RECEIVED
Aug 01 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2022-CP-23-03356 (S.C. Ct. App. filed Jan. 30, 2023)
Appellate Case No. 2023-000144

Citizens for Quality Rural Living, Inc., ……Appellant,

v.

LyonJay and the Greenville County Planning Commission, ……Respondents.

RESPONDENT LYONJAY'S FINAL BRIEF

Dated: August 1, 2023

Greenville, South Carolina

FOX ROTHSCHILD LLP

/s/William A. Neinast
William Swent, S.C. Bar No. 13519
R. Taylor Speer, S.C. Bar No. 100455
William A. Neinast, S.C. Bar No. 104218
2 W. Washington Street
Suite 1100
Greenville, SC 29601
Tel: 864.751.7600
Fax: 864.751.7800
WSwent@FoxRothschild.com
TSpeer@FoxRothschild.com
WNeinast@FoxRothschild.com

ATTORNEYS FOR RESPONDENT LYONJAY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The Circuit Court utilized the correct standards of review in ruling that the Greenville County Planning Commission had sufficient evidence before it to approve the Preliminary Plan.

II. The Circuit Court did not err in rejecting Appellant's claim that its due process rights were violated where Appellant admitted that it received notice and opportunity to be heard, and was in fact heard, prior to the approval of the Preliminary Plan.

III. Appellant failed to preserve any issues on appeal from the Greenville County Planning Commission below.

STATEMENT OF THE CASE AND FACTS

Citizens for Quality Rural Living, Inc. (hereinafter "Appellant" or "CQRL") has appealed a decision of the Greenville County Planning Commission (hereinafter the "GCPC") approving the preliminary plan for a proposed subdivision called River Preserve in Greenville County. Respondent LyonJay intends to develop River Preserve and is under contract to purchase the land in question, approximately 220 acres in rural Simpsonville, South Carolina. To that end, LyonJay filed a preliminary plan with the GCPC on April 6, 2022 (R. p. 84 – 85) as the Greenville County

Land Development Regulations (LDR) require (*see* R. pp. 278 – 479). LyonJay's preliminary plan submissions included a wetlands and riparian buffer delineation report (hereinafter the "Wetlands Delineation") (R. pp. 93 – 111), multiple traffic impact studies (TIS) (R. pp. 117 – 186; *see also* fn. 1, *infra*), and various other documents related to the planned subdivision (*e.g.,* Preliminary Plats at R. pp. 84 – 88). The Wetlands Delineation was prepared by Jon Pruitt, a qualified environmental consultant of twenty-seven (27) years and President of Atlantic Environmental Services, Inc (R. pp. 93 – 111). The TIS were prepared by Allen Reid, a Professional Engineer with Impact Designs, Inc. (R. pp. 117 – 186).

A lengthy pre-submittal and committee review process followed. Respondent LyonJay met with GCPC Subdivision Advisory Committee members and incorporated several recommended changes and inclusions in revised preliminary plan submissions (*e.g.,* R. pp. 84 – 88; 113 – 116). All such submissions were a matter of public record maintained by Greenville County (*see* R. p. 75).[1] After the conclusion of this feedback and resubmission process, the GCPC voted at a normally scheduled public meeting on May 25, 2022 to approve the preliminary plan (hereinafter

[1] Respondent Greenville County Planning Commission has previously furnished an affidavit from Greenville County's Subdivision Administrator describing the recordkeeping process for subdivision-related materials, and the availability of those materials as a matter of public record. *See* R. p. 75 (describing such testimony). However, in the course of preparation of final briefs, counsel for both Respondents realized that Appellant had omitted that affidavit from the Record on Appeal, as well as another affidavit from Respondent LyonJay's environmental consultant, all exhibits to all motions filed below, all exhibits to all briefing filed below, one Traffic Impact Study, letters of transmittal to the GCPC, and the meeting minutes approving the Preliminary Plan for River Preserve, the decision of which Appellant now seeks review from this Court. All such items were designated to be included in the Record on Appeal. Counsel for Respondents promptly communicated with each other and counsel for Appellant to redress these omissions. Appellant has filed a request with the Court for an extension to supplement the Record on Appeal and file the final briefs, simultaneously, to Friday, August 4, 2023. Respondent LyonJay does not oppose the request insofar as it seeks permission to supplement the Record, and indeed agrees that such supplementation has merit, but maintains that another extended briefing schedule is unnecessary in a case that has already seen unfortunate and substantial delay, particularly where the documents would merit only minimal additional citation.

the "Plan") for River Preserve (R. pp. 89 – 092) (*see* fn. 1). Several of Appellant's "members" attended and spoke in opposition to the Plan at this meeting. *Notice of Appeal from GCPC* at ¶ 21 (R. pp. 17 –18; 187 – 197).

Appellant filed its Notice of Appeal of the GCPC's decision with the Greenville County Court of Common Pleas on June 24, 2022, pursuant to S.C. Code Ann. § 18-7-10 *et seq*., Rule 74, SCRCP, and provisions of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (S.C. Code Ann. §6-29-310 to 1640, hereinafter the "LGCPEA").[2] In essence, Appellant claimed that (1) the Wetlands Delineation failed to consider certain waterways, (2) the TIS were improperly conducted utilizing a supposedly insufficient number of intersections, and (3) Appellant did not receive due process (R. pp. 14 – 32). Appellant engaged in significant briefing, to which LyonJay and the GCPC responded (R. pp. 33 – 83). Respondents submitted that the wetlands delineation and TIS were both conducted in accordance with the requirements of the LDR, and that Appellant received sufficient due process throughout the planning process.

On September 23, 2022, Judge Edward W. Miller heard the parties at oral argument (transcript at R. pp. 236 – 277), and rendered an Order on November 4, 2022 affirming the GCPC's decision to approve the Plan (R. pp. 1 – 10). Appellant moved for reconsideration on November 10, 2022 (R. pp. 198 – 211), which was denied via Form 4 Order on January 18, 2023 (R. pp. 11 – 13). Appellant's Notice of Appeal of both Orders to this Honorable Court followed on January 30, 2023.

STANDARD OF REVIEW

[2] While the Notice of Appeal, Appeal, and Summons filed with this Court are dated June 23, 2022, the file stamps on these documents indicate that they were in fact filed on June 24, 2022.

S.C. Code § 6-29-1150 provides a right to appeal planning commission decisions, and various procedural statutes such as S.C. Code Ann. § 18-7-180 and -190 and common law establish standards for review. As for alleged errors of fact, planning commission decisions receive the same level of deference as that given to findings of fact by a jury. *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 173, 656 S.E.2d 346, 351 (2008); *see also Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000) ("The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision."). This high degree of deference is commonly known as the "any evidence" standard. It is well-established that a South Carolina court must uphold a planning commission decision unless there is no evidence to support it. *Kurschner,* 376 S.C. at 173, 656 S.E.2d at 351; *Town of Hollywood v. Floyd,* 403 S.C. 466, 476, 744 S.E.2d 161, 166 (2013). Trial courts are not free to substitute their judgment for that of the Commission. *Town of Hollywood,* 403 S.C. at 476, 744 S.E.2d at 166 (2013); *Kurschner*, 376 S.C. at 173-174, 656 S.E.2d at 351 (2008). The "any evidence" standard is the ***most deferential standard*** of review recognized by South Carolina's courts, and planning commissions receive this deference because of our Supreme Court's recognition of "the legislature's intent [to grant] a planning commission broad discretion in this area." *Kurschner*, 376 S.C. at 173-174, 656 S.E.2d at 351.

It is also correct that planning commission decisions are subject to review for errors of law. *Kurschner*, 376 S.C. at 173-174, 656 S.E.2d at 351; and can "be overturned if [they are] arbitrary, capricious, [have] no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Rest. Row Assocs. v. Horry Cty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999); *see also Gurganiuous v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912 (Ct. App. 1995) (decision to be upheld absent abuse of discretion).

ARGUMENT

I. CONSIDERING SUFFICIENT EVIDENCE BEFORE IT AND UTILIZING THE DISCRETION IT IS AFFORDED BY LAW, THE GCPC PROPERLY APPROVED THE PRELIMINARY PLAN.

The Circuit Court correctly held that the GCPC did not err in approving the Plan. The GCPC's decision bore sufficient evidentiary support under the "any evidence" standard, and neither it nor the Circuit Court committed any errors of law warranting reversal. Our Supreme Court has now several times admonished against trial courts substituting their judgment for the judgment of county planning commissions as democratic bodies where no abuse of discretion is obvious from the record, and the Circuit Court here was correct in assessing that the GCPC did not abuse its discretion in approving the Plan. *See, e.g., Town of Hollywood v. Floyd,* 403 S.C. 466, 476, 744 S.E.2d 161, 166 (2013) ("By statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it.") (citing S.C. Code Ann. § 6–29–840 (2005)); *Bear Enterprises v. Greenville County*, 319 S.C. 137, 459 S.E. 2d 883 (1995).

Here, the Circuit Court explicitly considered and rejected Appellant's prior attempts to disguise its challenges to development as specious questions of law:

> Despite the South Carolina Supreme Court's admonition to the judiciary to give planning commission decisions a wide berth, CQRL asks this Court to substitute its opinion for that of the Planning Commission by asking this Court to weigh the sufficiency and adequacy of evidence available in the record. However, this Court does not engage in a de novo review. The Planning Commission's consideration of the wetlands delineation and the traffic impact study is neither fatal to the decision for approval nor warrants reversal. As with any evidence offered, debate may be taken on a document's content and opinions presented for and against the document. Evidence in the record shows that CQRL presented similar arguments before the Planning Commission as it does now before this Court. ***However, arguments on the sufficiency or adequacy of evidence are still arguments regarding evidence considered by the Planning Commission. CQRL's opposite viewpoint to that evidence does not constitute an error of law in the Planning Commission's consideration and determination of that evidence.***

Nov. 4, 2022 Order at 4 (emphasis added) (R. p. 4). Appellant CQRL strives to convince this Court that the Circuit Court overlooked repeated arguments that the GCPC had made legal miscalculations. The emphasized language from the Circuit Court's Order demonstrates that the lower court is not guilty of oversight. Rather, the Circuit Court openly searched for an error of law and found none. Further, per our Supreme Court in *Kurschner,* overturning the GCPC's decision to approve even had a genuine error of law been encountered would have only been appropriate if the decision was "controlled by" that error. *Kurschner,* 376 S.C. at 175, S.E.2d at 352. There is no evidence of any such "controlling" error here, and therefore the Circuit Court's decision must be affirmed.

A. The Circuit Court did not err in holding that the GCPC properly considered the Wetlands Delineation, which was conducted in accordance with the LDR requirements, as sufficient evidence for Plan approval.

Appellant CQRL's criticism of the Wetlands Delineation as tantamount to error of law is nothing more than an attempt to relitigate claims of factual insufficiency that CQRL has now asserted numerous times without success.[3] In essence, Appellant claims that the Wetlands Delineation was factually and/or legally insufficient because Appellant falsely declares it assessed "waters of the United States," as opposed to "waters of the State."[4] This argument comes in spite of the fact that in its initial Notice of Appeal from the GCPC, Appellant admitted that the GCPC only voted to approve the Plan after further "discussion regarding delineation of waterways and wetlands on site. . ." at the publicly held May 25, 2022 meeting, without restriction of discussion

[3] Appellant has produced absolutely no factual evidence whatsoever in opposition to either the Wetlands Delineation or the TIS at any point. Appellant has not pointed to any areas of the proposed Plan that would actually violate the waterway, wetland, or riparian buffer requirements.
[4] "Waters of the United States" is an arguably more narrow definition, though Appellant admits that the precise definition of "waters of the United States" has a "tortured regulatory and judicial history." *Appellant's Initial Br.* at 18, fn. 8.

to any specific definition of "waters." *Notice of Appeal from GCPC* at ¶ 22 (R. p. 18). Setting aside for the moment technical definitions, however, the Delineation's conclusions are *facts* which were before the GCPC, not law. At no point did the GCPC render a legal conclusion as to the Wetlands Delineation that would be subject to judicial review as a question of law. Appellant's conjurings around this argument must therefore fall away – the Wetlands Delineation was "any evidence" in front of the GCPC, and Appellant simply disagrees with the GCPC's conclusions drawn therefrom.[5]

More concerningly, however, Appellant continues to press its legal sufficiency argument even when faced with sworn testimony to the contrary, and without presenting any evidence whatsoever of its own. Environmental consultant Jon Pruitt, the Wetlands Delineation's author, has provided an affidavit in which he unequivocally testified that he "conducted a comprehensive, on-site examination of natural conditions. . ." that identified ***all*** present waterways to include "any so-called waters of the state that exist on the subject property." *Pruitt Aff., Ex. 1 to Resp. Br. in Opposition* at ¶ 7 – 8 (attached hereto as "**Exhibit A**," *see* fn. 1; Mr. Pruitt's testimony is also substantively described and excerpted at R. pp. 60 – 62). This Affidavit was filed below and Appellant has seen it. Despite ample opportunity to revise its arguments accordingly, Appellant has refused to do so, and has indeed *explicitly stated to this Court* that the Wetlands Delineation

---

[5] Likewise, Appellant decries the fact that the Circuit Court "never referenced or analyzed the term 'waters of the State.'" Appellant's Initial Br. at 22. Acting in its capacity as an appellate court for a lower tribunal, the Circuit Court was under no obligation to incorporate Appellant's briefing language in its Order. *See, e.g., Dreher v. S.C. Dep't of Health & Env't Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("[A]n appellate court may affirm the lower court's decision for any reason appearing in the record. [T]he prevailing party may—but is not required to—raise additional sustaining grounds to support the lower court's decision."); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

"appl[ied] the incorrect standard" and "fails to comply with the LDR's requirement to delineate all waters of the State." *Appellant's Initial Br*. at 21 – 22.

The factual record itself contradicts this false argument, as well. While the Wetlands Delineation was initially to be submitted to the United States Army Corps of Engineers (USACOE), no jurisdictional determination was ever received by the USACOE as it is not presently issuing such determinations.[6] *Ex. 1 to Resp. Br. in Opposition* at ¶ 9. Nowhere in the Wetlands Delineation itself does it claim that Mr. Pruitt only considered "waters of the United States." While the USACOE may only consider the presence of "waters of the United States" for purposes of determining jurisdiction, that does not mean that Mr. Pruitt only considered or included "waters of the United States" in preparing his Wetlands Delineation. Indeed, the Wetlands Delineation includes a map entitled "Depiction of Aquatic Resources" ***without caveat*** (R. p. 101). This statement, coupled with Mr. Pruitt's Affidavit, proves that he considered all waters on site, not just "waters of the United States."

While Appellant has challenged the admissibility of this Affidavit, that does not change the fact that it contains sworn testimony in direct factual contradiction to an argument that Appellant continues to put forward before this Court.[7] Moreover, Appellant's desired remedy,

---

[6] Moreover, Mr. Pruitt's submission to the USACOE was made subject to 18 U.S.C. § 1001, which provides that:

> Whoever, in any manner within the jurisdiction of any department or agency of The United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme or devises a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing same to contain any false, fictitious, or fraudulent statement or entry shall be fined not more than $10,000 or imprisoned not more than five years, or both.

[7] Respondent maintains that this Affidavit is properly before the Court. It solely describes and illuminates facts that were set forth before the GCPC, both in the Wetlands Delineation itself and

remand to the GCPC for "compliance with the LDR," would be meaningless, as a proper Wetlands Delineation in compliance with the LDR has already been conducted and considered.[8] *Appellant's Initial Br.* at 22. The Circuit Court's affirmation of the GCPC's consideration of the Wetlands Delineation was therefore not error.

B. The Circuit Court did not err in holding that the GCPC properly considered the Traffic Impact Study, which was likewise conducted in accordance with the LDR requirements, as sufficient evidence for Plan approval.

Appellant has additionally attempted to disguise its challenges to the factual sufficiency of the TIS via a tortured reading of plain language within the LDR. LDR Article 9.2(A) requires the completion of a TIS prior to subdivision approval, with specific limits on the scope of the TIS set forth in the LDR. In unzoned areas like the subject River Preserve property, the TIS area must "be limited . . . ***not to exceed*** adjacent or nearby 3 intersections within a ¾ mile radius from the property boundary." (emphasis added) "However, the study area ***may*** be expanded ***at the discretion of the County Traffic Engineer***, if 3 intersections are not available within a ¾ mile radius from the property boundary." *Id.* (emphasis added). The LDR therefore affords the County Traffic Engineer with a significant degree of discretion to require the conduct of traffic studies as he or she sees fit under the circumstances. It does not impose a ***requirement*** upon the County Traffic Engineer to expand a TIS at any point, as Appellant implies in its brief.[9]

---

heard at the various pre-approval meetings. Furthermore, the Affidavit was submitted in support of motions below.

[8]Appellant's argument that the Plan fails to observe the LDR's riparian buffer requirements consequently fails, because all waters were properly delineated. Moreover, Respondent's submissions to the GCPC properly demarcated all required buffer zones. *See, e.g., February 3, 2022 Revised Preliminary Plat Letter of Transmittal* at 00004 ("All lots have been removed from the 50' undisturbed buffer and this area is now counted towards open space.").

[9]Appellant further claims that ". . .the Circuit Court never referenced or analyzed the LDR's language establishing the requirements for TIS." *Appellant's Initial Br.* at 29. Appellant put forth significant oral argument regarding this language at the hearing, and the Nov. 4, 2022 Order included the following: "CQRL also asserts the traffic impact study in the record failed to properly

Here, the County Traffic Engineer considered these facts appropriately and thoroughly as they are found throughout more than one hundred and thirty (130) pages of documentation, all conducted in compliance with the LDR. Appellant admits that the GCPC discussed the TIS at its public pre-approval meeting on May 25, 2022. *Notice of Appeal from GCPC* at ¶ 22 (R. pp. 17 – 18; 187 – 197). However, Appellant bemoans the inclusion of consideration of the impact of "nonexistent intersections" (i.e., to-be-built intersections) within the TIS. *Appellant's Initial Br.* at 27. In doing so, Appellant disregards the fundamental purpose of why these planned future intersections were included within the study: to assess the impact of their construction on area traffic. Specifically, Respondent intends to construct the two new intersections for ingress and egress onto Wasson Way and Woodside Road. The TIS properly considered the vehicular travel through these two intersections and at the existing intersection of Wasson Way and Woodside Road.[10] The County Traffic Engineer considered expanding the study to include the intersection at S.C. Highway 418 and Woodside Road (which is more than three quarters of a mile from the property boundary), but deferred to the South Carolina Department of Transportation (SCDOT) because S.C. Highway 418 is a State road (R. pp. 133) (*see* fn. 1)[11]

---

evaluate the effect of the proposed subdivision on existing roads pursuant to Article 9 of the LDR." *See, e.g., Transcript* at 38:13 – 39:18.

[10] *See Traffic Impact Studies* 00354 – 00484 (*see* fn. 1). Appellant also implies in its Initial Brief that the TIS failed to consider "existing" and "no build" traffic conditions, as the LDR requires. *See* Art. 9.2(A), LDR. This is not factually correct. In reality, the TIS considered "existing" and "no build" traffic conditions for both Woodside Road and Wasson Way, the only two nearby roads: "Using the existing, no-build, and build traffic volumes, intersection analyses were conducted for the study intersections under Existing (2022) conditions, No-Build (2027) conditions, and Build (2027) conditions." *April 26, 2022 Traffic Impact Study Submission* at 11 (capitalization in original). It is unclear how the TIS could have incorporated present traffic volume data from intersections which do not presently exist, as Appellant suggests is necessary.

[11] *E.g., April 6, 2022 Traffic Impact Study Submission* at 00241 (*see* fn. 1).

This action was squarely within the discretion that the unambiguous language of the LDR affords. Appellant's arguments that the TIS was legally defective because it reflected the Greenville County Traffic Engineer's discretionary selection of intersections is again nothing more than an effort by CQRL to elevate its subjective determinations over those of GCPC. An exercise of discretion that the LDR explicitly confers is not error of law or fact.

II. APPELLANT RECEIVED MORE THAN ADEQUATE DUE PROCESS THROUGHOUT THE PLAN SUBMISSION PROCESS.

As the Circuit Court correctly concluded, Appellant's argument that it did not receive adequate due process is wholly "unsupported by law." *Nov. 4, 2022 Order* at 9 (R. p. 9). "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.* However, no particular procedure is required, as "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.*, 376 S.C. at 172, 656 S.E.2d at 350; *see also SCDSS v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 733-34 (2002) ("The requirements in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur.").

The South Carolina Supreme Court has concluded that the procedure that is due a subdivision applicant is different from and less formal than might be required in a traditional trial. *Kurschner*, 376 S.C. at 171-173, 656 S.E.2d at 350. Due process requires only that an applicant receive notice and an opportunity to be heard at some point before the Commission makes a final decision, but not at each level of the subdivision decision process. *See Ross v. MUSC*, 328 S.C.

51, 68, 492 S.E.2d 62, 71 (1997); *see also Donadieu v. Morgan Cnty. Planning Comm'n*, 2016 W. Va. LEXIS 726, *15-16 W. Va. (2016) ("With respect to documents that did exist in Planning Commission's files, petitioners appear to complain that the Planning Commission did not disclose those documents to them in advance of the public hearing. However, they misconstrue the nature of Planning Commission hearings; they are not akin to civil trials where parties are entitled to certain discovery disclosures. Rather, everything in the Planning Commission's file was available for public inspection, and as the Planning Commission noted, petitioners did not avail themselves of that access."); *Board of Curators v. Horowitz*, 435 U.S. 78, 92, 98 S.Ct. 948, 956, 55 L.Ed.2d 124, 136 (1978) ("An administrative agency's failure to follow its own rules and regulations does not create a constitutional due process right on behalf of a party who suffers some wrong at the hands of the administrative body.").

Here, Appellant claims that the GCPC allowed Respondent to submit revisions to the Plan in an "untimely" manner. Specifically, Appellant claims that the GCPC "improperly accepted revisions fifteen days and twenty-six days past the deadline for the applicant submittal deadline." *Notice of Appeal from GCPC* at ¶ 96 (R. p. 30). Despite claiming that the GCPC and LyonJay (a private, nongovernmental entity) somehow violated Appellant's due process rights, Appellant admits that it received notice of submissions of documentation in support of the Preliminary Plan, submitted written comments to the GCPC, and that several of its members were actually able to speak before the GCPC regarding River Preserve (R. pp. 17 –18; 187 – 197). Appellant admits that these plan revisions were considered, reviewed, discussed, and accepted at the GCPC's public meeting on May 25, 2022, which Appellant admits its "members" attended and were permitted to provide "comments." *Notice of Appeal from GCPC* at ¶ 21 (R. pp. 17 – 18). Moreover, the LDR explicitly contemplates that an initial subdivision plan will be revised prior to the GCPC public

hearing. LDR Art. 3.3.3 ("The Authorized Representative will ensure that all comments made at the Subdivision Advisory Committee meeting are fully addressed on the plan during an identified revision period. It is the revised plan that is submitted for the Planning Commission's review and approval, hold or denial."). Additionally, LDR Article 1.6.1 specifically empowers the GCPC to deviate from its subdivision review calendar if "agreed upon by both the applicant and the Commissioners." There is no evidence in the record that LyonJay and the Commissioners disagreed on the deviations from the calendar here.

Notwithstanding the provision of this public forum and its participation within that forum, Appellant claims that it somehow suffered prejudice as a result of these allegedly "untimely" submissions. To establish a procedural due process claim, Appellant must prove that the alleged deprivation caused them substantial prejudice. *Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987) (emphasis added). In its Initial Brief, Appellant misconstrues the burden: "Furthermore, the meeting minutes do not reflect that either of [Appellant's members] commented on the effect of this late change *because* the submission a month after the deadline prevented their adequate notice and opportunity to meaningfully comment." Appellant's Initial Br. at 32. The operative question here is not whether Appellant's members were able to comment, but whether they suffered substantial prejudice.[12] Appellant fails to identify exactly what this substantial prejudice was, any effect this prejudice had, what specific changes in the plan documents constituted prejudice, or how any such prejudice rose to the height of a due process violation. Indeed, a Mr. John Cook appears to have submitted a memorandum to the GCPC on Appellant's behalf on May 20, 2022 which discusses in detail the very same alleged

[12]Further, Appellant provides no factual support or explanation for its contention that the submission date somehow prevented its members from commenting. Nor does Appellant claim that its members did not actually review the revised submission.

waterway impact that Appellant claims it was not able to review in time for the May 25, 2022 GCPC meeting (R. pp. 187 – 197). Likewise, Mr. Jim Moore, CQRL's President, both emailed the GCPC expressing his thoughts prior to the May 25 meeting and spoke at the meeting himself (*id.; see also* R. pp. 89 – 92). Appellant has presented no factual material related to how an earlier submission would have changed those comments.

The record is clear: CQRL had full and fair opportunity to voice its concerns to the GCPC as a democratic body in a public forum. CQRL did so, received a result that it did not like, and now attempts to relitigate issues before this Court that the GCPC and the Circuit Court have already properly decided. CQRL properly received notice and had an opportunity to publicly speak prior to the GCPC's final decision – indeed, it did so. This satisfied the due process requirement. *See Ross*, 328 S.C. at 68, 492 S.E.2d at 71.

III. APPELLANT FAILED TO PRESERVE ANY ISSUES ON APPEAL FROM THE GREENVILLE COUNTY PLANNING COMMISSION BELOW.

Based on the record before the Court, the inescapable conclusion is that Appellant failed to preserve any issues for appeal. Since the Circuit Court acted in an appellate capacity, as a matter of law the Court was required to refrain from considering issues that were not raised to and ruled upon by the Planning Commission:

> [A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.

Elam v. SCDOT, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (emphasis added); *see also Brick v. Richland Cnty. Plan. Comm'n*, No. 2014-000583, 2016 WL 3200138 at *1 (S.C. Ct. App. June 8, 2016) (unpub.) (in planning commission appeal, "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be

preserved for appellate review.") (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)); *Rutter v. City of Columbia Design/Development Review Comm'n*, 2021 S.C. App. Unpub. LEXIS 265, *5, 2021 WL 2701549 (Ct. App. 2021) (finding error for a circuit court to consider a procedural due process issue in an appeal from an architectural review board decision when the appellant failed to object during the board hearing).

Here, despite Appellant's numerous contentions that the GCPC acted unlawfully and violated Appellant's due process rights during the process of approving the River Preserve Plan, Appellant has provided absolutely no factual basis supporting a conclusion that it actually raised, argued, and received decisions on any of these specific issues before the GCPC. Appellant has thinly pleaded that it "submitted written comments prior to the May 25, 2022 [GCPC] meeting," and that some of its members "also spoke in opposition to the subdivision." *Notice of Appeal from GCPC* at 4 - 5, ¶ 21 (R. pp. 15 – 16; 17 –18). Nowhere in its appeal has Appellant actually described the substance of such "comments" or "opposition," who these "members" are, whether they were authorized to speak on Appellant's behalf, or whether the GCPC ruled on any issues so raised. Vague "comments" and "opposition" do not amount to preservation of any issues on appeal. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80; *see also Rockville Cars, LLC v. City of Rockville*, *Md*., 891 F.3d 141, 149 (4th Cir. 2018).

Appellant has cited to *Newton v. Zoning Bd. of Appeals for Beaufort Cnty*., 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011) for the proposition that it merely needed to plead issues on appeal to the Circuit Court to preserve them. Appellant's reliance on *Newton* is misplaced, but more importantly misses the point. Respondent LyonJay has asserted a preservation issue based on the fact that the GCPC had no authority to deviate from Greenville County Land Development Regulations (the "LDR") as Appellant would require. Given the absence of the GCPC's ability to

(1) depart from LDR procedural provisions, or (2) impose an LDR requirement for federal confirmation of wetlands delineation, there was no concomitant entitlement of the GCPC to rule on those issues. The right to amend the Greenville County LDR lies with the Greenville County Council alone. LDR Art. 1.1. Hence, Appellant's appeal failed to state a claim upon which the Circuit Court or this Court could grant relief, insofar as it seeks relief in the form of this Court imposing requirements on the GCPC that the LDR do not.

As an elementary threshold matter, Appellant must put forth some evidence in the record that it objected below on the grounds it now raises on appeal. *E.g., Wilder Corp*., 330 S.C. at 76, 497 S.E.2d at 733; *Rutter*, 2021 S.C. App. Unpub. LEXIS 265, *5, 2021 WL 2701549 (Ct. App. 2021). Because Appellant has failed to put forth any such evidence, this Court should grant judgment in favor of Respondents and affirm the decision of the Circuit Court. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80.

CONCLUSION

The Circuit Court committed no reversible error. The GCPC's approval decision bore sufficient evidentiary support, it made no errors of law (and, if it did, all such errors were harmless), and Appellant was afforded ample due process prior to the approval decision. Appellant's tactic of couching questions of evidentiary sufficiency as questions of law is unavailing, and should not persuade this Court to overlook the considerable degree of deference that our Legislature and Supreme Court have afforded county planning commissions to regulate their land as they see fit. On the foregoing grounds, Respondent LyonJay respectfully requests this Honorable Court affirm the decision of the Greenville County Court of Common Pleas to affirm the decision of the GCPC approving the River Preserve preliminary plan.

Signature Page to Follow

Dated: August 1, 2023

Greenville, South Carolina

Respectfully submitted,

FOX ROTHSCHILD LLP

/s/William A. Neinast

William Swent, S.C. Bar No. 13519
R. Taylor Speer, S.C. Bar No. 100455
William A. Neinast, S.C. Bar No. 104218
2 W. Washington Street
Suite 1100
Greenville, SC 29601
Tel: 864.751.7600
Fax: 864.751.7800
WSwent@FoxRothschild.com
TSpeer@FoxRothschild.com
WNeinast@FoxRothschild.com

ATTORNEYS FOR RESPONDENT LYONJAY

STATE OF SOUTH CAROLINA **COUNTY OF GREENVILLE**	**APPEAL TO THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT**
Citizens for Quality Rural Living, Inc., Appellant, v. LyonJay and the Greenville County Planning Commission, Respondents.	Case No. 2022-CP-23-03356 **AFFIDAVIT OF JON PRUITT**

NOW COMES, the undersigned Affiant, Jon Pruitt, who, on personal information and belief, avers as follows:

1. I am Jon Pruitt, President of Atlantic Environmental Services, Inc. and a practicing environmental consultant with 27 years' experience providing wetlands delineations and permitting support.

2. I am familiar with the preliminary subdivision application for the River Preserve project submitted to Greenville County Subdivision Administration on April 6, 2022, which application is the subject of the captioned Appeal.

3. I conducted the wetlands delineation work reflected on the preliminary subdivision plat, a copy of which is attached.

4. I have reviewed the allegations of Citizens for Quality Rural Living ("CQRL") in a Notice of Appeal from Administrative Tribunal filed June 24, 2022. In particular, I have focused on assertions that my firm's wetlands delineation was somehow deficient as a mere ***request*** to the United States Army Corp of Engineers ("USACOE") for an "approved jurisdictional determination."

EXHIBIT A

5. I am familiar with the Greenville County Land Development Regulations, and I am aware of no provision in these regulations that requires an approved jurisdictional determination (an "AJD") issued by the USACOE as prerequisite to a subdivision application.

6. Rather, it is regular practice that environmental engineers/consultants, such as myself, perform wetlands delineations. A USACOE AJD is a desirable federal confirmation of sound environmental conclusions, but the absence of a USACOE AJD in no way diminishes or invalidates the underlying wetlands delineation.

7. My wetlands delineation as regards the River Preserve project was based on study of public information, technical data and a comprehensive, on-site examination of natural conditions. The delineation conforms to the standards set forth in the 1987 Corp of Engineers Wetlands Delineation Manual, as amended or supplemented.

8. In Paragraph 48 of its Notice of Appeal, CQRL asserts that the wetlands delineation in support of the River Preserve subdivision application "does not evaluate whether the River Preserve site contains water features [broadly characterized as waters of the state]." This is false. The delineation I performed for the River Preserve project identified, if any, all live streams, marshes, wetlands, water impoundments, lakes, watercourses and rivers (regardless of whether navigable or tributary to navigable waters), adjacent wetlands, isolated wetlands, intermittent streams, potholes, swamps, marshes, bogs and other waters that are not part of a tributary system to interstate or navigable waters. In other words, the River Preserve wetlands delineation has identified any so-called waters of the state that exist on the subject property.

9. Presently the USACOE is not issuing AJDs outside the context of Clean Water Act and other federal permitting. In other words, a USACOE AJD was, and is, not available for the River Preserve project. Attached and incorporated as **Exhibit A** hereto is USACOE's regulatory

response letter advising that jurisdictional determinations are not presently available in the context of local subdivision applications and further stating that "*South Carolina has a substantial community of environmental consultants who can prepare accurate and complete wetland delineations.*" The delineation I prepared for the River Preserve project was indeed accurate and complete.

Further Affiant sayeth naught.

Jon Pruitt

Sworn to and subscribed before me this
11 day of August, 2022

Notary Public for the State of South Carolina
My Commission Expires: 8-30-2029

RECEIVED
Aug 01 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2022-CP-23-03356 (S.C. Ct. App. filed Jan. 30, 2023)
Appellate Case No. 2023-000144

Citizens for Quality Rural Living, Inc., ……Appellant,

v.

LyonJay and the Greenville County Planning Commission, ……Respondents.

RESPONDENT LYONJAY'S RULE 211(b), SCACR CERTIFICATION

The undersigned hereby certifies that Respondent LyonJay's Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

~ Signature Page to Follow ~

Dated: August 1, 2023

Greenville, South Carolina

FOX ROTHSCHILD LLP

/s/William A. Neinast

William Swent, S.C. Bar No. 13519
R. Taylor Speer, S.C. Bar No. 100455
William A. Neinast, S.C. Bar No. 104218
2 W. Washington Street
Suite 1100
Greenville, SC 29601
Tel: 864.751.7600
Fax: 864.751.7800
WSwent@FoxRothschild.com
TSpeer@FoxRothschild.com
WNeinast@FoxRothschild.com

ATTORNEYS FOR RESPONDENT LYONJAY