THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Edward R. Miller, Circuit Court Judge

Appellate Case No. 2023-000144
Case No. 2022-CP-23-03356

Citizens for Quality Rural Living, Inc.,

Appellant,

v.

LyonJay and the Greenville County Planning Commission,

Respondents.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court fail to apply the correct standard of review when it concluded that the Greenville County Planning Commission did not abuse its discretion in approving a subdivision preliminary plan that incorporated a wetlands delineation conducted under the wrong legal standard and that failed to include the required riparian buffers?
2. Did the Circuit Court fail to apply the correct standard of review when it concluded that the Greenville County Planning Commission did not abuse its discretion in approving a subdivision preliminary plan despite incorporating a traffic impact study that violated the Greenville County Land Development Regulations?
3. Did the Circuit Court err in concluding that the Greenville County Planning Commission did not violate Citizens for Quality Rural Living, Inc.'s due process rights when it considered and approved the subdivision preliminary plan even though LyonJay repeatedly submitted revised plans beyond the set deadlines, and these revised plans were unavailable to the public in a timely manner?

STATEMENT OF THE CASE

This appeal centers on the approval of a residential subdivision in Greenville County, South Carolina. Respondent LyonJay submitted a subdivision preliminary plan[1] on April 5, 2022, requesting approval from Respondent Greenville County Planning Commission (Planning Commission). (R. p. 87) During a regularly scheduled public meeting held on May 25, 2022, the Planning Commission considered and approved a revised preliminary plan submitted by LyonJay on May 22, 2022. (R.p. 92,102-104R. p. 90).

After the Planning Commission approved the preliminary plan, Appellant Citizens for Quality Rural Living, Inc. (CQRL) filed an appeal of the decision to the Circuit Court on June 24, 2022. (*Id.*; R. p. 17). Following briefing and a hearing on September 23, 2022, the Circuit Court issued its Order on November 4, 2022, affirming the decision of the Planning Commission to approve the subdivision preliminary plan. *Id*.; (R.p.632 ;R.p. 4).

On November 10, 2022, CQRL filed a motion to reconsider. (R.p. 597-605). The Circuit Court denied the motion to reconsider in a Form 4 Order on January 18, 2023. (R.p.14).

CQRL filed and served this Notice of Appeal on January 30, 2023.

STANDARD OF REVIEW

The appellate courts will reverse decisions of a planning commission when it abuses its discretion. *Gurganious v. City of Beaufort*, 317 S.C. 481, 485, 454 S.E.2d 912, 915 (Ct. App. 1995). "An abuse of discretion occurs when [a decision] is based upon an error of law . . . ." *Id.*

[1] The documents interchangeably refer to preliminary plan and plat.

(quoting *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987)). "Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." *Mikell v. City of Charleston*, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009); *cf. Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 173-74, 656 S.E.2d 346, 351 (2008) (noting "*findings of fact* by the [planning commission] must be treated in the same manner as a finding of fact by a jury," which "will not be disturbed unless there is no evidence which reasonably supports the jury's findings" (emphasis added)).

"An issue regarding statutory interpretation is a question of law." *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011). "[I]n the area of statutory construction, [the court's] role is limited to determining legislative intent and effectuating that intent." *Eagle Container Co. v. Cnty. of Newberry*, 379 S.C. 546, 570, 666 S.E.2d 892, 895 (2008). "The determination of legislative intent is a matter of law." *Id.* at 568, 666 S.E.2d at 894.

STATEMENT OF FACTS

River Preserve is a proposed subdivision designed by LyonJay to be located in the southern rural portion of Greenville County. (R.p. 102-103; R.p. 91; R. p.90). The River Preserve preliminary plan contemplates the subdivision and development of a set of unzoned parcels comprising approximately 220 acres into a residential neighborhood containing 210 single-family residences. (R.p. 102-103; R. p. 91). The Reedy River and Woodside Creek[2] form a significant portion of the boundary for the proposed site. (R. p. 90).

Subdivision preliminary plans must be approved by the Greenville County Planning Commission pursuant to the Greenville County Land Development Regulations (LDR). *See* LDR, Article 3; Article 22; Article 9 (R. p. 676).[3] The specific design of the River Preserve preliminary plan changed several times after its initial submittal on April 5, 2022, with resubmissions on April 25, 2022, May 11, 2022, and May 22, 2022. (R. p. 90). The LDR envision changes to the proposed preliminary plan and re-submittals as local and state officials provide feedback on the plan only "during an identified revision period" prior to the ultimate consideration by the Planning Commission. *See* LDR, Article 3.3.3 (R. p.692).

Implementing this procedure, Greenville County created and published a 2022 Subdivision Review Calendar, which set forth the identified revision period and key deadlines for submission and consideration of proposed preliminary plans. (R. p. 131). The calendar indicated that applications submitted by April 6, 2022 would be heard at the ultimate Planning

[2] The approved preliminary plan references Woodside Creek, but the wetlands delineation identifies this waterway as Flat Rock Creek. The particular name is unimportant for purposes of this appeal, but for clarity, this brief will refer to it as Woodside Creek. (R. p. 90; R. p. 121).
[3] Greenville County has since amended its Land Development Regulations. To ensure this Court has the version effective at the time the Planning Commission approved River Preserve, CQRL intends to designate a copy of the regulations for inclusion in the record on appeal.

Commission meeting on May 25, 2022. (*Id.*). Prior to the final meeting, the calendar reflected that a proposed preliminary plan would have a Subdivision Advisory Committee[4] meeting on April 18, 2022, allowing an applicant eight days to address the committee's comments and revise the plan prior to an applicant resubmittal deadline on April 26, 2022. (*Id.*). Despite this unequivocal deadline and "identified revision period," LyonJay submitted revised plans on May 11, 2022 and May 22, 2022, as late as a mere three days before the Planning Commission meeting. (R. p. 90); *See* R. p. 692*)* The Planning Commission did not adjust the hearing and instead considered River Preserve during the scheduled May 25, 2022 meeting. (R. p. 102-104).

The April 5, 2022 preliminary plan indicated a traffic impact study (TIS) had been completed and asserted that River Preserve would "adhere to the recommendations on the [TIS]." (R. p. 87 n. 17). Following comments from the county traffic engineer during the Subdivision Advisory Committee meeting instructing LyonJay to incorporate a 5-8% growth rate and two other recently approved subdivisions, a revised TIS was completed utilizing a 5% growth rate. R. p. 228 n.i-ii; R. p. 428). However, a more significant problem with the TIS remained: inclusion of two nonexistent intersections in the analysis of the effect River Preserve will have on *existing roads*. (R. p. 418, 424-426, 428-429). Specifically, the development of River Preserve will require the construction of two access roads: Agate Road and Schist Avenue. (R. p. 90). The construction of these two roads will create two brand new intersections: the intersection of Agate Road and Woodside Road and the intersection of Schist Avenue and Wasson Way. (R. p. 90). At the time the Planning Commission considered River Preserve, these two intersections did not exist and will not exist until the construction of the development. (R. p.

[4] *See LDR*, Article 3.3.3 (stating the Subdivision Advisory Committee reviews and submits comments on preliminary plans prior to Planning Commission consideration).

90). Despite this problem, the TIS used these two nonexistent intersections to analyze the impact the River Preserve development would have on existing roads. (R. pp. 428-230).

Finally, the ultimately-approved preliminary plan submitted three days before the Planning Commission meeting reflected the most substantial change of any revision: the elimination of several waterways from the preliminary plan and their requisite buffers based on a belatedly-submitted request for jurisdictional determination by the U.S. Army Corps of Engineers, which LyonJay referred to as a "wetlands delineation." (R. p. 112; R. p. 90; R. p. 87). The notes contained on the April 5, 2022 preliminary plan indicated that "there are 7 possible blue line streams located on site" and that "a wetlands delineation will be completed to located [sic] areas of concern." (R. p. 87 n. 16). This wetlands delineation utilized a standard for federal jurisdiction over waterways: the presence of *waters of the United States*, even though the LDR—the regulations applicable to preliminary plan approval—require delineation of *waters of the State*. **(**R.p. 112; R. p. 832) Using this incorrect standard, the wetlands delineation concluded that the "3 clouded areas [reflecting several of the referenced blue line streams] do not exist" but is devoid of any factual assertions or evidence to support the conclusion. (R. p. 120). The wetlands delineation cites to data points and three photos of an "upland," but the "upland" is not located within any of the "3 clouded areas." (*Id.* at 9, 12-19). Despite space to do so, the data form supporting this determination lacks any written remarks that elaborate on the basis for the conclusion that several waterways have disappeared. (*Id.* at 14-19). Finally, the wetlands delineation does not make a single reference to the correct standard, waters of the State. (*Id.* at 1-19).

On May 25, 2022, the Planning Commission considered and approved the River Preserve preliminary plan. (R. p. 102-104; R. p. 90). CQRL filed its notice of appeal in the Circuit Court

on June 24, 2022. (R. p. 17) There, CQRL contended that the Court should reverse the approval of the River Preserve preliminary plan because (1) the preliminary plan failed to comply with waterway and wetlands delineation requirements contained in the LDR, (2) the preliminary plan failed to comply with riparian buffer requirements in the LDR, (3) the TIS conducted for the subdivision violated LDR requirements, and (4) the approval process violated CQRL's due process rights. *Id.* CQRL submitted a brief in support of these arguments on September 7, 2022. (*Id.*; R. p. 37).

The Circuit Court heard appellate arguments on September 23, 2022, and issued its Order affirming the Planning Commission's approval of River Preserve on November 4, 2022. (R. p. 632; R. p. 4). In its Order, the Circuit Court applied the "any evidence" standard to hold that evidence in the record supported the Planning Commission's approval of the subdivision preliminary plan incorporating the wetlands delineation and the TIS. (R. p. 6-8) Specifically, the Court concluded:

> 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.
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> . . .

> The applicable standard of review for this appeal mandates that this Court constrain itself to the determination of whether there was any evidence to support the Planning Commission's decision. The evidence in the record shows that the Planning Commission and planning staff considered hundreds of pages of documents including the challenged waterway delineation and traffic impact study.
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> The fact that this 'consideration' did not culminate in the result sought by CQRL does not advance its position on appeal. CQRL fails to show the Planning Commission's decision was arbitrary, capricious, had no reasonable relation to a lawful purpose, nor that the Planning Commission abused its discretion. In view of this Court's deferential standard of review, CQRL's argument must fail.

(*Id.*). In addition, the Circuit Court found the Planning Commission did not violate CQRL's due process rights. (*Id.* at 5-8). Specifically, the Circuit Court concluded:

> LyonJay's plans were a matter of public record, available for review and inspection, prior to the May 25, 2022, public hearing. CQRL had the opportunity and used the opportunity to oppose the preliminary plan prior to the hearing during the public comment stage and then again at the public hearing. At the hearing, the preliminary plan was extensively debated, questioned, and CQRL members appeared and presented their respective positions.
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> The contents of [subdivision application] files are available to the public from the opening of the file. The County Subdivision Administrator and her staff maintain and update these files as public records, which any citizen can view at County Square during the County's normal operating hours. As the application progresses, developers file multiple versions of preliminary plans as they make small changes to address concerns raised by Planning Commission staff and the Subdivision Advisory Committee. These changes and updated versions are kept in the physical file and are available for review.
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> Evidence [in] the record shows that CQRL had opportunity to voice its concerns through document submittal and public debate. CQRL received notice and engaged in the opportunity to publicly express

> its position prior to the Planning Commission's final decision, thus satisfying the requirements of due process.

(*Id.*). As a result of these findings, the Circuit Court affirmed the decision of the Planning Commission to approve the River Preserve preliminary plan and denied CQRL's appeal. (*Id.* at 8-9).

On November 10, 2022, CQRL filed a motion to reconsider, asserting that the Circuit Court (1) erroneously applied the "any evidence" standard because the standard governs only factual findings of the Planning Commission and not errors of law, and (2) overlooked significantly distinguishable circumstances from the decisions on which it heavily based its due process ruling. (R. p. 597-608). The Circuit Court denied the motion to reconsider in a Form 4 Order on January 18, 2023, "find[ing] there is nothing in [the motion] that would require reconsideration." (R. p. 14). This appeal followed.

ARGUMENT

I. The Circuit Court erred in applying the "any evidence" standard when the Planning Commission committed an error of law by approving the River Preserve preliminary plan that ignored the legal requirements contained in the Greenville County Land Development Regulations.

The Greenville County LDR establish legal requirements for the delineation of water features on subdivision preliminary plans and for conducting traffic impact studies for proposed subdivision developments. LyonJay's preliminary plan application for River Preserve ignored these legal requirements, and the Planning Commission's approval of River Preserve therefore violated the LDR and constituted an error of law. Despite the violation of these legal requirements and the Planning Commission's error of law, the Circuit Court applied the "any evidence" standard to the entirety of the Planning Commission's decision. (*See Order* at 3-5) (R. p. 6-8). However, decisions of a local board or commission are not subject solely to the "any

evidence" standard. *Historic Charleston Found. v. Krawcheck*, 313 S.C. 500, 506, 443 S.E.2d 401, 405 (Ct. App. 1994). Instead, this Court will reverse if the "Board's findings of fact have no evidentiary support *or the Board commits an error of law*." *Id.* (emphasis added).

The wetlands delineation and TIS issues CQRL raised in its first appeal required the Circuit Court to construe the language of the ordinance—a matter of law. (R. p. 21-32; R. p. 42-52); *see City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011) ("An issue regarding statutory interpretation is a question of law."); *Charleston Cnty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law."); *Georgia-Carolina Bail Bonds, Inc. v. Cnty. of Aiken*, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003) ("The legislature's intent should be ascertained primarily from the plain language of the statute."). CQRL's arguments accordingly challenge not the sufficiency of the evidence but the preliminary plan's failure to comply with the LDR's legal requirements for wetlands delineation and TIS. (R. p. 21-32; R. p. 42-52; R. p. 663, l.14-24; R. p. 597-605).

Instead of addressing the language of the ordinance at issue here and the legal requirements implicated, the Circuit Court simply applied the "any evidence" standard. (*Order* at 3-5). The Circuit Court explained:

> 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.
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> The applicable standard of review for this appeal mandates that this Court constrain itself to the determination of whether there was any evidence to support the Planning Commission's decision. The evidence in the record shows that Planning Commission and planning staff considered hundreds of pages of documents including the challenged waterway delineation and traffic impact study.
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> The fact that this 'consideration' did not culminate in the result sought by CQRL does not advance its position on appeal. CQRL fails to show the Planning Commission's decision was arbitrary, capricious, had no reasonable relation to a lawful purpose, nor that the Planning Commission abused its discretion. In view of this Court's deferential standard of review, CQRL's argument must fail.

(*Id.*). The Circuit Court's Order incorrectly latched on to the "any evidence" standard and failed to ever address CQRL's actual arguments implicating a matter of law: (1) the wetlands delineation applied a narrower legal standard than the standard required by the LDR, and (2) the TIS ignored the language of the LDR by including two nonexistent intersections in its analysis of River Preserve's effect on existing roads. (R. p. 21-32; R. p. 42-52; R. p. 634-638, 663-665).

CQRL therefore challenges the improper application of incorrect *legal standards* to satisfy the LDR's requirements. CQRL's challenge does not involve a debate or conflicting opinions over the sufficiency of the evidence. (*cf. Order* at 3-5)(R. p. 6-8). Because CQRL's challenge is not directed at the sufficiency of the evidence and did not ask the Circuit Court to substitute its opinion for the Planning Commission's evaluation of the evidence but instead raised an error of law, the Circuit Court applied an incorrect standard of review. (*See Order*).

CQRL raised the Circuit Court's standard of review error in its motion to reconsider, but the Circuit Court denied the motion without analysis. (R. p. 597-605; R. p. 14).

The "any evidence" standard of review is the correct standard for courts to apply as it relates to *factual findings* of the Planning Commission. *See Kurschner*, 376 S.C. at 173-74, 656 S.E.2d at 351. Our Supreme Court has previously rejected arguments seeking to conflate the "any evidence" standard for factual findings with the "broader and more independent review" required when the court construes an ordinance. *Somers*, 319 S.C. at 67, 459 S.E.2d at 841 ("Board contends that its determination of Council's intent was a finding of fact which is binding on this Court unless there is no evidence to support it. *We disagree*. The determination of legislative intent is a matter of law." (emphasis added)); *see also Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (noting a statute's text "is considered the best evidence of the legislative intent").

This Court's decision in *Austin v. Board of Zoning Appeals* exemplifies an "any evidence" case and demonstrates how CQRL's appeal does not present such a challenge. 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004). Austin appealed the Board of Zoning Appeals' issuance of a building permit, arguing that a setback should have been twenty feet instead of ten feet. *Id.* at 32, 606 S.E.2d at 210. The applicable ordinance provided that the appropriate setback for corner lots depended on which street had the most amount of daily traffic but allowed the property owner to decide each street's setback if the streets had an equal amount of daily traffic. *Id.* at 32, 606 S.E.2d at 211. The circuit court in *Austin* properly applied the "any evidence" standard to the Board of Zoning Appeals' *factual finding* that the streets had equal amounts of daily traffic and therefore affirmed its decision to issue the building permit with a ten-foot setback as selected by the property owner. *Id.* at 32-34, 606 S.E.2d at 211-12.

In contrast, courts owe no deference to a planning commission on questions of law and must determine whether a planning commission's decision "is correct as a matter of law," overturning a planning commission decision "where it is based on errors of law . . . ." *Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals*, 342 S.C. 480, 488, 536 S.E.2d 892, 896 (Ct. App. 2000); *Peterson Outdoor Adver. v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997). Here, the Circuit Court disregarded the proper standard of review. (*See Order* at 3-5). The Planning Commission did not make—and could not have made—any factual findings regarding the appropriate standard for assessing and delineating waters of the State or for conducting TIS because Greenville County Council established the appropriate standards when it adopted the ordinance.[5] (R. p. 102-104; R. p. 692, 774, 830). The Planning Commission is only permitted to apply the language of the ordinance as drafted by County Council.

Because the TIS and the wetlands delineation here failed to comply with the legal requirements of the LDR, the Planning Commission's approval of the preliminary plan incorporating the wetlands delineation and TIS was an error of law. By only analyzing the issue under the "any evidence" standard, the Circuit Court erred in failing to construe the language of the ordinance and in failing to determine that the Planning Commission committed an error of law when it approved a preliminary plan application that violated the ordinance's legal requirements. (R. p. 6-8). The Circuit Court's application of the incorrect legal standard requires reversal on both issues.

[5] In other words, the Planning Commission could make factual findings regarding whether a wetlands delineation or TIS satisfies the correct standard (which would be subject to the "any evidence" standard) but it cannot make factual findings on *which standard* must be applied. The correct standard must be determined by the construction of the language of the ordinance, a matter of law not subject to the "any evidence standard." *Mikell*, 386 S.C. at 158, 687 S.E.2d at 329 ("Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact.").

A. The Circuit Court erred in ignoring the fact that the preliminary plan incorporated a wetlands delineation that utilized the incorrect legal standard.

CQRL's first two grounds on appeal centered on the River Preserve preliminary plan's incorporation of a wetlands delineation that utilized the incorrect standard for assessing the presence of water features on the River Preserve site and delineating those water features on the preliminary plan in accordance with the LDR. (R. p. 90; R. p. 112). The standard for delineating such water features is a legal requirement imposed by the LDR. (R. p. 693; R. p. 832). The Planning Commission violated the LDR's plain language by failing to require a preliminary plan that delineated all *waters of the State* and their riparian buffers, instead approving a preliminary plan that evaluated only *waters of the United States*, an entirely different—and narrower—legal standard. (R. p. 90; R. p. 102-104; R. p. 112).

The LDR impose several obligations for delineating water features on the preliminary plan, which must be satisfied before the Planning Commission may legally approve the plan. R. p. 830; R. p. 694. One specific requirement that must be delineated on the preliminary plan is a "minimum fifty-foot riparian buffer . . . on all waters of the state." *LDR*, Article 22.3.5(E) (R. p. 832). Therefore, to comply with Article 22.3.5(E), the preliminary plan must first delineate all "waters of the State." Logically, a preliminary plan cannot show the requisite buffer on waters of the State without first identifying all such waters.

The approved preliminary plan failed to comply with this requirement because it incorporated the conclusions of a "wetlands delineation"[6] that applied an incorrect legal standard

[6] During the course of the appeal in Circuit Court, LyonJay attempted to introduce new evidence into the record by filing and relying upon an affidavit from its environmental consultant, who performed the wetlands delineation, to bolster its argument that the wetlands delineation complied with the standard imposed by the LDR. CQRL objected to the Circuit Court's consideration of this affidavit in its briefing and during the hearing as an improper attempt to supplement the record on appeal. (R. p. 41-42; R. p. 636, l. 20-25; R. p. 637, l. 1-2). *See Massey*

for determining the presence of the required "waters of the State." (R. p. 90; R. p. 102-104; R. p. 112). The wetlands delineation submitted by LyonJay is actually a "request for [U.S. Army Corps of Engineers] Jurisdictional Determination (JD)/Delineation."[7] (R. p. 112) Jurisdictional determinations performed by the Army Corps assess whether a site contains "waters of the United States," a term governing *only* federal regulatory jurisdiction. (R. p. 112) This federal standard is reflected in the document itself, which notes the "principal purpose" of the jurisdictional determination is to "determine whether there are any aquatic resources within the project area subject to *federal jurisdiction*." (*Id.* (emphasis added)). In addition, federal regulations outline the standard used for such determinations, specifically defining "approved jurisdictional determination" as a "Corps document stating the presence or absence of *waters of the United States* on a parcel or a written statement and map identifying the limits of *waters of the United States* on a parcel." 33 CFR § 331.2 (emphases added)).

These provisions demonstrate that Army Corps jurisdictional determinations do nothing but evaluate the presence or absence of waters of the United States, the jurisdictional standard for federal regulation. The Army Corps and the United States Environmental Protection Agency have adopted the following definition for waters of the United States:

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v. City of Greenville Bd. of Zoning Adj., 341 S.C. 193, 198, 532 S.E.2d 885, 887 (Ct. App. 2000). CQRL contends LyonJay abandoned any reliance on the affidavit during the hearing. (R. p. 653, l. 3-4; R. p. 654, l. 2-3). Out of an abundance of caution, CQRL renewed its objection in the Motion to Reconsider because the Order did not contain a ruling on the admissibility of the affidavit or an indication of whether the Circuit Court considered it during its decision. (R. p. 600 n.2). CQRL again renews its objection now to the extent LyonJay intends to rely on this affidavit.

[7] Contrary to LyonJay's repeated claims before the Circuit Court, CQRL does not contend whatsoever that the LDR require an approved jurisdictional determination by the Army Corps. Instead, CQRL has argued the problem is the legal standard utilized in Army Corps jurisdictional determinations is not appropriate for assessing "waters of the State." (R. p. 654, l. 5-7; cf. R. p. 664, l. 16-22; R. p. 43; R. p. 601 n.3).

(a) The term waters of the United States means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other

> than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
>
> (b) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
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> (c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

33 C.F.R. § 328.3(a)-(c) (eff. Aug. 25, 1993 to Aug. 28, 2015).[8]

Importantly, "waters of the *State*" is a different and much broader scope of water features than "waters of the *United States*." The South Carolina Department of Health and Environmental Control (DHEC) has defined "waters of the State" broadly as:

> lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic Ocean within the territorial limits of the State, and all other bodies of surface or underground water, natural or artificial, public or private, inland or coastal, fresh or salt, which are wholly or partially within or bordering the State or within its jurisdiction.

S.C. Code Ann. Reg. § 61-9.122.2(b).

The use of the federal jurisdictional standard in the wetlands delineation for River Preserve therefore failed to comply with Greenville County's requirements for a preliminary plan because the federal standard employs a different and narrower evaluation than an assessment of

[8] The definition of waters of the United States has a tortured regulatory and judicial history not relevant to this appeal. However, CQRL cites the pre-2015 regulatory definition even though a different definition had been adopted prior to River Preserve's approval because a United States District Court vacated the regulation, and the agencies returned to interpreting the definition consistent with the pre-2015 regulatory regime as of August 30, 2021. *See Pascua Yaqui Tribe v. Envt'l Prot. Agency*, 557 F.Supp.3d 949 (D. Ariz. 2021); 86 FR 69373.

the presence of waters of the *State*. (R. p. 90; R. p. 112). The LDR mandate this delineation of all "waters of the *State*" on preliminary plans to comply with the LDR's riparian buffer requirement. *LDR*, Article 22.3.5(E) (emphasis added); Article 3.3.4 (R. p. 832; R. p. 693).

As a result, the preliminary plan failed to comply with *legal requirements* of the LDR, and its approval by the Planning Commission is an error of law. The Circuit Court did not address CQRL's arguments that the Planning Commission's approval of the plan constituted an error of law because the preliminary plan's use of a wetlands delineation applying an incorrect standard violated the LDR. (R. p. 6-8).

The original preliminary plan for River Preserve delineated three unnamed tributaries to the Reedy River, located in the top left corner of the development, where the Reedy River takes a significant bend. (R. p. 87). The approved preliminary plan eliminated those three unnamed tributaries based on the wetlands delineation. (R. p. 120; R. p. 90;). Neither the original nor the approved preliminary plan delineated an additional water feature shown on Greenville County GIS maps and the National Wetlands Inventory.[9] (R. p. 115, 120; R. p. 90; R. p. 87). The wetlands delineation concluded—without proof—that these water features on the site "do not exist." (R. p. 120). Significantly, the wetlands delineation did not evaluate the existence of these water features utilizing the required legal standard—waters of the State—and instead only applied the federal regulatory standard for waters of the United States. (R. p. 112). Indeed, the wetlands delineation never even referenced the term "waters of the State." (*Id.*).

[9] This water feature is the blue line that flows to the right from Wetland A, as identified by the wetlands delineation, and encompassed within the "clouded area." (R. p. 120). Although Wetland A is shown on the approved plan, this adjacent water feature was never delineated on any plan, and the wetlands delineation did not evaluate whether it constitutes a water of the State. (*Id.*; R. p. 90; R. p. 87).

Our Supreme Court has recognized the distinction between the scope of federal and state regulatory jurisdiction over "waters."[10] In *Georgetown County League of Women Voters v. Smith Land Co.,* the Supreme Court rejected the circuit court's finding that DHEC lacked jurisdiction over isolated wetlands simply because the Corps, as a federal agency, lacked the ability to regulate isolated wetlands. 393 S.C. 350, 352-53, 713 S.E.2d 287, 288-89 (2011). The Court reasoned that the Corps' inability to "regulate isolated wetlands . . . *has no impact* on DHEC's ability, as a state agency, to do so" because the Pollution Control Act's definition of "waters" specifically included isolated wetlands. *Id.* (emphasis added). In addition to demonstrating the distinction between waters of the State and waters of the United States, the Supreme Court made clear that *all wetlands*, including isolated wetlands, must be included in any determination of the presence of waters of the State. *Id.*

Two decisions by our Supreme Court and by the United States Court of Appeals for the Fourth Circuit further illustrate the distinction between waters of the State and waters of the United States. *See Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. United States Army Corps of Eng'rs*, 801 F.Supp.2d 446 (D.S.C. 2011) *aff'd by* 501 Fed. Appx. 268 (4th Cir. 2012); *Deerfield Plantation Phase II-B Prop. Owners Ass'n, Inc. v. South Carolina Dep't of Health & Envt'l Control*, 414 S.C. 170, 777 S.E.2d 817 (2015).[11] The cases involved parallel state and federal challenges to the same proposed residential subdivision development on a

[10] The General Assembly has defined "waters" in the South Carolina Pollution Control Act identically as the regulatory definition adopted by DHEC, such that our Supreme Court's holding in *Georgetown County* applies with equal force to "waters of the State." *See* S.C. Code Ann. § 48-1-10(2).

[11] In its briefing and its Motion to Reconsider before the Circuit Court, CQRL raised the holdings in *Georgetown County* and the *Deerfield Plantation* decisions, but the Circuit Court never addressed the application of any of these decisions to the issues in this appeal. (R. p. 44-47; R. p. 602-603; R. p. 4; R. p. 14).

former golf course, the Old South Course, in Surfside Beach, South Carolina. "The redevelopment plan necessitated the construction of a new stormwater management system utilizing an existing drainage network of stormwater ponds on the Old South Course," which required a permit under the National Pollutant Discharge Elimination System, the scope of which depends on the assertion of federal jurisdiction. 414 S.C. at 173, 777 S.E.2d at 818.

There, the Corps asserted federal jurisdiction over two non-navigable tributaries but *not* over the stormwater ponds on site. 501 Fed. Appx. at 271. The Corps concluded the stormwater ponds were not waters of the United States, finding the stormwater ponds were "constructed primarily for aesthetic reasons associated with the design of a golf course" and were constructed to maintain a particular water level and "would flow only if the pond levels fluctuated above a certain point." 501 Fed. Appx. at 271-72. Notably, the Fourth Circuit affirmed the determination that stormwater ponds on the site were not "waters of the United States," but our Supreme Court concluded that those same stormwater ponds *were* "waters of the *State*." 801 F.Supp.2d at 461, 464-65; 501 Fed. Appx. at 275; 414 S.C. at 177-78, 777 S.E.2d at 820-21. The differing conclusions by the two courts demonstrate the difference in scope between the two standards and why the application of the federal standard does not satisfy the state standard.

The indisputably broader scope of State jurisdiction over waterways compared to federal jurisdiction makes clear that delineation of waters of the State is not satisfied simply by an assessment of the presence of waters of the United States. As a result, LyonJay's submittal of a request for Army Corps jurisdictional determination—which evaluates waters of the United States—fails to comply with the LDR's requirement to delineate all waters of the State. (R. p. 112; R. p. 102-104; R. p. 832). Moreover, the Planning Commission's acceptance of this wetlands delineation applying the incorrect standard and its approval of the River Preserve

preliminary plan incorporating this wetlands delineation constitutes an error of law. (*Id.*; R. p. 90; R. p. 102-104).

Yet, the Circuit Court never referenced or analyzed the term "waters of the State." The Circuit Court never evaluated whether a wetlands delineation incorporating waters of the *United States* satisfies the language of the LDR or grappled with the distinction between the two standards. Instead, the Circuit Court erroneously applied the "any evidence" standard when the issue raised by CQRL required the Court to construe the language of the ordinance, a matter of law. The Circuit Court's failure to engage in any analysis regarding what the LDR's language required for delineation of water features is an error of law and requires reversal. This Court must remand the preliminary plan for compliance with the LDR.

B. The Circuit Court's error in ignoring the correct legal standard for delineating waters of the State prevented it from addressing preliminary plan's related failure to include riparian buffers on all waters of the State.

The improper reliance on the deficient wetlands delineation produced the related but independent failure to include the location and delineation of the mandatory riparian buffer on all waters of the State. (R. p. 112; R. p. 90). Without properly evaluating and determining the presence of waters of the State on site, the complete delineation of the riparian buffers on all such water features remains impossible. (R. p. 120; R. p. 90. R. p 513). The Planning Commission's approval of River Preserve in the absence of a proper delineation of all riparian buffers violated the LDR and constitutes an abuse of discretion. (R. p. 907; R. p. 102-104). The Circuit Court's failure to construe the LDR's language regarding the appropriate waterway delineation standard prevented it from addressing the preliminary plan's failure to include the required riparian buffers on all waters of the State. (R. p 6-8).

Article 22.3.5(E) of the LDR requires a "minimum 50-foot riparian buffer on all waters of the State." The "Concept Plan," or draft preliminary plan, required by Article 22.2.1 mandates the plan include the "location and delineation of required buffers." *Id.* Furthermore, the LDR require that the preliminary plan include the location of all "areas that are required for stormwater or other infrastructure facilities." Article 3.3.4(J) (R. p. 694). Article 2 defines "riparian buffer" as:

> a natural or vegetated area adjacent to or bordering a body of water such as a stream, lake, pond, or other watercourse through which stormwater runoff flows in a diffuse manner so that the runoff does not become channeled and which provides for the infiltration of pollutants while protecting the water body.

The riparian buffer therefore serves a stormwater management function, which implicates Article 3.3.4(J)'s mandate that the preliminary plan delineate all areas required for stormwater or other infrastructure facilities.

The combination of Article 3.3.4(J), Article 22.2.1, and Article 22.3.5(E) unambiguously demonstrates that riparian buffers on waters of the State must be delineated at the preliminary plan stage. The delineation of such riparian buffers can only occur once a wetlands delineation properly evaluates the presence of all waters of the State. Because the wetlands delineation conducted here failed to apply the correct standard, the preliminary plan's use of its conclusions prevented compliance with these buffer requirements. (*LyonJay Wetlands Delineation*).

The Planning Commission's subsequent approval of the preliminary plan, which incorporated the conclusions of the wetlands delineation utilizing the incorrect legal standard, was an abuse of discretion. (R. p. 102-104); *see Peterson*, 327 S.C. at 235, 489 S.E.2d at 633; *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("An

abuse of discretion occurs when the [Commission's decision] is *based upon an error of law* or, when based on factual conclusions, without evidentiary support." (emphasis added).

By incorrectly applying the "any evidence" standard, the Circuit Court simply determined evidence in the record supported the conclusions of the wetlands delineation. (R. p. 6-8). As noted above, the Circuit Court committed an error by failing to construe the plain language of the ordinance to determine whether LyonJay and the Planning Commission utilized the correct legal standard in conducting the wetlands delineation. (*Id.*; R. p. 112). The wetlands delineation failed to evaluate the presence of waters of the State on the site and include their location on the preliminary plan. (*LyonJay Wetlands Delineation*). The preliminary plan can never include the location of riparian buffers on such waters of the State until that evaluation is completed.

The Circuit Court's error prevented it from conducting that analysis and remedying the failure to include such waters' riparian buffers on the preliminary plan. (R. p. 6-8; R. p. 90). CQRL therefore respectfully requests reversal and remand for compliance with the requirements set forth in the LDR.

C. The Circuit Court erred in affirming the Planning Commission's decision to approve the preliminary plan when the traffic impact study conducted for the subdivision violated clear legal requirements.

The Circuit Court similarly applied the "any evidence" standard to CQRL's argument that the TIS violated—and indeed ignored—clear legal requirements of the LDR. (R. p. 6-8). In doing so, the Circuit Court overlooked that the appropriate standard is whether the Planning Commission's decision is "correct as a matter of law" because the question is not whether sufficient evidence in the TIS supports the Planning Commission's factual findings. *Vulcan Materials Co.*, 342 S.C. at 488, S.E.2d at 896. Instead, the question is the requisite standard used in conducting the TIS, which required the Circuit Court to construe the language of the LDR, a

matter of law not subject to the "any evidence" standard. *Mikell*, 386 S.C. at 158, 687 S.E.2d at 329 ("Issues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact.").

Specifically, the Circuit Court did not address CQRL's argument that LyonJay's TIS evaluation of two nonexistent intersections is an error of law when the LDR require the TIS to evaluate traffic conditions on three *existing* intersections. (R. p. 6-8; R. p. 49-52; R. p. 775). Yet, instead of addressing the specific language of the ordinance, the Circuit Court *ignored* the ordinance's language completely and simply concluded evidence existed to support the TIS. (R. p. 36-8). The Circuit Court's failure to even *cite* the applicable language demonstrates the degree of its error. (*Id.*). This Court should reverse the Circuit Court's Order and remand the preliminary plan for compliance with the LDR.

Article 9 of the LDR establishes the requirements for a TIS. The purpose of a TIS is to evaluate "the effect a development's traffic may have on existing roads." *LDR*, Article 9.1 (R. p. 99). "Ultimately, the TIS can be used to assess if the scale of the development is appropriate for a particular site and what improvements may be necessary, on and off the site, to provide safe and efficient access and traffic flow." *Id.* Article 9.2(A) outlines the specific requirements for the TIS:

> An impact study shall analyze traffic conditions for the existing year conditions, build-out background year 'no build' conditions, and build-out year 'build' conditions. The study will be used to assess the need for changes in traffic control devices and roadway improvements necessary to accommodate the new development traffic. The study must also justify the proposed access plan and demonstrate the effects of the development on public roadways. The study area will be limited to a maximum of 3 peak hours and not to exceed adjacent or nearby 3 intersections within ½ mile radius from the property boundary. In unzoned areas, a TIS will be conducted when a subdivision will generate 50 peak-hour trips and the study area will be limited to a maximum of 3 peak hours and not to exceed

> adjacent or nearby 3 intersections within a ¾ mile radius from the property boundary. 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.

Because River Preserve is proposed for an unzoned area of Greenville County, the study area must include three adjacent or nearby intersections within a ¾ mile radius from the property boundary, but the Traffic Engineer is authorized to expand the study area if three intersections are unavailable within that radius. (R. p. 103); *Id.* Because River Preserve will produce more than fifty peak-hour trips in an unzoned area, it triggered the need for a TIS. (*Id.*); *see* Article 9.2(A) (R. p. 775) (requiring TIS for any subdivisions in unzoned areas that will trigger more than 50 peak-hour trips); Table 9.1.

LyonJay claimed before the Circuit Court that Article 9.2 does not require inclusion of three intersections in the TIS, arguing that the language "not to exceed" modifies the number of intersections required instead of the radius of the study area. (R. p. 65; R. p. 656). This reasoning ignores the remainder of the regulation, which authorizes the traffic engineer to expand the radius of the study area "*if 3 intersections are not available*." *LDR*, Article 9.2(A) (R. p. 775). LyonJay's reading would render the expansion provision meaningless. *See Henry-Davenport v. Sch. Dist. of Fairfield Cnty.*, 391 S.C. 85, 88, 705 S.E.2d 26, 28 (2011) ("[T]he cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature."); *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581 (noting the text of the statute is "the best evidence of the legislative intent"); *Georgia-Carolina Bail Bonds*, 354 S.C. at 24, 579 S.E.2d at 337 ("Statutes *must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect*, if it can be done by any reasonable construction." (emphasis added). The correct reading is that the provision requires analysis of three nearby intersections not to exceed a ¾ mile radius from the property boundary, but that radius can be

expanded beyond ¾ mile if there are not *three intersections* within that radius. This is the only interpretation that gives effect to the entire provision. *See id.* (noting statutory interpretation rules requires courts to give effect to sections within the same general statutory scheme and read the statutory provision as a whole).

The TIS here failed to properly evaluate the effect River Preserve will have on existing roads by analyzing two—out of the three required—intersections that *do not exist*. (R. p. 418, 424-426, 428-429). Specifically, the development of River Preserve will require the construction of two access roads: Agate Road and Schist Avenue. (R. p. 90). The construction of these two roads will then create two brand new intersections: the intersection of Agate Road and Woodside Road and the intersection of Schist Avenue and Wasson Way. *Id.*. At the time of the Planning Commission's consideration of River Preserve, these two intersections did not exist and will not exist until the completed construction of the development. *Id.*. Yet, the TIS used these two nonexistent intersections to analyze the impact River Preserve would have on *existing* roads. (R. p. 428-430; *LDR*, Article 9.1 (noting the purpose of a TIS is to evaluate "the effect a development's traffic may have on *existing* roads" (emphasis added)). The approval of River Preserve in light of this disregard of the regulatory requirements constitutes clear error, and the Circuit Court's failure to construe the LDR's language and give the provision effect similarly constitutes error. (R. p. 102-104; R. p. 4).

The predictable outcome of the TIS's use of two nonexistent intersections is evident in the study's notation that existing and no-build conditions were completely ignored for the two intersections that will only be created by the construction of River Preserve. (R. p. 428-430). Instead of analyzing three existing intersections, the future intersections of Agate Road and Woodside Road and Schist Avenue and Wasson Way were "[a]nalyzed under Build conditions

ONLY." (*Id.* (emphasis in original)). Given the obvious impossibility of comparing the "build" traffic conditions to nonexistent data, it is unsurprising that the TIS concluded the development would have minimal to no impact on the area's traffic and on existing roads and recommended no mitigation. *Id.* at 14.

LyonJay cannot permissibly avoid the LDR's requirement to evaluate "the effect a development's traffic may have on existing roads" by simply analyzing nonexistent roads and then claiming the development will not cause any effect on the roads. *Id.*; *LDR*, Article 9.1 (R. p. 774). Ultimately, the Planning Commission is responsible for evaluating a TIS submitted as part of a preliminary plan application and utilizing it "to *assess if the scale of the development is appropriate* for a particular site and what improvements may be necessary, on and off the site, to provide safe and efficient access and traffic flow." *LDR*, Article 9.1 (R. p. 774)(emphasis added); *see also* Article 9.5 (providing that TIS for residential subdivisions submitted through the preliminary plan process and on a County road "should be submitted to the Subdivision Administrator as a part of the preliminary subdivision submittal package"); Article 3.3.3 (R. p. 692) (noting major subdivisions are considered and approved through the preliminary plan process).

The Planning Commission's approval of River Preserve constitutes an abuse of discretion when it relied on a clearly noncompliant TIS that failed to accomplish its entire purpose: evaluating the effect a proposed development will have on existing roads. *See Bayle*, 344 S.C. at 128, 542 S.E.2d at 742 ("An abuse of discretion occurs when the [planning commission's decision] is *based upon an error of law* or, when based on factual conclusions, without evidentiary support." (emphasis added).

Yet, the Circuit Court never referenced or analyzed the LDR's language establishing the requirements for TIS. The Circuit Court never evaluated whether a TIS that only analyzes a single existing intersection satisfies the language of the LDR requiring analysis of three existing intersections. The Circuit Court simply ignored the fact that the TIS entirely disregarded the requirement to analyze three existing intersections by erroneously applying the "any evidence" standard even though the issue raised by CQRL required the Court to construe the language of the ordinance, a matter of law. The Circuit Court's failure to engage in any analysis regarding what the LDR's language required for conducting a TIS is an error of law and requires reversal. This Court must remand the preliminary plan for compliance with the LDR.

II. The Circuit Court erred in concluding CQRL received due process during the consideration and approval of the River Preserve preliminary plan.

The Circuit Court erroneously rejected CQRL's due process claim, incorrectly simplifying its argument to only the "unavailability of preliminary plan documents prior to the May 25, 2022, public hearing." (R. p. 8). Specifically, the Circuit Court concluded:

> LyonJay's plans were a matter of public record, available for review and inspection, prior to the May 25, 2022, public hearing. CQRL had the opportunity and used the opportunity to oppose the preliminary plan prior to the hearing during the public comment stage and then again at the public hearing. At the hearing, the preliminary plan was extensively debated, questioned, and CQRL members appeared and presented their respective positions.
>
> . . .
>
> The contents of [subdivision application] files are available to the public from the opening of the file. The County Subdivision Administrator and her staff maintain and update these files as public records, which any citizen can view at County Square during the County's normal operating hours. As the application progresses, developers file multiple versions of preliminary plans as they make small changes to address concerns raised by Planning Commission staff and the Subdivision Advisory Committee. These changes and

> updated versions are kept in the physical file and are available for review.
>
> . . .
>
> Evidence [in] the record shows that CQRL had opportunity to voice its concerns through document submittal and public debate. CQRL received notice and engaged in the opportunity to publicly express its position prior to the Planning Commission's final decision, thus satisfying the requirements of due process.

(R. p. 8-9). The Circuit Court's reasoning ignores the framework for the submission and approval of subdivision preliminary plan applications. *See LDR*, Article 3 (R. p. 692).

Although the procedure anticipates potential changes to a preliminary plan during the process, Greenville County Council set forth a procedure in the LDR for the consideration of proposed subdivision preliminary plans that established clearly defined—and public—deadlines. *See LDR*, Article 3.3.3 (R. p. 692). The LDR require the applicant to "ensure all comments" by the Subdivision Advisory Committee "are fully addressed on the plan *during an identified revision period*." *Id.* (emphasis added). This "identified revision period" is implemented through the publicly available Subdivision Review Calendar, which establishes the clear timeline for the initial submission of applications, the Subdivision Advisory Committee meeting, the applicant resubmittal deadline, the internal Planning Commission packet deadline, and, finally, the Planning Commission meeting. (R. p. 131).

CQRL, as well as the public at large, relies on the adherence to the deadlines established by Greenville County Council and set forth in the Subdivision Review Calendar to meaningfully participate in Planning Commission meetings. LyonJay submitted its application on April 5, 2022. (R. p. 87). The calendar indicated that applications submitted by April 6, 2022 would be scheduled for the Planning Commission meeting on May 25, 2022. (R. p. 131). Prior to the final meeting, the calendar reflected that the proposed preliminary plan would have a Subdivision

Advisory Committee meeting on April 18, 2022, followed by an applicant resubmittal deadline on April 26, 2022—the eight intervening days serving as the "identified revision period" referenced in Article 3.3.3. (*Id.*). Despite this unequivocal deadline, LyonJay submitted revised plans on May 11, 2022 and May 22, 2022, as late as a mere three days before the Planning Commission meeting and nearly a month past the deadline. (R. p. 90). The Planning Commission did not adjust the hearing date following these late revisions and instead considered River Preserve during the May 25, 2022 meeting. (R. p. 102-104).

Significantly, the change from the April 25, 2022 plan—the resubmittal deadline—to the ultimately approved version submitted on May 22, 2022 resulted in the elimination of waterways based on the conclusions contained in the wetlands delineation. (R. p. 117-121; R. p. 89; R. p. 90). This substantial change in the preliminary plan nearly a month after the resubmittal deadline and just three days before the Planning Commission meeting impeded CQRL and the public's "notice and . . . opportunity to be heard in a *meaningful way*." *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009) (noting the "fundamental requirements" of due process (emphasis added)). Contrary to the Circuit Court's Order, CQRL members did not submit comments that addressed the elimination of the waterways and their requisite riparian buffers because of the late acceptance of the revised preliminary plan. (R. p. 11). Notably, John Cook and Jim Moore's written objections were submitted *prior to* the May 22, 2022 preliminary plan that eliminated these waterways. (R. p. 487; R. p. 90). Furthermore, the meeting minutes do not reflect that either of them 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. (R. p. 102-104 R. p. 131; R. p. 90).

The Supreme Court's decision in *Kurschner v. City of Camden Planning Commission* provides guidance. 376 S.C. 165, 656 S.E.2d 346 (2008). There, the Kurschners appealed the Camden Planning Commission's denial of an application to subdivide their property and argued they were deprived of due process at the planning commission hearing. *Id.* at 169, 656 S.E.2d at 348-49. The Court found "the Kurschners were afforded a meaningful opportunity to be heard" when they submitted numerous exhibits to support their application, including tax information, letters of support, title history, and other subdivision examples, and found they were afforded due process when the planning commission "did not *preclude the Kurschners from accessing the evidence in opposition to their application*." *Id.* at 173, 656 S.E.2d at 350 (emphasis added). Here, although the circumstances are reversed, the Planning Commission's acceptance of substantial revisions to the preliminary plan far past the deadline and just three days before the hearing effectively functioned as the Planning Commission's "preclud[ing] the [public and CQRL] from accessing the evidence in [support] of [LyonJay's] application." *Id.* (*cf* R. p. 102-104; R. p. 90). This preclusion of access to these materials in a timely manner in contravention of unambiguous procedures and deadlines violated CQRL's due process rights. *Id.*;(R. p. 131).

The Circuit Court below heavily relied on the decision of another circuit court judge.[12] However, the Circuit Court ignored several significantly distinguishable facts. (R. p. 9-10; R. p. 1) (finding the appellants received due process when the applicant submitted its preliminary plan application in accordance with the timeline set forth in the subdivision review calendar). In contrast, here, LyonJay deviated from the Subdivision Review Calendar by submitting revised plans just three days before the hearing, long past the "identified revision period" and re-

[12] *Alliance to Preserve the Old White Horse Road Corridor, LLC and Mary Jean Horney v. RP&L, LLC and the Greenville County Planning Commission*, 2021CP2303048 (G.D. Morgan J., Order filed Aug. 17, 2022) (*Alliance to Preserve Order*).

submittal deadline, and the Planning Commission nonetheless went forward with the meeting as if LyonJay had submitted its final plan in accordance with the timeline established by the Subdivision Review Calendar. (R. p. 102-104R. p. 90; R. p. 131); See LDR, Article 3.3.3 (R. p. 692). In addition, unlike *Alliance to Preserve*, the due process violation here does not arise out of the unavailability of the plan *electronically* but instead by the acceptance of a significantly revised plan long past the deadline and a mere three days before the meeting, which prevented CQRL from a meaningful opportunity to comment on those revisions.[13] *Id.* The Circuit Court ignored these distinguishing factual circumstances. (R. p. 670, l. 19-25; p. 671, l. 1-10; R. p. 9-10; R. p. 605-606; R. p. 14).

CQRL acknowledges that developers may submit revised plans up until the re-submittal deadline that may not be available electronically; however, it is patently unreasonable for CQRL and the public to expect that revisions would be accepted in any form past that deadline without a revised hearing date. (R. P. 131); *See* LDR, Article 3.3.3 (R. p. 692). CQRL, as well as the public at large, relies on the adherence to the deadlines established by Greenville County Council and set forth in the Subdivision Review Calendar to meaningfully participate in Planning Commission meetings. *Id.* Allowing the Planning Commission and developers to ignore established deadlines relied upon by CQRL and the public would require interested parties to literally go to the Planning Commission office *every single day* to determine whether revisions were submitted. Such an unreasonable burden on the public is easily alleviated by the Planning Commission's adherence to the established deadlines. *See id.*.

[13] The other decision relied upon by the Circuit Court, *Donadieu v. Morgan Cnty. Planning Comm'n*, 2016 WL 5857275 (W. Va. 2016), an unpublished decision from West Virginia, is similarly distinguishable as it also did not involve the consideration of plans submitted long past clear deadlines.

The existence of the Subdivision Review Calendar and its unambiguous deadlines serves a critical function in ensuring items of public importance are considered only when the relevant materials are available in a timely manner to the public, with adequate time for review and meaningful participation at the final consideration of the application. The Planning Commission's acceptance and ultimate approval of such a significant change in the proposed plan so far past the deadline and so close to its final consideration is improper and violated CQRL's due process rights. (R. p. 102-104).

Finally, the Circuit Court's Order suggests that the fact the Planning Commission "considered, reviewed, discussed, and accepted [the revised plan] at the public hearing" somehow cures the violation. (R. p. 602). This conclusion ignores the fact that the Planning Commission's consideration of the revised plan—without an adequate and meaningful opportunity for the public and CQRL to comment on the changes—is at the core of the due process violation. (R. p. 52-55; R. p. 605-608). Otherwise, the logical extension of such reasoning is that an applicant could submit a substantially revised plan fifteen minutes before the meeting and no recourse would be available, so long as the Planning Commission considered and approved that updated plan.

Accordingly, CQRL respectfully requests this Court reverse the Circuit Court and remand the River Preserve preliminary plan for compliance with the established deadlines.

CONCLUSION

This Court should reverse the Circuit Court's Order affirming the Planning Commission's approval of River Preserve because the Circuit Court overlooked the correct standard of review, failed to conduct any analysis of the LDR language, and incorrectly concluded CQRL failed to establish a due process claim. Accordingly, the River Preserve

preliminary plan should be remanded for compliance with all applicable Land Development Regulations.

Respectfully submitted,

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