THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Bentley D. Price

APPELLATE CASE NO. 2023-000699

Marcelo Torricos, as Trustee of the John W. Beeson Irrevocable Trust II FBO James H. Beeson dated August 5, 2021.....Respondent,

v.

The Greenville County Planning Commission.....Appellant,

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT PROPERLY REVERSED THE PLANNING COMMISSION'S DECISION WHERE IT WAS BASED ON A COMPREHENSIVE PLAN AND REASONS APPLICABLE TO DIFFERENT FORMER PRELIMINARY SUBDIVISION APPLICATIONS.

2. WHETHER THE CIRCUIT COURT PROPERLY DEFINED THE LEGAL AUTHORITY AND LEGAL EVIDENCE THE PLANNING COMMISSION IS ALLOWED TO USE TO MAKE ITS DECISIONS.

3. WHETHER THE CIRCUIT COURT PROPERLY DETERMINED THE RELIEF TO BE ORDERED PURSUANT TO ITS POWERS WHEN SITTING IN APPELLATE CAPACITY.

STATEMENT OF THE CASE AND FACTS

On or around June 1, 2022, Respondent's engineer submitted a Preliminary Subdivision Application (PP-2022-105) (the "Application") on behalf of Respondent for property located in Greenville County ("Property"). (Notice of Appeal 4, ¶ 10). This subdivision was proposed to be named Langford Hills and consists entirely of unzoned property in southern Greenville County. (Minutes 6).

At its July 27, 2022 meeting, Greenville County Planning Staff recommended to the Greenville County Planning Commission ("Planning Commission") conditional approval of the Application (Minutes 6). Planning Staff noted that the Application differed from previous applications for Property in that it had no issues with preservation of a historic resource, had two less lots, and had 2.78 more acres of open space. (Minutes 6).

At the meeting, the Planning Commission based its discussion and decision on the Greenville County Comprehensive Plan (the "Plan").[1] (Minutes 7-9). Commissioner Rogers moved

[1] The Planning Commission specifically mentioned the Future Land Use Map. The Future Land Use Map is a page of the Plan. (Plan 99). The Plan specifically states: "The Future Land Use

to deny the Application on the following grounds:

1. The reason[]s set forth previously and the Judge's order.
2. The plan is inconsistent with the Comprehensive Plan.
3. Based on concerns of septic use.

(Minutes 8). The "concerns of septic use" were voiced by Commissioner Clark who "stated the Future Land Use Map for this area was supposed to reduce septic lots by 59%." (Minutes 8). The Commissioner was referring to a graphic labeled "Scenario 2 Benefits vs. Scenario 1" from the Comprehensive Plan. (Plan p. 98). Both the "inconsistent with the Plan" reason for denial and the "concern for septic use" reason for denial are based on the Plan.

The Planning Commission ultimately voted to deny the Application on a split 4-3 vote. (Minutes 9). The reasons for denial were (1) the reasons this project had been denied in the past[2], (2) the circuit court's order from another appeal, (3) inconsistency with the Plan, and (4) the use of septic tanks in contravention to the Plan's initiative to reduce septic tank usage over a period from 2020-2040. By letter dated August 2, 2022, Greenville County notified Respondent of the Planning Commission's decision. (Denial Letter). The Planning Commission did not provide a reason for its decision in the denial letter. (Denial Letter)

On August 26, 2022, Respondent filed a Notice of Appeal. (Notice of Appeal 1). A hearing was held before the circuit court after which the court vacated and remanded the Planning Commission's decision in an order filed March 31, 2023. (Order 11-12). On April 10,

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Map is not a regulatory or legally binding document." (Plan 98).

[2] Mark III made three previous attempts to have a preliminary plat application approved for a subdivision called Langford Hills. However, due to various modifications made for the present application, Mark III never submitted a plan identical to the plan submitted by Respondent. Property was subsequently sold to Respondent, and the Application was the first time Respondent applied for preliminary subdivision approval.

2023, the Planning Commission moved to alter or amend the order. (Motion to Amend 1). The motion was denied in an order filed April 25, 2023. (Order 4/25/23 1). This appeal followed.3

STANDARD OF REVIEW

A planning commission's decision must be overturned "where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion." *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 173-74, 656 S.E.2d 346, 351 (2008) (applying zoning board standard of review to a planning commission decision); see also *Rest. Row Assocs. v. Horry County.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) ("[A] decision of a municipal [Z]oning Board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.").

ARGUMENT

I. THE CIRCUIT COURT PROPERLY HELD THAT A COMPREHENSIVE PLAN IS NOT LAW AND THEREFORE IS NOT LEGAL SUPPORT FOR A PLANNING COMMISSION DECISION.

A. Guidance from the Comprehensive Plan is not Legal Support for Denying a Preliminary Subdivision Application.

The South Carolina Local Government Comprehensive Enabling Act of 1994 instructs planning commissions to "develop and maintain a comprehensive plan to guide development in its area of jurisdiction." *Sinkler v. County of Charleston*, 387 S.C. 67, 69 n.1, 690 S.E.2d 777, 778 n.1 (2010) (citing S.C. Code Ann. § 6-29-510(A)).

[3] Respondent incorporates its Memorandum of Law filed May 12, 2023 regarding Appealability of this matter.

Here, the Planning Commission has adopted such a plan. However, the Plan is not law, but an advisory document for Greenville County. The Plan expressly states it "is a guiding policy document that reflects a community's vision for its future." (Plan 10). The Plan "provides technical guidance and is *a foundation for other planning-related documents, such as zoning and land development regulations*." (Plan 10 emphasis added). As such, the Plan is not codified law, but merely an advisory document to serve as guidance for laws.

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

It is these regulations and ordinances enacted by an elected body, along with State statutes, that regulate a planning commission's consideration of whether to approve or deny preliminary subdivision applications. Once land development regulations and zoning ordinances are adopted, those regulations and zoning ordinances, along with State law, become the legal basis for approval or denial of an application by a planning commission.

However, instead of relying upon laws enacted in furtherance of the guidance from the Plan to make its decisions, the Planning Commission relied directly upon the non-codified advisory document itself for the reasons for its decision. As such, to the extent that the Planning Commission based its decision upon the Plan, the decision is an error of law and was properly vacated by the circuit court.

B. The Guidance from the Comprehensive Plan is too Vague and Ambiguous to Apply without being Constitutionally Infirm.

Further, even if the Plan was considered a potential legal basis for a decision, it is far too vague and broad to apply without being constitutionally infirm. A decision based on vague and extremely broad standards "is constitutionally infirm." *Peterson*, 327 S.C. at 37, 489 S.E.2d at 633-34. A decision based solely on vague and extremely broad standards "gives rise to an unconstitutionally vague application" of the standards and renders the decision "arbitrary and capricious and an abuse of discretion." *Id.* at 236-37, 489 S.E.2d at 633. Standards are vague and extremely broad where they:

1) "[F]ail to provide guidance to a potential applicant of the basis for denial or . . . approval;"
2) Grant the deciding body "overly broad discretion and allows them to arbitrarily decide whether to approve;"
3) Do not "provide notice to potential applicants of the criteria nor do they provide any objective standards;" and
4) Are "extremely subjective and lack definiteness."

Id. at 237, 489 S.E.2d at 633.

The Planning Commission did not provide a detailed reason for how the Application is inconsistent with the Plan in its denial letter or its motion to deny. (Minutes 8; Denial Letter). As such, to determine how the Application is inconsistent with the Plan, it is only possible to rely upon the Planning Commission's discussion of the Application during its meeting. (Minutes 7-9). The only direct reference to these inconsistencies is that the Application does not conform with the Future Land Use Map and does not "reach the goal of septic lot reduction" by 59%. (Minutes 8).

This is a reference to two pages out of 176 pages in the Plan. The 59% septic lot reduction is a bullet point in a graphic labeled "Scenario 2 Benefits vs. Scenario 1" stating "Up to 59% less new home septic systems installed over lifetime of plan (2020-2040)." (Plan 98). The referenced "Future Land Use Map" is a map of general uses throughout the County. (Plan 99). The map does not include parcel border lines, nor does it state desired residential use densities.

These references do not state any objective standard for how they should be implemented. If used by the Planning Commission as a basis for decision-making, these vague references would grant the Planning Commission overly broad discretion and allow them to arbitrarily decide whether to approve or deny any application. The Plan fails to provide guidance to a potential applicant of the basis for a decision because it is completely subjective and lacks definiteness. As such, the Planning Commission's reliance upon the Plan for the reason to deny the Application is constitutionally infirm.

C. Using the Comprehensive Plan to Restrict Density of Unzoned Property is Illegitimate Rezoning of the Property

Finally, the Planning Commission's attempt to use the Plan to restrict the use of Respondent's unzoned property is an illegitimate, unlawful rezoning of that property. "Rezoning is a legislative matter," *Bear Enterprises v. County of Greenville*, 391 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995). In Greenville County, only County Council may rezone property by approving an ordinance, whereas the Planning Commission only has the authority to recommend approval or disapproval of zoning map amendments to County Council. *See* Greenville County Zoning Ordinance § 3:2.6.

Any amendment to the zoning map requires a public hearing, S.C. Code Ann. § 6-29-760, in front of the entity allowed to amend the map – here County Council. Because no such public hearing occurred, the Planning Commission's attempt to rezone Respondent's property through use of the Plan is illegitimate. Any alternative would directly violate Respondent's constitutional right to due process.

Therefore, the circuit court properly held that the Plan is not law and is not legal support for the Planning Commission's decision.

II. THE CIRCUIT COURT PROPERLY HELD THAT AN ORDER DENYING AN APPEAL OF THE DENIAL OF A DIFFERENT PRELIMINARY SUBDIVISION APPLICATION WAS INAPPLICABLE TO CONSIDERATION OF THIS APPLICATION.

By further way of background, Mark III Properties, LLC (Mark III) owned Property in 2021. It filed three applications for a subdivision named Langford Hills including a preliminary subdivision application in December of 2021. (Nov. 17 Minutes 4; Jan. 26 Minutes 11; Apr. 27 Minutes 9). On January 26, 2022, the Planning Commission denied the application. (Jan. 26 Minutes 13). Mark III then filed an appeal arguing that S.C. Code § 6-29-1150(B) required the Planning Commission to state its reasons for denial with specificity and in writing. (June 3 Order 2). In that appeal, the circuit court held that S.C. Code § 6-29-1150(B) did not require the Planning Commission to specifically state its reasons for denial in its denial letter because the recorded minutes meet the requirement of the statute and the reasons for denial need not be reiterated. (June 3 Order 3). In April 2022, Mark III sold Property to Respondent for $1,237,000. (Deed 1).

"Only a party to a prior action or one in privity with a party to a prior action can be precluded from relitigating an issue on the basis of offensive collateral estoppel." *Carrigg v.*

Cannon, 347 S.C. 75, 80, 552 S.E.2d 767, 770 (Ct. App. 2001) (citing *Allstate Ins. Co. v. Donaldson*, 339 S.C. 202, 206, 528 S.E.2d 679, 681 (Ct. App. 2000); *Wade v. Berkeley County*, 330 S.C. 311, 317, 498 S.E.2d 684, 687 (Ct. App. 1998)). "The term 'privity,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Allstate*, 339 S.C. at 207, 528 S.E.2d at 681 (quoting *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994)).

> Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity.

Wade, 330 S.C. at 317, 498 S.E.2d at 687 (citations omitted).

"Due process concerns prohibit estopping litigants who never had a chance to present their evidence and arguments on a claim, despite one or more existing adjudications of the identical issue which stand squarely against their position." *Carrigg*, 347 S.C. at 81, 552 S.E.2d at 770 (citing *Richburg v. Baumann*, 290 S.C. 431, 434-35, 351 S.E.2d 164, 166 (1986)).

A. A Different Application Submitted by a Different Party is not Relevant to Respondent's Application.

Respondent is not the same party, nor does it assert the same legal right as Mark III. Respondent purchased Property from Mark III for value and is entitled to assert its own legal rights to develop Property.

Even if Respondent's relationship to Mark III was relevant, which it is not, Appellant failed to prove any relationship between them giving rise to them being "privies." Appellant's

argument that they were privies was that they used the same engineer, registered agent,[4] and law firm, none of which makes them the same parties.

Further, the Application is different from any prior application submitted by Mark III. (Minutes 6). As such, neither the parties nor the factual circumstances are similar to this case.

Therefore, the Court's order in C.A.# 2022-CP-23-01106 is not applicable to this matter.

B. Findings in the June 3, 2022 Order are not Preclusive where the Parties and Factual Circumstances are Different.

"Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *S.C. Pub. Interest Found. v. Greenville County*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (2013) (quoting *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). These doctrines present two different concepts:

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

Id. at 386, 480 S.E.2d at 507 (quoting *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 190 n.1 (Ct. App. 1984)).

[4] Counsel explained at the hearing that the registered agent for Mark III is not the same John W. Beeson who created the Respondent trust. (Trans. 10).

Res judicata requires the following elements: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Pye*, 325 S.C. at 436, 480 S.E.2d at 460.

Here, the first two elements clearly do not apply – the parties are not the same and the subject matter is not the same because this is a new, different application. Further, these specific issues were not at issue in the prior appeal. Even if Respondent and Mark III were considered in privity, the previous appeal litigated the legitimacy of the Planning Commission's documentation of its reasons for denial and not the legitimacy of its reasons themselves. Therefore, *res judicata* is not applicable.

A party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. *Beall*, 281 S.C. at 369 n.1, 315 S.E.2d at 189–90 n.1. For collateral estoppel to apply, the party against whom estoppel is asserted must have "had a full and fair opportunity to previously litigate the issues." *Carolina Renewal v. S.C. Dept. of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009) (quoting *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008)).

For similar reasons as stated above, collateral estoppel does apply.

Therefore, the circuit court properly held Respondent's application and appeal were not precluded by *res judicata* or collateral estoppel.

III. THE CIRCUIT COURT PROPERLY HELD THAT THE PLANNING COMMISSION WAS UNREASONABLE AND ABUSED ITS DISCRETION IN DENYING THIS APPLICATION FOR REASONS SET FORTH FOR DENYING DISTINCT PREVIOUS APPLICATIONS.

This is the first application Respondent has submitted to the Planning Commission. Also, the Application differs from any previous application for the Planning Commission's consideration. For example, no previous application was for development of this specific Property, nor did any previous application have the same density included in the Application. To deny the Application "for all reasons set forth previously," could as well be to deny it for all reasons the Planning Commission has used to deny any previous application for any property. As such, the Planning Commission's decision to deny the Application based on reasons set forth for the denial of previous applications with different parties and factual backgrounds must be arbitrary and unreasonable.

Further, even if the Planning Commission is allowed to rely upon unspecified previous reasons, the reasons for denial of any previous application for a subdivision named Langford Hills no longer exist. On November 17, 2021, the Planning Commission denied Mark III's application concerning a subdivision named Langford Hills due to the following reasons:

1) Concerns regarding preservation of two allegedly historic buildings (Minutes 6; Trans. 11, lines 7-23);
2) Failure to comply with the Comprehensive Plan, including septic tanks (Trans. 12, lines 2-6);
3) Pending appeal (Trans. 12, lines 7-14); and
4) Respondent's commitment to installing a right-hand turn lane (Trans. 12, line 15-p. 13, line 2).

One historic building was condemned and removed and the land on which the other house was located was not part of the subdivision in this Application. (Minutes 6). Appellant's

arguments regarding the Comprehensive Plan have been addressed above. *Supra* § 1. The pending appeal was the appeal resulting in the order addressed above. *Supra* § 2. At the hearing before the Planning Commission, staff's recommendation was to approve the application contingent upon Respondent complying with "[a]ll SCDOT required improvements," which Respondent committed to doing. (Minutes 6; Trans. 12, lines 15-18).

As such, the preliminary subdivision application process worked. Respondent received feedback from previous applications and addressed the concerns of the Planning Commission in this Application, abating all of the issues that caused previous objections.

Therefore, denying this Application based on the previously stated reasons is completely unreasonable and lacks evidentiary support because those conditions either lack legal support or the factual basis for said reasons no longer exists with this Application.

IV. THE CIRCUIT COURT PROPERLY DEFINED THE LEGAL AUTHORITY AND LEGAL EVIDENCE THE PLANNING COMMISSION IS ENTITLED TO USE TO MAKE ITS DECISIONS.

In properly determining that the Plan is not legal support to deny the Application, *see supra* § II, the circuit court reasoned that it is an abuse of discretion for the Planning Commission to deny a preliminary subdivision application if it substantially complies with the applicable land development regulations without seeking a variance, applicable zoning ordinances, and State statutes. (Order 5).

Appellant argues this constitutes a new standard of review from the any evidence standard. (Br. App. § II). However, as stated above, the court is simply stating the legal support available to the Planning Commission to make a decision, in contrast with the Plan. This is not contradictory to the existing standard of review, which not only requires some legal evidence to

uphold a decision, but also requires that the decision not be based on errors of law. *See Peterson Outdoor Advertising*, 327 S.C. at 235, 489 S.E.2d at 633 (a decision must be overturned "where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion." The Planning Commission is still able to use any legal evidence within the correct legal framework to make its decision.

Therefore, it was not error for the circuit court to explicitly state the laws applicable to the Planning Commission's determination of whether the approve or deny the Application.

V. THE CIRCUIT COURT PROPERLY DETERMINED THE RELIEF TO BE ORDERED PURSUANT TO ITS POWERS WHEN SITTING IN APPELLATE CAPACITY.

Appellant relies upon S.C. Code Section 6-29-840(A) to define the authority of the circuit court on appeal. (Br. App. 15). However, that statute defines the court's authority in appeals from a board of zoning appeals. The General Assembly did not include a similar limitation on a circuit court's appellate authority in appeals from a planning commission. Compare S.C. Code § 6-29-710, *et seq.* with § 6-29-1110, *et seq.* Without limitation, the circuit court's authority is similar to any court sitting in its appellate jurisdiction under common law, including the ability to instruct a lower tribunal as necessary. *See S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 250-51, 551 S.E.2d 274, 279 (Ct. App. 2001) ("[A] trial court has no authority to exceed the mandate of the appellate court on remand."); *see also Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) ("The trial court has a duty to follow the appellate court's directions.").

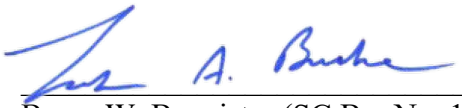
The court gave instructions to the Planning Commission that were necessary to implement its ruling. It instructed the Planning Commission on the applicable laws to consider when deciding whether to approve or deny the Application. *Supra* § IV. That Appellant has admitted that applying these valid instructions "essentially pre-ordain[s] that this subdivision will be approved," Br. App. 16, only serves are further evidence that the Application should have been approved by the Planning Commission in the first place.

Therefore, the circuit court's instructions to the Planning Commission did not exceed the court's authority on appeal and should be upheld.

CONCLUSION

For the reasons stated, Respondents respectfully request that this Court affirm the judgment of the circuit court.

Respectfully submitted,



November 27, 2023

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