THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Circuit Court Judge of the 9th Judicial Circuit

---

App. Case No. 2023-000296
Case No. 2021-CP-10-02888

---

J. Doe,

Appellant,

v.

Design Review Board (DRB)
and the
Town of Sullivans Island (SI),

Respondents.

---

# INITIAL BRIEF

---

C. Holmes
POB 187
S.I., SC 29482-0187
843.883.3010
Appellant

## TABLE OF CONTENTS


Table of Authorities..... *ii*

Statement of Issues on Appeal..... *vi*

Facts..... 1

Standard of Review..... 2

Argument..... 3

Conclusion..... 30

## TABLE OF AUTHORITIES

Cases


*Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863 (S.C. App., 2013)..... 18

*CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011)..... 14

*Citizens for Quclity Rural Living, Inc., v. Greenville Cnty. Planning Comm'n*, 825 S.E.2d 721 (Ct. App. 2019)..... 2,4,8,9,12-16

*City of Columbia v. Pic-A-Flick Video, Inc.*, 531 S.E.2d 518(2000)..... 2

*County of Sacramento v. Lewis*, 523 U.S. 833 (1998)..... 8,20,21,28

*Eagle Container LLC v. County of Newberry*, 666 S.E.2d 892 (2008)..... 3,8

*Eargle v. Horry Cty.*, 545 S.E.2d 276 (2001)..... 2

*Fesmire v. Digh*, 683 S.E.2d 803 (Ct. App. 2009)..... 2

*Fuentes v. Shevin*, 407 U.S. 67 (1972)..... 8,20,21,28

*Garris v. Governing Bd. of S.C. Reinsurance Facility*, 461 S.E.2d 819 (1995)..... 2

*Hall v. City of Greenville*, 88 S.E.2d 246 (1955)..... 12

*Hawkins v. City of Greenville*, 594 S.E.2d 557 (Ct.App.2004)..... 6,12

*Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988)..... 21,28

*Kiawah Devt. Partners v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707, 710 (S.C. 2014)..... 12

*Kurschner v. City of Camden Planning Commission*, 376 S.C. 165, 656 S.E.2d 346 (2008)..... 3,24,28

*Lightner v. Hampton Hall Club, Inc.*,
419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017)..... 2

*Mikell v. County of Charleston*, 687 S.E.2d 326 (2009)..... 3,8

*Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008)..... 8,21,28

*Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*,
396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011)..... 17,20

*Peterson Outdoor Advertising v. City of Myrtle Beach*,
327 S.C., 489 S.E.2d 630 (1997)..... 3,24,28

*Rest. Row Assocs. v. Horry Cty.*, 516 S.E.2d 442 (1999)..... 3,28

*Singletary v. S.C. Dep't of Educ.*,
447 S.E.2d 231 (Ct. App. 1994)..... 14

*S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*,
388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010)..... 14

*S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388,
629 S.E.2d 624 (2006)..... 14

*Spanish Wells Property Owners Ass'n, Inc., v. Board of Adjustment of Town of Hilton Head Island*,
357 S.E.2d 487 (Ct. App. 1987)..... 4,6,18

*Spanish Wells Property Owners Assn. v. Board of Adjustment*,
367 S.E.2d 160 (1988)..... 18

*State v. Blackmon*, 304 S.C. 270, 273, 403S.E.2d 660, 662 (1991)... 20

*State v. Long*, 363 S.C. 360, 610 S.E.2d 809 (2005)..... 16

*State v. Sweat*, 379 S.C. 367,
665 S.E.2d 645 (Ct. App. 2008)..... 15

*Univ. of S. California v. Moran*, 617 S.E.2d 135 (Ct. App. 2005)..... 2

*Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)..... 8,20,21,28

Constitutional Provisions


CONSTITUTION OF THE STATE OF SOUTH CAROLINA:

Const. art. I, sec. 2, 3, 4, 9, 10, and 14..... 28
Const., art. I, sec. 2, 3, 4, 10,14..... 7,10,12,15,16,17,21
Const., art. I, Sec. 13..... 6,12
Const., art. V, sec. 4..... 21,28
Const., art. V, sec. 4, 5..... 7,10,12,15,16,17
Const. art. V, sec. 5..... 28

U.S. CONSTITUTION :

Const., Article I, sec. 9, 10..... 8
Const., Article I, sec. 9, 10..... 7,10,12,15-17,21,28
Const., Article III..... 8
Const. amend. I, IV, V, VII, and XIV..... 7,8,10,12,15-17,21,28
Const., amend. V..... 6,12


Statutes, Zoning Ordinances, Rules, and Orders


CLDEA (Comprehensive Land Development Enabling Act)..... 19
LUDRA (*South Carolina Land Use Dispute Resolution Act enacted June 2, 2003)*..... 13
South Carolina Local Government Comprehensive Planning Enabling Act of 1994..... 13,17
S.C. Code § 5-31-450..... 1,5,6,12,22,27
S.C. Code § 6-7-750..... 18
S.C. Code § 6-29-820..... 16-18,20
S.C. Code § 6-29-825..... 17
S.C. Code § 6-29-900..... 4,5,11-17,19,21,22
S.C. Code § 6-29-930..... 11
S.C. Code § 6-29-1120..... 26
S.C. Code § 6-29-1150..... 15,16
S.C. Code § 15-43-20..... 6,12
S.C. Code § 15-53-30..... 8-10
S.C. Code § 15-53-60..... 8-10
S.C. Code § 15-53-130..... 8,9
SCRCP, Rule 21..... 5
S.C. Supreme Court Order dated Nov. 12, 2015..... 18,21
Sull. Isd. Zoning Ordinance (ZO) Art. XII, 21-109..... 7,22
Sull. Isd. Zoning Ordinance (ZO) Art. XII, 21-110..... 10

Other

Hubbard and Felix, *South Carolina Law of Torts*, (4th Ed. 2011)..... 12
Municipal Association of South Carolina (MASC), *2018 Comprehensive Planning Guide for Local Governments*..... 19
Wyche, Bradford W., *An Overview of Land Use Regulation in South Carolina*, 11 SOUTHEASTERN ENVTL. L.J. 183 (2003)..... 11

## STATEMENT OF ISSUES ON APPEAL

I. Statutory Authority/Jurisdiction

II. Objection is entered to the unauthorized record respondents filed.

III. Respondents frivolously advocate filing a frivolous claim.

IV. The record reflects a pattern and practice of failure to comply with the requirements of public notice which renders DRB approval void/voidable.

V. The decision of the DRB is unsupported by the record and reversible as a matter of law.

VI. Pursuant to S.C. Code § 15-53-130, 15-53-30, and/or 15-53-60 declaratory relief is proper.

VII. Pursuant to S.C. Code § 6-29-930, the taking claim is proper.

VIII. The appellant property owner has standing to and did timely request mediation under S.C. Code § 6-29-900 et seq.

IX. Pursuant to S.C. Code § 6-29-900 et seq., until and unless pre-litigation mediation is unsuccessful, the requested mediation "must be granted." The lower court erred as a matter of law in failing to grant mediation to the appellant property owner in the immediate vicinity adversely affected with a substantial interest.

X. The General Assembly intended to and did provide for ADR, including mediation, in all civil cases including this case, and the lower court erred in disregarding legislative intent, the letter and spirit of the laws, the ADR statutes, S.C. Code § 6-29-900 et seq., and South Carolina Supreme Court Orders.

XI. The lower court orders are reversible as a matter of law.

## FACTS

Contractor for property owners at 1608 Poe Avenue filed application with SI for approval of substantial non-compliance with applicable laws including regulations, land use statutes, flood zone requirements, Historic District laws, and ZO's (Zoning Ordinances). The lots in the subject block are some of the smallest and more modest on the Island. The property at 1608 Poe Avenue is elevated above the street which in turn is elevated above the appellant's property across the street. There is no mandatory roadway drainage in the 1608 Poe Avenue right of way. Despite request, the Respondents, Town of Sullivans Island (SI) and Design Review Board (DRB), have failed and refused to comply with applicable laws including S.C. Code § 5-31-450. That statute, S.C. Code § 5-31-450, provides for mandatory roadway drainage for South Carolina property owners and more so in this flood zone in a Historic District:

**SECTION 5-31-450.** Drains for surface water.

Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person. S.C. Code § 5-31-450.

HISTORY: 1962 Code Section 59-224; 1952 Code Section 59-224; 1942 Code Section 7301; 1932 Code Section 7301; Civ. C. '22 Section 4449; Civ. C. '12 Section 3026; 1902 (23) 1038; 1953 (48) 272.

As a result, the natural and historical drainage pattern and flow is interrupted causing ongoing injury and damages to the appellant property owner. The DRB granted standing for the appellant property

owner to be heard at hearing/rehearing along with concerns of similarly-situated, adversely affected property owners in the near vicinity with a substantial interest. Appellant timely filed in the lower court and timely served Notice of Appeal, Appeal Petition, Takings Claim, Jury Demand, Motion, Request for Declaratory Relief, and Request for Mediation. Notice of appeal of the lower court dismissal is timely served and filed.

## STANDARD OF REVIEW

"An issue regarding statutory interpretation is a question of law." *Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (quoting *Univ. of S. California v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005)). As to questions of law, this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

The standard of review for declaratory judgment is as follows. "The decision to grant a declaratory judgment is a matter [that] rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse." Eargle v. Horry Cty., 344 S.C. 449, 453, 545 S.E.2d 276, 279 (2001) (quoting *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 820 (1995)). "An abuse of discretion occurs [when] the trial court is controlled by an error of law or [when] the [c]ourt's order is based on factual conclusions without evidentiary support." *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000). See also *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Planning Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (S.C. App. 2019).

The Court may apply the same standard to appeal of DRB decisions that it would apply to Zoning Board decisions. "A decision of a zoning board will not be upheld where it is based on errors of

law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion."*Peterson Outdoor Advertising v. City of Myrtle Beach*,327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165,173-74, 656 S.E.2d 346, 351(2008)(applying Zoning Board standards). Further, "a decision of a municipal [Z]oning Board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." *Rest. Row Assocs. v. Horry Cty.*,335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). Although a review Court gives deference to those applying local zoning ordinances, ordinances are subject to "a broader and more independent review . . . when the issue concerns the construction of an ordinance." *Eagle Container LLC v. County of Newberry*,379 S.C. 564, 568 666 S.E.2d 892 894 (2008),cited in *Mikell v. County of Charleston*, 386 S.E.2d 326, 687 S.E.2d 326, 329 ((2009).

## ARGUMENT

Each assertion set forth in this document that is consistent with the following is incorporated by reference as if here set forth verbatim. As set forth more fully below and without being disagreeable, there is disagreement with the lower court orders.

I. Statutory Authority/Jurisdiction

As a threshold matter, pursuant to S.C. Code § 6-29-900 *et seq.*, there is no statutory authority/jurisdiction to dismiss the petition until and unless mediation is unsuccessful. Jurisdiction can be raised at any time. Jurisdiction cannot be waived. Respondents concede the DRB granted the petitioner's request for rehearing thereby granting petitioner standing as a property owner with a substantial interest in the immediate vicinity. The statutory scheme provides petitioner property owner the right to timely appeal and request pre-litigation mediation. Respondents concede abuse of discretion is the standard governing the DRB's decision to grant standing to the petitioner property owner: The DRB granted the appellant property owner standing at the DRB hearing/rehearing and there is no abuse of discretion or error of law. See *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Planning Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (S.C. App. 2019). Pursuant to S.C. Code § 6-29-900 *et seq.*, pre-litigation mediation must be granted. The matter is in pre-litigation status with no statutory authority/jurisdiction to dismiss the case until and unless mediation is unsuccessful. Respondents' reliance on *Spanish Wells* is misplaced, outmoded, and superseded by statute. *Spanish Wells Property Owners Ass'n v. Board of Adjustment*, 292 S.C. 542, 357 S.E.2d 487 (Ct.App. 1987)

(reversed on other grounds). To the extent there is ambiguity, the rule of lenity supports petitioner's position. Accordingly, the lower court orders are reversible as a matter of law.

II. Objection is entered to the unauthorized record respondents filed.

As a threshold matter, the record reflects respondents' Certification of Record is incomplete and fails to comply with statutory requirements pursuant to S.C. Code § 6-29-900 *et seq*. The record reflects the proverbial "document dump" and respondents failed to comply in good faith with statutory requirements pursuant to S.C. Code § 6-29-900 *et seq*. Respondents have no meritorious defense. The appellant reserves, preserves and does not waive any objection, rights, or privileges and respectfully requests remand for compliance with the statutory requirements pursuant to S.C. Code § 6-29-900 *et seq*., in order to provide adequate record for meaningful review. Accordingly, the lower court orders are reversible as a matter of law.

III. Respondents frivolously advocate filing a frivolous claim.

Respondents claim the case does not name the 1608 property owners and should be dismissed based on inapposite case law superseded by statute. Pursuant to Rule 21, SCRCP, misjoinder of parties is not ground for dismissal of an action. Respondents have not moved to join indispensable parties. Respondents cannot in good faith claim the 1608 property owners are indispensable. Parties are determined by the relief requested. Specifically, right of way drains for surface water is the relief requested as well as compliance with the statute requiring drainage for surface water. S.C. Code § 5-31-450. The appellant has the right to determine the requested relief and the appellant is requesting right of way relief. The 1608 Poe Avenue property owners have no ownership interest in the right of

way. Violation of the following statute provides authority under the facts for mandatory roadway drainage in the right of way and provides statutory authority for the claims herein.

**SECTION 5-31-450.** Drains for surface water.

Whenever, within the boundaries of any municipality, it shall be necessary or desirable to carry off the surface water from any street, alley or other public thoroughfare along such thoroughfare rather than over private lands adjacent to or adjoining such thoroughfare, such municipality shall, upon demand from the owner of such private lands, provide sufficient drainage for such water through open or covered drains, except when the formation of the street renders it impracticable, along or under such streets, alleys or other thoroughfare in such manner as to prevent the passage of such water over such private lands or property. But if such drains cannot be had along or under such streets, alleys or other thoroughfare, the municipal authorities may obtain, under proper proceedings for condemnation on payment of damages to the landowner, a right of way through the lands of such landowner for the necessary drains for such drainage. If any municipal corporation in this State shall fail or refuse to carry out the provisions of this section, any person injured thereby may have and maintain an action against such municipality for the actual damages sustained by such person. S.C. Code § 5-31-450.

HISTORY: 1962 Code Section 59-224; 1952 Code Section 59-224; 1942 Code Section 7301; 1932 Code Section 7301; Civ. C. '22 Section 4449; Civ. C. '12 Section 3026; 1902 (23) 1038; 1953 (48) 272.

See also *South Carolina Law of Torts*, Hubbard and Felix (4th Ed. 2011), pp. 245-270 (an owner can sue for an on-going nuisance caused by an affirmative act based on, including but not limited to, statutory authority in S.C. Code § 5-31-450); S.C. Code § 15-43-20; South Carolina Constitution, Art. I, Sec. 13; U.S. Const, 5th Amendment. That statute, S.C. Code § 5-31-450, provides for mandatory roadway drainage for adversely affected property owners and more so in a flood zone. In this case, the affirmative act includes DRB approval which provides statutory authority for the land owner to file a claim for relief herein. *Hawkins v. City of Greenville*, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct.App.2004). Respondents frivolously advocate filing a frivolous claim against a party unaffected by the relief requested. Respondents' reliance on *Spanish Wells* is misplaced, outmoded, and superseded by statute. *Spanish Wells Property Owners Ass'n v. Board of Adjustment*, 292 S.C. 542, 357 S.E.2d 487

(Ct.App. 1987) (reversed on other grounds and superseded). Accordingly, the lower court orders are reversible as a matter of law.

IV. The record reflects a pattern and practice of failure to comply with the requirements of public notice which renders DRB approval void/voidable.

Each assertion set forth in this document that is consistent with the following is incorporated by reference. The record reflects a pattern and practice of failure to comply with the requirements of public notice for full and fair notice. Respondents kindly noted that Zoning Ordinance (ZO) 21-109 requires notice as follows: "The sign **provided by the Zoning Administrator (ZA)** shall indicate that the Design Review Board shall be considering proposed improvements on the property and **shall furnish the time and date** of the Design Review Board hearing." ZO 21-109 (emphasis supplied). The record reflects photos showing the Zoning Administrator's public notice fails to provide the time, as required. ZO 21-109. Petitioner and other members of the community have requested compliance with public notice requirements. Despite timely objection, the unfortunate omission was not corrected prior to the hearing. Moreover, the record herein is consistent with a pattern and practice of failure to disclose the fact that properties are located in and around Historic Districts including but not limited to, the Fort Moultrie Historic District herein. Page 92 of respondents' record shows the application submitted and published to the public. That publication fails to disclose the location in and around the Historic District resulting in error of material fact and law. The location is at the Fort Moultrie Historic District; notice is required for members of the public including, for example, American Revolution history enthusiasts. Significantly and materially, the result is error of law in failure to comply with full and fair notice requirements, zoning ordinances, regulations, standards, guidelines, planning and land use management. The DRB does not have discretion to dwarf the Fort Moultrie Historic District.

Failure to sufficiently consider applicable ZO's including compatibility with the Fort Moultrie Historic District in a flood zone is arbitrary and capricious. Accordingly, remand or reversal is respectfully requested. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See U.S. Const., Article I, sec. 9 and 10; U.S. Const., Article III; U.S. Const. amend. I, IV, V, VII, and XIV.

V. The decision of the DRB is unsupported by the record and reversible as a matter of law.

The decision of the DRB is unsupported by the record and reversible as a matter of law. Specifically, the decision is reversible as a matter of law because there was no required public notice and insufficient consideration of zoning ordinances, regulations, standards, guidelines, planning, land use management, and the Fort Moultrie Historic District. To the extent there is ambiguity, the rule of lenity supports petitioner's position. Accordingly, the lower court orders are reversible as a matter of law. Although a review Court gives deference to those applying local zoning ordinances, ordinances are subject to "a broader and more independent review . . . when the issue concerns the construction of an ordinance." *Eagle Container LLC v. County of Newberry*,379 S.C. 564, 568 666 S.E.2d 892, 894 (2008),cited in *Mikell v. County of Charleston*, 386 S.E.2d 326, 687 S.E.2d 326, 329 ((2009).

VI. Pursuant to S.C. Code § 15-53-130, 15-53-30, and/or 15-53-60 declaratory relief is proper.

Governing precedent in the case of *Citizens for Quality Rural Living, Inc.*, provides that other claims are separate and distinct. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n*, 426 S.C. 97, 825 S.E.2d 721 (S.C. App. 2019). There is no authority or citation in support of dismissing other claims. In the case of *Citizens for Quality Rural Living, Inc.*, declaratory judgment relief is expressly authorized regarding, including but not limited to, standardizing the process under the ZO's for the procedures and scope of the ZA's duties. *Id.* The case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (COA Case No. 2017-000170), provides as follows:

Appellant maintains that it had standing to file its declaratory judgment action with the circuit court pursuant to the Declaratory Judgment Act to seek a uniform standard for the Commission's application of the Comprehensive Land Use Plan. We agree.

The purpose of the Declaratory Judgment Act (the Act) "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered." S.C. Code Ann. § 15-53-130 (2005). Further, the Act provides,

Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann. § 15-53-30 (2005) (emphasis added).

Moreover, the Act gives courts of record the power to "declare rights, status and other legal relations whether or not further relief is or could be claimed" and confers on such declarations "the force and effect of a final judgment or decree."

... "Further, section 15-53-60 confers standing on Appellant because the specific ruling Appellant seeks would remove the uncertainty concerning the Commission's discretionary authority." C*itizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (COA Case No. 2017-000170).

Moreover, appellant requests a clarification that the DRB is not required to grant increases and is not

bound to "rubber stamp" the decisions of the ZA and/or the Building Department. Appellant qualifies as a person whose rights, status or other legal relations are affected by local legislation and/or ZO. The ZO's and regulations by the governing authority must include a specific procedure for the submission and approval or disapproval by the DRB. As such, appellant may have determined any question of construction or validity arising under the regulations and/or ZO's, namely, whether they give authority to the DRB to establish a clear, standardized, and consistently-applied specific procedure for the submission of applications and approval or disapproval by the DRB, not a ZA. Accordingly, pursuant to S.C. Code § 15-53-30 and 15-53-60, the summary dismissal of the claim for declaratory relief is reversible as a matter of law.

In this very matter, the ZA violated the ZO's by misrepresenting that the ZO's provide no procedure to appeal a ZA's unauthorized, arbitrary, or capricious decisions. Specifically, the ZO's in Article XII, Section 21-110 provide as follows:

**Sec. 21-110. Administrative appeal.**

**A. Appeals of the administrative official.** Decisions of the Zoning Administrator or other appropriate administrative official in matters under the purview of the Design Review Board may be appealed to the Design Review Board where there is an alleged error in any order, requirement, determination, or decision. Appeals to the Design Review Board may be taken by any person aggrieved or by any officer, department, board, or bureau of the Town.

**B. Time limits.** The appeal shall be taken within a thirty (30) days, by filing with the officer from whom the appeal is taken and with the Design Review Board notice of appeal specifying the grounds of it. The officer from whom the appeal is taken immediately shall transmit to the Design Review Board all the papers constituting the record upon which the action appealed from was taken.

**C. Effect of appeal.** 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.

**D. Setting a time for the hearing.** The Design Review Board shall fix a reasonable time for the hearing of the appeal or other matter referred to it, and give public notice of the hearing, as well as due notice to the parties in interest, and decide the appeal or other matter within a reasonable time.

**E. Hearing and order.** Upon the hearing any party may appear in person or by agent or by attorney. The Design Review Board may reverse or affirm wholly or partially or may modify or reverse the

order, requirement, decision or determination appealed from and may make such order, requirement, decision or determination as should be made.

The propriety of tasking the subject of the appeal, i.e., the ZA, with receipt, processing, and scheduling the appeal of that ZA's wrongdoing is challenged including conflict of interest. The record reflects error of law and the alleged failure to comply with the ZO's. Dismissal is premature.

The record reflects the DRB granted petitioner's request for rehearing thereby granting appellant property owner standing at the DRB hearing and for appeal. Respondents have not claimed abuse of discretion in that DRB decision. The findings of fact by the DRB including the finding of fact that the appellant property owner has standing, must be treated as a finding of fact by a jury and the circuit court may not take additional evidence. S.C. Code § 6-29-900 *et seq*. Accordingly, the lower court orders are reversible as a matter of law.

VII. Pursuant to S.C. Code § 6-29-930, the taking claim is proper.

S.C. Code § 6-29-930 provides:

**SECTION 6-29-930**

Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the board of architectural review *(DRB)*, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking. S.C. Code § 6-29-930.

The General Assembly enacted LUDRA for the purpose of improving and expediting the adjudicatory process for property owners who wish to file a claim for a purported regulatory taking. Bradford W. Wyche, *An Overview of Land Use Regulation in South Carolina*, 11 SOUTHEASTERN ENVTL. L.J. 183, 196-97 (2003). LUDRA amends the South Carolina Local Government Comprehensive Planning Enabling Act of 1994. Accordingly, pursuant to S.C. Code § 6-29-930, the dismissal of the taking claim

is reversible as a matter of law. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (COA Case No. 2017-000170).

The plain language of S.C. Code § 6-29-930 and governing precedent provide that other claims are separate and distinct. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n,* 426 S.C. 97, 825 S.E.2d 721 (S.C. App. 2019). There is no authority or citation in support of dismissing other claims. The takings claim relates to appellant's loss of use and enjoyment of State and Federal Constitutional individual and property rights. See also *South Carolina Law of Torts,* Hubbard and Felix (4th Ed. 2011), pp. 245-270 (an owner can sue for an on-going nuisance caused by an affirmative act based on, including but not limited to, statutory authority in S.C. Code § 5-31-450); S.C. Code § 15-43-20; South Carolina Constitution, Art. I, Sec. 13; U.S. Const, 5th Amendment. The statute, S.C. Code § 5-31-450, provides for mandatory roadway drainage for appellant property owner adversely affected and more so in a flood zone. *Hawkins v. City of Greenville,* 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct.App.2004); *Hall v. City of Greenville,* 227 S.C. 375, 386, 88 S.E.2d 246, 251 (1955). The appellant property owner requests relief including punitive damages as authorized by law consistent with the evidence. Accordingly, the lower court orders are reversible as a matter of law.

VIII. The appellant property owner has standing to and did timely request mediation under S.C. Code § 6-29-900 et seq.

Our State's barrier islands and beaches are a precious public resource for the people of South Carolina. While the islands are a finite resource, a bevy of competing environmental, economic, and social uses seek to lay claim to them. The legislative branch has made policy decisions as to how those uses should be balanced in order to maximize the benefit to the people of South Carolina and enacted statutes to fulfill those policy decisions. The task falls to the courts to ensure that those statutes and regulations are correctly applied. *Kiawah Devt. Partners v. S.C. Dep't of Health & Envtl. Control,* 411

S.C. 16, 766 S.E.2d 707, 710 (S.C. 2014).

A. The plain language of the statute supports standing to request mediation under S.C. Code § 6-29-900 et seq.

"Notably, the parties agree that Appellant had standing to appear before the *Design Review Board.* In fact, Developer has admitted that Appellant's members include persons who own property and live in the immediate vicinity." *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), fn. 6 (emphasis supplied). The record reflects the petitioner herein owns property, lives in the immediate vicinity (i.e., across the street), and has a substantial interest in the Historic District and its perimeter where both properties are located. As one example, zoning ordinances establishing impervious surface limitations are enacted for the benefit of adjacent and neighboring property owners in order to protect them from damages caused by excessive stormwater runoff. The intended beneficiaries of the zoning ordinances establishing impervious surface limitations are surrounding property owners who could and would be adversely affected. Respondents' interpretation would render the zoning ordinances establishing impervious surface limitations superfluous because the intended beneficiaries, including surrounding property owners, would be unable to obtain that benefit. Accordingly, under the facts, the plain language of the statute supports standing for the appellant property owner who timely requested pre-litigation mediation.

B. The statutory scheme as a whole supports standing herein to request mediation.

Specifically, S.C. Code § 6-29-900 *et seq.* provides for mediation herein as outlined in the case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (COA Case No. 2017-000170. LUDRA (*South Carolina Land Use Dispute Resolution Act enacted June 2, 2003*) amends the South Carolina Local Government Comprehensive Planning

Enabling Act of 1994 by allowing a property owner whose land is the subject of a decision by the board of zoning appeals, board of architectural review or planning commission to file a notice of appeal with the circuit court, accompanied by a request for mediation. The statute could have been limited to the applicant property owner, but instead included property owners whose land is the subject of such a decision including surrounding property owners such as the appellant property owner herein who is adversely affected. Pursuant to S.C. Code § 6-29-900 *et seq.*, the request for mediation must be granted:

> Subsection (D)(2) carves out the subclass of property owners and gives this subclass the option of seeking pre-litigation mediation in addition to an appeal....Hence, LUDRA amended existing provisions governing appeals from a board of architectural review (section 6-29-900) by adding the option for pre-litigation mediation. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019).

Case law supports standing herein to request pre-litigation mediation. Accordingly, the statutory scheme as a whole supports appellant property owner's standing to request pre-litigation mediation.

C. The lower court's interpretation of the statute, S.C. Code § 6-29-900 et seq., erroneously limits the right to request mediation which leads to an absurd result.

The case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), provides:

> Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (citation omitted). Further, "[t]he intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context." *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994). A statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). "We therefore

should not concentrate on isolated phrases within the statute." *Id.* "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." *Id.* **"In that vein, we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,'for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'"** *Id.* (citation omitted) (alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008) (emphasis supplied)).

The Legislature could have limited pre-litigation mediation exclusively to the applicant property owner before the DRB but did not. Impervious surface limitations are an example of ZO's with neighboring property owners as the intended beneficiaries. Public policy supports the request for pre-litigation mediation after DRB decision which adversely affects the appellant property owner herein whose land is thereby the subject of a decision of the DRB. Limiting pre-litigation mediation to the applicant property owner leads to impermissible unequal treatment and/or absurd result. The statute supports appellant property owner's request for pre-litigation mediation herein.

"Notably, the parties agree that Appellant had standing to appear before the *Design Review Board.* In fact, Developer has admitted that Appellant's members include persons who own property and live in the immediate vicinity." *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), fn. 6 (emphasis supplied). The record reflects the appellant herein owns property and lives across the street in the immediate vicinity and perimeter of the Historic District linking the Officer's Quarters with Fort Moultrie and Battery Logan. Moreover, that case confirms petitioner's right to request mediation as follows:

In its brief, Developer argues that in LUDRA, the legislature drew a distinction between appeals from a *DRB* and appeals from a planning commission by allowing appeals from a *DRB* decision by a "person who may have a substantial interest in" the decision (*section 6-29-900*) while declining to expressly authorize anyone other than a property owner to appeal in section 6-29-1150(D). However, the standing provision in section 6-29-820 was in place before LUDRA was enacted. Further, prior to the enactment of LUDRA in 2003, the provision in section 6-29-1150 allowing an appeal to circuit court, then located in subsection (C), **did not specifically mention property owners**. Following Developer's logic, even property owners did not have standing to appeal prior to LUDRA's enactment,

which would render the appeal language meaningless due to the lack of standing for any class of persons wishing to appeal. Such a result is unacceptable. See *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [l]egislature or would defeat the plain legislative intention."); *State v. Long*, 363 S.C. 360, 364,610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something.").

In fact, LUDRA also added the language found in subsection (D)(2), specifically mentioning property owners, to sections 6-29-820 and *6-29-900* (governing appeals from decisions of boards of zoning appeals and *boards of architectural review*). See 2003 Act No. 39, §§ 3, 8(amending sections 6-29-820 and *6-29-900 to allow property owners the option of adding a request for pre-litigation mediation to the notice of appeal*). Both of these statutes included an appellate standing provision before LUDRA amended these statutes in 2003, and the **addition** of LUDRA's pre-litigation mediation option for property owners did not result in a corresponding reduction in the class of possible appellants in these statutes—the appellate standing provisions in both statutes remained intact.

Therefore, it is unlikely that in enacting LUDRA, the legislature intended to diminish the class of potential appellants seeking review of a planning commission *(or DRB)* decision when it added the pre-litigation mediation option for property owners to section 6-29-1150 *(and S.C. Code § 6-29-900 et seq.)*. Rather, it left the existing provisions in *all three statutes* intact. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), p. 11 (emphasis supplied) (bold in original).

The legislature intended to provide the appellant, a property owner who lives across the street in the immediate vicinity adversely affected with a substantial interest, standing and the statutory right to timely request pre-litigation mediation. Accordingly, the lower court orders are reversible as a matter of law.

D. The statutory scheme as a whole and/or comparison of parallel statutory schemes compels a broader interpretation of property owner as a party with standing to request pre-litigation mediation.

A parallel statutory scheme, also under the Comprehensive Planning Enabling Act (CPEA), may be found at S.C. Code Ann. § 6-29-820 regarding appeals from the zoning board. The statutory scheme in that setting has undergone parallel changes. The original § 6-29-820 under the 1994 Act reads as follows:

Section 6-29-820, A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county by filing with the clerk of the 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 decision of the board is mailed.

(Compare the original § 6-29-900 et seq appeal provision at South Carolina Local Government Comprehensive Planning Enabling Act of 1994, Act 355, 1994 Acts). Amendments in 2003 changed the section to read in a similar form to the section at issue, as follows:

Section 6-29-820. Appeal from zoning board of appeals to circuit court; pre-litigation mediation; filing requirements.

(A) A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county by filing with the clerk of the 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 decision of the board is mailed.

(B) A property owner whose land is the subject of a decision of the board of appeals may appeal either:
(1) as provided in subsection (A); or
(2) by filing a notice of appeal and request for pre-litigation mediation in accordance with Section 6-29-825.

Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

The appellant property owner timely filed both a petition and notice of appeal with mediation request.

The legislature went on to provide similar mediation guidelines, in a similar form to the section at issue herein, in a new subsection S.C. Code § 6-29-900 et seq. At least two cases have been filed with this Court under this statutory language, and neither challenged the appeal on the basis that the appellants were not property owners. Even though their positions had not been presented at the public hearing or communicated to the Board prior to filing the appeal petition with the circuit court, this Court has noted that under this scheme, non-property owner appellants (as opposed to the property owner appellant herein) who challenged whether the decision was correct as a matter of law had

standing merely by filing their issues on appeal in a written petition before the thirty-day filing period had expired. *Newton v. Zoning Board of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (Ct. App. 2011), reh'g denied; *Bevivino v. Town of Mt. Pleasant Bd. Of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013). In the instant case, the appellant property owner has standing merely by filing the issues on appeal in a written petition before the thirty-day filing period had expired. *Id.* Moreover, essentially all civil cases are subject to mandatory ADR which is hereby requested. The Supreme Court Order dated November 12, 2015, provides: "(W)e hereby order that the *(ADR)* program be operational in all counties in the state, effective January 1, 2016."

In a similar situation under the prior statutory scheme, this Court found that a community group, Spanish Wells Property Owners Association (POA), had standing to appeal a planning commission's grant of a development permit under the "any person who may have a substantial interest" standard in the old S.C. Code § 6-7-750: "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. The statute, therefore, gives Spanish Wells standing to appeal." *Spanish Wells Property Owner"s Ass'n, Inc., v. Board of Adjustment of Town of Hilton Head Island*, 292 S.C. 542, 357 S.E.2d 487 (Ct. App. 1987), (overruled on other grounds, *Spanish Wells Property Owner"s Ass'n, Inc., v. Board of Adjustment of Town of Hilton Head Island, 295 S.C. 67, 367 S.E.2d 160 (1988). See also Bevivino v. Town of Mt. Pleasant Bd. Of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863, 867 (Ct. App. 2013) (finding standing under the S.C. Code § 6-29-820 language "any person who may have a substantial interest in the zoning board decision" in individuals who lived in proximity to the approved project to appeal a Board of Zoning Appeals decision even when they never attended a Board hearing.) In this case, the DRB itself granted standing to appellant property owner in the near vicinity with a substantial interest when it granted appellant property owner's rehearing. It is respectfully submitted the statutory scheme as a whole and/or comparison of parallel statutory schemes compels a broader

interpretation for the appellant property owner as a party with standing to request pre-litigation mediation. In the alternative, the appellant is a person requesting mediation who may have a substantial interest in the DRB decision and who timely filed the petition appealing that decision.

The Municipal Association of South Carolina (MASC) has published a guide for its constituents on the application of the Comprehensive Land Development Enabling Act (CLDEA). The MASC guide describes the parallel provisions of the enabling statute which governs boards of zoning appeals, DRB's, and planning commissions, and how the 2003 amendments provided additional remedies for a property owner, but did not ameliorate any rights of non-property owners to appeal decisions impacting their communities. Municipal Association of South Carolina, *2018 Comprehensive Planning Guide for Local Governments*. Consistent with the plain language and the uniform interpretation of the ZO's and statutory language, the property owner appellant herein, in the immediate vicinity of the Historic District with a substantial interest who is specially damaged, is granted the right to appeal and to timely request pre-litigation mediation. S.C. Code Ann. § 6-29-900 et seq. (2019). Accordingly, the lower court orders are reversible as a matter of law.

IX. Pursuant to the statute, S.C. Code § 6-29-900 et seq., until and unless pre-litigation mediation is unsuccessful, the lower court only has jurisdiction to order pre-litigation mediation, and the requested mediation "must be granted." The lower court erred as a matter of law in failing to grant mediation to the appellant property owner in the immediate vicinity adversely affected with a substantial interest.

The DRB hearing/rehearing on the merits vests jurisdiction in the DRB at the pre-litigation stage; statutory authority provides property owners in the immediate vicinity whose property is adversely affected by a decision of the DRB with the right to appeal and to request mediation after the hearing; pursuant to the statute, the record reflects the appellant timely filed notice of appeal and mediation; the lower court erred because, pursuant to S.C. Code § 6-29-900 et seq., the request for mediation "must" be granted. The lower court erred because its only jurisdiction at the pre-litigation

stage is to order good faith mediation. Under the facts, there is no jurisdiction to dismiss until and unless mediation is unsuccessful. In this case, the lower court opinion is reversible for failure to comply with the unambiguously expressed legislative intent and language pursuant to S.C. Code § 6-29-900 et seq., which provides that the requested mediation "must be granted." Moreover, the Legislature intended to and the letter and spirit of the statutes embody the public policy of requiring mediation in essentially all civil cases and mediation "must" be granted.

At the pre-litigation stage, it is reversible error for the lower court to summarily dismiss the case. A property owner whose land is the subject of a decision of the board of appeals may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with section 6-29-900 et seq. If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted. S.C. Code § 6-29-900 et seq. When interpretation of a statute is required, "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Blackmon*, 304 S.C. 270, 273, 403S.E.2d 660, 662 (1991).

As per the case of *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011), the parallel statute, S.C. Code § 6–29–820(B), is designed to encourage **pre-litigation** mediation by **NOT** requiring the filing of a petition until and unless pre-litigation mediation is unsuccessful. In *Newton*, the Court made clear, "This procedure **does not allow for issue identification, or even party identification, prior to the filing of a petition** with the circuit court." *Id.*, p. 284 (emphasis supplied). In this case, the lower court erred as a matter of law in summarily dismissing the case at the **pre-litigation** stage. Accordingly, the lower court orders should be reversed. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against

"arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

X. The General Assembly intended to and did provide for ADR, including mediation, in all civil cases including this case, and the lower court erred in disregarding legislative intent, the letter and spirit of the laws, the ADR statutes, S.C. Code § 6-29-900 et seq., and South Carolina Supreme Court Orders.

Each assertion set forth in this document that is consistent with the following is incorporated by reference. The Supreme Court Order dated November 12, 2015, provides: "(W)e hereby order that the *(ADR)* program be operational in all counties in the state, effective January 1, 2016." The lower court erred in disregarding legislative intent, the letter and spirit of the laws, and the ADR statutes as well as South Carolina Supreme Court Orders. Accordingly, the lower court orders are reversible as a matter of law. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10;

U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

XI. The lower court orders are reversible as a matter of law.

Pursuant to Zoning Ordinance (ZO) 21-109, required notice for the hearing by the TOSI (Town of Sullivans Island) was not provided. The consequence of failure to provide sufficient legal notice, is invalidation of approval. The record reflects insufficient legal notice. Further, the applicant's incomplete application provides insufficient notice. The applicant is required to submit a complete application. The application form itself states incomplete submittals **WILL NOT BE PART OF THE MEETING AGENDA**. As such, no valid decision can be made on an incomplete application. An incomplete application is not a mere technicality including the fact it provides notice to members of the DRB as well as to the public and it creates an accurate record for future reference. Historic District standards are more stringent. Notice requirements were not met which is not fair notice to adjacent and neighboring property owners, to the community, or to the public at large.

Further, pursuant to S.C. Code § 6-29-900 *et seq*., the DRB has jurisdiction to grant standing. The DRB granted appellant property owner's timely request for rehearing thereby granting appellant property owner standing to appeal to the circuit court. The DRB recognized the appellant property owner as a proper party. The lower court order is reversible as a matter of law, including but not limited to, it arbitrarily and capriciously denies equal protection to adversely affected property owners in the immediate vicinity with a substantial interest. It denies due process to adversely affected property owners in the immediate vicinity with a substantial interest including denying a meaningful opportunity to be heard at a meaningful time. Moreover, it arbitrarily and capriciously violates principles of fundamental fairness, it is unreasonable, it lacks sufficient factual basis and evidence, and

it violates the prohibition against unequal treatment. Accordingly, the lower court orders are reversible as a matter of law.

Granting adversely affected property owners in the immediate vicinity with a substantial interest the right to request mediation is in the best interests of the TOSI, it is consistent with the letter and spirit of controlling laws, and it assists the intended beneficiaries of the ZO's, i.e., property owners. The right to request mediation should not be limited to applicants/developers.

Significantly and materially, the subject property located at 1608 Poe Avenue, Sullivans Island (SI), SC, is linked to the Historic District of Fort Moultrie and the Officer's Quarters with more stringent guidelines, requirements, and strict compliance under the zoning ordinances in effect in a flood zone. Unauthorized approvals are challenged. Regrettably, there is material and/or substantial non-compliance with controlling laws to the extreme prejudice of the Historic District, adjacent and neighboring property owners, and the community of Sullivans Island as well as locals, the tourist industry, the State, and historic preservationists of an iconic site marking American Independence. Adjacent and neighboring full-time residents, including the appellant property owner, have a substantial interest in and are adversely affected by non-compliance with, including non-compliance with flood zone regulations, the Historic District standards, the comprehensive plan, and/or the zoning ordinances.

The 1608 Poe Avenue applicant requested multiple unnecessary increases and relief from ZO's and failed to meet the requirements for multiple increases. There are no obvious obstacles, and the applicant has not claimed any obstacles, to respecting the Town's zoning ordinances, thoroughly researched at great cost, vetted, and voted. Requests for relief of multiple increases begets more requests for incompatible increases from this applicant as well as other applicants, setting an unlawful precedent. Developers and/or others have refused the Board's reasonable request for the parties to meet with members of the community. Moreover, Flood Zone regulations affecting the Historic District

have not been sufficiently considered, including but not limited to, the requirements of S.C. Code § 5-31-450 and roadway drainage.

The decision of the DRB is based on error of law, including some members of the DRB believe they have no legal basis to overrule, including but not limited to, the Zoning Administrator (ZA) or staff giving unlawful approval for non-compliance with the Zoning Ordinances (ZO) and/or the Zoning Administrator (ZA) misconstruing the technical requisites of the ZO. The record reflects the requirements of the ZO have not been met, including the requirements for legal notice and the requirements for a full, fair, and complete application prior to the public hearing. The appellant, the community at large, history enthusiasts, and the Historic District of Fort Moultrie are prejudiced thereby. Specifically, the DRB is the appeal mechanism for overreaching, unauthorized , non-compliant Zoning Administrator (ZA) and/or staff decisions. Clearly, if the DRB has authority to hear and act on a ZA appeal, it has authority to overturn and disagree with a ZA and/or staff.

Some members of the DRB mistakenly believed they were compelled by law to approve the ZA; and such belief was an error of law. Moreover, but for failure to comply with statutory requirements including those for public notice and complete applications, there should have and would have been a different result. The decision is based on error of material fact and/or law and should be remanded or reversed. The appellant requests remand to the DRB with instructions that the DRB can and should consider the policies in the comprehensive plan, Historic District standards, the ZO's, and/or the applicable law as indicated to deny approvals and that the DRB is not bound by the recommendations of the Zoning Administrator (ZA) and/or staff, given that this applicant has not met the requirements for the requested increases. "A decision of a zoning board will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion."*Peterson Outdoor Advertising v. City of Myrtle Beach*,327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in *Kurschner*

*v. City of Camden Planning Commission*, 376 S.C. 165,173-74, 656 S.E.2d 346, 351(2008)(applying Zoning Board standards). It is respectfully submitted that a discerning review finds the decision of the DRB is reversible.

The DRB has the duty and responsibility to approve or deny actions or decisions made by the ZA and/or staff. But for the DRB's admitted error of law and/or failure to apply the applicable law, the outcome should have and would have been different in favor of established full-time resident property owners including the appellant in the near vicinity. Contrary to admitted error of law applied by some members, the DRB does have the duty and authority to deny plans that they believe are not in the best interests of and/or are incompatible with the Historic District and its community. The DRB has the authority and the responsibility to deny incomplete, insufficient, or incompatible applications. DRB considerations include, but are not limited to, the wise and efficient use of public funds, existing infrastructure, lack of mandatory roadway drainage, the future growth, development, and redevelopment of its area of jurisdiction, and consideration of the fiscal impact on established property owners. Pursuant to state law, the DRB has every right to consider the applicable portions of the Comprehensive Plan while deciding matters before it. The Comprehensive Plan is a policy document which contains, including but not limited to, density considerations. The Plan is a tool to promote and maintain future growth and improve the quality of life for all residents and serves as a reference guide and a decision-making tool for the DRB.

The elevation of the subject property and its impact on appellant's property at a lower elevation across the street are linked to the Historic District of Fort Moultrie and the Officer's Quarters . All of the area concerned with this appeal is designated a Flood Zone. The density is the requirement for maintaining the character of the area and defining potential impacts on the infrastructure. Allowable density is defined by the citizens (property owners) in a zoned area using a legally approved process. The applicant failed to meet the requirements for the requested multiple increases which adversely

affect, including but not limited to, density as well as inadequate infrastructure including lack of mandatory roadway drainage outlet in a flood zone and, therefore, should be denied. But for the DRB's failure to comply with its duty to apply applicable law and oversight, there would have and should have been a different outcome with denial of unlawful, unnecessary, unsubstantiated, incongruous, arbitrary increases. Accordingly, the lower court orders are reversible as a matter of law.

In addition, the decision of the DRB for 1608 Poe Avenue is an abuse of discretion. The members of the community in opposition were clearly within the description of property owners and "residents of Sullivans Island" who are the intended beneficiaries of the zoning ordinances and applicable laws in order to preserve and promote the quality of life. Full-time residents established for the DRB the detrimental impacts to "public health, safety, economy, good order, appearance, convenience, morals, and general welfare." The public safety is in jeopardy, impacting Historic District standards in a flood zone with extreme stormwater drainage issues adversely affecting the adjacent and surrounding full-time residential neighborhood and property owners as well as appellant's ingress and egress and motor vehicle access to garage, home, and property along with unsafe navigation and impaired evacuation via streets, roads, and thoroughfares on the island with severe flooding when there is a hard rain which is not limited to extreme weather conditions such as hurricanes. The applicant has not met the ZO requirements and is materially non-compliant. The DRB failed to comply with the state statute for "the wise and efficient use of public funds, the future growth, development, and redevelopment of its area of jurisdiction, and consideration of the fiscal impact on property owners." The DRB decision is reversible as an abuse of discretion including but not limited to, failure to apply the applicable laws, the ZO's, and sufficient consideration of the Fort Moultrie Historic District.

Land development regulations were authorized by state government, among other reasons, "to assure, in general, the wise and timely development of new areas, and redevelopment of previously

developed areas in harmony with the comprehensive plans of municipalities and counties." SC Code 6-29-1120(5), 1976, as amended. The record reflects aerial maps demonstrating that this application is not in harmony with and is incongruous with the existing Historic District and neighboring properties, on the smaller, if not some of the smallest, of lot sizes in the TOSI. This evidence demonstrates lack of compatibility including density and usage out of harmony and incongruous with the Fort Moultrie Historic District. Sullivans Island was settled in the 1600's and the DRB does not have discretion to dwarf the Fort Moultrie Historic District. Abuse of discretion is reversible error.

The aerial maps and testimony demonstrate the existing Historic District in a flood zone. With some of the smallest lot sizes, the majority of properties on that block have ground floor living space. The application is not in harmony with either the comprehensive plan, flood zone regulations, and/or the current usage. Record evidence includes adverse impact on the appellant, other full-time residents, and surrounding property owners resulting in wrongful regulatory taking.

Expert witnesses, professional engineer opinions, and land surveys support the following testimony:

1. Impermissible alteration of the historical drainage patterns, including but not limited to, direction and flow rate, adversely impacts neighboring properties including appellant's in a flood zone.

2. Inadequate stormwater management, inadequate mandatory roadway drainage, and excess stormwater discharge in a flood zone cause adverse effects including water quality, health, safety, well-being, and environmental concerns.

3. The elevated slope of the applicant's property and failure to comply with S.C. Code § 5-31-450 (mandatory roadway drainage) cause excess stormwater runoff and severe flooding, ponding, and standing water, that does not clear rapidly, damaging appellant's and other properties at a lower elevation including single story, ground floor living space and homes in close proximity in the immediate vicinity in a flood zone.

The DRB approved an incompatible application which is non-compliant with ZO's, the comprehensive plans, reference guides, and standards for a flood zone at the Fort Moultrie Historic District and thereby abused its discretion. The DRB abused its discretion all to the appellant's and neighboring property owners' extreme prejudice. The DRB decision is reversible as a matter of law because the DRB abused its discretion including failing to apply applicable laws and sufficient consideration of the Fort Moultrie Historic District requirements, compatibility, and standards. "A decision of a zoning board will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion."*Peterson Outdoor Advertising v. City of Myrtle Beach*,327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165,173-74, 656 S.E.2d 346, 351(2008)(applying Zoning Board standards). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

Significantly and materially, the DRB decision is arbitrary. "(A) decision of a municipal *Design Review 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." *Rest. Row Assocs. v. Horry Cty.*,335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (emphasis supplied). It ignores expert opinion and documented,

meritorious concerns voiced by property owners including appellant with a substantial interest adversely affected in the immediate vicinity of the subject property and it is inconsistent with applicable law: Regulations, standards, guidelines, and ZO's in a flood zone. The DRB decision is reversible as arbitrary and unreasonable.

The application as approved is internally inconsistent, incomplete, and unauthorized. A community member has noted that the DRB's denial of another applicant's requested increase while granting unauthorized, unsubstantiated, unnecessary, non-compliant, and incompatible increases is unequal treatment, arbitrary and capricious, contrary to applicable law, and against public policy. Neighboring property owners have raised the following concerns:

Our hopes and expectation are they respect the setback and height restrictions that are in place and our expectation of the DRB is they do their part to enforce the guidelines so we maintain our great island. My main points are as follows...

i. There are setback requirements in place for a reason. If the homeowner wants to achieve a certain size house, then the DRB should deny their request and encourage them to find a lot on the island that suits their square footage requirements. There are other lots on the island.

ii. What is the real reason why the homeowners need the variance? The only logical reason I can see is they want more space. If it's not for space purposes, then they should design something in accordance with the building guidelines. It's that simple. If it is for space, the DRB should deny their request and encourage the property owners to obtain a larger property on the island to build their ideal home.

iii. What are the guiding principles that the DRB uses to determine when a setback or height restriction should be granted versus denied? What are the extenuating circumstance for this homeowner where they need to go beyond the setback and height restrictions? Knowing this would be beneficial. I have not heard or read anything that makes this a unique situation. This looks to be a situation where the homeowner is doing this for either (a) an investment / future profit potential via a sale or (b) trying to get the best deal possible by purchasing a smaller lot and building a larger home or (c) disregarding the rules and guidelines that have been established to maintain the historic and consistency of our unique island. If any of these is the case, then the homeowner should be denied and encouraged to re-submit their plans once they have obtained a lot that can support their larger design where setback or height exceptions aren't needed.

Accordingly, the lower court orders are reversible as a matter of law.

## CONCLUSION

In support of the general public policy as well as express legislative intent and statutes mandating ADR (Alternative Dispute Resolution) and for substantial justice affecting substantial rights, appellant respectfully requests reversal of the lower court orders.

Respectfully submitted,

C. Holmes
PO Box 187
SI, SC 29482
843.883.3010
Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Circuit Court Judge of the 9th Judicial Circuit

---

App. Case No. 2023-000296

---

J. Doe,

Appellant,

v.

Design Review Board (DRB)
and the
Town of Sullivans Island (SI),

Respondents.

---

# DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

---

Appellant proposes the following to be included in the Record on Appeal:

**Orders**

Order of January 23, 2023
Order of June 7, 2023
All intermediate orders.

**Pleadings and Motions**

Motions and other pleadings from the record

**Transcripts**

January 23, 2023
DRB hearing

**Other documents**

Statutes and Zoning Ordinances
Historic District Standards
MASC publications
Professional Engineer Report
Other

I certify that this designation contains no matter which is irrelevant to this appeal.

Dated 7/20/2024

C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010
For Appellant

RECEIVED
Jul 22 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Circuit Court Judge of the 9th Judicial Circuit

---

App. Case No. 2023-000296

---

J. Doe,

Appellant,

v.

Design Review Board (DRB)
and the
Town of Sullivans Island (SI),

Respondents.

---

PROOF OF SERVICE

---

I certify that a true copy of the above document was served upon the respondents by regular first class mail postage pre-paid on this date at this address: GT Walker, 66 Hasell St., Chas., SC 29401.

Dated 7/22/24

C. Holmes
PO Box 187
Sullivans Island, SC 29482
843.883.3010

Fax Cover:

*C. Holmes, M.D.*
*P O Box 187*
*Sullivans Island, SC 29482-0187*
*843.883.3010*

Hard copy
available
on request -

Thank You!