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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2023-001006

Justin O'Toole Lucey, Appellant,

v.

The Town of Mount Pleasant, South Carolina, and
WIN515, LLC, Respondents.

APPELLANT'S FINAL BRIEF

Jeffrey S. Tibbals (S.C. Bar No. 72628)
jst@bybeetibbals.com
Evan P. Williams (S.C. Bar No. 101981)
ewilliams@bybeetibbals.com
BYBEE & TIBBALS, LLC
880 Johnnie Dodds Blvd., Suite 2
Mt. Pleasant, South Carolina 29464
P.O. Box 1542 (29465)
Telephone: 843.881.1623

Counsel for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in finding that Appellant Justin O'Toole Lucey ("Lucey") did not have the requisite "substantial interest" necessary to possess statutory standing to appeal the DRB's decision?

2. Did the lower court err in interpreting "near vicinity" to require that a landowner's real property be physically adjacent or in immediate proximity to the subject parcel in order to confer statutory standing?

3. Did the lower court err in conflating, and combining, constitutional standing with statutory standing?

4. Did the lower court err in finding that no matters of public importance were implicated in the DRB's decision and subsequent appeal?

5. Did the lower court err in ruling that the Town's DRB is an entity independent and distinct from the Town, such that Lucey was required to separately name the DRB as a party in, and serve it with, notice of the appeal?

6. Did the lower court err in dismissing Lucey's appeal on jurisdictional grounds, when the motion to dismiss only requested dismissal under Rule 12(b)(6), SCRCP?

7. Did the lower court err in dismissing Lucey's appeal of the DRB's decision based on alleged failure to exhaust administrative remedies?

8. Did the lower court err in refusing to consider the merits of Lucey's appeal?

STATEMENT OF THE CASE

This appeal concerns a local architectural review board's final approval of an office/retail development proposed by Respondent WIN515, LLC ("WIN515" or "Developer") for real property identified as 515 Coleman Boulevard, Mount Pleasant, South Carolina 29464, consisting of approximately 0.22 acres (the "Property").[1] The most substantive issues on appeal include the requisite criteria necessary to satisfy the "substantial interest" test for statutory standing to appeal a municipal design board decision; and whether the board must be named as a party to the appeal, in addition to the controlling local governing body that controls it, for the Circuit Court to possess jurisdiction.

As to the substantial interest standard, this case presents a novel issue by inviting the Court to define, or set parameters for determining, "near vicinity" of property ownership or residence sufficient to bestow statutory standing for persons who seek to appeal decisions of local architectural review boards.

This case originated with the DRB's June 29, 2022 decision to grant Developer's request for "Final Approval of Site, Landscape, and Architecture" for a three-story office/retail development at the Property (the "Decision"). The Property lies at the corner of Simmons Street and Coleman Blvd., which is "one of the busiest intersections in the Town." (R. p. 24). Appellant Justin O'Toole Lucey ("Lucey"), who owns multiple properties in close proximity to the Property, timely appealed the DRB's Decision to the Charleston County Circuit Court, in accordance with S.C. Code Ann. § 6-29-900(A) and Section 156.422(C) of the Town's Code of Ordinances ("Town

[1] Herein, "Town" refers to Respondent The Town of Mount Pleasant, South Carolina, and "DRB" refers to the Town's Commercial Design Review Board. All parties agree that the DRB sits as a board of architectural review, as that term is used in S.C. Code Ann. §§ 6-29-870 – 6-29-930.

Code"), filing his petition, titled "Complaint," on July 25, 2022.[2] (R. pp. 31-33). Respondents were served with notice of the appeal via the petition on July 25, 2022. (R. pp. 405-406).

On August 8, 2022, WIN515 moved to dismiss Lucey's petition. After the parties submitted memoranda on the motion, the Circuit Court held a hearing via remote videoconference on January 27, 2023, and entered a form order on February 10, 2023 granting WIN515's motion, "formal order to follow." (R. pp. 4-6). The Circuit Court entered its formal order dismissing Lucey's DRB Appeal,[3] with prejudice, on April 5, 2023 (the "MTD Order"), ruling that "Lucey has no right to appeal or otherwise challenge the DRB's" Decision. (R. p. 16). Lucey timely moved to reconsider the MTD Order on April 14, 2023, which the Circuit Court denied via its order entered May 23, 2023 (the "MTR Order"). (R. pp. 18-29).

On June 20, 2023, Lucey timely filed and served his notice of appeal to this Court, challenging the MTD and MTR Orders (collectively, the "Orders"). The Orders dismissed Lucey's DRB Appeal on three grounds, holding that Lucey: 1) lacked statutory standing under S.C. Code Ann. § 6-29-900(A); 2) did not name the DRB as a party to the appeal; and 3) did not serve the DRB with notice of the appeal. Each Order also stated the appeal was dismissed for failure to exhaust certain administrative remedies (R. p. 8; R. p. 18), but both failed to specify the remedies at issue and lack any discussion or analysis that would support such a finding.

Save for any costs or expenses that may be recovered, there is no monetary amount

[2] The sections of the Town Code governing the DRB, certified as true and correct by the Town in early November 2023, are contained in the record. (R. pp. 420-458; *see also* R. pp. 388-391). Additionally, the record includes a certified copy of Town Am. Ordinance No. 22047 (R. pp. 459-460), which amended Town Code § 156.420(A) on August 12, 2022, as it shows (in strikethrough form) the text of that subsection as it existed on June 29, 2022, the date of the DRB's Decision.

[3] To avoid confusion, the appeal of the DRB's Decision to the Circuit Court is referred to as the "DRB Appeal."

involved or at issue on appeal, as Lucey's only requested relief is that the DRB's Decision be reversed and vacated.

STATEMENT OF THE FACTS

The subject Property is a vacant parcel located at the corner of Simmons Street and Coleman Blvd. in the Town (the "Intersection" or "Crossing"). Coleman Blvd. is a state highway, SC-703, one of the most traveled thoroughfares in the Town (R. p. 14), and the Intersection at which the Property sits is "one of the busiest intersections in the Town." (R. p. 24). Moultrie Middle School neighbors the Property to the east, separated only by a farmers' market, and the school is accessed via Coleman Blvd. and Simmons Street. (R. p. 32 at ¶ 8).

Many students that attend the school live in the surrounding area and walk to school or are driven and dropped off at or near the Intersection. (*E.g.*, R. pp. 90-91; R. pp. 101-102; R. pp. 105-107; R. p. 35 at ¶ 5.a.i.). This includes Lucey's children, whose residence on Rue De Muckle is two houses away from Simmons Street, which is one block north of Coleman Blvd. and the Intersection, across from the school. (R. p. 32 at ¶¶ 8,10; R. p. 34 n.1; R. p. 57, lines 11-21; R. p. 62, lines 6-9; R. p. 13 (GIS aerial image on which Lucey's residence is marked with a blue "X" and the Property with a green "X")). As acknowledged in the Orders, the Intersection is a high-traffic area. A school crossing officer was previously struck by a vehicle while managing traffic at the Intersection. (*E.g.*, R. p. 155). Additionally, a 7-year-old child nearly died after being struck by a vehicle while using a cut through in the neighborhood to get to the school. (R. pp. 94-95).

The DRB's June 29, 2022 meeting at which it made the Decision to grant Final Approval was the third time that the Developer's plans had been scheduled for such a vote. (R. pp. 32-33 at ¶¶ 13, 16, 21; R. pp. 109-110). Previously, on August 25, 2021, the DRB purportedly granted preliminary approval for the Developer's Project, and it was placed on the agenda for the DRB's

October 27, 2021 meeting for a determination on final approval. (R. p. 32 at ¶ 12; R. p. 109). Dozens of individuals appeared and spoke in opposition to the project, and the DRB voted unanimously to send it to a DRB subcommittee for further review and study. (R. p. 32 at ¶¶ 14-15). Six weeks later, on December 8, 2021, the DRB again considered whether to grant final approval. (R. p. 32 at ¶ 16; R. p. 41, line 25-p. 42, line 1). Once again there was strong outspoken public opposition to the project, and the DRB voted to deny the request for final approval. (R. p. 32-33 at ¶¶ 17-18; R. p. 42, lines 1-10).

The Developer appealed the denial to the Circuit Court, and after an unsuccessful mediation, it "resubmitted" plans to the DRB for consideration in or around early June 2022 that were substantively similar to the original submission. (R. p. 33 at ¶¶ 20-21; R. p. 34 at ¶ 1; R. p. 42, lines 9-11; R. pp. 299-303). This submittal was reviewed by staff and placed on the DRB's agenda for final review in June 2022, six months after the request for final approval was denied on December 8, 2021, even though the DRB's bylaws required a twelve-month waiting period before reconsideration. *See infra* Argument Sec. IV.A.

Based on its final submittal package, the Developer did not obtain the required preliminary approval for its resubmitted plans, and instead relied on the preliminary approval granted in August 2021 for the previous set of plans. (R. p. 270; *see also* R. p. 35 at ¶ 4). Despite the public notoriety of and outspoken opposition to the project, it was placed on the agenda for the DRB's June 29, 2022 meeting for final approval consideration without adequate notice to persons known to be interested in the outcome. (R. p. 34 at ¶ 2; R. p. 56, line 19-p. 57, line 6). As with the previous meetings, even though it occurred with little notice while many were on summer vacation, a sizable contingent of people spoke at the meeting in opposition to the project. (R. pp. 84-88).

Many opponents expressed the opinion that the area was already overdeveloped and posed safety concerns even without the added traffic from the proposed development. (R. pp. 85-86; *see also* R. pp. 90-108, R. pp. 112-113, R. p. 116, R. pp. 118-120, R. p. 124, R. pp. 126-135, R. pp.137-149, R. p. 151, R. pp. 154-155). Issues with the project relating to parking, ingress and egress and negative impacts on traffic flow were also raised. (R. pp. 85-86; R. pp. 90-91; R. pp. 96-97; R. pp. 102-107; R. p. 116; R. pp. 126-128; R. pp. 130-135; R. pp. 138-141; R. pp. 143-149; R. p. 155; *see also* R. p. 35 at ¶ 5; R. p. 36 at ¶ 9; R. p. 398 n.3). Additionally, a large number of the written comments submitted, which were mainly from area residents, opposed the project for visual aesthetic reasons and the development's architecture. (R. pp. 96-97; R. p. 100 (referring to the project as an "eye sore"); R. pp. 101-102; R. p. 105; R. pp. 106, 107 (stating the project would "stick out like a sore thumb"); R. p. 112; R. p. 124; R. pp. 126-127; R. p. 130; R. pp.138-141; R. p. 143; R. pp. 151-152; R. p. 155; *see also* R. p. 35 at ¶ 6; R. p. 37 at ¶ 11). After discussing the project in executive session for twenty-two (22) minutes, the DRB reconvened and voted to grant Final Approval of the Developer's project. (R. pp. 86-87). Lucey's DRB Appeal to the Circuit Court was timely filed on July 25, 2021.

STANDARD OF REVIEW

Multiple standards apply in reviewing this matter. First, in granting WIN515's motion to dismiss made under Rule 12(b)(6), SCRCP, the lower court's MTD Order applied a Rule 12(b)(6) standard of review. (R. p. 9). "In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010).[4] "In considering

[4] Unless otherwise noted, all emphases are added and all internal citations are omitted.

a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 74, 753 S.E.2d 846, 850 (2014). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

The Circuit Court did not rule on the merits of the BZA Decision or Appeal and instead ordered dismissal on jurisdictional grounds. However, in appeals from a local land use board decision, "the circuit court and the appellate court 'must determine only whether the decision of the board is correct as a matter of law.'" *Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 62, 737 S.E.2d 863, 866 (Ct. App. 2013). The decision of a municipal zoning 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." *Id.*

Third, although this Court has previously interpreted "substantial interest," the statutory term that confers standing (*infra* pp. 15-17), this case requires clarification of the "near proximity" group of the statutory class established via that interpretation. To the extent that presents an "[a]n issue regarding statutory interpretation[,] [it] is a question of law." *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Planning Comm'n*, 426 S.C. 97, 102, 825 S.E.2d 721, 724 (Ct. App. 2019). "As to questions of law, this court's standard of review is de novo." *Id.*

Finally, in reviewing the lower court's dismissal based on standing, "'[t]he question of subject matter jurisdiction is a question of law for the court.' We are free to decide questions of law with no deference to the trial court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

ARGUMENT

The Circuit Court's dismissal of Lucey's DRB Appeal, although couched as Rule 12(b)(6) ruling, was based entirely on standing and other jurisdictional grounds. It erred in finding that Lucey, because he did not separately name and serve the DRB to and with the appeal, did not perfect his appeal, meaning the Circuit Court purportedly lacked jurisdiction. The Circuit Court also erred in holding that the "substantial interest" standard for statutory standing requires ownership of property that is adjacent or in immediate proximity, as well as an examination of constitutional standing considerations, namely whether a particularized and actual injury exists (and is proven by "competent evidence"). As a result of its narrow review, the lower court erred in dismissing Lucey's petition under Rule 12(b)(6), SCRCP, and erred in failing to examine the substantive grounds and reasons advanced for reversing the DRB Decision.

To the extent that the lower court gave, or should have given, consideration to the merits of Lucey's DRB Appeal, the DRB Decision should have been reversed based on the DRB's failure to comply with the rules and regulations applicable to the same. Specifically, the DRB reconsidered the project before the required twelve-month waiting period for reconsideration had expired, and failed to give consideration to traffic and safety issues, which fall within the DRB's purview.

I. LUCEY POSSESSES A SUBSTANTIAL INTEREST THAT CONFERS STATUTORY STANDING

The Orders explicitly took note of the established principle that the "'concepts of constitutional standing are inapplicable when standing is conferred by statute.'" (R. p. 10; R. p. 19 (quoting *Pres. Society of Charleston v. S.C. Dep't of Health & Envt'l Control*, 430 S.C. 200,

210, 845 S.E.2d 481, 486 (2020)). Nevertheless, in contravention of binding precedent,[5] the lower court created a hybrid statutory-constitutional standing test through which it dismissed Lucey's appeal, all while terming it as a purely statutory standing determination as to whether Lucey possessed a substantial interest in the Decision. (R. pp. 11-12; R. pp. 20-21).

A. <u>The Lower Court's Errant Consideration of Constitutional Standing Factors</u>.

Contrary to the Orders (R. p. 11; R. p. 20), the "substantial interest" test for statutory standing was not "clarified" or "discussed in detail" in this Court's opinion in *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001). Quite the opposite, the Court's decision there did not analyze statutory standing and was limited to holding that "the League does not have standing under the three-pronged *Lujan* test or under Rule 201, SCACR," referencing the three-part test to determine Article III constitutional standing enumerated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *Beaufort Realty*, 346 S.C. at 303, 551 S.E.2d at 590.

And although it was issued prior to *Lujan*, this Court's opinion in *Spanish Wells* similarly held that traditional harm and injury notions of constitutional standing do not play a role in statutory standing for municipal land use board appeals. *Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of the Town of Hilton Head Island*, 292 S.C. 542, 545 (Ct. App. 1987), *reversed on other grounds*, 295 S.C. 67, 367 S.E.2d 160 (1988) ("The circuit court erred in applying the traditional common law test of 'special damage' rather than the 'substantial interest' test of the governing statute.").

[5] *See, e.g.*, *Pres. Society*, 430 S.C. at 209-11, 845 S.E.2d at 486 ("Standing may be acquired (1) by statute, (2) under the principle of 'constitutional standing,' or (3) via the 'public importance' exception to general standing requirements. … The concept of Article III standing as applied in the federal courts does not limit a state's ability to statutorily formulate standing criteria.").

The Orders also cite *Momeier v. John McAlister, Inc.*, 193 S.C. 422, 8 S.E.2d 737 (1940) in support of the rulings that special injury and damage, and a unique, individualized interest are required to possess standing under S.C. Code Ann. § 6-29-900. (R. p. 11; R. p. 20). However, *Momeier* is completely inapposite to the case at hand, as it did not involve a municipal land use board appeal, the Circuit Court was sitting as a court of first impression, and standing was not at issue. *Momeier*, 193 S.C. 422, 8 S.E.2d 737.

In essence, the Orders ignore the crux of the matter, that a party's possession or satisfaction of statutory standing, via owning property with requisite proximity, necessarily means that the required "substantial interest" exists to vest standing to pursue the appeal.

B. The Lower Court Misapplied the "Near Vicinity" Standard in Finding Lucey Lacked Statutory Standing.

Setting aside the errant constitutional standing review, this Court has already interpreted the statute's term, "substantial interest," and opined on the class of persons vested with statutory standing as a result. In *Spanish Wells*, the term was interpreted as allowing for two subsets of persons in the statutory class: those with property adjacent to the development at issue; and those with property in the near vicinity of the development. *Spanish Wells*, 292 S.C. at 544. At issue here is the interpretation and definition of the "near vicinity" subset of the class.[6]

The *Spanish Wells* opinion clearly distinguished between property adjacent to, and property in the near vicinity of, the development at issue, finding that the owners of both "types" of property possess statutory standing. *Spanish Wells*, 292 S.C. at 544 ("Spanish Wells and its members, as

[6] The Town attempted below to insert a "neighboring property owner" standard by referencing *Carnival Corp.* 407 S.C. 67, 753 S.E.2d 846. (R. pp. 408-409). However, *Carnival Corp.* did not involve a zoning board appeal, and examined constitutional standing, as well as standing for injunction actions regarding zoning ordinance violations under the specific terms of S.C. Code Ann. § 6-29-950, which differs from the statutory language at issue here. *Carnival Corp.*, 407 S.C. at 73-75, 78-80, 753 S.E.2d at 849-50, 852.

the owners of **property adjacent to and in the near vicinity of** the Calibogue development, are persons with a substantial interest in the Board's decision. The statute, therefore, gives Spanish Wells standing to appeal.").

However, in reading the MTD Order, the only conclusion is that the lower court either equated near vicinity with physically adjacent, or required possession of property that is both adjacent and in the near vicinity. (*E.g.*, R. pp. 10, 12, 14). Indeed, the Circuit Court dismissed on standing because Lucey did not own adjacent property. (R. p. 14) ("Lucey does not own property physically adjacent to WIN515's Property. . . . Therefore, his property ownership interests alleged in the Complaint fail to satisfy the "substantial interest" test laid out in *Spanish Wells*[.]"). Accordingly, the Circuit Court reversibly erred in dismissing the DRB Appeal.

While the MTR Order (R. p. 18) stated it "reaffirm[ed]"' the MTD Order, it employed revisionist history to pull back on the prior necessary property interest holding, stating the MTD Order held that Lucey lacked standing because he "does not own property *in the 'near vicinity' of WIN515, LLC's property*[.]" (R. p. 21 (emphasis in original)).

In so ruling, the lower court held that a property must be on the same side of the street as the subject development to be considered in the near vicinity. (R. p. 23 ("Both the Lucey Office and the Lucey Home are on the other side of Coleman Boulevard[.]")). Such a rule is inconsistent with the plain meaning of "near vicinity" and leads to the exclusion of persons that would clearly possess a substantial interest. The obvious example is a property that is directly across the street from the subject development; it would be utterly illogical to hold that an owner of such property lacked standing.

But the test does not require that the property be in the immediate vicinity, only in the near vicinity. In looking at the definitions of "near" and "vicinity" in order to afford the term its plain

and ordinary meaning, it should encompass properties "not far distant in time, place, or degree" and in "a surrounding area or district." *Merriam-Webster Dictionary*.[7] This comports with the statutory language regarding the creation of architectural review boards. S.C. Code Ann. § 6-29-870(A) (stating such boards may be created "for the preservation and protection of historic and architecturally valuable **districts and neighborhoods** or significant or natural scenic **areas**, or [to] protect[] or provide[], or both, for the unique, special, or desired character of a defined **district, corridor, or development area or any combination of it**[]"). As further demonstrated herein, Lucey's properties are clearly not a far distance away and are in the surrounding area or district.

1. The Lower Court Erred in Its Issue Preservation Rulings.

As an initial matter, the lower court erred in holding that it could not consider arguments as to the identity and location of Lucey's real property because that information was not contained in the record of the DRB proceedings. (R. p. 21). This ruling not only conflicts with the MTD Order's unconditional consideration of the Complaint and its attached exhibit, it also runs contrary to precedent established by this Court.

> Noting, however, that section 6-29-820(A) of the South Carolina Code (Supp.2012) allows any "person who may have a substantial interest in any decision" by the zoning board to appeal the decision to the circuit court and "does not require an appellant to attend a public hearing on the Board's decision *or even to communicate his concerns to the Board prior to filing his petition with the circuit court,*" this court held "the sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires."

Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals, 402 S.C. 57, 63, 737 S.E.2d 863, 867 (Ct. App. 2013) (quoting *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 117,

[7] https://www.merriam-webster.com/dictionary/near (defining "near," last updated Nov. 5, 2023); https://www.merriam-webster.com/dictionary/vicinity (defining "vicinity," last updated Oct. 30, 2023).

719 S.E.2d 282, 284 (Ct. App. 2011)) (emphasis in original).

Although *Bevivino* and *Newton* involved appeals of zoning board of appeals' decisions under Section 6-29-820(A), the analysis is equally applicable here as the processes are substantively the same. *Compare* S.C. Code Ann. § 6-29-820(A), *with* S.C. Code Ann. § 6-29-900(A).[8] The statutory "procedure does not allow for issue identification, or even party identification, prior to the filing of a petition with the circuit court." *Newton*, 396 S.C. at 117, 719 S.E.2d at 284.

Compounding its error, there are conflicting findings within the MTR Order itself as to the Complaint's contents. (*Compare* R. p. 21 (stating the Complaint is "entirely devoid of specific addresses and distances between Lucey's properties and WIN515, LLC's property[]"), *with* R. p. 22 ("These are the addresses identified in the 'Complaint.'")).

2. Lucey's Properties Confer Statutory Standing.

As stated in Lucey's petition, he "resides and owns properties near the Crossing." (R. p. 32 at ¶ 10). Therein, the "Crossing" is defined as the subject intersection of Coleman Blvd. and Simmons Street where the Developer's parcel is located. Attached as Exhibit A to Lucey's petition is his letter to the Town, dated June 27, 2022, in which he states "my main office building and annex are located at the corner of Mill and Lucas [Streets] (and has been since 1999), which neighborhood is accessed by the subject intersection. My residence is on the edge of this neighborhood on Rue de Muckle." (R. p. 34 at n.1).[9] While the letter from the Developer's counsel,

[8] The sections governing both types of boards are found in Article 5 of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. §§ 6-29-310, *et seq.*

[9] The street named Rue De Muckle, where Lucey resides, spans one block and contains only six lots. (R. p. 23 (aerial photograph from the Charleston County, South Carolina GIS website)). Lucey's adult children attended the school next to the Property, as will his youngest son, and Lucey

also dated June 27, 2022, was included in the DRB's record as correspondence sent for its June 29 meeting (R. pp. 109-111), Lucey's letter sent on the same date was excluded from the record of the DRB proceedings, even though a copy was sent to the email address designated by the Town for receiving public comments on DRB agenda items (planning@tompsc.com). (R. p. 37).

Setting this uneven treatment aside, it is axiomatic that exhibits attached to a pleading are part of and incorporated in a pleading, especially when ruling on a Rule 12(b) motion to dismiss. Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); (*see also* R. p. 396 ("A document which is attached to a complaint as an exhibit is 'part of the pleading for all purposes if a copy is attached to such pleading[.]'") (quoting *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009); citing Rule 10(c), SCRCP; *Burns v. Gardner*, 328 S.C. 608, 616, 493 S.E.2d 356, 360 (Ct. App. 1997))).

Accordingly, the locations of Lucey's home and law practice are alleged in the petition. Regardless, the lower court took judicial notice of the addresses of those properties: 634 Rue De Muckle, Mt. Pleasant, SC 29464 ("Lucey Home") and 415 Mill Street, Mt. Pleasant, SC 29464 ("Lucey Office"). (R. p. 13; R. p. 22).[10] As Lucey stated during the Circuit Court's hearing, his residence is only two blocks from the Developer's Property, and the Lucey Office is only four blocks away. (R. p. 59, lines 2-8). As shown on the aerials included in the Orders, if viewing the "straight line" distance, there are only two parcels of land separating the Lucey Home from the

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and his family regularly pass through the Intersection on foot or via bike or car. (R. p. 32 at ¶ 10; R. p. 34 n.1; R. p. 57, lines 11-18).

[10] Although faint, the aerial shown in the Orders is notated with different colored "X's" to mark the Developer's Property, the Lucey Home, and Lucey Office. (R. pp. 13-14; R. p. 23). For reference, Coleman Blvd. is the long, curved right-of-way that spans the width of the image.

development, a one-parcel shopping center and a bank. (R. p. 23). These two properties are in the surrounding area or district of the subject development and are close in distance, meaning they are in the near vicinity.

Additionally, during the hearing on the motion to dismiss and in email correspondence with the lower court prior to entry of the MTD Order, Lucey referenced a third property that provides standing. R. p. 59, lines 2-8; R. p. 410 (responding to the proposed formal order submitted by Respondents, Lucey stated "the new standing discussion fails to take judicial notice of the location/proximity of Lucey's closest commercial property, 510 Live Oak, which is approximately half of the distance between the subject property and Lucey Law office[]")).[11] This property, 510 Live Oak Drive, Mount Pleasant, SC 29464 ("510 Live Oak"), is located at the corner of Live Oak Drive and Scott Street, and is leased by third parties from Lucey for commercial and business purposes. Although the specific street address was not referenced at the hearing, Lucey distinguished 510 Live Oak from the Lucey Office and advised he owned three properties to be considered for standing. (R. p. 57, lines 19-22; R. p. 59, lines 2-8) (stating his nearest commercial property is two blocks away and his office is four blocks away).

Like the Lucey Home, 510 Live Oak is also only two blocks from the Developer's property and distance-wise appears even closer than, or at least equivalent to, the residence. (R. p. 13). (Live Oak Drive is the street that ends at its intersection with Simmons Street, just to the south/southeast of Rue De Muckle, as shown on the GIS aerial in the Orders). 510 Live Oak likewise provides standing, as it too is in the near vicinity of the subject development, located in the surrounding area or district and close in distance.

[11] Thus, contrary to the (R. p. 22 n.1), the motion to reconsider was not the first time ever in the litigation that Lucey referenced the 510 Live Oak Drive property.

The lower court was advised of Lucey's ownership of a third property before ruling on the motion to dismiss and advised of his ownership of 510 Live Oak before entering the MTD Order. Accordingly, the lower court erred in failing to consider this property in ruling on Lucey's standing and the motion. Additionally, even though the address and ownership were placed before the lower court prior to the MTD Order and in Lucey's motion to reconsider (R. p. 414 at ¶ 1.a.),[12] it also erred in failing to take judicial notice of and account for the 510 Live Oak property. The property's location and Lucey's ownership are reflected and established in public records, including the deed and an order entered in a separate Circuit Court appeal that was filed against the Town, Lucey, and his entities that own the Lucey Office and 510 Live Oak. *See* July 14, 2023 Order, Circuit Court Case No. 2021-CP-10-05211, at p. 5 (referencing part of the BOZA record in that case containing "a map of the area showing Lucey's parcels in relation to the Properties"),[13] p. 5 n.4. In that appeal, the appellant developer was represented by the same counsel representing WIN515 here. During the hearing on WIN515's motion to dismiss in this case, WIN515 mentioned this other zoning appeal that involved Lucey and the Town. (R. p. 43, lines 10-12; *see also* R. p. 58, line 20-p. 59, line 1 (Lucey stating "the only two zoning matters I've ever been involved in are in my neighborhood. Happens to be that … the appellee's counsel is involved in that [other] matter too.")).

Thus, by reference to a Circuit Court order entered in a separate proceeding, which was mentioned during this case's hearing by WIN515's attorney (and which involved Lucey, the Town,

[12] There is also reference to "510 Coleman" in paragraph 1.a. of Lucey's motion to reconsider, which is a typographical error and was intended to instead state "510 Live Oak." (R. p. 414).

[13] Said map is included in the March 3, 2023 BOZA Supplement of the Record filed in that case, on page 10 of Exhibit N. Thereon, 510 Live Oak is the highlighted property at the corner of Live Oak Drive and Scott Street.

and WIN515's attorney), the salient facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." Rule 201(b), SCRE.

And, although it is in the record of the proceedings below, to the extent necessary, this Court may take judicial notice of Lucey's ownership of 510 Live Oak. Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding."); *see also, e.g., Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 n.2, 1239-40 (4th Cir. 1989) (taking judicial notice for the first time on appeal of guilty pleas entered in a separate state court criminal action); Rule 201, SCRE, intro. note ("Except for subsection (g), this rule is identical to the federal rule.").

When viewed alone, any of Lucey's properties are sufficient to give rise to a substantial interest in the Decision. When Lucey's properties are viewed collectively, both in terms of the number and location, there can be no doubt that Lucey possesses the substantial interest required for statutory standing under S.C. Code Ann. § 6-29-900(A).

C. Alternatively, the Lower Court Erred in Its Analysis of Standing Via the "Public Importance" Exception.

Alternatively, should the Court find that Lucey lacks statutory standing, then standing is conferred via the "public importance" exception. South Carolina jurisprudence recognizes that "standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). When cases "fall within the ambit of important public interest, standing will be conferred 'without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.'" *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 341 (2008).

Whether a resolution is needed for future guidance is the key to the public importance analysis. *See, e.g., Baird v. Charleston Cnty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). "Yet

the very nature of the public importance exception to general standing requirements resists a formulaic approach, as each case must turn on 'the competing policy concerns'" underlying the standing inquiry. *ATC S., Inc.*, 380 S.C. at 199, 669 S.E.2d at 341. Those competing concerns are ensuring citizens' access to the judicial process to address alleged wrongdoings, but also promoting judicial economy and the protection of public officials from frivolous lawsuits. *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

With this backdrop in mind, there is an issue of public importance that exists here which requires the need for future guidance. Additionally, a ruling from the lower court on the merits of the DRB Appeal and provision of the necessary guidance will likely aid in preventing future frivolous litigation.

All parties and the lower court agree that this area experiences heavy vehicular and pedestrian traffic, some of the worst congestion in an increasingly populated Town. (*E.g.*, R. p. 383 (the Intersection is used by "several thousand people [] every day"); R. p. 24)). Indeed, due to the adjacent school and otherwise heavy foot traffic, the Intersection poses grave safety concerns. *Supra* p. 9. The danger posed to the public by this development is clearly present. However, Lucey recognizes that zoning generally on its own does not present an issue warranting public importance standing. *E.g., ATC S., Inc.*, 380 S.C. at 199-200, 699 S.E.2d at 341-42.

But, unlike *ATC South*, this is not a zoning challenge and the objection to the Developer's project has nothing to do with competition. *See id.* It is a challenge brought by a neighboring landowner, as a concerned citizen and parent of a young child who frequently traverses this Intersection, for the local government body to comply with the requisite regulations and rules. (R. p. 61, lines 24-p. 62, line 9). What moves the needle here is the need for a directive as to whether

the DRB can and should consider traffic and public safety interests and concerns in making decisions regarding land use development.

By granting Final Approval to the Developer, the DRB ignored the public's concerns and rejected citizen input as a basis for denying the Developer's request. In doing so, the DRB swept opposition on the basis of aesthetics under the rug, and instead sidestepped the issue and shirked its responsibilities by claiming it could not consider traffic or public safety issues in making a decision on the Developer's application.

The plain language of the Town's regulations governing the DRB specifies that public safety and traffic are matters that fall within the purpose of those regulations and ones that should be addressed in deciding on applications. *Infra* Argument Sec. IV.B. Additionally, it is well-established that traffic and public welfare concerns are legitimate government interests through which governmental conduct is often examined. *See, e.g.*, *Whaley v. Dorchester Cnty. Zoning Bd. of Appeals*, 337 S.C. 568, 575-76, 578, 524 S.E.2d 404, 408, 409 (1999). Guidance is needed as to whether the DRB can issue final approvals without considering such legitimate government interests. No matter the ruling, it will instruct opponents of future development as to what, if any, recourse they may have.

II. THE TOWN AND ITS DRB NEED NOT BE SEPARATELY NAMED PARTIES.

Relying on overbroad generalizations and misconceptions of statutory and common law, WIN515 posited below that it was inconceivable that the DRB could not be a necessary party to this action. (R. p. 380 ("Put simply, the DRB is a necessary party in this appeal. Without naming the DRB, this Court lacks jurisdiction over the DRB and lacks the authority to order any relief in this matter.")). These statements are completely and utterly without basis or support.

A. The Town's Presence Removes Any Necessity of the DRB.

First, the DRB is not an independent entity that stands separate and apart from the Town. It is subsumed within and a part of the Town as one of its many municipal boards, commissions, and committees. (R. pp. 400-402). The Town, via ordinance, created the DRB, and the Town, through its governing body, appoints and has authority to remove members of the DRB. Town Code §§ 156.420(A), (C) (R. pp. 454-455). Second, any order or directive issued by this Court or the Circuit Court for or against the Town is binding on the DRB, because it is an instrumentality and arm of the Town that is subject to the same mandates. In other words, it would be illogical, and contrary to law, to argue that the DRB could disregard such an order and act independently of any judicial decree imposed on the Town that relates to a DRB decision. Along this same vein, contrary to the MTD Order (R. p. 15), the Town and the DRB do not have separate interests in this appeal — unless, of course, the DRB would argue that its own decision should be reversed.

Moreover, statutory law is quite clear that the DRB is not a necessary party for this Court to order relief in this matter. *See* S.C. Code Ann. § 6-29-930(A) ("In the event that the decision of the board is reversed by the circuit court, the board must be charged with **the costs which must be *paid by the governing authority* which established the board of architectural review**."). Thus, the Town, not the DRB, is the party responsible for all costs awarded to a prevailing petitioner in an appeal to the Circuit Court. Its governing body, Town Council, established the DRB, and would pay any judgment with the Town's funds.

South Carolina common law also demonstrates that the DRB is not a necessary party. *Owen Steel Co. v. S.C. Tax Comm'n*, 281 S.C. 80, 85, 313 S.E.2d 636, 639 (Ct. App. 1984) (providing that "an administrative review board is not a necessary party for purposes of judicial review[]"). "In the absence of a provision in the [statutory scheme] as to parties, the question of

whether the agency is a necessary party to the petition for judicial review is governed by the general rules as to parties in civil actions." *Id.* at 85, 313 S.E.2d at 639. Under the general rules of civil actions, the DRB is not a necessary party. "Its presence is not required to insure there will be an adversary party before the court, and … [i]t has no rights which must be ascertained by the court. It does not protect any public interest that is separate and apart from" the Town. *Id.* And, as the *Owen Steel* Court noted, if the DRB wanted to participate in the judicial review proceedings, it could have moved to be joined as a party. *Id.* at 86, 313 S.E.2d at 639.

To buttress its rulings in the MTR Order, the lower court opined that it could not consider the *Owen Steel Co.* opinion, "as a matter of law[,]" because Lucey did not cite the opinion in opposing the motion to dismiss. (R. p. 27). This finding was in error, as Lucey did in fact cite the opinion for the exact same premise in his memorandum opposing the motion to dismiss. (R. p. 396).

Additionally, the legal authority and principle relied on by the lower court to exclude an opinion of this Court from consideration have no application here. The MTR Order referenced *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992), without citing any specific page(s) of the decision as providing support (R. p. 27), making it difficult to ascertain the excerpt considered relevant. To the extent it relied on this Court's affirming the circuit court's finding that "Rule 59(e), SCRCP was not the proper vehicle to amend a petition for post-conviction relief to add additional grounds for relief[]" (*Arnold*, 309 S.C. at 172, 420 S.E.2d at 842), said holding and the general principle regarding prohibition of unpreserved arguments have no bearing on the instant matter. Lucey was not raising any additional or new grounds or claims for relief. His motion to reconsider cited binding legal precedent, South Carolina common law, in support of his argument

and in opposition to Respondents' arguments that were previously asserted relating to the relative necessity of the DRB as a party.

B. Sources Referenced by Respondents and the Lower Court Do Not Support the DRB Being a Necessary Party.

As support for the supposed prerequisite that an architectural design board be named, WIN515 and the lower court rely on the South Carolina jurisprudence requiring that a permittee be named to a zoning board appeal. (R. p. 15; R. p. 379 (both quoting *Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988))). All of these discussions fail to account for the fact that WIN515 is the permittee and is named in this appeal. (R. p. 60, lines 14-24).

Additionally, Respondents argued, and the Circuit Court found, that the Circuit Court Clerk being obligated, under S.C. Code Ann. § 6-29-920, to give notice of the appeal to the DRB means that Lucey was required to name the DRB as a party. (*E.g.*, R. p. 408; R. pp. 14-15). The statute does not require that the appellant send notice to the design board or name it as a party, and nothing prevents the Clerk of the Circuit Court from sending notice of the appeal to the relevant board if said board is not a party to the appeal. And, as Lucey stated during the Circuit Court hearing, the statute actually gives the reasonable inference that the DRB is not a necessary party. (R. p. 60, lines 14-24) ("[I]f I had to sue the board and I had to serve the board within 30 days, there's no need for the clerk to provide the board a copy because I'd already done it.").

The Town's filings below prove that the DRB was given notice and act as a waiver of any argument that the DRB must be separately named. The purpose of the clerk giving notice of the appeal to the design board under Section 6-29-920(A) is to give time for the filing of an official copy of the board's proceedings. The statute requires that "the board must file with the clerk a duly certified copy of the proceedings held before the board of architectural review[.]" S.C. Code

Ann. § 6-29-920(A) (emphasis added). On August 24, 2022, acknowledging that the DRB is an instrumentality of the Town and that the DRB does not exist independently of the Town, the Town, and not the DRB, filed with the clerk a copy of the DRB's proceedings. (R. p. 77 (the Town, "pursuant to S.C. Code Ann. §6-29-920(A), hereby submits a copy of DRB's full record in this matter")). Accordingly, by filing the DRB's record, the Town acknowledged that the DRB received notice and that the Town was appearing and acting for the DRB, and any involvement or action by the DRB required by statute had been satisfied.

Alternatively, should this Court decide that both the Town and DRB are necessary separate parties, the lower court contradicted its ruling that the DRB cannot be added as a party via its finding that "Rule 19, SCRCP, applies in zoning appeals." (R. p. 26 (a necessary party "**shall** be joined as a party in the action . . ." (*id.*) (quoting Rule 19(a), SCRCP) (emphasis in original))).

III. BECAUSE IT IS NOT A NECESSARY PARTY TO THIS ACTION, SERVICE ON THE DRB WAS NOT REQUIRED

Because the DRB is not a necessary party to this action, there was no requirement for Lucey to serve the DRB with notice of the appeal. And, as discussed *supra* pp. 27-28, the Town satisfying the statutory obligations owed to file the record with the Circuit Court shows that the DRB was given notice of the appeal and moots the issue. It also further shows that service upon the Town effected service on the DRB, as the DRB is a part of the Town.

The lower court referenced Rule 74, SCRCP, as supporting its ruling, but that rule only requires service "on all parties" to the appeal. (R. pp. 15-16; R. pp. 26-27). Here, Lucey timely served all parties to this appeal. (R. pp. 405-406). Additionally, Rule 74 cannot be read to include, or mandate inclusion of, the board, agency, or tribunal as a party to an appeal to the Circuit Court. In this instance, there was no case or caption prior to the DRB Appeal as the DRB proceedings are not adversarial, meaning the DRB never was a "party." *See, e.g., Newton v. Zoning Bd. of Appeals*

for Beaufort Cnty., 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011); (*see also* R. p. 404). Moreover, such a reading of Rule 74 would require that administrative law courts and other inferior tribunals be named as parties to appeals of the decisions they issue.

IV. THE LOWER COURT FAILED TO CONSIDER THE MERITS OF LUCEY'S DRB APPEAL

Although WIN515 acknowledged that "[t]he Complaint is clearly an effort to appeal local government zoning … decisions[,]" and "[t]here are no causes of action set forth in the Complaint[,]" (R. p. 378), it perplexingly moved to dismiss the DRB Appeal solely under Rule 12(b)(6), SCRCP. (R. p. 73). Likewise, the lower court granted dismissal under Rule 12(b)(6) even though it only dismissed due to purported jurisdictional defects. (R. p. 9). Although it wrongly attempted to place Lucey at fault, the Town pointed these errors out below, stating that Rule 12(b)(6) was not the proper standard of review. (R. p. 408).

Regardless of the standard, though, the lower court failed to consider and rule upon the merits of Lucey's DRB Appeal, which it was required to do since Lucey has standing to lodge the appeal. In sitting as an appellate court in review of a local land use board decision, the Circuit Court "'shall determine only whether the decision of the board is correct as a matter of law[.]'" (R. p. 408) (quoting *McCrowey v. Zoning Bd. of Adjustment of City of Rock Hill*, 360 S.C. 301, 304, 599 S.E.2d 617, 619 (Ct. App. 2004)).

A. <u>The DRB Did Not Wait the Required Twelve Months to Reevaluate the Project</u>.

As raised in Lucey's petition, the DRB failed to comply with Section III.9.A.5. of the DRB's Rules of Procedure, also known as bylaws, which states that a denied project cannot be reconsidered for one year absent substantial change.

> Matters before the Board for final disposition that are denied shall not be resubmitted for a period of twelve months, … unless it can be demonstrated that there has been a substantial change in the community or project design since prior

> consideration of the petitioner's proposal to justify another review. Justification for consideration of review within the twelve-month waiting period shall be submitted in writing to the Zoning Administrator or designee.

DRB Bylaws § III.9.A.5. (R. p. 467).[14] The Developer's previous application for Final Approval was denied on December 8, 2021, and then reconsidered and approved a little more than six months later, on June 29, 2022. *Supra* p. 10. There is no evidence that the Developer submitted justification for early reconsideration to the Zoning Administrator, as required. DRB Bylaws § III.9.A.5. (R. p. 467). Moreover, the Town's reasons, provided post-Decision, as to why the resubmitted plans were considered substantially changed do not satisfy the criteria set forth in the DRB's Bylaws. (R. pp. 403-404 (Town stating the resubmitted plans show a lowered building height by approximately 3 ft., a change in primary building material to wood, and a different roof)). The six factors considered in evaluating a substantial change do not mention building materials and require a change in building height of more than ten feet. DRB Bylaws § III.9.A.5.a.1.-6. (R. p. 467).

Additionally, in looking at pages in the June 2022 submittal showing side-by-side renderings of the previous and resubmitted designs, outside of an awning around the third story of the proposed building, the visual appearance of the building's exterior appears largely unchanged. (R. pp. 299-303). The actual roof of the structure in both scenarios is a roof deck with railings, meaning it was not substantially revised. (R. pp. 299-303).

B. <u>Traffic and Safety Are Within the DRB's Purview</u>.

To the extent the Orders' generalized statements within the discussions of constitutional standing can be construed as determinations on the merits of Lucey's traffic and safety grounds,

[14] These bylaws were referenced in the Town's letter sent to Lucey prior to the DRB Appeal (R. pp. 403-404; *see also* R. p. 395), provided to the lower court via hyperlink (R. p. 419 n.1), and a copy is included in the record (R. pp. 461-470).

they are without basis. (*E.g.*, R. p. 12 ("[T]he DRB is a board of architectural review and traffic safety issues are entirely outside its purview.")). This finding is refuted by the text of the Town's regulations, which determine the scope of the DRB's authority. *See* S.C. Code Ann. § 6-29-880 ("The board of architectural review has those powers involving the structures and neighborhoods as may be determined by the zoning ordinance.").

Pursuant to Town Code § 156.421, which sets forth the duties and powers of the DRB, "[t]he Board's area of purview is more fully described in § 156.310, CDR-OD, Commercial Design Review Overlay District." Town Code § 156.421(D) (R. p. 391). One of the purposes of Town Code § 156.310 is "**[t]o enhance public safety by defining spaces to influence traffic movement**." Town Code § 156.310(A)(4) (R. p. 420);[15] *see also* Town Code §§ 156.310(F)(3)(a) (R. p. 436) ("The purpose and intent of these landscaping requirements is to … enhance public safety by defining spaces that influence efficient traffic movement."), 156.310(F)(6)(k)(1)(c) (R. p. 440) ("Raised pedestrian crosswalks (speed tables) may be utilized and are encouraged as a traffic-calming device[.]").

Town Code § 156.310(C) sets forth the design review process, including the role of the DRB, stating the DRB "shall conduct review and approval of all applicable projects subject to the provisions of this section [156.310][.]" (R. p. 420; *see also* R. p. 157). Indeed, the DRB's Decision required "that the developer work with Town staff to include safety measures as much as possible." June 29, 2022 Meeting Minutes (R. pp. 86-87).

[15] During the public comment period of the June 29, 2022 meeting, a citizen pointed to this specific section of the Town Code and the purpose therein while addressing the DRB. June 29, 2022 Meeting Minutes (R. p. 86) (comments of Ms. Mary Hope Green).

Safety and traffic concerns are entirely within the DRB's purview. The lower court erred in stating otherwise in its discussion of standing and erred in failing to rule on the merits of Lucey's DRB Appeal.

V. DISMISSAL BASED ON EXHAUSTION OF ADMINISTRATIVE REMEDIES IS IN ERROR

In addition to standing and the DRB not being a named party, the Orders ruled that the DRB Appeal was dismissed for purported failure to exhaust administrative remedies. (R. p. 8; R. p. 18). Outside of a conclusory statement in each of the Orders' introductory paragraphs, there is no other reference to or use of the term administrative remedies. As such, it is unknown what remedies were supposedly not pursued.

Without any guidance in the lower court's Orders, all that can be examined are the applicable arguments in the motion to dismiss. In its motion, WIN515 argued that Lucey did not exhaust administrative remedies for appealing staff decisions to the board of zoning appeals or to the DRB. (R. pp. 75-76 (citing S.C. Code Ann. §§ 6-29-800(B), 6-29-890(A); Town Code §§ 156.411(A)(1), 156.421(C))). These contentions appear to stem from the grounds relating to the DRB's premature review raised in Lucey's petition, including the improper review by Town staff. (R. p. 33 at ¶¶ 20-23).

The subject line of Lucey's June 27, 2022 letter to the Town, sent before the DRB's final meeting, is "Appeal of Planning Staff Decisions Relating to 515 Coleman." (R. p. 34). The letter's first sentence states, "Please accept this letter as an appeal of the following errors relating to the 515 Coleman project . . ." (R. p. 34). In response, the Town advised Lucey that he would need to direct any appeal to the Circuit Court. (R. pp. 403-404). Thereafter, in accordance with state statute and local ordinance specifying that the only remedy in the event of a denial by the DRB is an appeal to the Circuit Court, Lucey filed his petition with the Circuit Court. S.C. Code Ann. §

6-29-900(A); Town Code § 156.422(C) (R. p. 458). Consistent therewith, the prayer for relief in Lucey's petition asks that the DRB's Decision granting Final Approval be reversed. (R. p. 33). Accordingly, Lucey has exhausted any required administrative remedy, and the Town, which instructed him to proceed with an appeal to the Circuit Court, is estopped from contending that its directive was faulty or improper.

CONCLUSION

Because Lucey possesses statutory standing and the DRB is not a necessary party to this appeal, the lower court's dismissal of his DRB Appeal should be reversed and vacated. And because the DRB's Decision was incorrect as a matter of law, the Decision should likewise be reversed and vacated. Alternatively, the case should be remanded to the Circuit Court for a determination on the merits.

Respectfully submitted,

s/Jeffrey S. Tibbals
Jeffrey S. Tibbals (S.C. Bar No. 72628)
jst@bybeetibbals.com
Evan P. Williams (S.C. Bar No. 101981)
ewilliams@bybeetibbals.com
BYBEE & TIBBALS, LLC
880 Johnnie Dodds Blvd., Suite 2
Mt. Pleasant, SC 29464
Telephone: 843.881.1623

Counsel for Appellant

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Mt. Pleasant, South Carolina