THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
May 16 2024
SC 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 REPLY 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITIES

REPLY ARGUMENT

In opposing Lucey's appeal of the DRB's Decision, Respondents focus on alleged procedural defects, namely whether the municipal board must be named as a party together with the municipality (which governs the board).[1] Their brief does eventually turn to standing, but it fails to address the "near vicinity" or overarching "substantial interest" tests head on. Instead, Respondents ponderously discuss associational standing, the similarities between the requisite statutory standard and the common law "substantial damage" standard, and the abstract issue of differences they perceive in legal principles being "clearly distinguished" as opposed to "distinguished" in a case opinion (although the distinction is never made clear). In short, their discussion is aimed at distracting from, rather than analyzing, the issues.

While Respondents strive to convey the contrary, the substantive issues in this appeal are not complex. First, are the properties owned by Lucey located in the near vicinity of the subject Property such that he has statutory standing to pursue this appeal under this Court's previous interpretation of the substantial interest standard? Second, should the lower court have ruled on the merits of Lucey's DRB Appeal to reverse and vacate the DRB's Decision? The answer to both questions is in the affirmative.

I. RESPONDENTS' STANDING ARGUMENTS FAIL TO MAKE THE NECESSARY EXAMINATION OF STATUTORY STANDING.

Before turning to matters of import ─ the location of Lucey's properties as viewed under the statutory standing test ─ the points raised by Respondents in their standing discussion are briefly addressed.

[1] Unless otherwise noted, capitalized terms used herein are defined as set forth in Lucey's final brief ("Appellant's Br."). Additionally, all emphases are added and all internal citations are omitted unless otherwise stated.

A. Contrary to Respondents' Contentions, Associational Standing Was Not at Issue in *Spanish Wells I*.

To attack Lucey's standing, Respondents argue that "**it was only the question of the POA's associational standing that was before the court**[]" in *Spanish Wells I*.[2] Br. of Respondents p. 11. Respectfully, such a contention is puzzling, as the question considered by the Court was whether adjacent and surrounding property owners possessed statutory standing. "Spanish Wells and ***its members***, as 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." *Spanish Wells I*, 292 S.C. at 544.

As is clear from the text of the decision, this Court did not examine standing in the context of a singular person (or in the Article III context), but rather analyzed the statutory standing of multiple property owners – the persons who owned property that was both adjacent to and in the near vicinity of the development at issue. *Id.* at 544-45.

Admittedly, the named party in that case was an association, and the interests of its members (i.e., the location of property they owned) were considered; however, associational standing is a common law doctrine requiring a "concrete, particularized injury," an element of Article III standing, in order to initiate an action (not bring a statutory appeal). *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75-76, 753 S.E.2d 846, 850-51 (2014) ("An organization has associational standing 'if one or more of its members will suffer an individual *injury* by virtue of the contested act.'").

[2] *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) ("*Spanish Wells I*"), *reversed on other grounds*, 295 S.C. 67, 367 S.E.2d 160 (1988) ("*Spanish Wells II*").

The *Spanish Wells I* opinion did not even discuss, explicitly or implicitly, any of the three elements required under the associational standing test. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (an association can file "suit on behalf of its members when its members would otherwise have [Article III] standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit[]"). There is no mention or consideration of any injury to a plaintiff in *Spanish Wells I* – quite the opposite, actually, as the Court there found the application of common law standing principles to be in error. *See infra* Sec. I.C.

Ultimately, perhaps sensing the incongruence, Respondents eventually admit that the *Spanish Wells I* opinion decided standing based upon the location of property owned by the POA's members as viewed under the statutory test. Br. of Respondents p. 11.

B. Two Distinct Categories of Persons Are Vested With Statutory Standing Under Section 6-29-900(A).

Respondents espouse a narrow reading of *Spanish Wells I* in an attempt to limit its holding, arguing in essence that so long as one association member owned property adjacent to the subject, any discussion of "near vicinity" was merely dicta. Br. of Respondents pp. 11-12. However, such an argument ignores the fact that there are two separate groups of persons with statutory standing under Section 6-29-900.

Ultimately, Respondents have little choice but to concede that *Spanish Wells I* did in fact contemplate the existence of two classes of persons with standing under Section 6-29-900(A). Br. of Respondents p. 11. As they acknowledge, the statutory test requires separate determinations of whether the affected party owned property (1) adjacent to the development, or, separately, (2) in

the near vicinity of the development. *Id.* at pp. 11, 14-15; *Spanish Wells I*, 292 S.C. at 544-45. An affirmative answer to either satisfies the requisite "substantial interest" that confers standing.

C. Respondents Inject Common Law Standing Concepts Into the Governing Statutory Test (Despite Acknowledging the Impropriety of the Same).

Respondents display duplicity regarding their stance on common law standing principles. In one argument, Respondents hold firm that traditional measures have no place in determining Lucey's standing.[3] Abruptly thereafter, Respondents reverse course, asking this Court to consider common law standing principles (but only ones that allegedly weigh against Lucey's standing). Respondents, in contravention of controlling precedent established by this Court, conflate the "substantial interest" and "substantial damage" tests.[4] Br. of Respondents p. 14 ("under either test, whether measured in terms of 'damage' or 'interest,' to have standing, the amount of skin one must personally have in the game must rise to some 'substantial' threshold level of importance[]"). By jumbling the distinct standards, Respondents urge this Court to take a position that it expressly shot down as errant in *Spanish Wells I*. "The circuit court erred in applying the traditional common law test of 'special damage' rather than the 'substantial interest' test of the governing statute." *Spanish Wells I*, 292 S.C. at 545.

Respondents' brief pays tribute to this exact quote (Br. of Respondents p. 14 n.21), yet attempts to subtly blend the two standards such that "substantial interest" is no different than, and

---

[3] Br. of Respondents pp. 9-10 ("'The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.' … the right to take [appeals] being 'a creature of statute' 'aris[ing] from and … controlled by statutory law,' there is simply no room in the standing analysis for consideration of the common law concept … every case that Lucey cites regarding public-importance standing is a case addressing standing in the context of standing to *commence a lawsuit*, not standing to take an *appeal*.") (emphasis and latter alteration in original)).

[4] It also appears that Respondents seek to give the impression that Lucey's brief discussed facts to prove constitutional standing, as they attempt to pass off statements in his pleading filed below as ones made on appeal. Br. of Respondents p. 13.

even akin to, "substantial damage." Br. of Respondents p. 14 ("the circuit court … was property guided in determining the meaning of "substantial interest" in this context by drawing on instructive authorities on **the *general* subject and concept of standing**. … Indeed, the[] [two tests] have a common modifier[]"). Following this one-sided colloquy, Respondents recite excerpts from case opinions only ruling on constitutional standing, meaning they have no bearing on the matter at hand. Br. of Respondents pp. 14-15.

Moreover, under this line of discussion, including their request to errantly consider whether issues are "unique to Lucey's personal interest," (Br. of Respondents p. 15) Respondents attempt to blur the lines of the inherent distinction between the statutory and common law tests. Contrary to their representations, the location of one's property, and nothing else, determines whether one has the requisite amount of skin in the game.[5]

D. The Location of the Affected Party's Property Solely Determines Whether the Party Possesses Statutory Standing Under the Substantial Interest Inquiry – a Test that Lucey Passes.

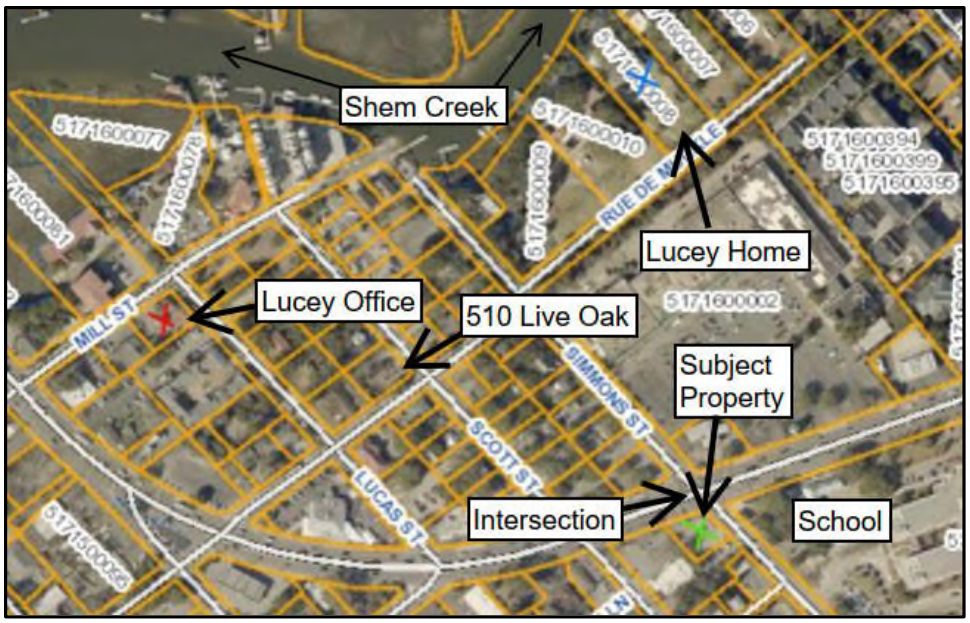
By zeroing in on red herrings, Respondents' brief contains little to no discussion of the relevant facts or their application to the statutory test. The analysis consists of hastily and summarily concluding that Lucey's properties "are not in the sufficiently 'near vicinity' of the Subject Property[,]" based only on the reason that his properties are across the street from the subject development. Br. of Respondents p. 15. This argument is a non-starter, as the legislature did not intend for "near vicinity" to exclude persons located across the street. *See* Appellant's Br. pp. 16-17.

[5] Even if this Court adopts Respondents' argument that the test is a substantial "something," i.e., "skin in the game," Lucey doubtlessly passes this test too based upon his work and home property ownership and attributes. Indeed, his life is centered in the near vicinity of the subject Property, as shown *infra*.

Moreover, as is the reason the vacant property has yet to be developed,[6] the Intersection at which the small parcel sits is just as important to the standing issue as the parcel itself. Besides containing a school within walking distance of his home that his children previously attended and will attend, this Intersection is one of two main points to reach, and one block away from, the streets on which the Lucey Home and 510 Live Oak are located. The remaining feeder streets other than Simmons Street, due to the presence of a median strip on the other parts of Coleman Boulevard, only provide access from one direction (*i.e.*, right-turn only access) for entering the neighborhood from Coleman Boulevard.

The foregoing is provided to demonstrate the proximity of Lucey's property as being in the same district or area, and not any common law standing elements that Respondents urge this Court to consider, such as substantial damage or personal prejudice. While Respondents take issue with Lucey's description of "near vicinity" encompassing properties "in 'a surrounding area or district[]'" (Br. of Respondents p. 10), they fail to point out that these terms are used in the statute to describe the purpose of design and architectural review boards. S.C. Code Ann. § 6-29-870(A) (providing "a board of architectural review or similar body" may be appointed "for the preservation and protection of … **districts** and neighborhoods … or [to] protect[] or provide[], or both, for … a defined **district**, corridor, or **development *area*** or any combination of it[]"). The GIS aerial map contained in the circuit court's Orders at issue is perhaps best illustrative, a copy of which follows:

[6] (*E.g.*, R. p. 58, lines 1-12; R. p. 37).



(See R. p. 13; R. p. 23).[7]

Although Lucey's properties are not adjacent to the subject site, there is no need or requirement that they be – only that they, or even one, are in the near vicinity. The lower court erred in finding that Lucey's properties were not in the near vicinity of the development such that Lucey did not have the substantial interest necessary for statutory standing. The spatial proximity of Lucey's properties (the Lucey Home, Lucey Office, and 510 Live Oak) to the subject Property are detailed in his brief, which leave no doubt that Lucey possesses statutory standing to pursue the appeal. Appellant's Br. at Argument Secs. I.B., I.B.2.

II. PURSUANT TO THE TOWN'S ORDINANCES, THE DRB'S PURVIEW EXTENDS TO TRAFFIC AND SAFETY ISSUES.

Respondents raise the matter of the DRB's purview in multiple parts of their brief, contending that it affects standing, jurisdiction, and the merits. Br. of Respondents pp. 1 n.1, 14,

[7] The map contained herein is the same as in the Orders, only it has been cropped for added clarity of the properties' relative locations, and the arrows and text boxes added for convenience.

15, 18.[8] Pursuant to South Carolina statute, the DRB's purview is dictated by the Town's ordinances, and thus extends to all matters contemplated thereunder. S.C. Code Ann. § 6-29-880. Thus, contrary to Respondents' claims, the semantics that may be implied by the word "design" being included in the board's name, or the "general subject matter of the BAR Statutes," are not controlling on the issue of which matters are to be considered by the DRB. Br. of Respondents p. 1 n.2.[9]

Instead, as Respondents acknowledge, Town Code Section 156.421 contains the provisions "addressing the DRB's duties and powers[.]" Br. of Respondents p. 1 n.2. Subsection (D) therein specifies that the **DRB's "area of purview is more fully described in § 1565.310**, CDR-OD, Commercial Design Review Overlay District." Town Code § 156.421(D) (*see* R. pp. 390-391; R. p. 457). Among other provisions, Town Code § 156.310 specifies that the Commercial Design Review Overlay District was established by the Town, "**[t]o enhance *public safety* by defining spaces to influence *traffic movement*."** Town Code § 156.310(A)(4) (R. p. 420). As a result, the DRB must consider and make decisions based on whether proposed projects would influence traffic movement to enhance public safety.

It is plainly evident that Respondents' contentions regarding the DRB's purview are attempts to sidestep the truth of the matter: the Town's Code of Ordinances specifies that traffic and safety issues are to be considered by the DRB. *See* Appellant's Br. Argument Sec. IV.B.

[8] Perhaps the one area in which the DRB's purview is not mentioned is Respondents' argument as to application of Rule 12(b)(6), SCRCP. Therein, the Town contradicts its position taken below, when it stated "Rule 12(b)(6) does not apply" and the "court may consider the entire record on appeal and its review is not limited to the Petition[.]" (R. p. 408).

[9] As defined in Respondents' brief, the "BAR Statutes" refers collectively to S.C. Code Ann. §§ 6-29-870 to -940. Br. of Respondents p.1 n.2.

III. THE RECORD REFUTES RESPONDENTS' CONTENTIONS THAT LUCEY WAIVED ANY SUBSTANTIVE ARGUMENT.

In making their only challenge to the merits of the appeal, that "Lucey's complaint is devoid of any objection to the aesthetics of the project (site, landscape, and architecture)," it appears that Respondents did not actually review the arguments presented by Lucey below. (*See* R. p. 35 at #6 ("The Plans are out of character and scale with this school neighborhood … and [t]his project does not have the open space and visibility that nearby Coleman properties have.")).

Beyond this unfounded allegation, Respondents set forth two grounds to argue that Lucey's appeal is without merit, neither of which actually concerns the merits of the appeal. Rather, both are assertions that Lucey's substantive arguments were waived because he allegedly did not appeal a decision issued by the Town's Zoning Administrator. Br. of Respondents pp. 17-18. Respondents contend that Lucey supposedly failed to appeal a decision(s) by the Zoning Administrator that: (a) the Developer's resubmitted plans presented a substantial change in the project design, such that the required 12-month waiting period for reconsideration did not apply;[10] and (b) the project satisfied all traffic and public safety concerns. *Id.*

The fault lines in these arguments are tremendous.

A. <u>The Record Does Not Contain or Even Mention a Decision by the Zoning Administrator</u>.

Initially, the record is devoid of any decision by the Zoning Administrator regarding traffic and safety issues or a substantial change in the Developer's plans, nor does any document in the

[10] Respondents' brief repeatedly cites Section III(4)(C)(4) of the DRB's Rules of Procedure as containing the exception to the 12-month wait for resubmission. Br. of Respondents pp. 17-18. However, there is no such section in the DRB's Rules of Procedure, also known as Bylaws (DRB Bylaws § I.1.) (R. p. 461). There does exist a Section III.4., which mandates that any testimony of witnesses at a DRB hearing must be given under oath, but there are no subsections that follow. DRB Bylaws § III.4. (R. pp. 464-465).

record refer to any such decision, including the Staff Report for the DRB's final meeting. Likely for this reason, Respondents make no effort to cite any portion of the record to support their claim that the Zoning Administrator made such a decision, further reinforcing its non-existence.

Moreover, reliance on this alleged Zoning Administrator decision was arguably waived by Respondents. Despite Lucey's petition raising these very issues, their filings with the circuit court do not contain any reference to the Zoning Administrator, let alone to any decision purportedly issued by the Zoning Administrator. As to the 12-month waiting period for resubmitting development plans, the Developer argued below that there was no such requirement because the Town's Code of Ordinances did not contain such a provision. (R. pp. 383-384). The Town failed to make any response, omitting any mention of the required waiting period in its filings (let alone any supposed Zoning Administrator decision on the matter). (*See* R. pp. 77-79; R. pp. 407-409). Similarly, the Town's filings below do not mention the purview of the DRB or that any such issues were waived by Lucey.

Yet, perhaps more convincing are statements by Town officials on these issues in the record. In responding to Lucey's appeal to the DRB on the issue of the 12-month waiting period being violated, the Town's attorney wrote, in part, that "**the Town *takes the position*** that the applicant's resubmittal included a substantial change as set forth in Section III.9.A.5.a.5. of the DRB Bylaws and was therefore properly submitted for DRB consideration." (R. p. 403-404). Glaringly obvious is the void of any reference to a previously issued decision, by the Zoning Administrator or anyone else, on the issue. Rather, the language of the letter, which is dated a week after the DRB's June 29, 2022 meeting, indicates that it was the first instance in which anyone at "the Town [took] the position" that the plans were substantially changed.

Additionally, while the staff report for the June 29 meeting indicated that the Planning Department (not the Zoning Administrator) had approved a parking plan,[11] no prior approval of traffic or public safety considerations was mentioned. (R. pp. 157-158). To the contrary, the report stated that "[a]ny comments related to Technical Review will be required to be addressed during the Development Review Team process[]" (R. p. 157), indicating that decisions on technical items, such as traffic design and safety, were pending and not yet issued.

Respondents' alternative point, that a Zoning Administrator's decision is entitled to significant deference on appeal (Br. of Respondents p. 18), may be true if such a decision is actually issued. Thus, while they argue that the record "is devoid of any indication that the Zoning Administrator's decision is based on no evidence or plagued by an error of law" (*id.*), the truth of the matter is that the record is devoid of any indication that the Zoning Administrator made any decision in the first place.

B. <u>Lucey's Separate Appeal to the DRB Negates Any Waiver Argument</u>.

Finally, contrary to Respondents' arguments on the "merits," Lucey did in fact make an appeal to the DRB. Having only the agenda for the DRB's June 29, 2022 meeting to respond to, Lucey wrote to the Town's attorney and the DRB on June 27, 2022 to appeal issues concerning traffic, parking, and public safety, and the failure to abide by the requisite 12-month waiting period for resubmissions. (*See* R. pp. 34-37).[12] The staff report, the only document that could perceivably

[11] Although supposedly approved, the parking plan appears flawed. Prepared August 11, 2021, before any purported "substantial change" had been made to the design plans, it was outdated and could not have adequately considered the impacts of any such change on the parking analysis. (R. pp. 337-340). Moreover, the study does not appear to consider the functionality of the proposed parking, including ingress and egress to and from the parking lot and its impacts on traffic flow, which were all issues raised by Lucey. (R. pp. 35-36 at ¶¶ 5, 7-9).

[12] This letter was sent to the email address designated by the Town for contacting the DRB (planning@tompsc.com). (R. p. 37).

contain any "decision" (even though it only sets forth staff's "recommendations"), was dated June 29, 2022, and posted after the deadline to submit public comments in advance of the DRB's meeting. (*See* R. pp. 34-35 at ¶¶ 3.-3.a. ("For example, the failure to provide a sufficiently adequate copy of the staff reports prevents stakeholders from knowing what "substantial change" the planning staff is relying upon in allowing this project to come back up for review.")).

Thus, there was (and still is) no evidence that the required written justification for early reconsideration had been submitted by the Developer (DRB Bylaws § III.9.A.5.) (R. p. 467), and no evidence or any notice of a prior decision that a substantial change in plans existed to support early reconsideration. Forced to operate under an assumption that any relevant decisions had been made, Lucey submitted an appeal to the DRB to preserve those issues, ascribing his letter with the subject line "Appeal of Planning Staff Decisions Relating to 515 Coleman." (R. p. 34)

Accordingly, Respondents' assertions that Lucey did not file an appeal to the DRB are plainly refuted by the record. (R. p. 34 (the letter's first sentence states, "[p]lease accept this letter as an appeal of the following errors relating to the 515 Coleman project . . .")).

Perhaps more noteworthy is Respondents' claim that the non-occurrence of a stay of the DRB's proceeding is evidence of a failure to appeal. Br. of Respondents p. 17 ("Had Lucey filed such appeal, it would have triggered an automatic stay, thus preventing WIN515's revised plans from appearing before the DRB for a decision on the merits until the appeal was decided."). The perplexity is that Lucey's letter appealing to the DRB expressly requested that proceedings on the application be stayed. (R. p. 37 ("Please confirm that the consideration of 515 Coleman will be removed from the agenda until this appeal is heard and resolved.")). Thus, all parties are in agreement that the Developer's application should not have been heard by the DRB at its June 29, 2022 meeting.

Yet, the Town disregarded Lucey's request and its statutory obligation to stay such proceedings under Section 6-29-890(B) (*see* Br. of Respondents p. 17 n. 26). Instead, the Town advised Lucey that his appeal to the DRB should have been filed with the circuit court. Accordingly, Respondents are barred from asserting that Lucey failed to make an appeal to the DRB, and from raising any associated waiver or exhaustion of administrative remedies argument.

IV. THE PRESENCE OF THE TOWN RENDERS THE TOWN'S DRB A DUPLICATIVE, UNNECESSARY PARTY, AND THERE IS NO STATUTORY LANGUAGE REQUIRING THAT THE DRB BE NAMED.

Based on their brief, the preeminent issue in this appeal for Respondents is whether a municipal board is required to be named as a party even though the municipality itself is named. And, as stated by Respondents, the issue "turns on whether the statutory scheme required [Lucey] to do so." Br. of Respondents p. 4. While Respondents alternate between claiming a specific statutory subsection or the broader statutory scheme is controlling and necessary to examine,[13] the plain and short of it is that there is no statutory requirement that the DRB be named as a party to this appeal.

Respondents' brief, despite its smoke and mirrors, only buttresses the foregoing. Despite listing every instance of the word "board" being mentioned in the "BAR Statutes," it fails to recite any statutory language that actually requires that the board be a named party in an appeal.[14]

[13] Arguably, Respondents' counter-statement of issues on appeal limits their arguments in sections I.A.-C. to being evaluated solely under Section 6-29-900. Br. of Respondents p. 1. The heading of argument I.A. goes even further, alleging the "[a]ppeal is defective under § 6-29-900(A) because the DRB itself was not named as a party." *Id.* at p. 4.

[14] To dispose of another of Respondents' veiled arguments, the timeliness of Lucey's appeal is not at issue. As it is not a necessary party, the DRB did not need to be served with notice of the appeal.

A. <u>After Advising Below that Obligations Under Section 6-29-920 Were Satisfied, Respondents Cannot Now Cite Its Provisions as a Basis for Alleged Defect</u>.

Contrary to Respondents' assertion, the Town's filing of the record of the DRB proceedings with the lower court is indeed a relevant consideration. Upon notice of the appeal, the Town did not raise any objection or argue an inability to file the record due to the DRB not being named as a party. (R. pp. 77-79). In its Submission of Record, the Town did not contend that the clerk was unable to carry out any statutory function (or even reference any "statutorily mandated function" of the clerk), did not allege that proper statutory notice was not given, and did not otherwise assert that Section 6-29-920 had not been or could not be complied with. (R. pp. 77-79).

Rather than make any of the foregoing objections, the Town acted on behalf of one of its municipal bodies, the DRB, and "pursuant to S.C. Code Ann. §6-29-920(A), [] submit[ted] a copy of DRB's full record in this matter." (R. p. 77). By filing the record with the Circuit Court "pursuant to" Section 6-29-920(A) and not contemporaneously raising any alleged defect associated therewith, the Town represented that the statutory requirements thereunder had been satisfied.

Despite Respondents' efforts to convince the Court otherwise, the statute does ***not*** "clearly contemplate that the appeal petition will name the board … so the clerk can" give notice to the board. Br. of Respondents p. 6. In reality, naming a board in a petition does not provide the clerk with the ability to give notice, or even offer any assistance with this task. Even if Lucey's petition had named the DRB, such petitions are not required to set forth the mailing address of opposing parties, meaning a petition does not provide the circuit court clerk with any information needed to

carry out the statutory function of giving notice.[15] Nor is there any requirement that a petitioner separately provide the clerk with any contact information for the opposing parties upon filing the petition. Perhaps more conclusively, the clerk's function of giving notice is rendered pointless if a petitioner is required to name the board, because the petitioner would then be required to serve the petition on the board and thereby effectuate notice.

Finally, coming full circle, even though the DRB was not named, and the petition did not provide an address for any opposing party, notice was still able to be delivered to the address which the Town and the DRB share, 100 Ann Edwards Lane in Mount Pleasant (R. p. 406), and the Town was able to satisfy the statutory obligation of filing the record in response.

B. The Misplaced Common Law Considerations Urged by Respondents Fail to Persuade.

Perhaps because the statutory sections contain no language mandating that the DRB be named, Respondents, despite asserting the issue is "a specific inquiry into the statutory requirements" (Br. of Respondents p. 5 n.8), turn to general common law principles in an attempt to salvage their necessary party claim. But the argument advanced is problematic, as it requires an underlying premise that the Town has no control over the DRB. Although they recognize that costs charged in the event of reversal are "paid by the governing authority which established the board" pursuant to Section 6-29-930(A), Respondents nevertheless declare that "[w]ithout the DRB as a named party, the circuit court sitting in its appellate capacity would lack jurisdiction

[15] This discussion of compliance with the statutory filing requirements ties into Respondents' challenge to the validity of Lucey's appeal based on the title ascribed to his initial filing. Br. of Respondents pp. 6, 6 n.9. There is no rule requiring the petition be titled or captioned in a particular manner – the only requirement to appeal a DRB decision is for the affected party to file "a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law." § 6-29-900(A). Lucey's written filing set forth plainly, fully, and distinctly why the DRB's decision is contrary to law. Indeed, although titled a "Complaint," Lucey petitioned the lower court therein to reverse and vacate the DRB's Decision. (R. p. 33 at ¶ 23, Prayer for Relief).

over all the necessary parties to order the relief contemplated by the BAR Statutes." Br. of Respondents pp. 5-6, 7.

Because the Town, and the permittee,[16] are named in this action, the circuit court has jurisdiction over all parties necessary to order any relief contemplated by the BAR Statutes – the payment of costs by the governing authority, i.e., Town Council, which would use the Town's funds. The DRB is an instrumentality and arm of the Town that is subject to the same mandates; they share the same address and the DRB even holds its meetings in Town Council Chambers. (R. p. 81). Any judicial order issued to the Town is binding on the DRB, which is unable to disobey a directive from the court or its governing authority relating to a DRB decision.

While their point is unclear, Respondents also argue that the DRB has a "distinct and independent role it plays in the Town's design review process[.]" Br. of Respondents p. 7. The DRB's role in the design review process was carried out, and will continue to be carried out, regardless of the decision made on appeal, and, according to Respondents, "[t]he question at hand is not some general inquiry into the relationship between the DRB and the Town[.]" Br. of Respondents p. 5 n.8. Additionally, the DRB's role does not provide any basis to satisfy the requisite common law elements to find it is a necessary party. The DRB is a part of the Town, it "has no rights which must be ascertained . . . [and] [i]t does not protect any public interest that is separate and apart from" the Town, such that it need not be separately named. *Owen Steel Co. v. S.C. Tax Comm'n*, 281 S.C. 80, 85, 313 S.E.2d 636, 639 (Ct. App. 1984).

[16] Respondents again take the tack of claiming that the permittee being a necessary party, as held in *Spanish Wells II*, somehow provides a basis for requiring the presence of both the municipality and the municipal board. Br. of Respondents p. 7. However, there is clearly no correlation, and the opinion offers no support for Respondents' position. *See* Appellant's Br. p. 27.

Yet, even in the face of the foregoing, Respondents still claim that the DRB's absence creates a jurisdictional defect. The only way to square this argument is if it rests on the premise that the Town does not have authority over the DRB. But surely that is not the case. Indeed, earlier in their brief, Respondents readily acknowledge that the Town, via its governing body, has the authority to appoint and remove members of the DRB.[17]

That leaves an irreconcilable conflict within Respondents' position – either the DRB is an independent body without oversight, such that its presence is required for jurisdiction to vest, or the Town via Council governs and has authority over the DRB such that it is not a necessary party. The most likely resolution to this apparent contradiction is that Respondents have presented a false dilemma. Backed into a corner, Respondents throw both theories up, hoping they have blurred the lines and caused enough confusion to convince this Court to ignore the absence of a statutory mandate – and abandon common sense.

Regardless, in the end, the only argument that Respondents place before the Court is that Section "6-29-900(A) required that the DRB itself be timely named … as a party to Lucey's Appeal." Br. of Respondents p. 8. In full, the statute provides:

> A person who may have a substantial interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.

S.C. Code Ann. § 6-29-900(A).

[17] Br. of Respondents p. 1 n.2 (quoting Town Code § 156.420(A)(1)), p. 5 (quoting S.C. Code Ann. § 6-29-870(B)).

It is abundantly clear that Respondents' conclusion is entirely unsupported by the text of the statute, which contains no requirement that the DRB be named as a party to an appeal to the circuit court.

CONCLUSION

Statutory standing exists for Lucey to pursue his appeal and the DRB is not a necessary party to the same. Accordingly, the lower court's dismissal of the DRB Appeal should be reversed and vacated. Likewise, the DRB's Decision, which was incorrect as a matter of law, should be reversed and vacated, or, alternatively, the case should be remanded for a decision on the merits by the Circuit Court.

Respectfully submitted,

s/Evan P. Williams
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

Attorneys for Appellant

May 16, 2024
Mt. Pleasant, South Carolina