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

Case No. 2022-CP-10-03328
Appellate Case No. 2023-001006

Justin O'Toole Lucey,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF RESPONDENTS

Stephen L. Brown (SC Bar No. 66468)
Brian L. Quisenberry (SC Bar No. 73637)
Russell G. Hines (SC Bar No. 72100)
Zachary M. Kern (SC Bar No. 103731)
Graydon V. Olive, IV (SC Bar No. 105319)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Respondent
The Town of Mount Pleasant, South Carolina

Ross A. Appel (SC Bar No. 79149)
Forrest W. Lewis (SC Bar No. 105525)
MCCULLOUGH KAHN APPEL
2036 eWall Street
Mount Pleasant, South Carolina 29464
(843) 937-0400

Attorneys for Respondent
WIN515, LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authority

Pursuant to Rule 208(b)(6), SCACR, Respondents, The Town of Mount Pleasant, South Carolina (the "Town"), and WIN515, LLC ("WIN515"), join in this single brief in response to the brief of Appellant, Justin O'Toole Lucey ("Lucey").

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Where appeals from decisions of the DRB[1] to the circuit court are governed by S.C. Code Ann. § 6-29-900,[2] did the circuit court commit reversible error by dismissing Lucey's (attempted) appeal of the DRB's decision to grant WIN515 final design approval for the Subject Project[3]?

A. Is Lucey's appeal defective because the DRB was not named as a party?

B. Is Lucey's appeal defective because Lucey lacks the requisite "substantial interest" in the DRB's decision under § 6-29-900(A) and, thus, lacks standing to appeal it?

C. In addition to the bases for dismissal addressed in Issues/Arguments I.A. and I.B., where § 6-29-900(A) directs that appeals from decisions of the DRB to the circuit court are to be initiated by filing a "petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law" but Lucey initiated the instant proceedings by filing a summons and complaint naming himself as "Plaintiff" and the Town and WIN515 as "Defendants," was dismissal of Lucey's filing proper under Rule 12(b)(6), SCRCP, for failure to state facts sufficient to constitute a cause of action?

II. Out of an abundance of caution, assuming, *arguendo*, it is proper for this Court to reach the merits of Lucey's appeal, is Lucey's appeal meritorious?

---

[1] The "DRB" refers to the Town's Commercial Design Review Board.

[2] As Lucey acknowledges (Br. of Appellant p. 7 n.1), the DRB sits as a "board of architectural review," as that term is used in S.C. Code Ann. §§ 6-29-870 to -940 (collectively, the "BAR Statutes"). (*See also* Mount Pleasant Code § 156.420(A)(1) (R. p. 454) ("Pursuant to S.C. Code Title 6, Chapter 29, there is hereby created a Design Review Board, to be composed of seven members appointed by the Mayor and Town Council.").) To be clear, as its name implies, and in accordance with the general subject matter of the BAR Statutes, which is, of course, boards of *architectural* review, the DRB's purview is (and is limited) to *design* standards and does not extend to other aspects of the Town's Zoning Ordinance. (*See* Mount Pleasant Code § 156.421 (R. p. 457) (addressing the DRB's duties and powers); R. pp. 157-161.)

[3] The "Subject Project" is defined in the Statement of the Case.

COUNTER-STATEMENT OF THE CASE

WIN515 owns the real property identified by Charleston County TMS No. 532-01-00-151, which is located at 515 Coleman Boulevard in Mount Pleasant, South Carolina (the "Subject Property"). By unanimous vote at a public meeting held June 29, 2022, the DRB granted final site, landscape, and architecture approval, in other words, final design approval (the "DRB Decision"), to the three-story mixed use (retail/office) project WIN515 intends to construct on the Subject Property (the "Subject Project"). (R. pp. 85-86.)

Regarding appeals from decisions of the DRB to the circuit court, § 6-29-900(A) provides as follows:

> 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.

On July 25, 2022, Lucey filed what he contends is a valid appeal of the DRB Decision. Naming himself as "Plaintiff" and the Town and WIN515 as "Defendants" and demanding a jury trial, Lucey filed a summons and complaint in the Charleston County Court of Common Pleas,[4] "seek[ing] an Order . . . reversing and vacating the [DRB Decision]" ("Lucey's Appeal"). (R. p. 33.) Lucey did not name the DRB itself as a party, only the Town and WIN515. (R. pp. 30-33.)

On August 8, 2022, WIN515 filed a motion, in which the Town later joined, to dismiss Lucey's Appeal as statutorily defective in a number of respects, including its failure to name a necessary party, the DRB itself, and Lucey's lack of the requisite "substantial interest" in the DRB

[4] (R. pp. 30-33.)

Decision to have standing to appeal it (the "Motion to Dismiss"). (*See* R. pp. 73-76; R. pp. 377-386; R. pp. 407-409.)

After a hearing on January 27, 2023,[5] the circuit court, the Honorable R. Keith Kelly presiding, granted the Motion to Dismiss and dismissed Lucey's Appeal with prejudice by order filed April 5, 2023, for its failure to name (and serve) the DRB as a party and Lucey's lack of standing. (R. pp. 7-17.)[6] The circuit court went on to deny Lucey's motion to reconsider, filed April 14, 2023 (the "Motion to Reconsider"),[7] by order filed May 23, 2023. (R. pp. 18-29.)

This appeal follows.

STANDARD OF REVIEW

Issues/Arguments I.A. and I.B. turn on statutory interpretation, which is an issue of law for the court that is subject to de novo review. *See Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012) (citing *Muci v. State Farm Mut. Auto. Ins. Co.*, 478 Mich. 178, 732 N.W.2d 88, 93 (2007) ("The interpretation of court rules and statutes presents an issue of law that is reviewed de novo.")); *see also Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984) (even where a ruling is on a matter within the trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise of discretion, the question presented on appeal is one of law). Issues of law are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016).

---

[5] (R. pp. 38-71.)

[6] The circuit court's formal order filed April 5, 2023, was preceded by a form order filed February 10, 2023, stating that the court had decided to grant the Motion to Dismiss and that a formal order to that effect would follow. (R. pp. 4-6.)

[7] (R. pp. 413-419.)

Issue/Argument I.C. implicates Rule 12(b)(6), under which a defendant may move to dismiss a complaint due to its "failure to state facts sufficient to constitute a cause of action." In reviewing a Rule 12(b)(6) dismissal, the appellate court applies the same standard of review as the lower court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved on his behalf, the allegations set forth on the face of the complaint state any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007).

ARGUMENT

I. The circuit court did not commit reversible error by dismissing Lucey's Appeal.

A. Lucey's Appeal is defective under § 6-29-900(A) because the DRB itself was not named as a party.

"The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005); *see also Spanish Wells Property Owners Assoc., Inc. v. Board of Adjustment of the Town of Hilton Head Island*, 292 S.C. 542, 545, 357 S.E.2d 487, 487 (Ct. App. 1987) ("*Spanish Wells I*") ("Appeals are unknown at common law; the right to appeal is a creature of statute."), *reversed on other grounds by* 295 S.C. 67, 367 S.E.2d 160 (1988) ("*Spanish Wells II*"). Indeed, Lucey himself implicitly acknowledges that the answer to the question of whether Lucey's Appeal is defective for failing to name the DRB as a party turns on whether the statutory scheme required him to do so. (*See* Br. of Appellant pp. 25-26 ("'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.'") (emphasis added) (citing *Owen Steel Co. v. S.C. Tax Comm'n*, 281 S.C. 80, 85, 313

S.E.2d 636, 639 (Ct. App. 1984)).)[8] And again, the statute that controls the right to appeal a decision of the DRB to the circuit court is § 6-29-900, which is, of course, among the BAR Statutes.

The primary consideration in interpreting a statute is the intent of the legislature. *State v. Squires*, 311 S.C. 11, 14, 426 S.E.2d 738, 739 (1992). "In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). "'A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . .'" *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (quoting 82 C.J.S. *Statutes* § 346)).

The plain language of § 6-29-900(A) recognizes a difference between the "board" (here the DRB) "from" which a decision may be appealed to the circuit court and the "governing authority" (here the Town) that created the "board." This distinction appears repeatedly in the BAR Statutes. *See, e.g.,* § 6-29-870(B) ("The governing authority or authorities creating the board may remove any member of the board which it has appointed."); § 6-29-870(D) ("The board shall appoint a secretary who may be an officer of the governing authority or of the board of architectural review."); § 6-29-890(A) ("Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county."); § 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.").

---

[8] Accordingly, Lucey's contention about the DRB being an "instrumentality" of the Town (Br. of Appellant p. 28), or any other words to that effect, is irrelevant. The question at hand is not some general inquiry into the relationship between the DRB and the Town, but rather a specific inquiry into the statutory requirements to properly appeal a decision of the DRB to the circuit court and whether the BAR Statutes recognize boards of architectural review—the very entities whose creation they specifically authorize and address—as distinct decision-making

Section 6-29-900(A) expressly recognizes that it is the "decision of the board" that is being appeal "from," not any decision of the "governing authority;" § 6-29-870(D) requires the "board" to appoint a secretary; and § 6-29-920(A) requires that, upon the filing of an appeal petition, the clerk of the circuit court must "give immediate notice of the appeal to the *secretary of the board* and within thirty days from the time of the notice, the *board* must file with the clerk a duly certified copy of the proceedings held before the *board* of architectural review, including a transcript of the evidence heard before the *board*, if any, and the decision of the *board* including its findings of fact and conclusions." (emphasis added). Besides contemplating that the appellant will indeed file an appeal petition (which was not done here, as Lucey's Appeal was filed as a summons and complaint by Lucey as "Plaintiff" against the Town and WIN515 as "Defendants"), these statutes clearly contemplate that the appeal petition will name the board (here the DRB) as a party to the appeal so the clerk of the circuit court can carry out the statutorily mandated function of giving notice, not to the "governing authority," but to the "secretary of the board."[9]

Section 6-29-910 expressly authorizes the "board," not the "governing authority," to appear before the circuit court to seek relief "[i]n the case of contempt by a party, witness, or other person before the board . . . ." Indeed, by providing that, "[i]n the event that the decision of the *board* is

---

entities that must be named as parties when their decisions are appealed to the circuit court, which, as the circuit court correctly concluded here, they do.

[9] This case illustrates well the breakdown of the contemplated procedure caused by a statutorily defective attempt at an appeal. As the circuit court noted in its order granting the Motion to Dismiss, being in the form of a summons and complaint, Lucey's Appeal was filed under the "Case Sub Type" classification "Real Prop / Other 499," not "Zoning Board – 970," and as a result, the clerk of court processed it as an ordinary civil action, not an appeal from the DRB. (R. p. 8 n.2.) The fact that the Town, after it was served with Lucey's Appeal via process server (R. p. 72), was able to file the record of the DRB proceedings in the circuit court (*see* Br. of Appellant pp. 27-28) is beside the point and has no bearing on whether Lucey's Appeal is defective for failing to name the DRB as a party. The question of the defectiveness of Lucey's Appeal does not turn on the Town's response to it, but rather on whether Lucey's Appeal met the statutory requirements in the first place, which it did not.

reversed by the circuit court, the *board* must be charged with the costs which must be *paid* by the *governing authority* . . . ," § 6-29-930(A) (emphasis added) expressly contemplates that it is the "board," not the "governing authority," that will be the party before the circuit court to have costs charged against it. Likewise, the statutory requirement that the circuit court must remand the matter to the "board," not the "governing authority," for rehearing if the court determines the record of the proceedings below is insufficient for review[10] presupposes that the "board" will be before the circuit court so that the court can direct the "board" to rehear the matter.

In *Spanish Wells II*, the Supreme Court held "a development permittee is a necessary party to an appeal of its permit," reasoning that the permittee was "the most interested party," because the appeal was an attempt to invalidate its interest, and that naming the permittee "serves judicial economy," because it ensures the permittee "will be bound because it is a party to the appeal." 295 S.C. at 69, 367 S.E.2d at 161. Similar logic holds here. While the DRB may or may not be the *most* interested party in this matter, it is clearly an interested party by virtue of, at the very least, the distinct and independent role it plays in the Town's design review process pursuant to the BAR Statutes. And naming the DRB is also necessary for purposes of judicial economy. Without the DRB as a named party, the circuit court sitting in its appellate capacity would lack jurisdiction over all the necessary parties to order the relief contemplated by the BAR Statutes.

Properly read and construed, § 6-29-900(A) required that the DRB itself be timely named (i.e., within the 30-day deadline to file an appeal petition) as a party to Lucey's Appeal. The failure

[10] § 6-29-930(A) ("In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing.").

to do so was a jurisdictional defect[11] that could not be corrected by amendment[12] and required dismissal of Lucey's Appeal with prejudice.

B. Lucey's Appeal is defective because Lucey lacks the requisite "substantial interest" in the DRB Decision under § 6-29-900(A) and, thus, lacks standing to appeal it.

Again, "[t]he right of appeal arises from and is controlled by statutory law;"[13] the statute that controls the right to appeal a decision of the DRB to the circuit court is § 6-29-900, which is, of course, among the BAR Statutes; and, in subsection (A), it grants standing to appeal to any "person who may have a substantial interest in any decision of the [DRB] . . . ."

---

[11] *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 n.7 (Ct. App. 2000) ("[T]he timeliness of an appeal from a zoning board's decision is a jurisdictional requirement and, as such, may be raised at anytime by either party or sua sponte by this Court."). Although *Vulcan* involved an appeal from a board of zoning appeals, rather than an appeal from a board of architectural review, the principle that the timeliness of an appeal is jurisdictional applies with equal force to appeals from a board of architectural review. Indeed, as Lucey himself acknowledges, "the analysis [under S.C. Code Ann. § 6-29-820, regarding appeals from a board of zoning appeals to the circuit court] is equally applicable here [(i.e., in a case involving an appeal from a board of architectural review to the circuit court under § 6-29-900] as the processes are substantially the same." (Br. of Appellant p. 18.)

[12] *Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d (Ct. App. 2004) (instructing that "[t]he procedures governing appeals of [board of zoning appeals'] decisions to the circuit court are prescribed by statute;" that the procedural rules governing civil trial litigation do not apply when the circuit court is sitting in its appellate capacity; that the controlling statute, § 6-29-820, requires the appellant to timely file a written petition with the clerk of court "'setting forth plainly, fully, and distinctly why the decision is contrary to law;'" and that § 6-29-820 makes no provision for amendment of such a petition, and holding that the circuit court correctly denied the appellant's request to amend her petition after the expiration of the time to appeal). Like *Vulcan*, 342 S.C. 480, 489, 536 S.E.2d 892, *Austin*, too, involved an appeal from a board of zoning appeals, rather than an appeal from a board of architectural review, and here again, the legal principle that an appeal petition cannot be amended after the expiration of the time to appeal applies with equal force to appeals from a board of architectural review. (Br. of Appellant p. 18 (acknowledging that "the analysis [under § 6-29-820, regarding appeals from a board of zoning appeals to the circuit court] is equally applicable here [(i.e., in a case involving an appeal from a board of architectural review to the circuit court under § 6-29-900] as the processes are substantially the same.").)

[13] *Hagood*, 362 S.C. at 194, 607 S.E.2d at 708; *see also Spanish Wells I*, 292 S.C. at 545, 357 S.E.2d at 487 ("Appeals are unknown at common law; the right to appeal is a creature of statute.").

As an initial matter, Lucey's alternative argument that he has standing to appeal the DRB Decision via the common law "public importance" exception[14] can be dispensed with right away, because "[w]here," as here, "a statute grants a particular class of aggrieved persons the right to appeal, the statute, not the common law, prevails." *Spanish Wells I*, 292 S.C. at 545, 357 S.E.2d at 487; *see also Preservation 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) ("'The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.'") (quoting *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012)). In other words, appeals being "unknown at common law"[15] and the right to take them being "a creature of statute"[16] "aris[ing] from and . . . controlled by statutory law,"[17] there is simply no room in the standing analysis for consideration of the common law concept of public-importance standing. Indeed, 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*. (Br. of Appellant p. 22 (citing *Davis v. Richland Cnty. Council*, 372 S.C. 497, 642 S.E.2d 740 (2007) (addressing standing to bring a declaratory judgment action); *id.* (citing *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 669 S.E.2d 337 (2008) (addressing standing to bring a declaratory judgment action); *id.* (citing *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999) (addressing standing to sue to enjoin issuance of hospital revenue bonds); *id.* at p. 23 (citing *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (addressing standing to bring declaratory judgment action).) These cases, like Lucey's public-

---

[14] (*See* Br. of Appellant pp. 22-24.)

[15] *Spanish Wells I*, 292 S.C. at 545, 357 S.E.2d at 487 ("Appeals are unknown at common law; the right to appeal is a creature of statute.").

[16] *Id.*

[17] *Hagood*, 362 S.C. at 194, 607 S.E.2d at 708 ("The right of appeal arises from and is controlled by statutory law.").

importance-standing argument, are inapposite and unavailing here, where the question is about statutory standing to appeal.

As for the question of statutory standing to appeal under § 6-29-900(A), Lucey lacks the requisite "substantial interest" in the DRB Decision. To construe § 6-29-900(A) otherwise would expand the universe of potential appellants of the DRB Decision to propositions so large they could not possibly have been intended by the legislature. *See Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the legislative intention).

Implicitly acknowledging that he does not own property "adjacent" to the Subject Property, Lucey stakes his claim to a "substantial interest" in the DRB Decision on his contention that the property he owns is in the sufficiently "near vicinity,"[18] which term Lucey suggests is malleable enough to encompass all properties "'not far distant in time, place, or degree' and in 'a surrounding area or district.'" (Br. of Appellant pp. 16-17 (quoting www.merriam-webster.com).)

According to Lucey, *Spanish Wells I* "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." (Br. of Appellant p. 15; *see also id.* (asserting that *Spanish Wells I* interpreted "substantial interest" "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.").) Respectfully, *Spanish Wells I* did not go so far as that.

The appellant in *Spanish Wells I* (and, for that matter, *Spanish Wells II*, which refers to the Supreme Court's decision in the same case, which, again, reversed *Spanish Wells I* on a ground

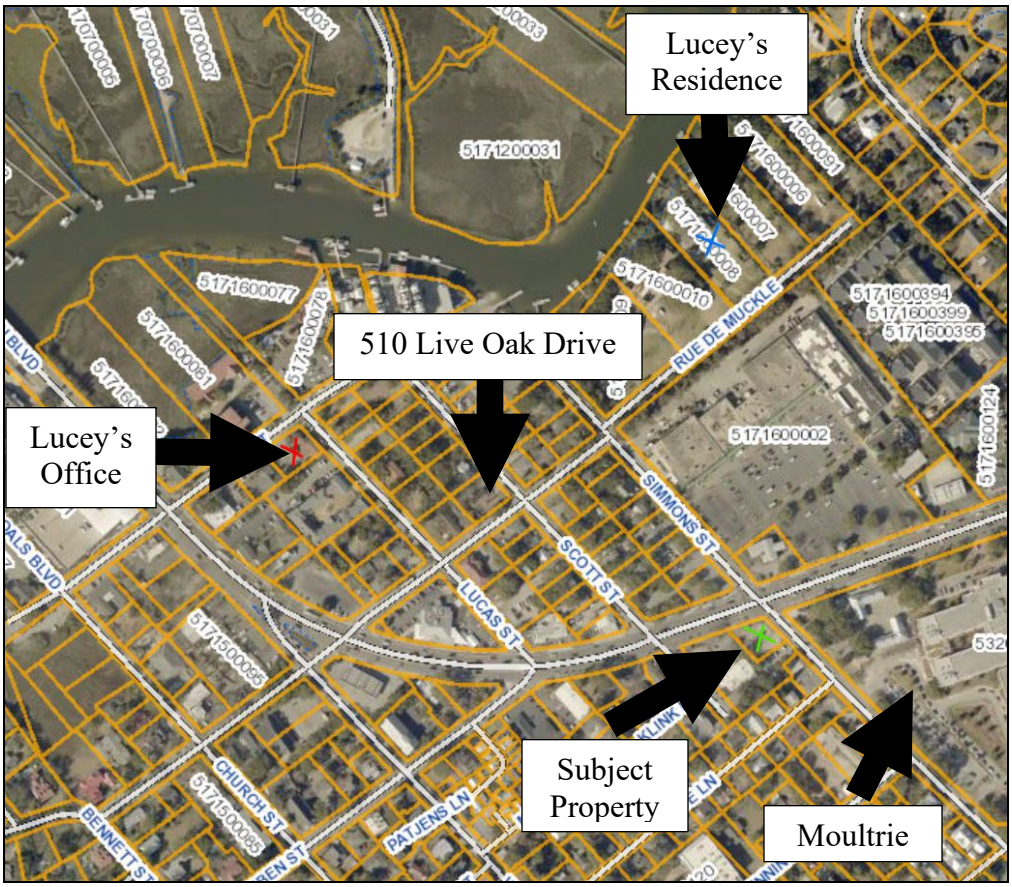
unrelated to the issue of standing) was not an individual property owner, but rather a property owners association (the "POA"), and it was only the question of the POA's associational standing that was before the court. 292 S.C. at 545, 357 S.E.2d at 487 ("The statute, therefore, gives *[the POA]* standing to appeal.") (emphasis added); *see also Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014) (explaining that "[a]n organization has associational standing 'if *one or more* of its members will suffer an individual injury by virtue of the contested act,'" i.e., that associational standing does not require every individual member of the organization to have standing in their own right) (emphasis added) (quoting *Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291 (2001)). The question of whether a particular individual owner of property that was merely in the "near vicinity" of, but not "adjacent" to, the development at issue had the requisite "substantial interest" was neither essential to the holding of nor directly addressed in *Spanish Wells I*; nor, for that matter, was the question of what constitutes the "near vicinity." So, while it is true that *Spanish Wells I* held that the POA had a "substantial interest" because its membership included both owners of property "adjacent" to and in the "near vicinity" of the development at issue, it is not true that *Spanish Wells I* "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," as Lucey contends. (Br. of Appellant p. 15.)

"A party seeking to establish standing bears the burden of proving it." *S.C. Pub. Interest Foundation v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 645, 744 S.E.2d 521, 524 (2013). Regarding his claimed "substantial interest" in the DRB Decision, Lucey points to his ownership of three properties (collectively, the "Lucey Properties"): his office at the corner of Mill and Lucas

---

[18] (*See* Br. of Appellant p. 15 ("At issue here is the interpretation and definition of

Streets; his home on Rue De Muckle; and a rental property he owns at 510 Live Oak Drive, which is at the corner of Live Oak Drive and Scott Street. (*See* Br. of Appellant pp. 18-22.) Along with the Subject Property and Moultrie Middle School ("Moultrie"), these properties are identified on the following map, which was included in the circuit court's orders granting the Motion to Dismiss and denying the Motion to Reconsider[19]:



(R. pp. 7-29.)

Lucey also points to the Subject Project being "adjacent to a school [(i.e., Moultrie)], a school crossing, and a dangerous and busy intersection located at Coleman [Boulevard] and

---

the 'near vicinity' subset of the class.").)

[19] The arrows and text boxes are not on the map in the circuit court's orders but are added here for the sake of clarity.

Simmons [Street] ('the Crossing')"[20] and to his and his family's longstanding, frequent use of the Crossing. (R. p. 32 ¶ 10; *see also* R. p. 34 n.1 ("I pass through this intersection on foot, on bike, and by car many times a week, alone, or with my 3-year-old child and others.").)

To be sure, the applicable test for determining Lucey's standing here is the statutory "substantial interest" test under § 6-29-900(A), not the traditional common law "substantial damage" test,[21] and the circuit court correctly applied the correct test to conclude that Lucey lacked the requisite "substantial interest" to appeal the DRB Decision, which concerned *design* approval for a project to which the Lucey Properties are neither "adjacent" (as, again, Lucey himself admits) nor sufficiently in the "near vicinity" of to see. And in doing so, the circuit court, while duly adhering to the applicable statutory "substantial interest" test, was properly guided in determining the meaning of "substantial interest" in this context by drawing on instructive authorities on the general subject and concept of standing. In other words, even though the "substantial interest" test and the "substantial damage" test and are not one and the same, it is not as if they are polar opposites. Indeed, they have a common modifier, "substantial," the use of which shows that, 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.

Beaufort Realty Co., Inc. v. Beaufort County, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001), stands for the proposition that for a party to have a "substantial interest" it must be a real party in interest, notwithstanding physical proximity to the property or development at issue in the appeal. This Court has described a "real party in interest" as one with "a real, material, or

[20] (R. p. 32 ¶ 8.)

substantial interest in the outcome of the litigation. *Hill v. South Carolina Dept. of Health and Environmental Control*, 389 S.C. 1, 698 S.E.2d 612 (2010). Someone who is a "real party in interest" with a "substantial interest" is not "one who has only a nominal, formal, or technical interest in, or connection with, the action." *Stoney v. Stoney*, 425 S.C. 47, 819 S.E.2d 201 (2018); *see also Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 29, 416 S.E.2d 641, 645 (1992) ("[S]uch imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public.").

The circuit court correctly found that Lucey lacks a "substantial interest" in the DRB Decision and, thus, lacks statutory standing under § 6-29-900(A). The Lucey Properties are on the other side of Coleman Boulevard, one the busiest thoroughfares in Mount Pleasant. They are not in the sufficiently "near vicinity" of the Subject Property to give Lucy the requisite "substantial interest," as that term is contemplated by § 6-29-900(A), in the *design* approval at issue to give Lucy the right to appeal it. And besides not being unique to Lucey's personal interest, the traffic safety issues Lucey alleges are not properly related to the DRB Decision, which, again, concerns the *design* of the Subject Project.

C. In addition to the bases for dismissal addressed in Issues/Arguments I.A. and I.B., dismissal of Lucey's Appeal is proper under Rule 12(b)(6).

Section 6-29-900(A) plainly directs that appeals from decisions of the DRB to the circuit court are to be initiated by filing a "petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law," yet Lucey initiated the instant proceedings by filing a summons and complaint naming himself as "Plaintiff" and the Town and WIN515 as "Defendants," and his complaint sets forth no cognizable cause of action against the Town or

---

[21] *Spanish Wells I*, 292 S.C. at 545, 357 S.E.2d at 487 ("The circuit court erred in applying the traditional common law test of 'special damage" rather than the 'substantial

WIN515. Accordingly, in addition to the bases for dismissal addressed in Issues/Arguments I.A. and I.B., dismissal of Lucey's Appeal is proper under Rule 12(b)(6).

II. Out of an abundance of caution, assuming, *arguendo*, it is proper for this Court to reach the merits of Lucey's appeal, Lucey's appeal is without merit.

Lucey's argument that the circuit court erred in failing to consider Lucey's Appeal on the merits is unavailing. So far, the only matters that have properly come before the circuit court for decision in these proceedings are the Motion to Dismiss,[22] which the court properly granted, and the Motion to Reconsider, which it properly denied. The circuit court having thus disposed of the matter without the merits of Lucey's Appeal ever having been properly put before it for decision, it makes no sense to accuse the court of having "failed" to the consider them; nor does it make sense for Lucey, even assuming, *arguendo*, he could show that the dismissal below was erroneous, to now invite this Court to address the merits of Lucey's Appeal before the circuit court has done so in the first instance. Nonetheless, since Lucey's brief includes argument on the merits, out of an abundance of caution, Respondents would make clear that the record before this Court[23] clearly demonstrates Lucey's Appeal is without merit given the highly deferential standard of review afforded quasi-judicial boards like the DRB.[24]

---

interest" test of the governing statute.")

[22] To be clear, the only thing heard (or scheduled to be heard) by the circuit court on January 27, 2023, was the Motion to Dismiss. (*See* R. p. 40:3–5 ("THE COURT: I believe the next one is 2022-CP-10-00328, Lucey v. WIN515, LLC. Let me get that pulled on my screen. I have a motion to dismiss.").)

[23] *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment.").

[24] "The appellate court gives 'great deference to the decisions of those charged with interpreting and applying local zoning ordinances.'" *Arkay, LLC v. City of Charleston*, 418 S.C. 86, 91, 791 S.E.2d 305, 308 (Ct. App. 2016) (quoting *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995)). "The appellate court is not free to substitute its

Lucey sets forth the grounds for his appeal in Paragraph 22 of his complaint, which reads as follows:

> Both the Town staff and DRB approvals violate Town ordinances for the reasons set forth in the attached June 27, 2022 letter (Exhibit A), including that Town ordinances bar reconsideration of a denied project for one (1) year absent substantial change, which did not occur.

(R. p. 33 ¶ 22.) None of these purported grounds justify this Court's reversal of the unanimous DRB Decision.

The Town's Zoning Administrator determined WIN515's revised plans for the Subject Project met all the necessary requirements to appear before the DRB on June 29, 2022, for final review. While this was within a year of the DRB's December 8, 2021, denial of an earlier iteration of the Subject Project, Section III(4)(C)(4) of the DRB Rules of Procedure provides for an exception to the one-year post-denial waiting period if "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." Section III(4)(C)(4) goes on to state that "[a]ny person aggrieved from actions of the Zoning Administrator or other administrative official, may appeal to the appropriate appellate body pursuant to S.C. Code of Laws, Title 6, Chapter 29."

To challenge the Zoning Administrator's determination that WIN515's revised plans reflected a "substantial change," Lucey was required to take an administrative appeal of the staff decision to the DRB.[25] Had Lucey filed such appeal, it would have triggered an automatic

---

judgment for that of the [board]. Accordingly, we will not reverse the circuit court's affirmance of the [board] unless the [board's] findings of fact have no evidentiary support or the [board] commits an error of law." *Gurganious*, 317 S.C. at 487, 454 S.E.2d at 916.

[25] § 6-29-890(A) ("Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or

stay,[26] thus preventing WIN515's revised plans from appearing before the DRB for a decision on the merits until the appeal was decided. But this never happened. Lucey failed to timely and properly contest his disputes regarding the Zoning Administrator's interpretation of Section III(4)(C)(4) by filing a direct appeal to the DRB. The time for such an appeal has long passed, and the DRB unanimously approved WIN515's revised plans. Therefore, Lucey waived his ability to contest the Zoning Administrator's "substantial change" determination. This unappealed ruling is the law of the case,[27] and it may not be collaterally attacked at the DRB hearing on the merits of WIN515's application, by Lucey's Appeal (to the circuit court), or the instant appeal to this Court.

And even assuming, *arguendo*, that the "substantial change" issue is properly before this Court, it is a factual finding entitled to significant deference. The Court may only overturn the Zoning Administrator's finding if there is "no evidentiary support or the [DRB] commits an error of law." Lucey cannot meet this burden. Lucey's Appeal is entirely conclusory, and the record on appeal is devoid of any indication that the Zoning Administrator's decision is based on no evidence or plagued by an error of law.

Lucey's substantive disagreements with the DRB's unanimous approval of the Subject Project fare no better. All of his arguments, presented in his letter attached as Exhibit A to his

---

both, by filing with the officer from whom the appeal is taken and with the board of architectural review notice of appeal specifying the grounds of it.")

[26] § 6-29-890(B) ("An appeal stays all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board, after the notice of appeal has been filed with him, that by reason of facts stated in the certificate a stay would, in his opinion, cause imminent peril to life and property. In that case, proceedings may not be stayed otherwise than by a restraining order which may be granted by the board or by a court of record on application, upon notice to the officer from whom the appeal is taken, and on due cause shown.")

[27] *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (stating an unappealed ruling is the law of the case).

complaint, pertain to zoning matters outside the scope of the DRB's authority.[28] Lucey's complaint is devoid of any objection to the aesthetics of the project (site, landscape, and architecture), which is what the DRB considered. Rather, Lucey attempts to litigate zoning issues outside of the DRB's purview, including protestations over off-street minimum parking requirements and traffic safety (intersection visibility, access drives, and delivery areas). These aspects of the Subject Project were approved by the Zoning Administrator and other appropriate Town officials. These determinations were not appealed, timely or otherwise, by Lucey or anyone else. Therefore, out of an abundance of caution, assuming, *arguendo*, it is proper for this Court to reach the merits of Lucey's appeal, the Court should find that Lucey's appeal is without merit.

CONCLUSION

For the foregoing reasons, Respondents ask this Honorable Court to affirm the circuit court. And again, out of an abundance of caution, assuming, *arguendo*, it is proper for this Court to reach the merits of Lucey's appeal, the Court should find that Lucey's appeal is without merit.

<SIGNED ON THE FOLLOWING PAGE>

[28] *See* footnote 2, *supra*.

Respectfully submitted,

By: s/Russell G. Hines

Stephen L. Brown (SC Bar No. 66468)
Brian L. Quisenberry (SC Bar No. 73637)
Russell G. Hines (SC Bar No. 72100)
Graydon V. Olive, IV (SC Bar No. 105319)
Zachary M. Kern (SC Bar No. 103731)
CLEMENT RIVERS, LLP
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Respondent
The Town of Mount Pleasant, South Carolina

Charleston, South Carolina

May 16, 2024

Respectfully submitted,

By: s/Ross A. Appel

Ross A. Appel (SC Bar No. 79149)
Forrest W. Lewis (SC Bar No. 105525)
MCCULLOUGH KAHN APPEL
2036 eWall Street
Mount Pleasant, South Carolina 29464
(843) 937-0400

Attorneys for Respondent
WIN515, LLC

Mount Pleasant, South Carolina

May 16, 2024