EXHIBIT A

STATE OF SOUTH CAROLINA COUNTY OF HORRY Michael Smith; Cynthia Vanaman-Setzer, Clarence E. Frazer, Richard J. Owen, and Erika K. Farthing, Petitioners, v. The City of Myrtle Beach, South Carolina, and GD CP Properties, LLC, Respondents.	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT C/A No.: 2024-CP-26-08031 **ORDER GRANTING RESPONDENTS' MOTION TO DISMISS APPEAL**

ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS

This matter came before the Court on Wednesday March 26, 2025, upon separate Motions to Dismiss, filed on behalf of Respondent the City of Myrtle Beach ("City") and Respondent GD CP Properties, LLC("GDCP"). Present at the hearing, held via WebEx, was John M. Leiter, Esq., on behalf of Petitioners; Douglas M. Zayicek, on behalf of the City; and Cheryl D. Shoun and Max J. Mazurek, on behalf of GDCP. For the reasons set forth below, Respondents' Motions to Dismiss are GRANTED.[1]

BACKGROUND

Petitioners filed the instant appeal on November 22, 2024, seeking to appeal two separate orders of the City of Myrtle Beach Board of Zoning Appeals (the "BZA") decision denying Petitioners' appeal from the City Planning Commission. As further discussed below, except for Petitioners' Notice of Appeal, Petitioners' appeal is devoid of any reference to the BZA's decision.

By way of background, property owned by GDCP, commonly known and referred to as the Cane Patch Tract – a tract of land at the corner of 76th Avenue North and Highway 17 Bypass, in

[1] The Court issues this singular Order granting both the City's and GDCP's Motions to Dismiss.

the City of Myrtle Beach – was subdivided into two parcels, as evidenced by a plat recorded in the Office of the Register of Deeds for Horry County, South Carolina, on May 21, 2024, at Plat Book 322, Page 104. This subdivision created what is now known as Parcel 2-A and Parcel 2-B, respectively consisting of 11.33 acres and 14.27 acres. Parcel 2-B upon which GDCP intends to construct 62 homes (the "Cane Patch Project"), is the only parcel at issue in this appeal.

On June 18, 2024, following three meetings, the City of Myrtle Beach Planning Commission (the "Planning Commission"), approved the further subdivision of Parcel 2-B to reflect 62 single family home sites as well as other, attendant areas to be developed (the "Property"). It is undisputed that no proper and timely appeal was taken from the Planning Commission's action of June 18, 2024.

Following Planning Commission's June 18th approval, on July 15, 2024, Petitioner Michael Smith ("Smith") filed an application with the BZA appealing Planning Commission's approval of the subdivision of the Property. Petitioner Smith's application to the BZA stated he was appealing the Zoning Administrator's approval of the application of the Cane Patch project to appear before the Planning Commission ("Appeal 24-14").

Subsequently, on July 16, 2024, Petitioner Cynthia Vanaman-Setzer ("Setzer"), as agent for Mark Garrow,[2] filed an application with the BZA also appealing the subdivision of the Cane Patch Tract; specifically, the subdivision of Parcel 2-B ("Appeal 24-15"). Petitioner Setzer asserted the Planning Commission inaccurately interpreted the Code of Ordinances City of Myrtle Beach,

[2] It is stated, in the application for appeal to the BZA, that Ms. Setzer is acting as agent for Mark Garrow, owner. Application 24-15 also sets forth that Mr. Garrow, as the President of the Seville Property Owners Association, represents the interest of 91 Seville property owners, constituting a total of approximately 166 residents. There is not, however, any resolution or any other proof of Mr. Garrow's authority to proceed with an appeal to the BZA on behalf of any other individual, or even a homeowners' association. Rather, there was a single application and a single application fee remitted to the City of Myrtle Beach.

South Carolina ("City Ordinance(s)"), erroneously granted approval of the subdivision to GDCP, and requested that the BZA rescind the issued approval for the subdivision.

On September 12, 2024, the BZA heard separate arguments on Appeals 24-14 and 24-15 during the BZA's regularly scheduled meeting. Petitioner Smith presented his case and represented to the BZA that Appeal 24-14 was made on behalf of himself and 90 others living in nearby communities. However, the BZA found there was no evidence that anyone other than Petitioner Smith filed an appeal or paid a filing fee. Petitioner Setzer presented as to Appeal 24-15, noting her appearance on behalf of Mark Garrow, who was unavailable.

Based upon the presentation of all 'interested parties,' and the records before the BZA, on October 25, 2024, the BZA issued two separate orders denying both Appeal 24-14 and Appeal 24-15. R. at 000186-000187.

On November 22, 2024, Appellants filed this instant Appeal and Petition for Judicial review.[3] Importantly, Petitioners' Appeal and Petition for Judicial Review, in Paragraph 1, states "[t]his matter is before the Court on appeal from a decision of the City of Myrtle Beach Zoning Administrator and Planning Commission approving the subdivision of a 14.26 acre parcel of land" owned by GDCP. Paragraph 9 states "Petitioners are aggrieved by the decision of the Zoning Administrator and Planning Commission made on June 18, 2024," and that Petitioners request "[a]n appeal from the Zoning Administrator and Planning Commission decision…." Numerous other Paragraphs in the Petition purport to challenge the Planning Commission's actions. Paragraph 39 alleges actions are contrary to City's statutes; Paragraph 40 alleges the Planning Commission lacked statutory authority to act in this case; Paragraph 41 alleges the Planning

[3] Despite the BZA's issuance of two separate orders, Petitioners Smith and Setzer filed this "joint" appeal while adding Petitioners Clarence E. Frazer ("Frazer"), Richard J. Owen ("Owen"), and Erika K. Farthing ("Farthing"); neither Frazer, Farthing, or Owen were identified as appellants before the BZA.

Commission's decision is contrary to law; and Petitioner's Prayer for Relief asks the Court to reverse the Planning Commission's approval of the subdivision request.[4] Petitioner's appeal is curiously devoid of any reference to the October 25, 2024 orders.

STANDARD OF REVIEW

"By statute, the trial court must uphold a decision by the Planning Commission unless there is no evidence to support it." *Town of Hollywood v. Floyd, et al.* 403 S.C. 466, 744 S.E.2d 161 (2013), citing *Kurschner v. City of Camden Planning Comm'n,* 376 S.C. 165, 656 S.E.2d 346 (2008). The *Kurschner* Court expressly refused to apply a standard of review other than the 'any evidence' standard, as any other standard would be contrary to the legislature's intent in granting a planning commission broad discretion in this area. *Id.* at 174. Relying upon *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 489 S.E.2d 630 (1997), the *Kurschner* Court reiterated that a zoning board decision will not be upheld where it is based on errors of law, where there is no legal evidence to support the decision, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion. *Kurschner* at 174. In the context of zoning, a reviewing body's decision will not be disturbed if there is evidence in the record to support its decision. *Peterson Outdoor Advertising* at 235.

In analyzing an appeal from a planning commission, the Court of Appeals found "[o]n appeal, the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence." *Black v. Lexington Cty. Bd. of Zoning Appeals,* 396 S.C. 453, 722 S.E.2d 22 (Ct. App. 2012). "In reviewing the questions presented by the appeal, the [reviewing] court shall determine only whether the decision of the Board is correct

[4] The first paragraph of Petitioners' Appeal and Petition for Judicial Review alleges a BZA Order on June 18, 2024. However, there is no such BZA Order of that date.

as a matter of law." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004); S.C. Code Ann. § 6–29–840(A) (Supp.2021). The decision of the zoning board must be supported by competent, substantial, and material evidence, and cannot be based on mere opinion or speculation testimony. *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (2012); *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999).

Moreover, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." *Peterson Outdoor Advert.*, 327 S.C. at 235, 489 S.E.2d at 633.

ANALYSIS

I. Petitioners' Appeal and Petition are Untimely.

a. Appeals of the Planning Commission must be taken to the Circuit Court

Petitioners cite § 6-29-820 and Section 506.A as the authoritative basis for their appeal to this Court. However, based upon Petitioners' Brief and the oral arguments of counsel, this Court finds the applicable statute governing this Appeal is § 6-29-1150 – Submission of plan or plat to planning commission; record appeal, and City Ordinance 20-64.

The subdivision of land in South Carolina is governed by both state statutes and local ordinances. South Carolina Code, Title 6, Chapter 29, Article 7, entitled "Local Planning—Land Development Regulation," contains the applicable State statutes. Subsections 6-29-1110(2) and (4) state "Land development" includes the subdivision of land – the sole basis of Petitioner's appeal. S.C. Code Ann. § 6-29-1130 states "the local planning commission" prepares and recommends regulations governing the development of land in municipalities.

S.C. Code Ann. § 6-29-1150, entitled "Submission of plan or plat to planning commission; record; appeal," subsection (A) states that cities must "include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff." S.C. Code Ann. § 6-29-1150(A).

The City's ordinance regarding the subdivision of land is consistent with the State law above. Chapter 20 of the City's Ordinances, entitled "Subdivision Regulations," contain the applicable local ordinances. Section 20-1 states "This ordinance is adopted pursuant to the authority conferred by S.C. Code 1994, Section 6-29-1110 et seq." Section 20-2(a) sets forth that "[t]hese regulations shall govern all subdivision of land lying within the corporate limits of the city." The City's definition of "Land development" includes the subdivision of land in Section 20-3.

City Ordinance 20-22 sets forth the procedure for the approval of an application to subdivide land. City Ordinance requires

> (1) a developer's plans to be submitted to the City's Zoning Administrator within 30 days "prior to the regularly-scheduled meeting date of the planning commission; (2) the planning commission shall act on the developer's preliminary plans within 60 days after receipt thereof; (3) for final approval, a developer must submit to the Zoning Administrator the requested final plans within one year of the date of preliminary approval; (4) final approval shall come from the planning commission; (5) the approved final plat must be recorded within 12 months "after approval by the planning commission.

City Ordinance 20-22.

City Ordinance 20-64 states that "[a]n appeal from the decision of the planning commission must be taken to the circuit court within 30 days after actual notice of the decision, pursuant to Section 6-29-1150 of the state code of laws." Similarly, S.C. Code Ann. § 6-29-1150(D)(1) provides that "[any] appeal from the decision of the planning commission must be taken to the

circuit court within thirty days after actual notice of the decision." S.C. Code Ann. § 6-29-1150(D)(1).

The Court must comply with the rules of statutory construction. Statutory/ordinance construction is solely a matter of law for the Court, regardless of the allegations in any pleadings. *See, e.g., Boiter v. South Carolina Dept. of Transp.*, 393 S.C. 123, 712 S.E.2d 401 (2011) ("Questions of statutory construction are a matter of law."); *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995) ("The determination of legislative intent is a matter of law."); *Carnival Corp., et al. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 753 S.E.2d 846, (2014).

To that end, where a 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. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).[5]

City Ordinance 20-64 and S.C. Code Ann. § 6-29-1150 are clear and unambiguous. Both require appeals from Planning Commission to be taken to the Circuit Court within thirty days. City Ordinance 20-64; S.C. Code Ann. § 6-29-1150(D)(1).

In Petitioners' Appeal and Petition for Judicial Review, Petitioners repeatedly assert they are appealing the decision of the Planning Commission approving the subdivision of the Property. *See* Pet'rs'. Appeal 1, 10, 12, 16, 18. Paragraph 1 of Petitioners' Appeal and Petition states, "[t]his matter is before the Court on appeal from a decision of the City of Myrtle Beach…*approving the subdivision* of a 14.26 acre parcel of land." Similarly, Paragraph 9 states "Petitioners are aggrieved by the decision…*granting the subdivision*…." Paragraph 9(a)(1) states Petitioners request

[5] City ordinances are subject to the same rules of statutory construction. *Olds v. City of Goose Creek*, 424 S.C. 240, 818 S.E.2d 5 (2018).

"Declaratory relief finding and declaring that any decision… *approving the subdivision* of the Property is contrary to law, *ultra vires*, void and invalid as a matter of law…." Section A of Petitioners' Prayer for Relief asks this Court for an Order "Declaring any determination or any attempt…to make a determination that the Property *could be subdivided*…is void, invalid, *ultra vires* and contrary to law." (all quotes in this paragraph with emphasis added).[6]

In addition to the Petition for Judicial Review, Petitioner Smith represented to the City BZA that "[w]e are appealing the June 18th decision by the Planning Commission which approved the subdivision project…." R. at 000026. [7] Petitioner Setzer also stated "we are in agreement with what [Petitioner] Smith already referred to." R. at 000129.

Based upon Petitioners' filings with this Court, and the record on appeal, it is apparent Petitioners are appealing the City Planning Commission's June 18, 2024, decision to approve GDCP's subdivision request. However, the Planning Commission's June 18, 2024, decision was not timely appealed to this Court. This action was filed on November 27, 2024 – 157 days after City Planning Commission's decision – purportedly appealing the decision of the BZA. While the Court understands and appreciates Petitioners' concerns about development, traffic, noise, safety, and other matters relating to Respondent GDCP's subdivision, the law is clear.[8] All of those matters upon which Petitioners base their appeal are solely within the jurisdiction of the Planning Commission, and all Planning Commission decisions must be appealed to this Court, not the City

[6] These are but a few examples taken directly from Petitioners' filings.

[7] With regard to Petitioner Smith's reference to "we," he stated under oath that "While this appeal is being made in my name, it is also on behalf of over 90 citizens in other Grand Dunes community, as well as the Northwood community." R. 000026. No one in the audience corrected him.

[8] In making their determination, the Planning Commission cannot rely on speculation and conjecture. *Wyndham Enterprises, LLC v. City of North Augusta*, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (2012); *Bannum, Inc. v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439.

BZA. If Petitioners felt the matter should not have been on the Planning Commission's Agenda, or that there were factual or legal errors made by City staff that were relied on by the Planning Commission, or that the Planning Commission decision is wrong because it relied on the wrong zoning classification, etc., it was incumbent on Petitioners to timely appeal the Planning Commission's "faulty" process, factual errors, and conclusions to Circuit Court, not the BZA.

The requirement of filing the notice of appeal is jurisdictional. In other words, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice. *Mears v. Mears,* 287 S.C. 168, 337 S.E.2d 206 (1985). The law is clear that an appellant's failure to comply with the procedural requirements to perfect an appeal deprives a court of jurisdiction. *See State v. Brown,* 358 S.C. 382, 596 S.E.2d 39 (2004); *Great Games, Inc. v. South Carolina Dept. of Revenue*, 339 S.C. 79, 529 S.E.2d 6 (2000); *See also*, SCRCP Rule 74.

This Court finds Petitioners did not timely perfect an appeal of the June 18, 2024 decision. Filing this action on November 22, 2024, in any way challenging or appealing what was on the Planning Commission's June 18, 2024 agenda, what occurred during or resulted from the June 18, 2024 hearing, the "facts" upon which Planning Commission relied in making a decision, or its final determination is untimely.

b. Assuming Petitioners' Appeals were Properly Before the BZA, the BZA Made Proper Disposition Thereof.

By way of alternative analysis, if Petitioners' Appeal and Petition for Judicial Review is an appeal from the BZA Orders, this Court finds the BZA correctly determined the appeals were untimely.

First, to the extent Petitioners allege the Zoning Administrator improperly placed an item on the Planning Commission agenda, those appeals were not timely filed with the City BZA within

thirty days. Petitioner Stezer's application to the BZA acknowledged the Cane Patch Project was before Planning Commission on May 21, 2024. R. at 000214. Petitioner Smith's application to the BZA acknowledged the Cane Patch Project was before the Planning Commission on June 4, 2024. R. at 000203. To be timely, an appeal of the Zoning Administrator's decision to place the Cane Patch Project on a Planning Commission agenda were required to be filed with the BZA within 30 days of the May 31, 2024, publication of the Planning Commission agenda, or at the latest, the June 4, 2024, Planning Commission meeting. Despite having notice as early as May 21, 2024, Petitioners' BZA Appeals were not filed until July 15 & 16, 2024, well beyond the 30-day deadline.[9]

Second, Petitioners argue the applicability of the R-7 Zoning Classification to the Property. The BZA rightfully found that the inapplicability had been determined previously.[10] Most recently, the inapplicability of R-7 to this Property was determined in January 2022 when the Cottages at Cane Patch, a 305-unit project, was approved by the Community Appearance Board ("CAB"). Petitioners Smith and Setzer appealed that determination to the Circuit Court, 2022-CP-26-01234 ("Cottages Appeal"). A settlement agreement was executed on September 12, 2022, in which Petitioners Smith and Setzer were parties, along with the owner of the Property at the time. R. at 001146-001160. Significantly, the City, the CAB, and the Zoning Administrator, all of whom were respondents in the Cottages Appeal, were not parties to the settlement agreement. More significantly, the Cottages Appeal was dismissed as to *all* parties. The issues relating to the Zoning Administrator's determination as to the applicability of R-7 zoning have previously been decided and are therefore not properly before this Court.

[9] This issue is addressed in Paragraph No. 8 of the BZA Orders. R. at 000190; 000196.

[10] See, for example, Appeal and Petition Paragraphs 9(a)(i), 22, 25, 26, 27, 30, 35, 36, 59, 61, and 85.

As explained in the BZA Orders on Appeal, Paragraph No. 7, the City's conclusion that R7 zoning does not apply to GDCP's property "was decided years ago." R. at 000190; 000196. This was not a "new" finding by City staff or the Planning Commission that just came up at the May 21, June 4, or June 18 Planning Commission meetings. Thus, the time to appeal or in any way challenge the City zoning classification as to this Property has long passed.

Therefore, to the extent Petitioners are appealing from the BZA's rulings, this Court finds the BZA correctly found that the time for Petitioners to appeal the Zoning Administrator's determination as to the applicability of R-7 zoning expired before Petitioners' July 15 and 16, 2024 filings.

II. Petitioners Failed to Identify an Appealable Action of the Zoning Administrator's Recommendations, Decisions, Findings, or Interactions with the Planning Commission.

Petitioners have failed to establish an action of the Zoning Administrator that was properly before the BZA.

State statute and the City Ordinances governing the jurisdiction of the BZA are clear and unambiguous. Appendix A of the City's Code of Ordinances is the City Zoning Ordinance. Article 5 contains the Ordinances governing the BZA. Section 503 expressly provides the BZA has authority over variances, special exceptions, and appeals where it is alleged that the Zoning Administrator erred "in the enforcement of the Zoning Ordinance." None of these issues are involved in this action.

Section 503.A. of the City Zoning Ordinance gives the BZA jurisdiction over matters where it is alleged the Zoning Administrator made an error regarding the "enforcement of the Zoning Ordinance."[11] Pursuant to Section 301.A.(9), the Zoning Administrator can "Enforce the Zoning

[11] This language is the same as in S.C. Code Ann. 6-29-800(A)(1).

Ordinance." Pursuant to Section 301.B., the Zoning Administrator can "enforce" the Zoning Ordinance by:

> (1) Notifying in writing the person responsible for such violation, indicating the nature of the violation, and ordering the action necessary to correct it; or
>
> (2) Ordering in writing the person responsible to discontinue the illegal use, addition, alteration, or structural change; or
>
> (3) Ordering in writing the person responsible to immediately discontinue the illegal work being done; or
>
> (4) Issuing an ordinance summons; or by taking any other action authorized by law to ensure compliance with or to prevent violation of the ordinance.

Petitioners' "appeals" were heard by the BZA on September 12, 2024.[12] Petitioners do not allege any variance, or special exception is involved in this action. Petitioners, however, repeatedly refer to actions of the Zoning Administrator in their Appeal. At that hearing, Petitioner Smith specifically stated "[w]e are appealing the June 18th decision by the Planning Commission…." R. at 000026. Petitioner Smith, in the Response to Application Question 1, states their appeal is based on the Zoning Administrator "either failing to reject, or otherwise approving, the application of [GDCP's project] to appear before the City Planning Commission Board for approval." R. at 000203.[13] Despite being given the opportunity to establish if anything complained of fell within the BZA's jurisdiction, Petitioners failed to do so.

Based on the foregoing, this Court finds Appellants have failed to establish an error in the BZA's Orders dismissing their appeals. Planning Commission made the final determination; any

[12] Well after their time to appeal the Planning Commission's decision on June 18, 2024.

[13] There is no evidence in the Record that the Zoning Administrator "creates" the Planning Commission's Agenda, but again, the Court gives Petitioners every benefit of the doubt.

appeals therefrom were required to be filed with the Circuit Court within 30 days of that determination.

CONCLUSION

Based on the foregoing, this Court finds Petitioners did not timely appeal the decision of the Planning Commission to this Court. Furthermore, if the appeal is from the BZA's Orders, the BZA correctly determined the applications of Petitioners to be untimely, and Petitioners failed to establish an action of the Zoning Administrator that was properly before the BZA.[14]

Therefore, IT IS ORDERED, ADJUDGED, AND DECREED that Respondents' Motions to Dismiss are GRANTED.

AND IT IS SO ORDERED.

[*Electronic Signature Page to Follow*]

[14] The City BZA Orders on appeal contain other findings and conclusions, which the Court incorporates herein by reference. The Court feels those findings and conclusions are self-explanatory and do not need further discussion herein.

Horry Common Pleas

Case Caption: Michael Smith , plaintiff, et al VS Myrtle Beach South Carolina City Of , defendant, et al

Case Number: 2024CP2608031

Type: Order/Dismissal

15th Circuit Resident Judge

s/ B. Alex Hyman