plat approval. The court recognizes that there are harmless errors[1] and errors that may be fixed by an applicant prior to final plat approval[2]. With that being said, if an preliminary subdivision application (1) substantially complies with the Greenville County Land Development Regulations (the "LDR"), (2) complies with applicable zoning ordinances (3) complies with applicable State statutes, and (4) no variance from the LDR is requested, then the Planning Commission has no authority to deny a project, and to do so is an abuse of discretion.

Secondly, after a review of the record, specifically Pages 8 and 9 of the minutes from the July 27, 2022 hearing, the court finds that the Planning Commission applies the Comprehensive Plan in an arbitrary manner. At the July 27, 2022 hearing several of the Commissioners mention that the Planning Commission's application of the Comprehensive Plan is entirely inconsistent and applied in some instances and not in others. This troubles the court and is the very definition of arbitrary application and decision-making.

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[1] In the Planning Commission's brief in the matter of *Alliance to Preserve the Old White Horse Road Corridor and Mary Horney v. RP&L and the Greenville County Planning Commission* (2021-CP-23-3048), which was made a part of the record on appeal, concedes, on Page 12, that harmless errors may exist.

[2] In the Planning Commission's brief in the matter of *Alliance to Preserve the Old White Horse Road Corridor and Mary Horney v. RP&L and the Greenville County Planning Commission* (2021-CP-23-3048), which was made a part of the record on appeal, concedes, on Page 13, that there are issues that arise in the development process that may be addressed at the final development phase rather than the initial subdivision application phase.

Third, the court finds that by forcing the Appellant to comply with the Comprehensive Plans density suggestions, the Planning Commission has, in effect, zoned the Appellant's property that lies in the unzoned portion of Greenville County in violation of the Appellant's due process rights.

In Greenville County, only County Council may zone or rezone property by approving an ordinance, whereas the Planning Commission only has the authority to *recommend* approval or disapproval of zoning map amendments to County Council. *See* Greenville County Zoning Ordinance § 3:2.6.

Furthermore, if the County were to attempt to zone private land, it must take the proper steps to ensure due process. "Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." *Kurschner,* 376 S.C. at 171, 656 S.E.2d at 350. The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. *Id.*

That was the General Assembly's intent when it enacted S.C. Code Ann. § 6-29-760 which states, "[b]efore enacting or amending any zoning regulations or maps, the governing authority, or the planning commission, if authorized by the governing authority, shall hold a public hearing on it, which must be advertised and conducted according to lawfully prescribed procedures. S.C. Code Ann. § 6-29-760(A). Any evidence that the Planning Commission followed the procedures outlined in S.C. Code Ann. § 6-29-760 or any other similar procedure that would have put the Appellant on fair and proper notice that an uncodified density requirement was going to be considered for this application is entirely absent from the record. As such, the Planning Commission's decision to deny cannot stand.

For all of the reasons set forth previously, the court finds that the use of the Comprehensive Plan was not supported by law, was arbitrary, and was an abuse of discretion.

B. Judge Verdin's June 3, 2022 Order.

The court also finds that the Planning Commission abused its discretion in applying Judge Verdin's June 3, 2022 order ("June 2022 Order") as a basis for denying the Appellant's application.

It is apparent to the court that the only issue decided on appeal in the June 2022 Order was the issue of notice. S.C. Code 6-29-1150(B) states, "[a] record of all actions on all land development plans and subdivision plats with the grounds for approval or disapproval and any conditions attached to the action must be maintained as a public record." In that matter, the Appellant, Mark III Properties, LLC ("Mark III"), argued that by failing to put the reason for denial of a subdivision application in writing, the Planning Commission acted arbitrarily and capriciously. The court disagreed and found that the County had satisfied its requirement under S.C. Code 6-29-1150(B) when it created and published the minutes from the January 26, 2022 meeting and that the minutes constitute a sufficient public record.

The court finds that the Planning Commission's attempt to apply the June 2022 Order as a basis for denying Appellant's application is in error for three reasons. First, the order is very limited in nature and only decides one legal issue – whether the Planning Commission is required to publish its reason for denial in its written denial letter. Second, the applicant and appellant for the underlying application reviewed in the June 2022 Order are not the same entity or party as the applicant and appellate in this matter. Third and foremost, the application in this matter is different from the application reviewed in the June 2022 Order.

C. Denying the subdivision application "for all other reason's set forth previously."

As to the Planning Commission's decision to deny the Appellant's preliminary subdivision application based on "all other reason's set for previously," the court finds that the Planning Commission acted unreasonably and abused its discretion.

First, the Appellant and the applicant in previous preliminary application concerning this property are not the same party. The record is replete with evidence that this is the first time the Appellant applied for preliminary subdivision approval from the County. All prior applications were made by Mark III, while the application in this matter was submitted by the Trust. The Respondent argued, that while Mark III and John W. Beeson are separate parties, John W. Beeson is a privy of Mark III. However, John W. Beeson is not the Appellant, the Trust is.

Even assuming arguendo, that the Trust was privy to Mark III: (1) the application considered on July 27, 2022 was different than any of the three applications previously submitted by Mark III[3] and (2) the claims in prior appeals were different than the claims made in the appeal at hand.

At the hearing, the Respondents themselves submitted summaries of prior applications that clearly show the applications were not the same. So, to deny this Appellant's application, based on reasons another applicant's different applications were previously denied is devoid of fairness and reason, and amounts to an abuse of discretion.

For these same reasons, the court denies the Respondent's motion or request to have this appeal dismissed based on res judicata and/or collateral estoppel.

[3] Mark III Properties submitted similar, but not the same, applications concerning the same property in November of 2021, January of 2022, and April of 2022. The minutes from these meetings were made a part of the record on appeal.

D. The Defenses of *res judicata* and collateral estoppel.

In their argument, the Respondent asserted the defenses of *res judicata* and/or collateral estoppel. "Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *South Carolina Public Interest Foundation v. Greenville County*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (2013) (quoting *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct.App.1997). These doctrines do present two "different concepts":

> A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit.

South Carolina Public Interest Foundation v. Greenville County, 401 S.C. 377 at 386, 480 S.E.2d at 507 (quoting *Beall v. Doe,* 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 190 n. 1 (Ct.App.1984)).

Res judicata requires the following elements: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." The court finds that the Trust and prior applicant, Mark III Properties, are not the same party and are not privy to one another. Again, while Mark III Properties and John W. Beeson may be privy to one another, John W. Beeson was not the applicant in this matter, the Trust was. Additionally, the court finds that the subject matter of this appeal was not the subject matter of any previous appeal in the past. Per the record, Mark III Properties appealed the denial of a similarly-named subdivision twice previously. One appeal resulted in Judge Verdin's June 3, 2022 order that has already been addressed and which dealt with a different application and entirely different claims than the ones before this court

now. The second appeal dealt with a different application and was withdrawn prior to its adjudication.

Further, the Respondent argues that even if the present claims were not raised in prior appeals, they could have been raised in those appeals. Even if the Trust and prior parties were considered privies, the previous appeals dealt with completely different underlying applications. As such, the same set of factual circumstances and claims were not in existence in the prior appeals. Therefore, the court denies the Respondent's motion to dismiss based on the doctrine of *res judicata.*

As to the defense of collateral estoppel, the party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984). For collateral estoppel to apply, the party against whom estoppel is asserted must have "had a full and fair opportunity to previously litigate the issues." *Carolina Renewal v. S.C. Dept. Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (quoting *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct.App.2008)).

As stated previously, the court finds that the Trust is not the same party as any party that filed an application or appealed in the past. Further, The court finds that the issue before this court has not been litigated in any prior actions. The Respondent argued that the issues before the court related to the January appeal that Judge Verdin ruled on are the same issues being adjudicated today. The court disagrees. The June 3, 2022 order is clear that a very limited issue was before the court on appeal. That issue being whether the Planning Commission is required to publish its

reason for denial in its written denial letter. The issues before the court now, are far more substantive and include, but are not limited to, challenges to the Planning Commission's use of the comprehensive plan to deny subdivision applications, due process arguments, and the validity of the Planning Commissions ability to deny subdivision applications for "all other reasons set forth previously."

Finally, as stated previously, the application appealed here is different from any application appealed from in the past. As such, similar factual circumstances do not exist such that decisions on past appeals could estop the Appellant's position in this appeal.

For these reasons, the Respondent's motion to dismiss this appeal based on the doctrine of collateral estoppel is denied.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The Respondent's motions to dismiss this appeal based on the doctrines of *res judicata* and/or collateral estoppel are denied.

2. The Planning Commission's denial of the Appellant's preliminary subdivision applications considered on July 27, 2022 is hereby **VACATED**.

3. The issue shall be remanded back to the Planning Commission.

4. The Appellant may refile a new application with the Planning Commission for the Langford Hills Subdivision. The Appellant has leave to make modifications to the application to ensure that it substantially complies with relevant statutes, land development regulations, and any applicable ordinances.

5. In its consideration for approval, conditional approval, or denial, the Planning Commission is barred from (1) using the Comprehensive Plan as a basis for denial, (2) Judge

Verdin's June 3, 2022 Order as a basis for denial, and (3) any of the other reason's similar applications were denied previously as a basis for denial.

6. Should the Planning Commission decide to deny this new application, then the Appellant shall have leave to file an expedited appeal per S.C. Code Ann. § 6-29-1150. I am retaining jurisdiction in this matter and, if Appellant files a subsequent appeal pursuant to this order, then the Planning Commission shall provide my chambers with a detailed list of the reasons and detailed explanations as to why the Planning Commission has denied the Appellant's new application. Should I find that the reasons or basis for denial is or are not supported by law, the facts, are arbitrary, unreasonable, harmless error or an abuse of discretion, then the matter will again be remanded back to the Planning Commission with direct orders to approve the application as filed.

IT IS SO ORDERED.

_____
Honorable Bentley D. Price
Presiding Family Court Judge

March _____, 2023
_____, South Carolina

Greenville Common Pleas

Case Caption: Marcelo Torricos Trustee , plaintiff, et al VS Planning Commission Greenville County

Case Number: 2022CP2304704

Type: Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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