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# Exhibit 1

## April 5, 2023 Order Granting Motion to Dismiss

Appellant Justin O'Toole Lucey's Notice of Appeal

*Justin O'Toole Lucey*
*v.*
*The Town of Mount Pleasant, South Carolina and WIN515, LLC*

Charleston County Court of Common Pleas Case No. 2022-CP-10-03328
Appellate Case No. 2023-___________

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FOR THE NINTH JUDICIAL CIRCUIT |
| COUNTY OF CHARLESTON | ) | |
| | ) | CASE NO.: 2022-CP-10-03328 |
| Justin O'Toole Lucey, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | **ORDER GRANTING DEFENDANT'S WIN515, LLC'S MOTION TO DISMISS PLAINTIFF'S APPEAL** |
| | ) | |
| | ) | |
| The Town of Mount Pleasant, South Carolina and WIN515, LLC, | ) | |
| | ) | |
| Defendants. | ) | |

This matter comes before the Court on Defendant WIN515, LLC's ("WIN515") Motion to Dismiss Plaintiff Justin O'Toole Lucey's ("Lucey") Complaint.

The Court conducted a hearing on the matter on January 27, 2023. Lucey, an attorney himself, appeared on his own behalf, Ross Appel appeared for WIN515 and Brian Quisenberry appeared for The Town of Mount Pleasant, South Carolina (the "Town"). On January 20, 2023 Defendant WIN515, LLC filed a memorandum in support of its Motion to Dismiss. On January 23, 2023, Plaintiff Justin Lucey filed a memorandum in opposition to the Motion to Dismiss. On January 26, 2023, Defendant Town of Mount Pleasant filed a memorandum in support of WIN515 LLC's Motion to Dismiss.

The Court has fully considered WIN515's Motion to Dismiss, the memoranda of law submitted in support of and in opposition, Lucey's Complaint, the Town's Notice of Opposition and Submission of the Record before the Design Review Board filed on August 24, 2022,[1] the applicable law, and the arguments of counsel.

[1] The Town takes the position that Lucey's attempt at an appeal is "procedurally and jurisdictionally defective in several respects. Thus, the Court may deny this appeal summarily without the need to proceed further into the substance of Appellant's appeal."

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The Court finds the Complaint should be dismissed, with prejudice, because Lucey lacks statutory standing to appeal the Town of Mount Pleasant Commercial Design Review Board ("DRB") decision at issue in this case, failed to name the DRB as a necessary party, failed to timely serve the DRB as required by Rule 74, SCRCP, and failed to exhaust certain mandatory administrative remedies.

## COMPLAINT'S ALLEGATIONS AND RECORD ON APPEAL

On July 25, 2022, Lucey filed a document styled a "Complaint"[2] against the Town of Mount Pleasant, South Carolina (the "Town") and WIN515. The Complaint seeks an order reversing both (1) the DRB's unanimous decision to grant June 29, 2022 "Final Approval of Site, Landscape, and Architecture" for WIN515's three-story office/retail development at 515 Coleman Boulevard, Mt. Pleasant, SC 29464 (the "Property") and (2) the decision to place WIN515's project on the June 29, 2022 agenda in the first place. (Compl. ¶¶ 21, 22, 24) (Record, Ex. A, Ex. B, Ex .D). The DRB is not named as a party.

The Complaint alleges Lucey has standing to appeal the DRB's decision because "[t]he Project is adjacent to a school, a school crossing, and a dangerous and busy intersection located at Coleman and Simmons ('the Crossing')" and "Plaintiff resides and owns properties near the Crossing. Plaintiff and his minor children have utilized the Crossing for a decade and continue to do so." (Compl. ¶¶ 8, 10). The Complaint includes, as an exhibit, Lucey's June 27, 2022 letter, which states in a footnote as follows:

> As you may be aware, my main office building and annex are located at the corner of Mill and Lucas (and has been since 1999), which neighborhood is accessed by the subject intersection. My residence is on the edge of this neighborhood on Rue de

[2] The Complaint was filed under the "Case Sub Type" classification "Real Prop / Other 499" – not "Zoning Board – 970." As a result, the Charleston County Clerk of Court processed the Complaint as an ordinary civil action, not a zoning appeal from a local quasi-judicial body.

Muckle. I pass through this intersection on foot, on bike, and by car many times a week, alone, or with my 3-year-old child and others.

## STANDARD OF REVIEW

The Rules of Civil Procedure generally apply with respect to appeals to circuit court from "the judgement of an inferior court or decision of an administrative agency or tribunal." Rule 74, SCRCP ("The proceedings in the circuit court shall be in accordance with these rules, and priority shall be given to the hearing and disposition of such appeals in accordance with law.").

Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its "failure to state facts sufficient to constitute a cause of action." In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper. *Id*.

## CONCLUSIONS OF LAW

South Carolina's appellate courts have not been shy to dismiss, with prejudice, jurisdictionally defective zoning appeals. Lucey's appeal suffers from numerous, fatal jurisdictional defects. These include the failures to allege statutory standing, to name the DRB (a necessary party to this appeal), to timely serve the DRB, and to exhaust administrative remedies. Each of these jurisdictional defects, on their own, is sufficient to dismiss the Complaint with prejudice. The Court agrees with both WIN515 and the Town that the Complaint should be dismissed with prejudice.

### A. Lucey lacks statutory standing to appeal the DRB's decision.



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Lack of standing can be raised on a motion to dismiss. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) ("Defendants move to dismiss Plaintiffs' complaint in its entirety on the ground Plaintiffs lack standing to bring any of the claims contained therein. We agree.").

"Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation." *Youngblood v. S.C. Dep't of Soc. Servs*., 402 S.C. 311, 31 7, 741 S.E.2d 515, 518 (2013). "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020), *reh'g denied* (Aug. 7, 2020).

The Town's Zoning Code establishes the DRB and governs the procedure for appealing its decisions. Section 156.420(A)(1) confirms the DRB is a "board of architectural review" governed by the South Carolina Planning and Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310, *et seq*. (the "Act"). S.C. Code Ann. § 6-29-900(A) limits statutory standing to appeal board of architectural review decisions to those with a "substantial interest" in the decision.

Neither Lucey's Complaint nor the evidence contained in the Record on Appeal establish that Lucey has a "substantial interest" as required to confer standing sufficient to support his appeal in this case. Lucey has failed to establish that he is an owner of property "adjacent to and in the near vicinity of the proposed development at issue in this appeal. See, Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island, 292 S.C. 542, 357 S.E.2d 487 (Ct. App. 1987), rev'd on other grounds, 367 S.E.2d 160 (1988) (holding that owners of property "adjacent to and in the near vicinity of [a proposed development]" were persons with "substantial



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interest" in a zoning decision to establish standing to appeal the decision). See also, Momeier v. John McAlister, 193 S.C. 422, 8 S.E.2d 737 (1940) (neighboring property owner alleging special injury and damage to his property because immediate neighbor was conducting funeral home in a residential district has a significant interest different from the public at large to support an action for injunction for violation of the city ordinance).

To have standing a party must also be a real party in interest. The South Carolina Court of Appeals has described a "real party in interest" as one with "a real, material, or substantial interest in the outcome of the litigation." *Hill v. South Carolina Dept. of Health and Environmental Control*, 389 S.C. 1, 698 S.E.2d 612 (2010). Someone who is a "real party in interest" with "substantial interest" is not "one who has only a nominal, formal, or technical interest in, or connection with, the action." *Stoney v. Stoney*, 425 S.C. 47, 819 S.E.2d 201 (2018).

The requirement that the party must have a "substantial interest" to have standing to appeal a zoning decision was discussed in detail in *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001). There, the Court of Appeals found a non-profit environmental group lacked standing because:

> The League has not alleged that it or its members have suffered or will suffer an individualized injury as the result of the filing of the subdivision plats. Although the League alleges its members will suffer injury if the islands are developed, the injury is purely conjectural and hypothetical. There is no evidence in the record that either the League or its members have suffered any actual injury by the filing of the subdivision plats.

551 S.E.2d 589.

The Complaint alleges Lucey "resides and owns properties near the Crossing. Plaintiff and his minor children have utilized the Crossing for a decade and continue to do so." (Compl. ¶ 10). The June 27, 2022 letter, attached to the Complaint, states: "As you may be aware, my main office building and annex are located at the corner of Mill and Lucas (and has been since 1999), which

neighborhood is accessed by the subject intersection. My residence is on the edge of this neighborhood on Rue de Muckle."

The Complaint fails to provide the address for Lucey's law firm and his home, and that information is not contained in the Record on Appeal. Lucey therefore has failed to establish that he is an owner of property adjacent to and in the near vicinity of this proposed development.

Furthermore, Lucey's alleged harms are purely "conjectural and hypothetical" and do not constitute an "individualized injury." Lucey's Complaint focuses on alleged traffic safety issues associated with the proposed development, but none of these technical matters are addressed by way of "competent evidence" either in the record of the DRB hearing or in the Complaint. Bannum, Inc. v. City of Columbia, 335 S.C. 202, 206, 516 S.E.2d 439, 441 (1999) (reversing a zoning board's denial of a special exception permit and holding that although neighboring residents testified they felt a proposed halfway house would increase traffic, there was no factual evidence presented to support that allegation); Wyndham Enters., LLC v. City of N. Augusta, 401 S.C. 144, 150-51, 735 S.E.2d 659, 663 (Ct. App. 2012) ("Regarding the residents' traffic concerns, we note that although there was testimony that residents felt the fireworks business would increase traffic, they failed to offer any competent evidence to support their opinions.") Lucey is an attorney – not a traffic engineer or safety expert; therefore his opinion on these technical matters does not consist of "competent evidence." Furthermore, the DRB is a board of architectural review and traffic safety issues are entirely outside its purview. Finally, while Lucey alleges to use the intersection near the Property – so do several thousands of other people every day. Lucey's alleged harms, to the extent there are any, are indistinguishable from that of the general public. For these reasons, the Complaint's alleged harms are purely "conjectural and hypothetical" and fail to articulate any "individualized harm." Beaufort Realty Co., Inc. v. Beaufort County, supra. Accordingly, the Court concludes the Complaint and the Record



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on Appeal fail to establish Lucey has the required "substantial interest" to confer standing to bring this appeal.

This Court also takes judicial notice of the following public records: Lucey's law firm is located at 415 Mill Street, Mt. Pleasant, SC 29464 (the "Lucey Office") and Lucey's residence is located at 634 Rue De Muckle, Mt. Pleasant, SC 29464 (the "Lucey Home"). The Court further takes judicial notice of the location of and spatial relationship between the Lucey Office, Lucey Home, and the Property at issue in this appeal, according to the GIS Website for Charleston County.

The Lucey Office is denoted by a red "X," the Lucey Home by a blue "X," and the Property by a green "X."

Lucey does not own property physically adjacent to WIN515's Property. Both the Lucey Office and the Lucey Home are on the other side of Coleman Boulevard, one the busiest thoroughfares in Mount Pleasant. Therefore, his property ownership interests alleged in the Complaint fail to satisfy the "substantial interest" test laid out in *Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island*, *supra*.

Given the above, Lucey lacks statutory standing under S.C. Code Ann. § 6-29-900(A) to maintain the instant appeal, and his appeal is therefore dismissed.

**B. Lucey failed to timely name the DRB – a necessary party to this appeal.**

An appeal from the DRB must be "filed within thirty days after the affected party receives actual notice of the decision… ." S.C. Code Ann. § 6-29-900(A). A zoning appeal must be perfected within the statutorily defined thirty (30) day appeal period. *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 (Ct. App. 2000) (the timeliness of an appeal from the decision of a zoning board is jurisdictional). An appellant cannot amend an appeal outside the thirty (30) day appeal period to name a necessary party. *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004).

The DRB is a necessary party in this appeal.[3] The statutory procedures governing appeals from the board of architectural review necessitate bringing the board itself within the circuit court's jurisdiction. *See*, *e.g.*, S.C. Code Ann. § 6-29-920 ("the clerk of the circuit court must give

[3] Zoning appeals routinely include, as a respondent, the board itself in addition to the local government entity itself. *See*, *e.g.*, *Croft v. Town of Summerville Bd. of Architectural Review*, 433 S.C. 473, 860 S.E.2d 352 (2021); *Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019); *Christ Cent. Ministries v. City of Columbia Bd. of Zoning Appeals*, 424 S.C. 358, 818 S.E.2d 30 (Ct. App. 2018).



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immediate notice of the appeal to the secretary of the board. . ."); S.C. Code Ann. § 6-29-930(A) ("In the event that the decision of the board is reversed by the circuit court, the board must be charged with the costs which must be paid by the governing authority which established the board of architectural review."); *Spanish Wells Prop. Owners Asso. v. Bd. of Adjustment*, 295 S.C. 67, 68-69, 367 S.E.2d 160, 161 (1988) (holding a development permittee is a necessary party in a zoning appeal because, among other things, it "serves judicial economy" because "the permittee will be bound because it is a party to the appeal.").

Lucey failed to name the DRB within the thirty (30) day appeal period, and he has not attempted to name the DRB since the filing of the Complaint. Without naming the DRB, this Court lacks jurisdiction over the DRB and lacks the authority to order any relief in this matter. The DRB would not be bound by this Court's decision since it is not a party. See, *Spanish Wells Prop. Owners Asso. v. Bd. of Adjustment*, *supra*. Naming the Town itself is insufficient to perfect the instant zoning appeal. The Town and the DRB are distinct legal entities with separate interests and roles in this appeal.

For these reasons, the purported appeal is jurisdictionally deficient due to Lucey's failure to name all necessary parties. This is a fatal defect that cannot be cured given the expiration of the thirty (30) day appeal period. The Complaint, therefore, must be dismissed with prejudice.

**C. Lucey failed to timely serve the DRB – a necessary party to this appeal.**

In addition to being governed by the Act, zoning appeals must also comply with Rule 74, SCRCP ("Procedure on Appeal to the Circuit Court"). That rule provides, in relevant part, as follows: "Notice of appeal to the circuit court must be **served** on **all parties** within thirty (30) days after receipt of written notice of the judgment, order or decision appealed from." (Emphasis added).



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Lucey has failed to comply with Rule 74, SCRCP because the filings of record reveal that the Complaint was not timely served on the DRB (a necessary, but omitted party). The sole affidavit of service of record reveals that the purported appeal was served on the Town. There is no affidavit of service on file with respect to the DRB.

As a result, Lucey has failed to timely perfect the instant appeal by serving all necessary parties. The timeliness of an appeal is jurisdictional. *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, supra.* Therefore, the Complaint must be dismissed with prejudice because Rule 74, SCRCP was not satisfied.

**FINAL ORDER AND JUDGMENT**

The Court **GRANTS** WIN515's Motion to Dismiss Lucey's Complaint with prejudice. Lucey has no right to appeal or otherwise challenge the DRB's June 29, 2022 "Final Approval of Site, Landscape, and Architecture" for the Property. It is hereby **ORDERED, ADJUDGED AND DECREED** that this appeal is **DENIED** with prejudice.

**IT IS SO ORDERED.**

____________________________
Judge R. Keith Kelly

________________, 2023
Charleston, South Carolina



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Charleston Common Pleas

**Case Caption:** Justin O'Toole Lucey VS Win515 Llc , defendant, et al

**Case Number:** 2022CP1003328

**Type:** Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165

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