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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Hon. G.D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2022-001301

Alliance to Preserve the Old White Horse Road Corridor, LLC
and Mary Jean Horney, ... Appellants,

v.

RP&L, LLC and the Greenville County Planning
Commission .... Respondents.

FINAL BRIEF OF APPELLANT

William M. Wilson III (S.C. Bar No. 15808)
Wyche, P.A.
P.O. Box 728
Greenville, SC 29602-0728
(864) 242-8200

William F. Childers, Jr.
Eller Tonnsen Bach
1306 South Church Street,
Greenville, South Carolina 29605
(864) 236-5013

Attorney for Appellants

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STATEMENT OF ISSUES ON APPEAL

This matter involves an appeal from the approval of a 73-home subdivision in northern Greenville County by the Greenville County Planning Commission. Appellants are an adjacent landowner and a limited liability company representing the interests of local citizens who oppose the development on the basis that it fails to comply with the Greenville County Land Development Regulations.

1. Did the Planning Commission err by failing to make any findings of fact, conclusions of law, or other written grounds to delineate the reasoning for its approval of the Application for the Stables subdivision?

2. Did the Planning Commission err in approving the Application for the Stables subdivision when there was no evidence in the record that the Stables satisfied all three criteria of LDR Article 3.1 and/or when the decision was controlled by an error of law?

3. Did the Planning Commission err in approving the Application for the Stables subdivision when there was no evidence in the record that the Stables had approval from the fire department?

4. Did the Planning Commission err in approving the Application for the Stables subdivision when there was no evidence in the record that the Stables satisfied LDR Article 11 and the Greenville County Zoning Ordinance?

5. Did the Planning Commission violate Appellants' procedural due process rights by not making the Revised Preliminary Plan available to the public prior to the May 26, 2021 meeting?

STATEMENT OF THE CASE

On March 31, 2021, the developer, RP&L, LLC ("RP&L") filed a preliminary subdivision application with the Greenville County Planning Commission ("Application"). (R. pp. 167-68, 175).

On April 19, 2021, the Planning Commission Subdivision Advisory Committee ("SAC") recommended several changes to the preliminary plan for the Stables. (R. pp. 173-74, 176-84).

On April 26, 2021, RP&L submitted a revised preliminary plan (the "Revised Preliminary Plan") in response to SAC's recommendations. (R. pp. 200, 208-209, 225).

On May 26, 2021, the Planning Commission held a meeting to decide whether to approve the Stables Revised Preliminary Plan. (R. pp. 234-241). The Planning Commission voted 5 to 4 to approve the Stables. (R. p. 241).

On June 7, 2021, the Planning Commission issued a written decision in the form of a letter to RP&L informing it of its decision to approve the Stables. (R. pp. 186-87).

On June 25, 2021, Appellants timely filed the current appeal in Greenville County. (R. p. 420). Both parties submitted supporting memoranda and the Record on Appeal. (Final Brief of Appellants; Final Brief of Respondents; Final Reply Brief of Appellants; Record on Appeal) (R. pp. 15-63, 90-457).

On July 6, 2022, the lower court issued a Form 4 Order affirming the Planning Commission. (Form 4 Order) (R. p. 1).

On August 17, 2022, the lower court issued its Order Affirming Decision of Greenville County Planning Commission. (Formal Order) (R. pp. 4-14).

On September 16, 2022, Appellants timely filed and served their Notice of Appeal. (Notice of Appeal) (R. pp. 458-471).

STATEMENT OF FACTS

Appellant Mary Jean Horney owns a small horse farm located at 10010 Old White Horse Road immediately adjacent to the proposed Stables subdivision, and she is impacted by the decision of the Planning Commission. (R. pp. 325-26). She is the organizer of the Appellant Alliance to Preserve the Old White Horse Corridor, LLC ("Alliance")—a limited liability company formed in the State of South Carolina for the purpose of preserving an area of Greenville County commonly referred to as "the Old White Horse Corridor." (R. p. 421). Respondent RP&L proposes to subdivide and develop an approximately 43-acre property located at the intersection of Meadow Brook Road and Old White Horse Road in a rural section of Greenville County. (R. p. 96). The area in which the Stables is proposed to be located consists of rural agricultural and equestrian land. (R. pp. 94, 325-26). Among the immediate surrounding properties of the Stables include Ms. Horney's 31-acre horse farm to the north; Riverbend Equestrian Park, a 63-acre equestrian facility, to the southeast; as well a 58-acre farm to the east. (R. pp. 94, 325-26). The other surrounding properties consist mainly of agricultural and/or equestrian uses. (R. pp. 94, 325-26).

In its Application, RP&L sought for the Stables to be a "cluster development," which is characterized by lots clustered to preserve open space for recreational, environmental, or ecological reasons. (R. pp. 167, 387). Cluster development is also referred to as "open space development," which is defined as "a form of residential subdivision that permits housing units to be grouped on sites or lots with dimensions, frontages, and setbacks reduced from conventional sizes provided the density of the tract as a whole shall not exceed the density allowed by the zoning district under existing regulations and the remaining land area is devoted to common open space." (R. p. 393). By definition, cluster developments "are intended to

preserve substantial amounts of open space for recreational, environmental, and ecological reasons." (R. p. 397). The open space can consist of "developable" and "undevelopable" land as defined in the Zoning Ordinance and/or LDR. (R. p. 399).

The Stables originally was proposed to be a total of 43-acres, consisting of 73 units, and providing for 14.05 acres of "open space." (R. p. 167). The lots vary in size, but most are approximately 7800 square feet, or 0.174 acres. (R. pp. 160, 175). With its application, RP&L submitted a preliminary plan also dated March 31, 2021. (R. pp. 160, 175). Notably, this preliminary plan did not label any areas of land as developable open space and also did not specify any proposed uses for the open space as required by the LDR Article 11.3.2(B). (R. pp. 160, 175, 388).

Prior to the meeting, the Planning Commission was provided with several letters in opposition to the development. (R. pp. 242-361). Attorney William F. Childers, Jr. sent a letter on behalf of Appellant, Ms. Mary Jean Horney. (R. pp. 315-322). In total, 19 parties submitted opposition correspondence to the Planning Commission. (R. pp. 242-361). At the meeting, Attorney Childers appeared on behalf of Ms. Horney. (R. pp. 234-35). Attorney Childers argued the Stables' preliminary plan should be denied because (1) the Stables was incompatible with the surrounding land use density of the area and (2) the preliminary plan did not comply with LDR Article 11 as related to open space requirements of cluster developments. (R. pp. 234-35). Another nearby landowner, Shannon Wilson, also presented in opposition to the Stables. (R. pp. 235-238). Ms. Wilson presented a Petition opposing the Stables with 191 names, (R. pp. 203-207, 236), and she raised several concerns with the Stables related to (1) traffic increases, (2) storm water management and flooding, (3) the safety of the proposed access to the development; (4) density; and (5) the lack of compatibility with the surrounding rural area. (R. pp. 235-38). All

of these matters and concerns raised by Mr. Childers, Ms. Wilson, and the Petitioners were addressed in more detail in the letters. (R. pp. 242-361).

The engineer for the project, Kevin Tumblin, appeared on behalf of the developer in favor of the Stables. (R. pp. 238-41). During the engineer's presentation, at least one Commission member raised concerns related to the proposed access for the subdivision, which is located on Meadow Brook Road, a small county road that only has ingress or egress via the busy Old White Horse Road. (R. pp. 239-40). Specifically, Commissioner Cindy Clark noted the proposed access was an "awkward way to get into the subdivision and leave the subdivision." (R. p. 239). Commissioner Clark also expressed concern that the Greenville County Fire Department had not commented on the proposed access, noting she had "real concerns" about a fire truck being able to access the development and noted she would like to hear from the fire department about that issue. (R. pp. 239-40). In response, Planning Commission staff informed Commissioner Clark they had contacted the Fire Department for comment; however, they had not responded. (R. p. 240). Planning Commission staff noted that the decision to approve the Stables could be delayed until the fire department could comment; however, that did not happen. (R. p. 240). Commissioner Clark also raised issues with flooding in the area as was shown in correspondence received prior to the meeting from a local resident, Don Woodard, who carefully researched the flooding issues in the area. (R. pp. 191-99, 239). Commissioner Clark concluded her position by stating, "Everything west of the Reedy is along this corridor is very rural, large lots. This is not a compatible use along this corridor. And the fact that [the Stables] is sandwiched between 2 equestrian facilities I think is also not a good fit." (R. p. 240).

Following Commissioner Clark's comments, Commissioner Frank Hammond asked the engineer if there were any fire safety access issues with the development as proposed to which

the engineer responded negatively; however, the engineer did not cite to any evidence in support of this response, nor was any basis provided for such an opinion by an engineer. (R. p. 240).

Of note, Commissioner Jay Rogers asked the engineer the distance between the Stables and Green Valley Country Club. (R. p. 241). When the engineer was unsure, Commissioner Rogers stated his belief that the Stables was not incompatible with the surrounding area because at least one of the subdivisions near Green Valley has lots that are smaller than one acre. (R. p. 241). It appears from the transcript that Commissioner Rogers was referencing a GIS screen shot presented by Planning Commission staff at the meeting and available at page 63 of the Planning Commission file. (R. pp. 229, 241). Notably, it appears the GIS screen shot that Commissioner Rogers was referencing shows the location of developments east of the Reedy River that are not on Old White Horse Road; whereas, the Stables is located on Old White Horse Road west of the Reedy River. (R. p. 229). This seemingly minor distinction is in fact a major error that impacted the Planning Commission's decision in this case because the land located east of the Reedy is zoned Residential-15 (R-15); however, the land located west of the Reedy is zoned Residential-Suburban (R-S). (R. pp. 395-96). Additionally, the land east of the Reedy is characterized as "Suburban Neighborhood" land-use under the Greenville County Comprehensive Plan, which allows for a gross density of 3 to 5 dwellings per acre. (R. p. 419). However, the land west of the Reedy is labeled as "Suburban Edge," which allows for only 0 to 1 dwelling per acre. (R. p. 419). Stated another way, it appears that Commissioner Rogers in fact compared the Stables to developments in different zoning and land use classifications in his finding that the Stables was compatible with the surrounding area.

After these exchanges, the Planning Commission took a vote and approved the Application with five votes in favor and four votes against. (R. p. 241). On June 7, 2021, the

Planning Commission mailed a letter to RP&L informing it of the approval of the Stables, which is the only written record of the Planning Commission's decision. (R. pp. 186-87).[1]

STANDARD OF REVIEW

This appeal is authorized by South Carolina's Local Government Comprehensive Planning Enabling Act, which provides a right to appeal from Planning Commission decisions involving land development regulations for any "party in interest." *See* S.C. Code Ann. § 6-29-1150; *see also Grays Hill Baptist Church v. Beaufort Cty.*, 431 S.C. 630, 635 & n.4, 850 S.E.2d 29, 31 & n.4 (2020). Neighboring property owners who stand to be negatively impacted by a proposed subdivision are among the parties authorized to undertake such an appeal, and so are citizen organizations. *See Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Planning Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019).

Under S.C. Code Ann. § 6-29-1150(B): "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 addition, the developer must be notified in writing of the actions taken." *Id*. (emphasis added). The standard of review under S.C. Code Ann. § 6-29-1150 requires reversal when the decision of the Planning Commission "is based on errors of law" or when it "is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Grays Hill Baptist Church v. Beaufort Cty.*, 431 S.C. 630, 635 & n.4, 850 S.E.2d 29, 31 & n.4 (2020) (internal quotations omitted).

It is important to note that the "any evidence" standard only applies in "the zoning context," and therefore does not apply here where the issue is compliance of a subdivision with

[1] Appellants did not receive a copy of the written decision until receipt of the Commission file via the Planning Commission's counsel on November 2, 2021. (R. p. 20).

land development regulations. *Id*. (citing *Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997)). S.C. Code Ann. § 6-29-780 *et seq.* governs appeals to the Board of Zoning Appeals and then to the circuit court, which is separate from the appeal of land use regulations in Section 6-29-1150. The Board of Zoning Appeals must hold hearings and issue its final decisions and orders in writing with findings of fact and conclusions of law. *Id.* § 6-29-800(F). These findings of facts "must be treated in the same manner as a finding of fact by a jury." *Id*. § 6-29-840(A). It follows that the "any evidence" standard governs zoning appeals. *See Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 656 S.E.2d 346 (2008). But the standard of Section 6-29-1150, which involves compliance with land development regulations, is different and is not required to be treated in the same manner as a finding of fact by a jury. If follows that the "any evidence" standard does not apply here.

ARGUMENT

Appellants essentially make three arguments that justify reversal of the Planning Commission's approval of the Stables subdivision Application. Each argument is independently sufficient in itself to require reversal.

First, the Planning Commission erred in not making any written findings of fact, conclusions of law, or other grounds for approving the Stables subdivision under the Greenville County Land Development Regulations (LDR). There simply is no discernible basis for the decision that may be reviewed on appeal. It follows that the Planning Commission's decision must be reversed as an abuse of discretion, arbitrary and capricious, and/or controlled by an error of law. This first argument alone entitles the Appellants to a reversal.

Second, if the Court can get past the first hurdle, there is no evidence in the record that supports the Planning Commission's decision. Specifically, there is no evidence that the Stables

subdivision satisfies any of the three criteria of LDR Article 3.1, satisfies the criteria for a cluster development under LDR Article 11, or that fire safety was addressed. If evidence is lacking for even one of the mandatory criteria, then the Planning Commission's approval must be reversed as an abuse of discretion, arbitrary and capricious, and/or controlled by an error of law.

Third, the Planning Commission's approval of the Stables subdivision violated Appellants' procedural due process rights because an incorrect preliminary plan was posted on the Commission's website prior to the May 26, 2021 meeting, which resulted in the correct plan not being available to the public prior to the meeting. It follows that the approval must be reversed.

I. The Planning Commission erred by failing to make any findings of fact, conclusions of law, or other written grounds to delineate the reasoning for its approval of the Application for the Stables subdivision

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 allows for the establishment of local planning commissions, including a county planning commission established by a county council. S.C. Code Ann. § 6-29-310 to -330. 1150(B). As such, the Greenville County Planning Commission is charged with "the function and duty . . . to undertake a continuing planning program for the physical, social, and economic growth, development, and redevelopment of [Greenville County]." *Id*. § 6-29-340(A). Land development regulations adopted by a county "must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff." *Id*. § 6-29-1150(A). Under the Greenville County Land Regulations, which were adopted pursuant to the authority of S.C. Code Ann. § 6-29-1110 et seq., no plat of a subdivision of land shall be filed or recorded until submitted to and approved by the Planning Commission. LDR 1.1. (R. p. 368). Article 3 of the Land Development Regulations includes the general subdivision requirements that must be

met by a developer. Article 11 includes the requirements for cluster developments. In the present case, RP&L's Application sought approval for the Stables subdivision under these Articles.

Importantly, a local planning commission is required to "keep a record of its resolutions, findings, and determinations, which record must be a public record." *Id.* § 6-29-360(B) (emphasis added). Furthermore, when considering an application for a subdivision under the land development regulations, **the Planning Commission was required to set forth in writing "the grounds for its approval or disapproval"**:

> 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 addition, the developer must be notified in writing of the actions taken.

Id. § 6-29-1150(B) (emphasis added). In essence, the Planning Commission must make findings of fact and conclusions of law delineating the reasons for its decision, or at the very least make some record of the grounds for approval or disapproval.

Although such grounds for its decision need only meet the "abuse of discretion" standard on appellate review, *see Grays Hill Baptist Church*, 431 S.C. at 635 & n.4, 850 S.E.2d at 31 & n.4, such a standard cannot be satisfied when the Planning Commission fails to articulate the grounds for its decision, because it is in such a failure that the Planning Commission demonstrates that it failed to exercise any discretion at all. It is well established that the failure to exercise discretion in itself is an abuse of discretion. *See, e.g., Lollis v. Dutton*, 421 S.C. 467, 487, 807 S.E.2d 723, 733 (Ct. App. 2017). As the *Lollis* court explained, when a decision fails to set forth the grounds for its basis or otherwise is "lacking a discernible reason," this failure is tantamount to the failure to exercise discretion and therefore an abuse of discretion:

> As to the merits, the circuit court's summary order denying all post-trial motions did not specifically address the above three grounds or the standards set forth in the corresponding statute or rule. We acknowledge that findings of fact and conclusions of

> law are generally not required for decisions on motions. See Rule 52(a), SCRCP ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." (emphasis added)); *Woodson v. DLI Props., LLC*, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014) (citing Rule 52, SCRCP, for the proposition that findings of facts and conclusions of law on motions are not required for appellate review). However, the circuit court's order indicates it did not exercise any discretion to evaluate the Duttons' request for fees and costs under Rule 37(c), SCRCP or the UDJA. *See Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997) ("A failure to exercise discretion amounts to an abuse of that discretion."); *see also Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the [circuit court] is vested with discretion, but [its] ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *Johnson v. Johnson*, 296 S.C. 289, 304, 372 S.E.2d 107, 115 (Ct. App. 1988) ("A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion.").

Id.

The same holds true here with respect to the decision of the Planning Commission. Also, at least two circuit courts have ruled that the Planning Commission's failure to set forth the basis for its reasoning in the approval of a subdivision plat was grounds for reversal. In *Northern Greenville County Rural Landowners v. Vicars Construction, LLC and the Greenville County Planning Commission*, No. 2020-CP-23-03513, the circuit court held that the Planning Commission's "approval of a subdivision cannot be supported without findings specifically addressing each of the three factors in Article 3.1. Without such findings, this court cannot adequately exercise its statutory authority to review the Planning Commission's decision." (R. p. 164). In *Vicars*, the court remanded a preliminary plan approval to the Planning Commission to make "comprehensive written findings to delineate the reasoning of its approval of the subdivision" and to specifically address the factors outlined in Article 3.1. (R. pp. 163-66).

Similarly in *Northern Greenville County Rural Landowners v. SK Builders, Inc.*, No. 2020-CP-23-05445, at 3-4 (S.C. Comm. Pl. June 3, 2022), the circuit court held that it could not make a determination of whether the criteria of Article 3.1 were adequately considered and therefore reversed the approval of the subdivision and remanded for the Planning Commission to

address the Article 3.1 factors. (R. pp. 364-65). The circuit court reached this conclusion even though the "Planning Commission point[ed] to various discussions and information presented at the hearing regarding [the Article 3.1 criteria of] compatibility with the surrounding land use density" and even though "[t]he minutes of the Planning Commission contain[ed] numerous references and discussions relating to Article 3.1 factors." *Id*. at 3. (R. p. 364). It also is notable that the circuit court reversed the Planning Commission despite applying the incorrect "any evidence" standard.[2]

Under the reasoning of the circuit court's precedent in *Vicars* and *SK Builders*, it is clear the Planning Commission must make specific findings of fact and conclusions of law addressing all three criteria under LDR Article 3.1 when it approves a subdivision under LDR Article 3.1. Otherwise, a court reviewing the decision on appeal cannot determine whether the Planning Commission's decision was arbitrary and capricious or abused its discretion.

Here, the Planning Commission failed to set forth any basis for its decision, as no written findings of fact, conclusions of law, or grounds for approval were published by the Planning Commission. At the meeting on May 26, 2021, it simply took a vote and declared that the Application passed 5-4. (R. p. 241). On June 7, 2021, the Planning Commission mailed a letter to RP&L informing it of the approval of the Stables, which was the only written record of the

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[2] As noted in the Standard of Review section above, the "any evidence" standard applies only to zoning decisions. But <u>even if</u> it did apply here (which it does not), the failure to set forth any basis for the decision makes it impossible to determine if the standard is met. *See id*. ("The minutes of the Planning Commission contain numerous references and discussions relating to Article 3.1 factors, but it is difficult for this Court to determine if these discussions rise to the level of evidence to comport with the "any evidence" standard set out in *Kurschner*.") (R. p. 275). Further, to the extent this appeal is governed by S.C. Code Ann. § 6-29-840(A) and the "any evidence" standard, this standard expressly applies to "findings of fact" that must be made by the Board of Zoning Appeals, or in this case the Planning Commission. Thus, if Section 6-29-840(A) is the correct standard to apply, then the lack of findings of fact by the Planning Commission is dispositive of the appeal and requires reversal.

Planning Commission's decision. (R. pp. 186-87). However, this letter failed to include any findings of fact, conclusions of law, or other grounds for approval. Indeed, it merely stated that the Planning Commission "granted approval of the above-referenced application." (R. p. 186).

Such a decision demonstrates the epitome of "[a] decision lacking a discernible reason," which as noted by *Lollis* is an abuse of discretion. There simply is no way to discern the logic or reasoning of the Planning Commission. For example, under LDR Article 3.1, "Submitted subdivisions may be approved [by the Planning Commission] if they meet all of the following [three] criteria: [One,] Adequate existing infrastructure and transportation systems exist to support the project; [Two,] The project is compatible with the surrounding land use density; [and Three,] The project is compatible with the site's environmental conditions, such as but not limited to, wetlands, flooding, endangered species and/or habitat, and historic sites and/or cemeteries." (R. p. 372). As in *Northern Greenville County Rural Landowners*, it is impossible to know how the Planning Commission applied these criteria to the Stables development.

Similarly, LDR Article 11 addresses cluster developments, and mandates that "[t]he Planning Commission shall determine if the preliminary plan(s) is consistent with the purpose and intent of the Zoning Ordinance related to cluster development and open space and these guidelines [setting forth five guidelines]." Article 11.1 (R. p. 387). Article 11.4 mandates that "[t]he required open space must be directly accessible to the largest practical number of lots within the development," as well as "safe, convenient access to the open space" from non-adjoining lots. As with Article 3.1, it is impossible to ascertain whether the Planning Commission analyzed these requirements or applied them at all.

In sum, the Planning Commission offered no specific findings of fact, conclusions of law, or any other "grounds for approval or disapproval" to support its decision as required by S.C.

Code Ann. § 6-29-1150(B). (R. pp. 186-87). Without a written basis for its decision, it cannot be determined whether the Planning Commission exercised any discretion at all. As a result, the law demands that the Planning Commission be reversed for abuse of discretion and/or violation of the arbitrary and capricious standard.

II. There is no evidence in the record that the Stables development satisfies all three criteria of LDR Article 3.1 and/or the decision was controlled by an error of law

In order to grant approval, the Planning Commission must find that the proposed subdivision meets all three criteria of LDR Article 3.1: "Submitted subdivisions may be approved [by the Planning Commission] if they meet all of the following criteria: [a]dequate existing infrastructure and transportation systems exist to support the project; [t]he project is compatible with the surrounding land use density; [and t]he project is compatible with the site's environmental conditions, such as but not limited to, wetlands, flooding, endangered species and/or habitat, and historic sites and/or cemeteries." (R. p. 372).

A. There is no evidence in the record that adequate existing infrastructure and transportation systems exist to support the project, and the decision was controlled by an error of law

The first mandatory criteria that must be met is that the Planning Commission must find that "adequate existing infrastructure and transportation systems exist to support the project." (R. p. 372). The Stables has a single access point on Meadow Brook Road. (R. pp. 178, 145). The South Carolina Department of Transportation (DOT) would not comment on this access point because Meadow Brook Road is a county road and not a state road. (R. p. 178). However, Meadow Brook Road is a dead-end road that only has ingress or egress onto Old White Horse Road, a state road. (R. pp. 4, 147, 150-51). Although the access point provided for the Stables is technically Meadow Brook Road, the de facto access point will be Old White Horse Road. as Appellants argued at the Planning Commission meeting. (R. pp. 236, 239-40). Old White Horse

Road is already well known for its high-volume traffic that will only increase with the addition of the Stables. (R. pp. 93, 273, 276-77, 282, 291, 302, 310, 320, 328, 330, 332-33, 335).

One way to support a finding on this criterion is a traffic impact study (TIS). *See* LDR Article 9.1 ("A traffic impact study (TIS) evaluates the effect a development's traffic may have on existing roads.") (R. p. 383). Notably, the Planning Commission is allowed broad discretion to order a TIS under the LDR Article 9. (R. p. 383). Nevertheless, Commissioner Bichel noted that the Planning Commission could not order a TIS for the Stables because the LDR only requires them for proposed subdivisions of 90 lots (as compared to the 73 lots of the Stables). (R. p. 238). Commissioner Bichel also declared that the Planning Commission "can't combine them" in reference to the 73 lots of the Stables with the 40 lots of the new Stonepark development less than one mile north on Old White Horse Road. (R. p. 238).

Commissioner Bichel's expression of these limitations upon the Planning Commission's ability to require a traffic study was a blatantly erroneous interpretation of Article 9 of the LDR, which provides "guidelines" for determining whether to require a TIS. (R. p. 383). While Table 9.1 of the LDR does indicate that a TIS for developments of 90 units for single-family homes is "required," nothing in Article 9 states that the Planning Commission lacks the authority to order a TIS for developments of less than 90 homes. (R. p. 383).

Additionally, as Appellants argued to the Planning Commission prior to and at the meeting, the traffic impact of the Stables should have been considered in conjunction with other new developments in the area such as Stonepark subdivision. (R. pp. 93, 238). Stonepark is a new subdivision on Old White Horse Road that was scheduled to begin construction in May 2021. (R. p. 93). Stonepark is less than one mile away from the proposed location of the Stables. (R. p. 93). The combined effect of these two developments would be to add 113 new homes to

the area (with all residents spilling onto Old White Horse Road), which would easily trigger the need for a TIS. (R. pp. 93, 238). However, the Planning Commission stated that under the LDR, it could not consider the combined effect of two subdivisions when evaluating the need for a TIS. (R. p. 238). This was an error of law in and of itself as nothing in Article 9 states that the Planning Commission lacks the authority to consider the combined effects of two subdivisions when evaluating the need for a TIS. (R. p. 383).

In short, the Planning Commission's decision to approve the Stables preliminary plan without evidence of adequate existing infrastructure and transportation systems is without evidentiary support, arbitrary, an abuse of discretion, and controlled by a clear error of law. It therefore must be reversed.

B. There is no evidence in the record of compatibility with the surrounding land-use density

The second mandatory criteria that must be met is that the Planning Commission must find that the development is "compatible with the surrounding land use density." (R. p. 372). There is no evidence in the record that could support a finding that the Stables subdivision is compatible with the surrounding land use density. The Old White Horse Corridor in which the Stables is proposed to be located consists of rural agricultural and equestrian land. (R. pp. 94, 235, 325-26). Among the immediate surrounding properties of the Stables include Ms. Horney's 31-acre horse farm to the north; Riverbend Equestrian Park, a 63-acre equestrian facility to the southeast; as well as a 58-acre farm to the east of the Stables. (R. pp. 94, 325-26). The other surrounding properties consist mainly of agricultural and/or equestrian uses. (R. pp. 94, 325-26). The land to the immediate north of the Stables is Ms. Horney's 31-acre horse farm, the land to the immediate southeast is a 63-acre equestrian park, and the land to the immediate east of the Stables is a 58-acre farm. (R. p. 94, 235).

The Stables and surrounding land along the Old White Horse Corridor are located in Zone R-S, which allows for a land-use density of 1.7 homes per acre. (R. p. 401). The purpose of R-S zoning is to "provide reasonable safeguards for areas that are in the process of development with predominantly single-family dwellings but are generally still rural in character." (R. p. 395). Further, under the Planning Commission's own Comprehensive Plan, the Stables is located in the "Suburban Edge Classification," which is described as low-density residential areas that offer opportunities for low-intensity development that is well-integrated with the natural landscape and agricultural uses. (R. p. 419). The target density for such areas is "0 to 1 dwellings per acre." (R. p. 419).

By comparison, the Stables will consist of 73 home sites crammed onto approximately 19 acres (of the total 43-acre tract) with the remaining land used for open space and/or common areas. (R. pp. 94, 228). Most of these proposed homes are located on lots of only 7800 square feet (0.174 acres), which is a density of over 5.5 homes per acre. (R. p. 96). The Stables, as proposed, is not compatible with the surrounding land use density and in fact is entirely dissimilar to the surrounding area. As noted by Commissioner Clark, "Everything west of the Reedy is along this corridor is very rural, large lots. This is not a compatible use along this corridor. And the fact that [the Stables] is sandwiched between 2 equestrian facilities I think is also not a good fit." (R. p. 240).

The only attempt at the Planning Commission meeting to point to evidence of compatibility was a comment by Commissioner Rogers that he thought there may be a subdivision next to Green Valley where the lots were smaller and less than one acres, but he concluded: "I don't know if it's totally uncharacteristic of that area." (R. p. 241). This statement fails to offer any basis to conclude that the Stables was compatible with surrounding land use

density because it points to his lack of knowledge and fails even to specify the subdivision being referenced. In any event, the reference appears to be a reference to subdivisions shown on a GIS screenshot provided in the Planning Commission staff's report showing the location of developments east of the Reedy River, (R. p. 229), but these subdivisions are located in zone R-15, which allows for 2.9 units per acre for cluster developments (as compared to 1.7 units per acre for the correct zone of R-S). (R. p. 401, 454-56). In addition, they are in the "Suburban Neighborhood" land-use type under the Comprehensive Plan, which allows for a gross density of 3 to 5 dwellings per acre or up to a 500% increase in density when compared to Suburban Edge. (R. pp. 419, 457).

In short, there simply is no evidence in the record supporting a finding of compatibility with the surrounding land use density, and the Planning Commission's decision to approve the Stables preliminary plan without this evidence is without evidentiary support, arbitrary, an abuse of discretion, and a clear error of law. It therefore must be reversed.

C. Compatibility with the site's environmental conditions, such as but not limited to, wetlands, flooding, endangered species and/or habitat, and historic sites and/or cemeteries

The third mandatory criteria that must be met is that the Planning Commission must find that the project is "compatible with the site's environmental conditions." (R. p. 372). There is no evidence in the record that could support a finding that the Stables subdivision is compatible with the site's environmental conditions in terms of flooding. There is ample evidence in the record that the Stables is located in an area that is already prone to flooding. (R. pp. 191-99). This problem was brought to the attention of the Planning Commission by way of correspondence from Don Woodard and other concerned citizens. (R. pp. 191-99). The Subdivision Advisory Committee determined that the Stables was located in the Reedy River

watershed. (R. p. 220). However, as argued below, in reality the main waterflow in the area of the Stables is called "the Branch," which is an approximately one-mile blue-line stream that initiates from a pond on the Stables property and flows to the south. (R. pp. 94, 191). The Branch has experienced increased incidences of flooding affecting roads and other infrastructure at the location where the Stables is proposed. (R. pp. 191-199). All the water runoff in this area flows into the Branch. (R. p. 94). None of this waterflow reaches the Reedy River until it reaches Richmond Hills, which is approximately two miles from the location of the Stables. (R. p. 183). During heavy rain, the Branch will flood, causing damage to the surrounding properties as was shown in pictures presented to the Planning Commission. (R. pp. 191-199). The water runoff from the Stables will only increase the risk of flooding in this area.

In response to these concerns, RP&L's civil engineer Kevin Tumblin stated that "I don't [understand the flooding issue] either, and I'm not sure about that." (R. p. 239). He also conceded that he has not yet reached the design phase for stormwater runoff but that when they do they would "closely look at the existing pond to see if there are any issues." (R. p. 239). Therefore, there was no evidence in the record from which the Planning Commission could find that the criteria for environmental compatibility was met, and the Planning Commission's decision to approve the Stables preliminary plan without this evidence is without evidentiary support, arbitrary, an abuse of discretion, and a clear error of law. It therefore must be reversed.

III. There is no evidence in the record that the Stables development had approval from the fire department

The welfare and safety of the public is a major consideration for the Planning Commission when deciding whether to approve a development. See LDR, Article 1.1 (R. p. 368). Regarding the Stables, the Planning Commission expressed concern about the ability of the Greenville County Fire Department to safely access the subdivision via Meadow Brook Road in

case of an emergency. (R. pp. 239-40). Specifically, Commissioner Cindy Clark noted the proposed access was an "awkward way to get into the subdivision and leave the subdivision." (R. p. 239). Meadow Brook Road is currently only 16-feet wide. (R. p. 145). The developer plans to widen Meadow Brook Road to 20 feet, but only from Old White Horse Road to the proposed entrance. (R. p. 96).

Commissioner Clark expressed concern that the Greenville County Fire Department had not commented on the access, noting she had "real concerns" about a fire truck being able to access the development and noted she would like to hear from the fire department about that issue. (R. pp. 239-40). In response, Planning Commission staff informed Commissioner Clark they had contacted the Fire Department for comment; however, they had not responded. (R. p. 240). Planning Commission staff noted the decision to approve the Stables could be delayed to allow the fire department to comment; however, the Planning Commission approved the Stables despite receiving no input from the fire department. (R. p. 240).

The only evidence offered by R&L was Kevin Tumblin's answer to one question from Commission Hammond whether there was "any reason to believe there's a fire safety access issue": "No. After we do improvements to the front entrance and widen it, whatever the county recommends, there won't be any issues." (R. p. 240). This self-serving statement failed to provide any evidence that the Fire Department had indicated that it could safely serve the proposed subdivision. The Planning Commission ignored its statutory duty to ensure that the safety and welfare of the public is protected by new developments. *See* S.C. Code Ann. § 6-29-1120 (Supp. 2019) (stating that "[t]he regulation of land development by municipalities, counties, or consolidated political subdivisions is authorized for the following purposes . . . to assure the adequate provision of safe and convenient traffic access and circulation, both

vehicular and pedestrian, in and through new land developments[.]" (emphasis added)); LDR Article 1.1 (stating the Greenville County Council adopts the LDR "to provide for . . . a distribution of population and traffic which will create conditions favorable to the health, safety, and welfare of the general public."); LDR Article 1.2 ("The public health, safety, . . . and general welfare require the harmonious, orderly, and progressive development of land within the municipalities and counties of the State of South Carolina.") (R. p. 368). The Planning Commission's approval of the Stables despite public safety threats is necessarily without evidentiary support, arbitrary, an abuse of discretion, and based on a misunderstanding of law.

IV. There is no evidence in the record that the Stables' Revised Preliminary Plan complied with LDR Article 11 and the Greenville County Zoning Ordinance

As a "cluster development," the Stables is subject to specific requirements under the LDR and the Zoning Ordinance related to the "open space" provided for in the preliminary plan. See generally LDR Article 11 (R. pp. 387-91). Specifically, the developer shall show the "developable" and "undevelopable" acreage of open space on the preliminary plan as well as the proposed uses for the open space. LDR Article 11.3.2(B) (emphasis added) (R. p. 388). The open space must also be "directly accessible to the largest practical number of lots within the development." LDR Article 11.4 (R. p. 388). "Non-adjoining lots must be provided with safe, convenient access to the open space." (R. p. 388).

The following is a summary of the proposed "open space" for the Stables as shown on the Revised Preliminary Plan (R. p. 96):

Undeveloped Area E (Developable) - 10.9 acres of open space. This property is on the far east end of the property closest to the Reedy River.

Undeveloped Area F (Undevelopable) - 2.00 acres. This property is apparently located within the floodplain on or near the Reedy River.

As argued below and noted herein, the Stables Revised Preliminary Plan, as proposed, violates LDR Article 11 in several ways. First, the open space is not "directly accessible to the largest practical number of lots within the development." LDR, Article 11.4 (R. p. 388). The open space provided for by the Stables Revised Preliminary Plan is located on the far east side of the property away from a majority of the proposed homesites in the development. (R. p. 96). There appear to be at most 5 out of 73 lots that have direct access to the open space. (R. p. 96). Likewise, 10.9 acres of the open space, labeled "Undeveloped Area E" on the revised plan, is a dense forest with steep slopes. (R. p. 96). The other 2 acres are located on the farthest end of the property in the Reedy River floodplain and are certainly not "directly accessible" by any of the lots. (R. p. 96).

Additionally, the Stables Revised Preliminary Plan does not provide any proposed uses for the open space as required by LDR Article 11.3.2(B). (R. pp. 96, 388). It is unclear whether the proposed open space will be preserved for "recreational, environmental, or ecological reasons" as intended by the LDR as no proposed uses to date have been given for the Stables' open space. (R. p. 387). Indeed, it is difficult to imagine what the proposed uses for the open space will be when, again, it consists of 10.9 acres of a dense forest with steep terrain and another 2 acres of undevelopable land inside a floodplain. (R. p. 96). The developer's failure to identify any proposed uses expressed for this open space either on the Revised Preliminary Plan or otherwise is a violation of both the LDR and Zoning Ordinance. (R. pp. 388, 397).

Under the LDR, the open space must also comply with the Zoning Ordinance. See LDR Article 11.1 ("The Planning Commission shall determine if the preliminary plan is consistent with the purpose and intent of the Zoning Ordinance related to cluster development and these guidelines . . . Home sites are clustered to preserve open space for recreational, environmental, or

ecological reasons[.]") (R. p. 387); LDR Article 3.3.4(N) ("The Preliminary Plan shall comply with the requirements of the Zoning Ordinance in effect in the area proposed for a subdivision.") (R. p. 374).

The Zoning Ordinance provides two options for a developer to choose from in deciding to use open space development. (Zoning Ordinance, Section 7:2.3, Section 7:2.4) (R. p. 398). Under Option #1—which Respondents chose for the Stables—a development of 43 acres zoned R-S with public water requires a minimum open space of 12.9 acres or 30% of the total acreage. (Zoning Ordinance, Table 7.1) (R. p. 401). Under Option #1, land dedicated to open space must be of meaningful proportions and dimensions, must be contiguous to the extent practicable, and must not include land dedicated for uses such as community swimming pools, clubhouses, and similar uses. (Zoning Ordinance, Section 7:2.4-6) (R. p. 399). Additionally, fenced detention or retention areas used for stormwater management "shall not be included in the calculation of required open space." (Id.) (R. 399). Moreover, the minimum tract area for the open space shall be 2 acres, which must consist of contiguous parcels, not be divided by an existing public or private road or a recreational or navigable body of water. (Zoning Ordinance, Article 7:2.4-1) (R. p. 398). Finally, under Option #1, the open space may consist of developable and undevelopable land. (R. p. 399). The Zoning Ordinance defines "Developable Land" as "land which is suitable as a location for structures." (Zoning Ordinance, Article 4). The Zoning Ordinance defines "Undevelopable Land" as "land that has developmental constraints due to one of the following constraining factors: land with a slope greater than 30 percent, lakes, marshes, sloughs, wetlands, areas within the Area of Special Flood Hazard, defined as the land in the floodplain within a community subject to inundation by the base flood having a one percent or greater chance of being equaled or exceeded in any given year, and areas of recent or active landslides." (Zoning

Ordinance, Article 4) (R. p. 394).

An examination of the open space provided for by the Stables Revised Preliminary Plan reveals several violations of the Zoning Ordinance. First, it appears that the Planning Commission staff may have used common area in calculating the open space for the Stables. Specifically, the staff report states that the Stables includes "12.9 acres of common area including detention area, community park and cluster mailbox area." (R. p. 231). To the extent the detention area and/or "community park" were included in the open space calculation, this was a violation of the clear language in Section 7:2.4-6 as those areas cannot be used in the open space determination. (R. p. 399). Next, as shown by the attached survey of the Stables' location dated June 17, 2021, it appears that Area E, which the developer and the preliminary plan labeled "developable land" in fact includes wetland areas. (R. p. 367). If Area E in fact includes wetland areas, then those areas are "undevelopable" by definition under the Zoning Ordinance. (Zoning Ordinance, Article 4) (R. p. 394). Consequently, it appears that some of the open space provided by the Stables is in fact undevelopable contrary to what was presented on the Revised Preliminary Plan and approved by the Planning Commission.

Finally, it appears that there was an error with the calculation of the required open space for the development. Specifically, the attached survey shows that the area where the Stables is located consists of 43.6989 acres unlike the 43 acres as stated on the Revised Preliminary Plan. (R. pp. 96, 367). Because the property consists of 43.6989 acres, under the Zoning Ordinance, the Stables requires 13.1 acres of open space (30% x 43.6989 = 13.1). (Zoning Ordinance, Table 7.1) (R. p. 401). Therefore, the proposed 12.9 acres of open space for the Stables Revised Preliminary Plan is insufficient and thus in violation of the LDR and Zoning Ordinance.

The Planning Commission's decision to approve the Stables Revised Preliminary Plan

despite clear violations of LDR Article 11 and the Zoning Ordinance is without evidentiary support, arbitrary, an abuse of discretion, and a clear error of law.

V. The Planning Commission violated Appellants' procedural due process rights by not making the Revised Preliminary Plan available to the public prior to the May 26, 2021 meeting

Prior to and even after the meeting held on May 26, 2021, the preliminary plan presented on the Planning Commission's website was dated March 31, 2021 (the "public plan"). (R. pp. 346-351). It appears this was the initial preliminary plan submitted by the developer on March 31, 2021 along with its application. (R. pp. 167-168, 175, 214). However, the developer submitted a Revised Preliminary Plan dated April 26, 2021, in response to SAC's recommended changes. (R. pp. 216, 225). The Planning Commission had possession of the Revised Preliminary Plan for one month prior to the May 26, 2021, meeting; however, it was never made available to the public prior to the meeting. Importantly, the Revised Preliminary Plan contained several differences related to the configuration of the "open space" for the Stables, which is subject to specific requirements under Article 11 of the LDR. For example, the Revised Preliminary Plan contained 12.9 acres of open space; whereas, the public plan contained 14.05 acres of open space. (R. pp. 96, 160). The Revised Preliminary Plan also labeled certain open space as "developable," but the public plan did not. (R. pp. 96, 160).

The configuration of the open space—and its violation of Article 11 of the LDR—served as a substantial argument of Ms. Horney's counsel in opposition to the Stables (that in the plan "we reviewed there was not any area of the open space labeled developable.") (R. p. 235). The concerns were brought to the Planning Commission's attention during the presentation at the Planning Commission meeting. (R. p. 235). Furthermore, this procedural error was conceded by the Planning Commission following the meeting. (R. pp. 161-62). Specifically, Ms. Paula

Gucker, Assistant County Administrator for Community Planning, Development and Public Works, acknowledged in an email to the undersigned that the Planning Commission did not make the Revised Preliminary Plan available to the public on its website, even the day after the Revised Preliminary Plan was approved. (R. pp. 161-62). Therefore, it is undisputed that the public did not have access to the Revised Preliminary Plan prior to the May 26, 2021, meeting. See Greenville County Planning Commission Bylaws, Article I, Section 5 (stating the Secretary "shall . . . [m]aintain commission records as public records"); *id*. at Article V, Section 2 ("Copies of all notices, correspondence, reports, and forms shall be maintained as public records.") (R. pp. 436, 438). The Planning Commission's position that the correct plan was available in the file is not helpful when the public plan being provided to the public online is inconsistent. The public should not be put in a position to have to double check (and to do so on a daily basis) to see if the Planning Commission's documents posted on its website are up to date.

This procedural error prevented Appellants and all those in opposition from being able to examine the changes the developer made between the two preliminary plans and impacted the brief ten minutes, combined, in which citizens may speak against the Application. Had Appellants been provided with the Revised Preliminary Plan prior to the meeting, their arguments would have shifted to address the changes related to the specifications of the "open space" between the public plan and the Revised Preliminary Plan. Moreover, Appellants would have been able to bring these arguments to the Planning Commission's attention prior to their ultimate approval. Instead, Appellants were denied the opportunity to sufficiently examine the Revised Preliminary Plan prior to its approval on May 26, 2021.

Due process requires, at a minimum, that a party be given notice and an opportunity to be heard in a meaningful way. *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656

S.E.2d 346, 350 (2008). Appellants were denied that right as they were not provided notice of the proper plan that was up for approval at the May 26, 2021, hearing. Similarly, Appellants were denied an opportunity to be heard in a meaningful way as they were not allowed the opportunity to present objections on the actual plan that was up for approval. Appellants could not have been heard in a meaningful way as they were denied access to the essential document that was before the Planning Commission for approval. The prejudice from this due process violation is clear—Appellants had to craft their arguments around a document (the public plan) that was not even up for approval at the meeting. They then had to analyze the Revised Preliminary Plan "on the fly," in the collective ten minutes parties in opposition are allowed to speak, and at the only time the public is provided to oppose the preliminary plan. See Greenville County Planning Commission Bylaws, Article IV, Section 2 (providing parties in opposition 10 minutes to speak on a matter before the Planning Commission) (R. p. 438). Had Appellants been provided notice of the actual plan that was under consideration by the Planning Commission—even shortly before the meeting—their strategy for opposing the Revised Preliminary Plan would have adapted. Instead, Appellants were led to believe, and consequently forced to make arguments concerning, a plan that was not even under consideration by the Planning Commission. This error caused Appellants to lose credibility in the eyes of the Planning Commission and to spend their public comment time focused on issues that were not relevant.

Appellants respectfully assert that this procedural due process violation requires a reversal of the Planning Commission's approval of the Revised Preliminary Plan.

CONCLUSION

Appellants respectfully assert that the Planning Commission's approval of the Stables Revised Preliminary Plan violated their procedural due process rights to notice and an

opportunity to be heard in a meaningful way. The Planning Commission likewise erred in not making any findings of fact, conclusions of law, or other written grounds to support its decision. And there was no evidence in the record supporting all of the mandatory criteria for approval under LDR Article 3.1, LDR Section 11.1 and 11.4, and/or the Zoning Ordinance. Appellants respectfully request that this Court reverse the circuit court's affirmance of the Planning Commission's decision and reverse the Planning Commission's approval of the Stables subdivision Application.

Respectfully submitted,

s/ William M. Wilson III

William M. Wilson III (S.C. Bar No. 15808)
Wyche, P.A.
Post Office Box 728
Greenville, S.C. 29602-0728
(864) 242-8200

Date: April 24, 2023

Attorneys for Appellants

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IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Hon. G.D. Morgan, Jr., Circuit Court Judge

Commons Pleas Case No. 2021-CP-23-03048

Alliance to Preserve the Old White Horse Road Corridor, LLC
And Mary Jean Horney, ... Appellants,

v.

RP&L, LLC and the Greenville County Planning
Commission .... Respondents.

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants Alliance to Preserve the Old White Horse Road Corridor, LLC and Mary Jean Horney certified that the Final Brief of Appellant complies with Rule 211(b), SCAR

Respectfully submitted,

s/ William M. Wilson III

William M. Wilson III (S.C. Bar No. 15808)
Wyche, P.A.
Post Office Box 728
Greenville, S.C. 29602-0728
(864) 242-8200

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PROOF OF SERVICE

I, the undersigned Legal Assistant/Paralegal of the law offices of Wyche, P.A., attorneys for Alliance to Preserve the Old White Horse Road Corridor, LLC and Mary jean Horney in the within action, do hereby certify that I have this date served upon opposing counsel and/or parties in this action the foregoing **FINAL BRIEF OF APPELLANT** by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Parties Served:

Townes B. Johnson III
Townes B. Johnson III, LLC
P.O. Box 9246
Greenville, South Carolina 29604
tjohnson@sc.legal

Andrew F. Lindemann
Lindemann & Davis
P.O. Box 6923
Columbia, South Carolina 29260
andrew@ldlawsc.com

William F. Childers, Jr.
Eller Tonnsen Bach
1306 South Church Street,
Greenville, South Carolina 29605
wchilders@etblawfirm.com

s/William M. Wilson III
William M. Wilson III (SC Bar# 15808)

Greenville, South Carolina
April 24, 2023