THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Case No. 2014-CP-39-398
Appellate Case No.: 2014-001771

Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner.....Respondents

v.

The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes and Monica Zeilinski, Defendants,

Of whom Tom Winkopp is the Appellant.....Appellant

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF PICKENS	)	CASE NO.: 2014-CP-39-0398
	)	
Charles Alan Grubb, et al.,	)	
	)	
Petitioners,	)	
	)	**ORDER**
v.	)	
	)	
The City of Clemson, et al.,	)	
	)	
Respondents,.	)	

THIS MATTER CAME BEFORE me on June 20, 2014, on Petitioners' Motion to Dismiss Respondents' Counterclaim, pursuant to Rule 12(b)(6), SCRCP, and Respondents' Motions for Bifurcation and for a Protective Order. For the reasons stated below, Petitioners' Motion to Dismiss is GRANTED and Respondents' Motion for a Protective Order is GRANTED.

Factual Background

Respondent Tom Winkopp, a real estate developer, proposed plans and specifications for a multi-family, mixed-use development in the city of Clemson to the city's Board of Architectural Review. The Board approved the proposal, and the Petitioners appeal. Winkopp subsequently asserted a counterclaim against Petitioners for abuse of process. Petitioners filed a Motion to Dismiss the counterclaim, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Respondent Winkopp filed a Motion to Bifurcate the counterclaim and the appeal. Respondents Winkopp and William E. Dukes filed a Motion for a Protective Order to limit any further discovery to the issues raised in the counterclaim.

A. Petitioners' Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP

Standard of Review

In ruling on a 12(b)(6) motion to dismiss for failure to state facts sufficient to constitute a cause of action, a trial court must base its decision "solely upon the allegations set forth on the face of the complaint." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 252-53 (Ct. App. 2002) (citing *State Bd. of Med. Exam'rs v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990)). The court must view the allegations in the light most favorable to the non-moving party and must resolve every doubt in his favor. *Id.* Where the defendant demonstrates the plaintiff has failed to allege facts sufficient to constitute a cause of action in the pleadings, the trial court may dismiss the claim. *See Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (Ct.App. 2006).

Analysis

A claim of abuse of process "is intended to compensate a party for harm resulting from another party's misuse of the legal system." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014) (citing *Food Lion, Inc.*, 351 S.C. 65, at 74 n. 5, 567 S.E.2d at 255 n. 5. To prevail, the claimant must show the accused (1) acted with an ulterior motive and (2) performed "a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Id.*

If one undertakes to use the judicial process to further an objective for which the process was not intended, the ulterior motive element is met. *See First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct.App. 1994) ("An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process.") To meet the second

element, the complaint must allege "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process." *Hanier v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). Our supreme court has stated the second element includes three components: (1) a "willful" or overt act which is performed (2) through the use of the process and which is (3) "improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Food Lion, Inc.*, 351 S.C. at 71, 567 S.E.2d at 254.

Nowhere in Respondents' complaint do they allege sufficient facts that would give rise to the alleged misuse of the legal process by Petitioners. "A complaint which neglects to allege a perversion or misuse of the process by omitting facts necessary to show an *improper* willful act in the use of the process has not stated a cause of action for abuse of process and fails as a matter of law." *Id.* at 77, 567 S.E. 2d at 257 (emphasis in original). The facts alleged are not sufficient to support an essential element of this cause of action— that Petitioners are appealing the Board's decision solely to delay, sabotage, or "kill" the project, a purpose for which the appellate process is not intended. That there is a delay in the resolution of a dispute is a natural consequence of any appeal. Respondents' complaint must set forth specific facts showing Petitioners are using the appellate process in this case primarily for a purpose for which the process was not intended. The allegations in the complaint fall short of this standard.

The only fact Respondents allege, with questionable specificity, is that Respondent Winkopp is "informed and believes" Petitioners are aware the appeal is "frivolous and without merit" and are only appealing the decision of the Board in an attempt to "kill or delay" the development project. One is not liable for abuse of process "where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Hanier*, 328 S.C. at 136, 492 S.E. 2d at 107; *see also Pallares*, 407 S.C. at 371, 756

S.E.2d at 133 ("[N]o action lies where a person has an incidental or concurrent motive of spite or merely seeks to gain a collateral advantage from the process."); *Food Lion, Inc.*, 351 S.C. at 74, 567 S.E.2d at 255 ("An allegation of an ulterior purpose or 'bad motive', standing alone, is insufficient to assert a claim for abuse of process.") Respondents must allege facts sufficient to not only show Petitioners filed this appeal to further an ulterior purpose, but also that Petitioners took willful acts to abuse the legal process. The vague allegations in Respondents' complaint are insufficient to support the abuse of process claim.

Conclusion

Viewing the complaint in the light most favorable to the Respondents, this Court finds the bare allegations offered to support the claim are insufficient to sustain an abuse of process cause of action. Petitioners' Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, is granted and Respondents' counterclaim is dismissed without prejudice.

B. Motion for Protective Order

The parties agree South Carolina Code subsection §6-29-900(A) (Supp. 2013) governs appeals from the Board of Architectural Review and provides for an expedited appeal process. The circuit court must hear the appeal "on the certified record of the board proceedings" and is prohibited from taking additional evidence. S.C. Code Ann. §6-29-930(A)(Supp. 2013). The only way to expand the evidence presented to the circuit court is for the court to remand the matter to the Board for rehearing. *Id.* Petitioners seek leave to take discovery they deem "necessary to ensure that the record of the [Board of Architectural Review] is complete and accurate" on appeal. The record of the Board of Architectural Review has been certified to this Court, and no party has challenged the record. No further discovery is required or allowed in the

appeal of this matter, therefore Respondent's Motion for Protective Order from further discovery is hereby granted.

C. Motion to Bifurcate

Respondents filed a Motion to Bifurcate the appeal and counterclaim. This Court declines to address this motion because the Motion to Dismiss is dispositive of the issue.

IT IS SO ORDERED.

7/7 2014

Letitia H. Verdin
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS
IN THE COURT OF COMMON PLEAS

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP39398

PLAINTIFF(S)		DEFENDANT(S)	
Charles Alan Grubb	Roberta Elizabeth Vogt	The City of Clemson and the Board of Architectural Review	Tom Winkopp
Eleanor Hare	Derek Hodgin		
Katherine Lee Schwennsen	Linda Gahan	William E. Dukes	Monica Zeilinski
Virginia Carner			

2014 AUG -5 A 10:02

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant Tom Winkopp's Motion to Reconsider, Alter, and Amend this Court's Order dated July 7, 2014 is hereby respectfully denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

f applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2162 Judge Code	8/1/2014 Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on 8/5/14, to attorneys of record or to parties (when appearing pro se) as follows:

Robert T. Lyles, 342 East Bay Street, Charleston, SC 29401

ATTORNEY(S) FOR THE PLAINTIFF(S)

Thomas W. Traxler, PO Box 10828, Greenville, SC 29603

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Watson - Deputy

Harold P. Welborn, Pickens County Clerk Of Court - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner PETITIONERS, VS. The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski DEFENDANT.	)	CASE NO. 2014-CP-39-398 **SUMMONS**

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2014 MAR -2 P 4:05

TO THE ABOVE-NAMED DEFENDANTS,

YOU ARE HEREBY SUMMONED and required to appear and defend the Petition in this action, a copy of which herewith served upon you, and to serve a copy of your Answer to the said Petition on the Petitioners' attorney, LYLES AND LYLES, LLC, Robert T. Lyles, Jr., Esquire, at his office, 342 East Bay Street, Charleston, South Carolina 29401, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you *fail to appear and defend* the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Petition.

[Signature page to follow]

LYLES & LYLES, LLC

Robert Lyles Jr.

Robert T. Lyles, Jr., Esquire Signed by

Marshall T. Austin, Esquire Misty Soles

342 East Bay Street Bar # 70623

Charleston, SC 29401

Attorneys For Petitioners

Charleston, South Carolina

April 2, 2014

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO. 2014-CP-39- 398

Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner

PETITIONERS,

VS.

The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski

DEFENDANT.

PETITION AND NOTICE OF APPEAL OR ALTERNATIVE MOTION FOR TEMPORARY OR PERMANENT INJUNCTION

Pursuant to S.C. Code Ann. § 6-29-900, the above-named Petitioners hereby file this Petition and Notice of Appeal to the Pickens County Court of Common Pleas from the decision of the City of Clemson Board gfof Architectural Review (the "BAR") issued on March 4, 2014 *in which the BAR approved the plans and specifications of a mixed-use commercial development located at 392 College Ave, 390 College Ave, 105 Finley St., & NA College Ave.*, Clemson, Pickens County, South Carolina. Alternatively, Petitioners move for a temporary or *permanent injunction pursuant to S.C. Code § 6-29-950.*

Petitioners allege as follows:

1. William E. Dukes and Monica Zeilinski own several parcels of land located at 392 College Ave, 390 College Ave, 105 Finley St., & NA College Ave., Clemson, Pickens

County, South Carolina. Mr. Tom Winkopp (the "Applicant"), working with Dukes and Zeilinksi, filed plans with the City of Clemson to construct a multi-family, mixed-use development at that location (the "Project").

2. The parcels were originally zoned as follows:

   a. 392 College Ave was zoned as CP-1 (Neighborhood business district).

   b. 390 College Ave was zoned as CP-1.

   c. 105 Finley St. was zoned as RM-3 (Multi-household residential district).

   d. College Ave was zoned as CP-1.

3. On October 14, 2013, the Applicant made an initial request to combine Dukes and Zeilinski's parcels of land into a single parcel that would be re-zoned as C (General Commercial).

4. On November 18, 2013, the matter was heard by the City Council of Clemson (the "City Council") for a first reading, which included an opportunity for the public to provide relevant input. However, at that time, no plans or any indication of the ultimate use of the property had been identified, rending members of the public completely incapable from providing meaningful input. At that time, the City Council approved the first reading of the rezoning request and amended the request to exclude the Zielinski property.

5. On the second reading, which took place on December 2, 2013, the City Council approved rezoning of the parcels.

6. With the plans having finally been made available to the public, the Project was brought before the BAR on January 7, 2014, for conceptual review due to its location in an architectural overlay district; asked for more information from the architect to be considered at the next meeting.

7. The Project, which is out of character with that area give its scale and nonconformity with the surrounding historic district in which it sits, is likely to substantially increase and affect traffic, and is not in compliance with local ordinances governing structures, is highly controversial and numerous citizens, including Petitioners, sought to provide input to the BAR. To that end, Petitioners and other citizens of the City of Clemson created an online petition with over 1,250 signatures. However, the petition was never fully considered or acknowledged by the City of Clemson or the BAR.

8. On several instances during the month of January 2014, members of the BAR and representatives of the City of Clemson notified Petitioners that they were prohibited from contacting members of the BAR to discuss the Project on the erroneous basis that the BAR's consideration of the project as a "quasi-judicial" body. This was a purposeful attempt by the City of Clemson and the BAR to quiet Petitioners' opposition to the Project. The BAR failed to provide Petitioners or the public with a mechanism to provide input.

9. The Applicant submitted the Project for final approval by the BAR on February 4, 2014. Petitioners persisted in their requests for an opportunity to be heard by the BAR to voice their concerns over the Project's impact on the surrounding area and the proposed plans' failure to comply with relevant City of Clemson zoning ordinances. At the meeting on February 4, 2014, the BAR passed a motion postponing a final decision until a BAR meeting could be held in April, 2014. Additionally, the BAR requested that staff from the City of Clemson make a presentation to the BAR with the goal of clarifying terms such as scale, applicable rules of procedure, and the relevant zoning ordinances among other issues. Mr. Winkopp was also asked to provide a report on any resolutions between

adjacent neighbors and him after having a meeting to discuss any unaddressed issues. The BAR designated the March 4, 2014, meeting to be an informative meeting with staff to explain some of the intricacies of the issues surrounding the Project.

10. Notwithstanding the BAR's refusal to consider input from Petitioners, at the scheduled meeting of City Council on March 3, 2014, the day prior to the meeting at which the application was approved, Barry A. Jones, AIA, a licensed architect, notified the BAR and City Council of specific portions of the Project's plans that violated zoning ordinances enacted by the City of Clemson. (See attached Exhibit #1)

11. As noted in Mr. Jones' letter, the Applicants' submissions contained *misinterpretations of* zoning ordinances of the Code of the City of Clemson pertaining to height, exterior walls, number of vehicular entrances, and façade setbacks. Specifically, the following provisions were not correctly interpreted:

    a. Clemson Code of Ordinances § 19-107.

    b. Clemson Code of Ordinances § 19-308.

    c. Clemson Code of Ordinances § 19-309.

    d. Clemson Code of Ordinances § 19-505.

    e. Clemson Code of Ordinances § 19-506.

    f. Clemson Code of Ordinances § 19-507.

    g. Clemson Code of Ordinances § 19-508.

12. Without adequate notice to the Petitioners, and despite Petitioners' requests for a meaningful opportunity to be heard or any information related to alleged violations of City of Clemson zoning ordinances, the BAR moved forward with its consideration of the Project application on March 4, 2014, a full month before the previously noticed date of

April 1, 2014. Without input from the Petitioners, and without adequate notice, the BAR approved the Project at that time.

13. Petitioners appeal the BAR's decision based on the following grounds:

a. The decision of the BAR was not correct as a matter of law.

b. The BAR's decision fails to allow the Petitioners a meaningful mechanism through which they could gain access or provide input to the members of the BAR.

c. The Project violates Clemson City Ordinances.

d. The BAR failed to follow Clemson City Ordinances governing its actions.

e. The BAR failed to provide adequate notice of the meeting date and the topics proposed for consideration.

f. The BAR's failure to provide adequate notice and a meaningful opportunity to be heard violated Petitioners' right to procedural due process.

g. The BAR violated Petitioners' right to freedom of speech.

WHEREFORE, having fully pled, Petitioners request that the Court, pursuant its authority under S.C. Code Ann. § 6-29-930, reverse the decision of the City of Clemson Board of Architectural Review on the following basis:

1. The decision of the BAR was not correct as a matter of law;
2. The BAR's decision fails to allow the Petitioners a meaningful mechanism through which they could gain access or provide input to the members of the BAR;
3. The Project violates Clemson City Ordinances;
4. The BAR failed to follow Clemson City Ordinances governing its actions;

5. The BAR failed to provide adequate notice of the meeting date and the topics proposed for consideration;
6. The BAR's failure to provide adequate notice and a meaningful opportunity to be heard violated Petitioners' right to procedural due process;
7. The BAR violated Petitioners' right to freedom of speech;
8. That the City of Clemson Board of Architectural Review failed to comply with applicable ordinances governing its conduct and meetings;
9. That the City of Clemson Board of Architectural Review violated the Petitioners due process and their First Amendment rights; and
10. That the Project failed to comply with some or all of the fully applicable ordinances:
    a. Clemson Code of Ordinances § 19-107.
    b. Clemson Code of Ordinances § 19-308.
    c. Clemson Code of Ordinances § 19-309.
    d. Clemson Code of Ordinances § 19-505.
    e. Clemson Code of Ordinances § 19-506.
    f. Clemson Code of Ordinances § 19-507.
    g. Clemson Code of Ordinances § 19-508.

Alternatively, if the court finds the certified record is insufficient for review, Petitioners ask that the Court remand the decision to the City of Clemson Board of Architectural Review for rehearing.

[Signature page to follow]

Respectfully Submitted,

LYLES & LYLES, LLC

Robert Lyles, JR.

Robert T. Lyles, Jr., Esq. Signed by
Marshall T. Austin, Esq. Misty Sottes
342 East Bay Street Bar# 70623
Charleston, SC 29401
Attorneys for Petitioners

April 2, 2014

EXHIBIT 1

Members of the Board of Architectural Review
City of Clemson
1250 Tiger Blvd.
Clemson, SC 29631

February 28,2014

Re: Dukes Center aka College Avenue Project

Dear Members of the Board,

As a licensed Architect with a 40 year resume of architectural practice in 20 states, I have seen the pressure placed on volunteer boards to render simple, "yes or no?" answers about very complicated matters. At times, some may not even know what questions to ask on topics they only rarely have to consider. I believe you would welcome any objective help you could get with your endeavors.

In my own review of the zoning ordinance, (which is something I spent countless hours doing over my architectural career), I have found situations where it appears to me that the city is not properly enforcing its codes. These issues could not present themselves until there was an actual project design. Neither the Planning Commission nor the City Council has acted upon an actual building design in this process. Only the BAR reviews the proposed project design, so it seems these matters fall to you.

Please see the attachment for my analysis of these issues. Issue #1 regarding building height was only recently mitigated by a reduction in the number of floors in the building design. However, for weeks, the city adamantly defended the previous design through its faulty interpretation of the definition of "height" as found in the zoning ordinance. They were wrong and should now correct the public record.

Issues # 2 and #3 deal with specific restrictions on Multi Use structures if they are to be permitted in a C District. The zoning ordinance is quite clear in its mandate that ALL of the restrictions have to be followed. From my reading of the code as further explained in the attachments, this project design does NOT meet all of the requirements that permit a Multi Use structure in a C district. Issue #4 is then directly related to Issue #2.

If my analysis is correct (and I welcome scrutiny from the city) I believe the BAR should take these issues seriously into consideration and must not knowingly approve a project design that is non-compliant with city ordinance.

Sincerely,

Barry A Jones AIA
Clemson

Unenforced Codes and Ordinances

Dukes Centre Proposed Housing and Parking Ramp Project
February 28, 2014

Issue # 1: Staff has historically errored in its interpretation of the zoning law's definition of "height"

From the staff report submitted with the January 7 BAR agenda:

Building Height:
Zoned at 65' Maximum. Building height is defined *as the vertical distance from the average finished ground elevation at the front of the building as determined by the main entrance of the building to the highest parapet or roofline of a flat roof*

The building is within the maximum allowable height.

By the city's own definition, the location of the "main entrance " determines where the "front of the building" is located. Height is then measured from the "average finished ground elevation at the front of the building ", and NOT just at the point of the main entrance.

From the zoning ordinance: Article I.Adoption and Interpretation 19-107. Definitions:
Building height means the vertical distance from the average finished ground elevation at the front of the building as determined by the main entrance of the building to

(1) The highest parapet or roofline of a flat roof . .

With the exception of this most recent submission, all previous versions of the project design exceeded the height restriction because the city did not properly apply the definition of height The site slopes some 10 feet from south to north making the "average finished ground elevation at the front of the building" approximately 5 feet below the southern floor level. Until now, the "height "of this project was always closer to 70 ft on the College Avenue (west) elevation and was always non-compliant with the zoning regulations despite the city's assertions to the BAR that the project met the height restrictions. The city should acknowledge it's previous errors of instruction to the BAR and correct the official record.

SEE EXHIBIT # 1

Issue # 2: Staff has not enforced the zoning ordinance regarding Mixed Use structures in C districts with regard to the location of the exterior walls facing College Avenue.

From City zoning ordinance Sec.19-309.(General commercial district (C) Conditional uses
C Permitted Uses -1 Mixed Use structures provided ALL of the following conditions are met
Item a-ii

ii Along College Avenue, a minimum of 80% of the building facade of the principal use structure(s) shall be constructed at the minimum front setback line and a minimum of 55% of the building facade of the principal use structure(s) shall be required along all other frontages

Zoning Ordinance: 19-107. Definitions. *Principal structure or use* means a structure or use which is significant or [illegible] at [illegible] accessory The *principal use* is the housing component

Zoning Ordinance: 19-107 Definitions: *Mixed use structure* means a building containing residential uses in addition to non-residential uses otherwise permitted by the district This term shall include condominium hotels Project meets the definition of mixed-use structures and must meet ALL conditions referenced.

From 2013-R-06 staff report- October Meeting and zoning ordinance: Front Setback 0 ft - Maximum Front Setback: 15' -Side Setback 0 -Rear Setback 10

By code, 80% of the façade of the housing component facing College Avenue shall be constructed at the 0 ft front yard set back None of the proposed building façade is at the minimum (0 foot) set back along College Avenue, let alone 80 %. The project is noncompliant with the zoning ordinance.

SEE EXHIBIT # 2

Red is city code text
Black is author's text

Issue #3: Staff has not enforced the zoning ordinance regarding Mixed Use structures in C districts with regard to the allowable number of vehicular entrances to the site per street frontage.

From City zoning ordinance Sec.19-309.C General commercial district (C) Conditional uses
C Permitted Uses -1 Mixed Use structures provided ALL of the following conditions are met Item d

d. No more than one entrance, not exceeding 25 feet in width per street frontage may be allowed to provide vehicular access to the interior of the building or site An additional 5 feet of width for a pedestrian sidewalk shall be provided
Two vehicular entrances are shown along the College Ave street frontage. Only One vehicular entrance is permitted by the zoning ordinance.

From the BAR standards "Figure 6"
Vehicular and pedestrian access.
1 A maximum of one curb cut shall be allowed for lots with street frontage less than or equal to 250 feet (Figure 6)
2 For lots with street frontage greater than 250 feet, one additional driveway opening per 250 feet of street frontage shall be allowed (Figure 6)

The zoning code and BAR standards for driveways are seemingly in conflict . From the BAR standards Sec 19-502 Application of Regulations, Certificate of Approvals; Conflicts

(c) Where architectural review standards conflict with zoning regulations, subdivision or land development regulations building codes fire codes or other safety regulations the conflicting architectural review standards shall not apply.

As the city has stated time and time again, when in conflict with other regulations, the BAR standards do not apply Only one vehicular entrance is permitted per street frontage by the zoning ordinance and the project is non-compliant with the zoning ordinance.

SEE EXHIBIT # 2

Issue# 4: Staff has not enforced zoning ordinance requirements regarding building facade step-backs

From the City zoning ordinance Sec.19-309.C General commercial district (c) District Regulations
8. Building façade step-back requirements: Where at least 50 % of the facade of the structure is located within 5 feet of a public or private right of way the building facade shall be stepped back at least 8 feet for structures over 24 feet in height beginning at or below the third-floor level.

This goes hand in hand with Issue #2 and C. 1.a.ii section above. If 80 % of the building façade along College Avenue has to be at the 0 foot setback, then it follows that the building façade along College Avenue must also step back per this requirement. There is no step back in the design of the façade facing College Avenue and the project is noncompliant with the Zoning Ordinance.

SEE EXHIBITS #3 and #4

Red is city code text
Black is author's text

NORTH ELEVATION
SCALE: 1" = 1'-0"

EXHIBIT #1

trehel corporation
the better building process

Signature ARCHITECTS

(c) *Conditional uses.* The following conditional uses are permitted in C districts:

C Permitted Uses				SIC Code	SIC Description	Parking Spaces Required
1.	Mixed Use Structure(s), provided all of the following conditions are met:			N/A	N/A	1 per dwelling unit, provided however, that no more than 30% of the required spaces may be designed for compact vehicles utilizing a minimum parking stall dimension of no less than 16 feet by 8 feet, provided the spaces are permanently designated by sign(s) as being for use by compact cars only. All other required spaces shall comply with the specifications of Section 19-44B
	a.	Principal use structure(s) that front College Avenue, Keith Street, Earle Street, McCullom Street, Finley Street, Sloan Street, N. Clemson Avenue, or property owned by the City of Clemson or the U.S. Army Corps of Engineers shall have:				
		i.	Service, retail, or office uses along 100% of the façade that abuts the street, sidewalk, or grade level; and			
		ii.	Along College Avenue, a minimum of 80% of the building facade of the principal use structure(s) shall be constructed at the minimum front setback line and a minimum of 55% of the building facade of the principal use structure(s) shall be required along all other frontages.			
	b.	Principal use structure(s) that abut Daniel Drive shall have service, retail, or office uses along at least 40% of that facade at street or sidewalk level. The remaining frontage may be used for other permitted uses, recreational amenities or residential uses;				
	c.	Service, retail, or office uses shall occupy a space along the frontage of the principal use structure that has a minimum depth of 25 feet;				
	d.	No more than one entrance, not exceeding 25 feet in width per street frontage, may be allowed to provide vehicular access to the interior of the building or site. An additional 5 feet of width for a pedestrian sidewalk shall be provided;				
	e.	One 8-foot wide entrance doorway providing pedestrian access to the interior of the principal use structure may be permitted per street frontage;			EXHIBIT # 12	
	f.	Dwelling units are permitted subject to the following:				

(e) *District regulations.* The following regulations apply to all uses in C districts:

1. Minimum lot area:	None.
2. Minimum lot width at front building line:	None.
3. Front setbacks:	None
a. Minimum front setback	Unless otherwise noted elsewhere in this section, all structures shall comply with the following:
b. Maximum front setback	a. The maximum front setback for any principal structure shall be 15 feet; b. Any principal structure with a front setback greater than three feet shall utilize the space between the right-of-way and the building for outdoor dining, courtyards or similar spaces; and c. No off-street parking shall be allowed in front of the front building line.
4. Minimum side setbacks:	None.
5. Minimum rear setbacks:	10 feet.
6. Maximum dwelling occupancy:	1 family, plus not more than 2 unrelated persons, or not more than 4 unrelated persons per dwelling unit.
7. Maximum structure height.	65 feet
8. Building facade step-back requirements	Where at least 50 percent of the facade of the structure is located within 5 feet of a public or private right-of-way, the building facade shall be stepped back at least 8 feet for structures over 24 feet in height beginning at or below the third-floor level.
9. Expansions/Additions of Existing Buildings:	The expansion or addition of existing buildings over 25 feet in height is exempt from the facade step-back requirement of subparagraph 8., provided the following conditions are met: 1. Building material and color palette used for the expansion or addition will be the same as the original building; and 2. At least 30% of the addition or expansion abutting the public right-of-way shall be

EXHIBIT # 3

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2014 MAY 12 A 11:05

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS)	
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner,	
Petitioners,	**ANSWER AND COUNTERCLAIM OF DEFENDANT TOM WINKOPP**
v.	
The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski,	
Defendants.	C.A. No.: 2014-CP-39-398

The Defendant Tom Winkopp ("Winkopp") responding to the Petition and Notice of Appeal or Alternative Motion for Temporary or Permanent Injunction ("Petition") will show:

FOR A FIRST DEFENSE

1. Each and every allegation of the Petition that is not hereinafter specifically admitted, modified or explained is denied and strict proof demanded thereof.

2. Winkopp admits the allegations of Paragraph 1 to the extent that they allege that the Defendant Dukes and Zeilinski owned several parcels of land identified in that paragraph. Otherwise, the allegations of that paragraph are denied.

3. Winkopp admits so much of Paragraph 2 as states that the parcels were zoned earlier as alleged, but the parcels were subsequently rezoned as "C."

4. Winkopp denies the allegations of Paragraph 3. The initial request to re-zone was made prior to October 14, 2013, and was to combine and re-zone a portion of 105 Finley Street

along with the other three parcels referenced in Paragraph 2 of the Petition with 386 College Avenue and 388 College Avenue.

5. The allegations of Paragraph 4 are admitted to the extent that on November 18, 2013, the matter was heard by the City Council of Clemson for a first reading, which provided an opportunity for the public to provide relevant input. Winkopp further admits that City Council approved the first reading of the re-zoning request and amended the request to exclude the Zeilinski property. Otherwise the allegations of Paragraph 4 are denied.

6. The allegations of Paragraph 5 are admitted.

7. With regard to the allegations of Paragraph 6, Winkopp admits that the Project (as defined in the Petition), was brought before the Board of Architectural Review ("BAR") on January 7, 2014, for a conceptual review due to the property being located in an architectural overlay district. The remaining allegations of Paragraph 6 are denied.

8. The allegations of Paragraph 7 are denied except that Winkopp admits that certain persons created an on-line petition with signatures.

9. Upon information and belief, the allegations of Paragraph 8 are denied.

10. With regard to Paragraph 9, Winkopp denies that he submitted the Project for final approval by the BAR on February 4, 2014. The plans had been submitted to the BAR before that date. Winkopp admits that the BAR had a meeting on February 4, 2014. Otherwise the allegations of Paragraph 9 are denied. Reference is made to the record in the matter for the actions taken at such meeting.

11. With respect to the allegations of Paragraph 10 of the Complaint, Winkopp admits on information and belief that the letter dated February 28, 2014 from Barry A. Jones was received by the BAR and was made part of the record of the meeting on March 4, 2014.

Reference is made to the letter for the contents of that letter and any allegation of Paragraph 10 inconsistent with that letter are denied. Any other allegations in Paragraph 10 are denied.

12. The allegations of Paragraph 11 are denied.

13. With respect to the allegations of Paragraph 12, Winkopp admits that the BAR proceeded with consideration of the Project application on March 4, 2014, and that the BAR approved the Project at that time. Otherwise, the allegations of Paragraph 12 are denied.

14. The allegations of Paragraph 13 are denied.

FOR A SECOND DEFENSE

15. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

16. The Petition fails to state facts sufficient to constitute any cause of action or appeal and the same should therefore be dismissed pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure.*

FOR A THIRD DEFENSE

17. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

18. Winkopp is informed and believes that any appeal and review of this matter is limited to the record presented to this Court by the BAR and that the scope of review is limited to that record. Any allegations of the Petition inconsistent with the record are denied. Any allegations of the Petition, even to the extent admitted in this Answer and Counterclaim, are irrelevant and not appropriate for review or consideration by the Court.

FOR A FOURTH DEFENSE

19. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

20. All actions of the BAR were made in accordance with the law and within the confines of discretion and authority of the BAR.

FOR A FIFTH DEFENSE

21. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

22. The parcels of real property that are in question with this matter were re-zoned by the Clemson City Council at its meeting on December 2, 2013. That decision, from which no appeal was made, is final and binding upon all parties, including the Petitioners in this matter. Therefore, this Petition is barred as a matter of law, and Winkopp is entitled to all uses of the subject parcels of property as allowed by the re-zoning classification approved by the Clemson City Council on December 2, 2013.

FOR A SIXTH DEFENSE

23. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

24. Winkopp affirmatively pleads *res judicata*, collateral estoppel, and issue preclusion based upon the decision of Clemson City Council on December 2, 2013, to re-zone this property to its present allowed uses.

FOR A SEVENTH DEFENSE
AND BY WAY OF COUNTERCLAIM
(Abuse of Process)

25. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

26. It is patently clear that this property was properly re-zoned and no appeal was taken for the re-zoning. Therefore, as a matter of law, Winkopp is entitled to all of the uses of the property as allowed by the re-zoning classification of the property. Further, the decision of the BAR is limited to ensuring compliance with the minimum architectural requirements imposed upon this district. It is patently clear from the record in this matter that Winkopp and the BAR complied with the requirements set forth for evaluation and determination by the BAR.

27. Therefore, this appeal is wholly without merit and is frivolous. Winkopp is informed and believes that the Petitioners are aware that their Petition is frivolous and without merit. He is further informed and believes that this appeal is done for no purpose other than attempting to sabotage the Project and to prevent him from developing his Project in accordance with his plans. Winkopp further specifically alleges that the ulterior motive of this lawsuit or Petition is not for a legitimate review and appeal of the decision of the BAR, but is instead done with the ulterior motive of delaying or killing the Project, which they could not accomplish before Clemson City Council with the re-zoning or before the BAR. Further, Winkopp alleges that this constitutes a willful act in the use of process not proper in the conduct of these proceedings and it is used to gain an objective (killing or delaying of the Project) not legitimate in the use of this process.

28. These acts by the Plaintiffs were willful and intentional.

29. As a direct, proximate and foreseeable result of this abuse of process by each of the Petitioners, Winkopp has been compelled to suffer significant damages with respect to impairment of his Project and his funding, thereby causing him economic loss with regard to the

profitability of this Project. Winkopp is informed and believes that he is entitled to actual and punitive damages in this matter.

WHEREFORE, the Defendant Tom Winkopp prays that the Petition of the Petitioners be dismissed with costs and that he be granted actual and punitive damages against each of them jointly and severally under his foregoing Counterclaim for abuse of process.

Thomas W. Traxler (S.C. Bar #5624)
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(864) 242-3566 / Fax: (864) 232-1558
tom.traxler@carterlawpa.com
Attorney for Defendant Tom Winkopp

Dated: May 8, 2014
Greenville, South Carolina

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2014 MAY 12 A 11:04

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner, Petitioners, v. The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski, Defendants.	**ANSWER OF DEFENDANT WILLIAM E. DUKES** C.A. No.: 2014-CP-39-398

The Defendant William E. Dukes ("Dukes") responding to the Petition and Notice of Appeal or Alternative Motion for Temporary or Permanent Injunction ("Petition") will show:

FOR A FIRST DEFENSE

1. Each and every allegation of the Petition that is not hereinafter specifically admitted, modified or explained is denied and strict proof demanded thereof.

2. Dukes admits the allegations of Paragraph 1 to the extent that they allege that he and Zeilinski owned several parcels of land identified in that paragraph. Otherwise, the allegations of that paragraph are denied.

3. Dukes admits so much of Paragraph 2 as states that the parcels were zoned earlier as alleged, but the parcels were subsequently rezoned as "C."

4. Dukes denies the allegations of Paragraph 3. The initial request to re-zone was made prior to October 14, 2013, and was to combine and re-zone a portion of 105 Finley Street along with the other three parcels referenced in Paragraph 2 of the Petition with 386 College Avenue and 388 College Avenue.

5. The allegations of Paragraph 4 are admitted to the extent that on November 18, 2013, the matter was heard by the City Council of Clemson for a first reading, which provided an opportunity for the public to provide relevant input. Dukes further admits that City Council approved the first reading of the re-zoning request and amended the request to exclude the Zeilinski property. Otherwise the allegations of Paragraph 4 are denied.

6. The allegations of Paragraph 5 are admitted.

7. With regard to the allegations of Paragraph 6, Dukes admits on information and belief that the Project (as defined in the Petition), was brought before the Board of Architectural Review ("BAR") on January 7, 2014, for a conceptual review due to the property being located in an architectural overlay district. The remaining allegations of Paragraph 6 are denied.

8. The allegations of Paragraph 7 are denied except that Dukes admits that certain persons created an on-line petition with signatures.

9. Upon information and belief, the allegations of Paragraph 8 are denied.

10. With regard to Paragraph 9, Dukes denies that the Project was submitted for final approval by the BAR on February 4, 2014. The plans had been submitted to the BAR before that date. Dukes admits that the BAR had a meeting on February 4, 2014. Otherwise the allegations of Paragraph 9 are denied. Reference to the record in this matter is made for actions taken at that meeting.

11. With respect to the allegations of Paragraph 10 of the Complaint, Dukes admits on information and belief that the letter dated February 28, 2014 from Barry A. Jones was received by the BAR and was made part of the record of the meeting on March 4, 2014. Reference is made to the letter for the contents of that letter and any allegation in Paragraph 10 inconsistent with that letter are denied. Any other allegations of Paragraph 10 are denied.

12. The allegations of Paragraph 11 are denied.

13. With respect to the allegations of Paragraph 12, Dukes admits on information and belief that the BAR proceeded with consideration of the Project application on March 4, 2014, and that the BAR approved the Project at that time. Otherwise, the allegations of Paragraph 12 are denied.

14. The allegations of Paragraph 13 are denied.

FOR A SECOND DEFENSE

15. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

16. The Petition fails to state facts sufficient to constitute any cause of action or appeal and the same should therefore be dismissed pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure.*

FOR A THIRD DEFENSE

17. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

18. Dukes is informed and believes that any appeal and review of this matter is limited to the record presented to this Court by the BAR and that the scope of review is limited to that record. Any allegations of the Petition inconsistent with the record are denied. Any allegations of the Petition, even to the extent admitted in this Answer, are irrelevant and not appropriate for review or consideration by the Court.

FOR A FOURTH DEFENSE

19. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

20. All actions of the BAR were made in accordance with the law and within the confines of discretion and authority of the BAR.

FOR A FIFTH DEFENSE

21. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

22. The parcels of real property that are in question with this matter were re-zoned by the Clemson City Council at its meeting on December 2, 2013. That decision, from which no appeal was made, is final and binding upon all parties, including the Petitioners in this matter. Therefore, this Petition is barred as a matter of law, and Dukes is entitled to all uses of the subject parcels of property as allowed by the re-zoning classification approved by the Clemson City Council on December 2, 2013.

FOR A SIXTH DEFENSE

23. Each and every allegation set forth above is incorporated herein by reference as if fully repeated herein.

24. Dukes affirmatively pleads *res judicata*, collateral estoppel, and issue preclusion based upon the decision of Clemson City Council on December 2, 2013, to re-zone this property to its present allowed uses.

WHEREFORE, the Defendant William E. Dukes prays that the Petition of the Petitioners be dismissed with costs.

Thomas W. Traxler (S.C. Bar #5624)
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tom.traxler@carterlawpa.com
Attorney for Defendant William E. Dukes

Dated: May 8, 2014
Greenville, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner, Petitioners, v. The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski, Defendants.	CASE NO. 2014-CP-39-398 **Amended Answer of The City of Clemson and The Board of Architectural Review**

The Defendants, The City of Clemson ("Clemson") and The Board of Architectural Review ("BAR"), answering the Petition and Appeal ("Petition") of the Petitioners, would respectfully show and allege unto the Court as follows:

FOR A FIRST DEFENSE

1. Clemson and the BAR would show that the Petition fails to state facts sufficient to constitute causes of action against these Defendants and that the alleged causes of action so stated in said Petition fail to state claims on which relief can be granted and, therefore, said Petition should be dismissed as to these Defendants.

FOR A SECOND DEFENSE

2. The allegations contained in the first defense hereinabove set forth are incorporated herein and made part of this defense by reference thereto.

3. Clemson and the BAR deny each and every allegation contained in the Petition not hereinafter specifically admitted, modified or explained.

4. Clemson and the BAR admit, based upon information and belief and the record on appeal, the allegations contained in Paragraph 1 of the Petition, with the exception of the allegation that plans were filed with Clemson. Clemson and the BAR would show that, initially, no plans were required to be filed and, thus, were not filed since the Owners and the Applicant were making a request for re-zoning of the parcels of land in question.

5. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 2 of the Petition and demand strict proof thereof. Further answering said allegation, Clemson and the BAR would show that the record on appeal establishes that the four parcels cited in said paragraph were originally zoned as stated therein but that the request for re-zoning also included two other parcels owned by Defendant William E. Dukes, i.e. 386 College Avenue and 388 College Avenue, both of which were already zoned as C.

6. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 3 of the Petition and demand strict proof thereof. Further answering said allegations, Clemson and the BAR would show that the record on appeal establishes that the initial request to re-zone was made to the Clemson Planning Commission prior to October 14, 2013 and was to combine and re-zone a portion of 105 Finley Street (owned by the Defendant, Marcia Zielinski), along with the other three parcels referenced in Paragraph 2 of the Petition, with 386 College Avenue and 388 College Avenue (already zoned as C).

7. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 4 of the Petition and demand strict proof thereof. Further answering said allegations, Clemson and the BAR would show the record on appeal establishes that, on October 14, 2013, the Clemson Planning Commission unanimously approved the request for re-zoning at a public meeting; that, at said public meeting the Project presented was referenced as a high density, mixed-use, building

development; that, following the approval by the Clemson Planning Commission, the Clemson City Council, during its regular meeting on October 21, 2013, set a date for a public hearing on this request for rezoning for November 4, 2013; that, during this public hearing, which was properly advertised through all normal channels, concerns such as property values, increased traffic, safety, scale, height, noise, light, increased student housing, big box structure, how the Project supports or conflicts with the comprehensive plan and other such issues were thoroughly discussed by and with members of the public; and, that the developer was at this public hearing and presented the Project as a high density, mixed-use, building development. Clemson and the BAR would also show that the record on appeal establishes that this Project was presented to the Clemson City Council at its public meeting on November 18, 2013 for first reading of a proposed re-zoning request and not as a planned development; that this Council meeting had a public input session wherein one person (one of the Petitioners) spoke in opposition to this Project; that the Applicant, Tom Winkopp, informed Clemson City Council that, based upon comments made at the public hearing on November 4, 2013 regarding the Project from the neighboring property owners, he had re-designed the Project to address the issues that were discussed/presented and would not develop two of the areas on the original plans; that the zoning request was amended at this Council meeting to exclude the property of Monica Zeilinksi; and, that the Clemson City Council unanimously voted to approve the first reading of this request for rezoning on November 18, 2013.

8. Clemson and the BAR admit the allegations contained in Paragraph 5 of the Petition. Further answering said allegations, Clemson and the BAR would show that the record on appeal establishes that, during this second and final reading at the Clemson City Council meeting on December 2, 2013, the public input session was extended from thirty (30) minutes to forty-five

(45) minutes to allow all interested persons an opportunity to comment on this request for rezoning during which time fifteen (15) City residents (including one of the Petitioners) spoke in opposition to the re-zoning request in question with all such comments being related to concerns involving increased traffic, safety, more student housing, big box structure, storm water management and quality of life in the downtown area; that the decision to allow the re-zoning was approved by the Clemson City Council at this meeting by a 4 to 2 vote (one member having recused himself) with each council member providing public comments related to their vote in opposition or in favor of the re-zoning request; that the two council members who voted in opposition to the decision read prepared statements into the public record which included their concerns which mirrored the concerns of the Petitioners; and, that there was no appeal of this legislative decision.

9. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 6 of the Petition and demand strict proof thereof. Furthering answer said allegations, Clemson and the BAR would show that the record on appeal establishes that plans for the Project had been available to the public prior to the Project being brought before the BAR on January 7, 2014 for conceptual review (due to its location in an architectural overlay district); that members of the BAR at that meeting acknowledged that the Project could not be denied by the BAR on the basis of scale or size as that legislative decision had previously been made by the Clemson City Council when the request for rezoning had been approved by the Clemson City Council and was therefore outside the scope of review of the BAR; that while that Project was categorized as "handsome", some members of the BAR requested more information regarding some minor issues; and, that no action was required or taken by the BAR at that meeting.

10. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 7 of the Petition and demand strict proof thereof. Further answering said allegations, Clemson and the

BAR would show that the record on appeal establishes that there are four (4) buildings within a few blocks of this Project that are larger than or of comparable size to the Project; that the City of Clemson has no "historic district"; that this "E Petition" was addressed only to the Clemson City Council; that it addressed the same issues raised by those in opposition to the rezoning request which were presented to the Clemson City Council at its Council meeting on December 2, 2013; that the petition was not received by the Clemson City Council until after it had made its legislative decision to approve the request for re-zoning; that the Clemson City Council made its legislative decision to approve the zoning request after full consideration of all the issues raised by all concerned; and, that the members of the BAR were aware of this E-Petition prior to its decision regarding this Project.

11. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 8 of the Petition and demand strict proof thereof. Further answering said allegations, Clemson and the BAR would show that the record on appeal establishes that the BAR members as well as members of the public were advised by staff of the City of Clemson ("Staff") that the BAR functioned as a "quasi-judicial" body; that if members of the public had comments/concerns they wanted to share with members of the BAR, they should send those to the Staff who would make them available to the BAR members for consideration as part of the record which was done; and, that, as previously referenced herein, the public had multiple opportunities for input in the legislative process.

12. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 9 of the Petition and demand strict proof thereof. Further answering said allegations, Clemson and the BAR would show that the record on appeal establishes that the Project was submitted for approval two (2) weeks prior to the meeting on February 4, 2014; that, at the meeting on February 4, 2014, staff made a lengthy presentation that included the concerns being raised by some members of the

public and discussed the compliance of the Project with the applicable Ordinances/Codes; that the BAR made suggestions to the Staff and Applicant and took action as reflected in the record on appeal; and, that a "March 4, 2014" meeting to provide more information to the BAR was suggested but not designated/confirmed.

13. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 10 of the Petition and demand strict proof thereof. Further answering said allegations, Clemson and the BAR would show that the record on appeal establishes that prior to the meeting of the BAR on March 4, 2014, a letter dated February 28, 2014 from Barry A. Jones ("Jones") was received by the BAR and was made a part of the record of the meeting on March 4, 2014; that the letter and attachments thereto were considered by the BAR along with a considered and thorough response to the Jones letter provided by Staff prior to the meeting of March 4, 2014; and, that by its decision on the issue, the BAR disagreed with the analysis/opinions of Jones.

14. Clemson and the BAR deny the allegations contained in Paragraph 11 of the Petition and demand strict proof thereof.

15. Clemson and the BAR deny, as pleaded, the allegations contained in Paragraph 12 of the Petition and demand strict proof thereof. Further answering said allegations, Clemson and the BAR would show that the record on appeal establishes the action taken by the BAR and the basis for that action at its meeting on March 4, 2014; that, at this meeting, the BAR chose to rescind the postponement passed at the February 4 meeting in order to consider the Applicant's request at this meeting since the Applicant had previously responded to the BAR requests, modified his plan accordingly and thus had, notwithstanding the previous decision to postpone, decided to re-submit the Project for review at that meeting; and, that the Project was correctly approved by the BAR, as a matter of law, at that meeting.

16. Clemson and the BAR deny the allegations contained in Paragraph 13 of the Petition and demand strict proof thereof.

FOR A THIRD DEFENSE

17. The allegations contained in the defenses hereinabove set forth are incorporated herein and made part of this defense by reference thereto.

18. Clemson and the BAR would show that the decision of the BAR was correct as a matter of law.

FOR A FOURTH DEFENSE

19. The allegations contained in the defenses hereinabove set forth are incorporated herein and made part of this defense by reference thereto.

20. Clemson and the BAR would show that the Clemson City Council approved the re-zoning request at its meeting on December 2, 2013 thereby making a legislative finding to approve the rezoning request from which no appeal was taken. Therefore, this Project and/or any subsequent project that is in compliance with this approved rezoning must, as a matter of law, be approved by the BAR.

21. Accordingly, this Petition is barred as a matter of law.

FOR A FIFTH DEFENSE

22. The allegations contained in the defenses hereinabove set forth are incorporated herein and made part of this defense by reference thereto.

23. Clemson and the BAR would show that this Petition/Action is barred by the doctrine of *Res Judicata,* Collateral Estoppel and/or issue preclusion based upon the legislative decision of the Clemson City Council on December 2, 2013 from which no appeal was taken.

WHEREFORE, having fully answered the Petition, Clemson and the BAR request that the Petition and Appeal be dismissed, that all relief requested in the Petition and Appeal be denied and for such other and further relief as this Court deems just and proper.

This 8th day of May, 2014.

LOGAN, JOLLY & SMITH, LLP

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1805 North Boulevard
Anderson, South Carolina 29621
Telephone: (864) 226-1910
Fax: (864) 226-1931

Counsel for The City of Clemson and
The Board of Architectural Review

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	IN THE COURT OF COMMON PLEAS THIRTEEN JUDICIAL CIRCUIT CASE NUMBER: 2014-CP-39-00398
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner, Petitioners, vs. The City of Clemson, The Board of Architectural Review, Tom Winkopp, and William E. Dukes, Respondents.	MOTION TO DISMISS Counterclaim of Respondent Tom Winkopp

TO: THOMAS W. TRAXLER, ESQUIRE, ATTORNEY FOR TOM WINKOPP:

PLEASE TAKE NOTICE that the Petitioners above-named, by and through their undersigned counsel, will move before the Presiding Judge of the Court of Common Pleas for the County of Pickens, South Carolina, for an Order, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, granting dismissal of Respondent Tom Winkopp's Counterclaim against Petitioners, paragraphs 25 through 29 of his Answer and Counterclaim, on the grounds that the Counterclaim fails to state facts sufficient to constitute a cause of action.

This Motion will be based on the pleadings between the parties and the arguments of counsel, as well as the statutory and common law of the State of South Carolina as may be further addressed in a Memorandum of Law to be filed with this Court prior to a hearing on this Motion.

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, S.C. 29401
843-577-7730 / rtl@lylesfirm.com
Attorneys for the Petitioners

Charleston, South Carolina

Jan 3, 2014

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT CASE NO.: 2014-CP-39-398
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner, Petitioners, vs. The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, and Monica Zeilinski, Respondent.	)	**PETITIONER'S MEMORANDUM SUPPORTING ITS MOTION TO DISMISS**

BACKGROUND

Petitioners filed their Petition with this Court appealing the decision of the City of Clemson's Board of Architectural Review due to the improper approval of the plans and specifications of a mixed-use commercial development in the City of Clemson. In the alternative, or as an additional form of relief, Petitioners sought an injunction against further implementation of said development during the pendency of this matter. Defendant Tom Winkopp Answered the Petition and asserted a Counterclaim against Petitioners sounding in Abuse of Process. See Winkopp Answer and Counterclaim ¶¶'s 25-29. Petitioners then filed their Motion to Dismiss Defendant Winkopp's Counterclaim. Based on the arguments below and those presented to the Court, this Court should dismiss Defendant Winkopp's Counterclaim. Additionally, at a minimum, this Court should issue an injunction barring further implementation of the proposed development until this matter is resolved.

STANDARD

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a party may make a motion to dismiss a claim for "failure to state facts sufficient to constitute a cause of action." *Shealy v. Doe*, S.C. Ct. App. Opinion No. 4128 (2006). When faced with a Motion to Dismiss under Rule 12(b)(6), *SCRCP*, the Court must dispose of it based solely upon the allegations pled in the claim and with the allegations of the claim being viewed as admitted. That being said, the "the circuit court may dismiss a claim when the [Petitioners] demonstrate the [Counterclaimant's] 'failure to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Hambrick v. GMAC Mortgage Corporation*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006).

ARGUMENT

Petitioner's Motion to Dismiss Should Be Granted

The Petition which initiated this matter concerns one thing – whether the proper processes were followed regarding the City of Clemson's Board of Architectural Review's (hereafter "BAR") determination on the rezoning of land and approval of plans for the developer Defendants' construction project. Accordingly, Petitioners exercised their specific statutory right under S.C. Code § 6-29-900 and filed their appeal of the BAR's decision. Defendant Winkopp now claims that Petitioners' assertion of those appeal rights constitutes an abuse of process. Winkopp's claim is flawed and legally unsustainable, however, and should be dismissed by the Court.

To properly assert an Abuse of Process cause of action, Defendants must establish (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. *D.R. Horton v. Wescott Land Co.*, 398 S.C. 528, 730 S.E.2d 340 (Ct. App. 2012). An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of

the process. *Id.* The "willful act" element comprises three components: (1) a "willful" or overt act (2) "in the use of the process" (3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective. *Food Lion v. United Food & Commercial Workers*, 351 S.C. 65, 567 S.E.2d 251 (Ct. App. 2002). Winkopp and Dukes have failed to allege, and cannot prove, either of those elements.

As noted by the Court of Appeals in *Food Lion*, "to sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e., for collateral reasons, but that willful acts were taken through which the process was misapplied or abused." *Id* at 255. Stated another way, our Courts have already determined "there is no liability when the process has been carried to its authorized conclusion even if done with bad intentions." *D.R. Horton* at 551. Further, the willful act required to be alleged and proven requites "[s]ome definite act... not authorized by the process or aimed at an object not legitimate in the use of the process..." *Hainer v. Am Med Int'l*, 328 SC 128, 136, 492 S.E. 2d 103, 107 (1997).

Winkopp cannot allege, or prove, that Petitioners have misapplied or abused the appeal process. He does allege that the purpose of the appeal is to delay and "kill" his project. However, if taken as true this is not actionable. If an authorized appeal causes the delay of a project, or, in the end, means approval of a project is rejected (i.e., the project is "killed"), that is simply a result of the appeal process. The appeal process exists for that very purpose. Thus, Defendant's claim, even if deemed admitted, only shows that Petitioners' acts were both (a) authorized by S.C. Code §6-29-900 and (b) aimed at a legitimate objective – a review of the BAR decision and the process(es) involved with the same, and, hopefully, a reversal of the BAR decision.

The importance of the Court's decision on this issue cannot be overstated. Winkopp's claim rests upon the notion that someone, specifically him, has the right to preliminarily assess the merits of a lawfully filed appeal of a BAR decision involving one of his projects. If he finds the appeal to be without merit (and why would he ever find an appeal of the approval of one of his projects to be facially meritorious?), the appeal then becomes actionable. That is in derogation of the right of the public to the lawfully appeal decisions of the BAR, effectively depriving members of the public of their due process rights. It also serves to make Winkopp, and developers like him, the party, jury and judge with respect to the approval process of his projects. If Winkopp's claim stands, *anyone* who files an appeal of any BAR decision is subjected to being sued for damages by the responding party on the basis of abuse of process. With this claim, Winkopp seek to chill the right of the public to take lawful exception, through the legislatively provided appeals process, to what he seeks to build.

Winkopp has not and cannot allege what is required to support his claim for abuse of process, namely that Petitoners have done anything, or requested anything, that is an abuse or misuse of the appeal process provided to them by the General Assembly. The lawful filing of an appeal, authorized by statute, for the purpose for which it is authorized, can never be the basis of such a claim. For those reasons, Winkopp's claim should be dismissed, with prejudice.

CONCLUSION

Petitioners acted as outlined by the S.C. Code and raised a legitimate concern with this Court. While it is understandable Winkopp opposes the Petition , nothing done by the Petitioners supports a cause of action against them for abuse of process. Defendants cannot sustain a cause of action of Abuse of Process and it should be dismissed.

Respectfully submitted,

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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS)

Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner,

v.

The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski,

Defendants.

DEFENDANTS TOM WINKOPP AND WILLIAM E. DUKES' REPLY MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS AND REPLY MEMORANDUM TO MOTION TO BIFURCATE AND FOR PROTECTIVE ORDER

C.A. No.: 2014-CP-39-398

BACKGROUND

This action was commenced by an appeal by the Petitioners appealing the decision of the City of Clemson's Board of Architectural Review with regard to approval of plans and specifications for a multi-family mixed-use development in the City of Clemson by the Defendant Tom Winkopp ("Winkopp").

Winkopp has asserted a Counterclaim against the Petitioners for abuse of process, and the Petitioners have filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure (SCRCP)*. Winkopp has filed and served his Motion to Bifurcate these proceedings for the appeal of the Petitioners to be heard on the expedited basis provided by statute and for the Counterclaim to proceed separately. The Defendants Winkopp and William E. Dukes have also filed and served their Motion for Protective order to limit discovery to the issues raised in the Counterclaim.

The Winkopp Counterclaim asserts that the Petitioners have pursued this appeal for the ulterior purpose of delaying or killing the multi-family mixed-use project ("Project") of Winkopp and that such was a willful act not proper in the conduct of these proceedings and used to gain an objection not legitimate in the use of this process.

ARGUMENT

1. The Petitioners' Motion To Dismiss Must Be Denied.

In deciding a Motion that has been made pursuant to *SCRCP* Rule 12(b)(6), the Court must look to the bare allegations of the Complaint to determine whether the Complaint alleges facts that constitute a cause of action cognizable in South Carolina.

First, there is no debate in this case but that "abuse of process" is a legitimate cause of action in this State. That is certainly not challenged in this case.

Second, the inquiry for the Court then is whether Winkopp's Complaint alleges facts sufficient to constitute a cause of action for "abuse of process."

"A trial court's ruling on a 12(b)(6) motion to dismiss for failure to state facts constituting a cause of action must be based solely upon the allegations set forth on the face of the complaint. [citation omitted]. In deciding the motion, the court must view the allegations in the light most favorable to the plaintiff, 'with every doubt resolved in his favor.' [citation omitted]. The trial court, therefore, must refuse a 12(b)(6) motion if the 'facts alleged and reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Food Lion, Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 252-253 (Ct. App. 2002).

The inquiry before this Court is whether or not the allegations of the Complaint in the present case sufficiently plead the elements of abuse of process, without the Court undertaking to

weigh the weight of such allegations. Stated simply, if the Complaint alleges the elements necessary for an abuse of process cause of action, then the Court must conclude that the mere allegations are sufficient and deny the Rule 12(b)(6) motion.

Abuse of process in South Carolina consists of two essential elements: (1) An "ulterior purpose" and (2) a "willful act in use of the process not proper in the conduct of the proceeding." *Id.* at 71.

The second element of "willful act" requires "[s]ome definite act...not authorized by the process or aimed at an object not legitimate in the use of the process is required." *Id.*, citing *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). The element of "willful act" consists of three components: (1) a "willful" or overt act, (2) "in the use of the process," and, (3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective. *Id.* at 253-254.

Therefore, since the inquiry in a Rule 12(b)(6) motion is to determine simply whether the pleadings set forth allegations to support these elements, it is useful to compare each element with the actual allegations of the Complaint. If they match, the Rule 12(b)(6) Motion is to be denied.

The following shows very simply and graphically the elements of abuse of process and has in bold below each the allegation of the Complaint that meets that element.

A. Ulterior purpose. "An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." *D.R.Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 521, 730 S.E.2d 340, 352 (Ct.App. 2012).

ALLEGATION: **"He [Winkopp] is further informed and believes that this appeal is done for no purpose other than attempting to sabotage the Project and to prevent him from developing this Project in accordance with his plans. Winkopp further specifically alleges that the ulterior motive of this lawsuit or Petition is not for a legitimate review and appeal of the decision of the BAR, but is instead done**

with the ulterior motive of delay or killing the project...." (¶ 27, Winkopp Answer and Counterclaim).

B. A "willful act in the use of the process not proper in the conduct of the proceedings:"

1. ALLEGATION: "Further, Winkopp alleges that this constitutes *a willful act in the use of the process not proper in the conduct of these proceedings* and it is used to gain an objective (killing or delaying of the Project) not legitimate in the use of this process. (¶ 27, Winkopp Answer and Counterclaim). [Emphasis Added].

a. A willful overt act....

i. ALLEGATION: "Further, Winkopp alleges that this constitutes a *willful* act in the use of the process not proper in the conduct of these proceedings and it is used to gain an objective (killing or delaying of the Project) not legitimate in the use of this process." (¶ 27, Winkopp Answer and Counterclaim). [Emphasis Added].

ii. ALLEGATION: "These acts by the Plaintiffs were willful and intentional." (¶ 28, Winkopp Answer and Counterclaim).

b. In the use of the process...

ALLEGATION: "Further, Winkopp alleges that this constitutes a willful act *in the use of the process* not proper in the conduct of these proceedings...." (¶ 27, Winkopp Answer and Counterclaim). [Emphasis Added].

c. That is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective.

ALLEGATION: "Winkopp further specifically alleges that the ulterior motive of this lawsuit or Petition is not for a legitimate review and appeal of the decision of the BAR, but is instead done with the ulterior motive of delaying or killing the Project, which they could not accomplish before Clemson City Council with the re-zoning or before the BAR. Further, Winkopp alleges that this constitutes a willful act in the use of process not proper in the conduct of these proceedings and *it is used to gain an objective (killing or delaying of the Project) not legitimate in the use of this process.*" (¶ 27, Winkopp Answer and Counterclaim). [Emphasis Added].

Therefore, each of the elements of abuse of process, as recognized by the Appellate Courts of South Carolina, has been sufficiently pled in this matter.

The entire gravamen of the abuse of process cause of action in South Carolina is to impose civil liability upon a party who initiates process (civil or criminal) for some purpose other than just the purposes for which the process is intended. Unlike a cause of action for malicious prosecution, a liability for abuse of process is not dependent upon the outcome of the process that has been abused. That is why there is clear civil liability for a person who initiates criminal process in order to gain advantage in a civil matter. If a party initiates the criminal process against someone other than for the legitimate purpose of a criminal prosecution, (i.e., to gain civil advantage), there may very well be probable cause for the initiation of the criminal process and the criminal process may very well end in a conviction, but, nonetheless, a criminal defendant who has had such criminal proceeding invoked against him can still seek liability against the perpetrator for abusing the criminal process. It is the perverted use of the process -- the use of the process for purposes for which it was not intended -- that gives rise to liability for abuse of process.

If this Court were to adopt the position urged upon it by the Petitioners, the Court would hold, as a matter of law, that no abuse of process could ever possibly lie in an appeal of a permitting decision by a governmental entity or rezoning matter, no matter how dark and malicious the intent was behind such appeal. In such an instance, the Court would be abandoning a Rule 12(b)(6) analysis of matching the allegations of a pleading against the elements of the cause of action, and the Court would rule, as a matter of law, that an appeal from a governmental decision could never, ever be an abuse of process regardless of the circumstances. That would

mean that this Court would be ruling that a cause of action for abuse of process is not a cognizable cause of action in such a case. That is not the law of the State of South Carolina.

Stated more bluntly, if the Court adopts the position propounded by the Petitioners, the Court would be ruling that there could never, ever be an abuse of process by such an appeal even if the Petitioners themselves stood up before the Court and announced to the Court that their sole purpose was to ruin the Project and that they had no other interest whatsoever in the appeal. That is the position that the Petitioners are trying to foist upon this Court. That position removes the elements of "ulterior motive" and "willful act in the use of the process not proper in the conduct of proceedings" from consideration and eliminates any cause of action for abuse of process in such a case.

In the South Carolina case of *LaMotte v. Punchline of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988) , Punchline of Columbia, Inc. secured required variances and permitting from the City of Columbia, which LaMotte and others appealed. While that was essentially a zoning appeal, nonetheless, it is analogous to the case before this Court. The South Carolina Supreme Court upheld the Circuit Court granting summary judgment (this was not a Rule 12(b)(6) case) stating that the record indicated that "appellant had not asserted a cause of action for abuse of process because they had not alleged that respondent engaged in 'a willful act in the use of the process not proper under the regular conduct of the proceedings.'" *Id.* at 71, 370 S.E.2d at 713. Therefore, the South Carolina Supreme Court has acknowledged the validity of a cause of action for abuse of process for a "malicious appeal" and has recognized an abuse of process can lie in such an appeal. The Supreme Court in the *LaMotte* case simply found that the record did not show that the Plaintiff had asserted such a cause of action since they did not allege that the respondents engaged in "a willful act in the use of the process not proper in the regular conduct

of the conduct of the proceedings." That allegation that the Supreme Court in *LaMotte* found deficient lies in the express wording of the Counterclaim in this matter: "He [Winkopp] is further informed and believes that this appeal is done for no purpose other than attempting to sabotage the Project and to prevent him from developing his Project in accordance with his plans. Winkopp further specifically alleges that the ulterior motive of this lawsuit or Petition is not for a legitimate review and appeal of the decision of the BAR, but is instead done with the ulterior motive of delaying or killing the Project, which they could not accomplish before Clemson City Council with the re-zoning or before the BAR. Further, Winkopp alleges that this constitutes a willful act in the use of process not proper in the conduct of these proceedings and it is used to gain an objective (killing or delaying of the Project) not legitimate in the use of this process." (¶ 27, Winkopp Answer and Counterclaim).

Unlike a cause of action for malicious prosecution, it is not an element of an abuse of process cause of action that the matter be frivolous or without merit. The frivolousness or lack of merit may be indicative of an ulterior motive, but such is not a necessary element.

Again, unlike a cause of action for malicious prosecution, it is also not a necessary element for an abuse of process cause of action that the abusive process be terminated in favor of the victim. For this reason, it has clearly been recognized that it is an abuse of process in South Carolina for a person to initiate a criminal process in order to gain leverage in a civil matter, and it is irrelevant (except as proof of ulterior purpose and willful, overt act) whether there is probable cause for the initiation of the criminal process or that the prosecution be terminated in favor of the accused. Even if the appeal were decided in favor of the Petitioners, nonetheless, a cause of action for abuse of process would still lie. It is the perversion of the legal process of the appeal in order to gain any collateral advantage that is the essence of the abuse of process cause

of action. That is why "[i]t is settled that it is unnecessary to show that the proceeding complained of was instituted without probable cause or was terminated in favor of the defendant in order for him to recover for abuse of process." *Ransome v. Mimms*, 320 F. Supp. 1110, 1114 (D.C. S.C. 1971), citing 1 Am. Jur, 2d *Abuse of Process*, §7 (1962).

It is hard to imagine a pleading more carefully tracking the established elements of an established cause of action than Winkopp's Counterclaim, and the Counterclaim specifically identifies that the ulterior purpose and the specific willful, overt act were to use the appeal process in an effort to delay or kill the Project.

2. The Motion To Bifurcate and For Protective Order Should Be Granted:

Both sides in this matter acknowledge that the statutory provisions relating to an appeal of the Board of Architectural Review call for an expedited appeal process before the Circuit Court, with the Circuit Court's decision being limited very simply to the record certified to it from the Board of Architectural Review. *S.C. Code Ann.* §6-29-930(A)(Supp. 2013). The Court is to take no additional evidence. *Id.*

Therefore, since the record of the Board of Architectural Review has been certified to this Court, the Court is now ready to review that record and to decide the Petitioners' appeal. Unless there is some challenge to the certified record, which there has not been to date, this matter is ready for a decision by this Court. The City of Clemson Board of Architectural Review has filed with the Clerk of Court "a duly certified copy of the proceedings held before the board of architectural review, including a transcript of the evidence held before the board, including its findings of fact and conclusions." This is a non-jury matter. This appeal is ready to be decided today. No discovery is needed and none should be allowed.

The fact that the Petitioners seek discovery when they are not allowed to present evidence comports with the Counterclaim that they use this appeal to delay and kill Winkopp's project. The discovery is designed for delay.

However, the abuse of process claim will require discovery.

While the Petitioners and/or the Court expressed the thought that the same Judge should decide the abuse of process Counterclaim as decides the appeal, both Winkopp and the Petitioners have a right to a jury trial on the Counterclaim. Since the Petitioners have filed their Rule 12(b)(6) Motion to Dismiss the Counterclaim, no responsive pleadings have been received by Winkopp or his counsel, and Winkopp still has ten (10) days from receipt of the Reply within which to demand a jury trial. That may very well be what transpires. Therefore, assigning the appeal and also the trial on the Counterclaim to the same Judge would violate the Petitioner's and Winkopp's right to a jury trial on the Counterclaim.

This is the basis for Winkopp's Motion to Bifurcate and for a Protective Order. Since no discovery is necessary on the appeal and the record of the Board of Architectural Review has already been certified to the Court and that matter is ready for decision, it makes every bit of sense for the Court to bifurcate the matter and decide the appeal right away and to limit any discovery in this matter to the Counterclaim alleged by Winkopp. The Counterclaim can then separately proceed through the normal course of discovery and litigation to its conclusion, most probably by jury trial.

CONCLUSION

Therefore, the Defendant Winkopp opposes the Petitioners' Rule 12(b)(6) Motion To Dismiss his Counterclaim, and the Defendants Winkopp and William E. Dukes urge the Court to grant the Motion to Bifurcate so that the appeal issue can be heard on the prescribed expedited

basis with the Counterclaim being determined separately and that their Motion for a Protective Order be granted barring discovery on the issue of the appeal and limiting discovery to the issue of the Winkopp Counterclaim.

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Dated: June 24, 2014
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	CASE NO.: 2014-CP-39-398
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner,	)	**PETITIONER'S REPLY TO DEFENDANTS TOM WINKOPP AND WILLIAM E. DUKES' MEMORANDUM IN OPPOSITIONTO PETITIONERS' MOTION TO DISMISS**
Petitioners,	)	
vs.	)	
The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, and Monica Zeilinski,	)	
Respondent.	)	

For purposes of this Reply, Petitioners need not review the background of this case, which has been briefed by both parties in prior Memoranda. Here, Petitioners focus on Defendants Winkopp and Dukes' application of the law relative to claims of abuse of process to a Motion to Dismiss under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

Defendants Winkopp and Dukes' Memorandum accurately states the standard for the court in discussing the elements of a claim for abuse of process as set forth by *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 567 S.E.2d 251, 253 (S.C. App. 2002). However, while that case is directly applicable to the facts of the case currently before the Court, that decision supports a ruling in favor of Petitioner's Motion to Dismiss Defendants Winkopp and Dukes' claim for abuse of process, as Respondent has failed to sufficiently plead the elements necessary to support that claim.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(6), *SCRCP*, a party may make a Motion to Dismiss a claim for "failure to state facts sufficient to constitute a cause of action." *Shealy v. Doe*, S.C. Ct. App.

Opinion No. 4128 (2006). When faced with a Motion to Dismiss under Rule 12(b)(6), *SCRCP*, the Court must dispose of it based solely upon the allegations pled in the claim and with the allegations of the claim being viewed as admitted. That being said, the "the circuit court may dismiss a claim when the [Petitioners] demonstrate the [Counterclaimant's] 'failure to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Hambrick v. GMAC Mortgage Corporation*, 370 S.C. 118, 634 S.E.2d 5 (Ct. App. 2006).

ARGUMENT

Defendants Winkopp and Dukes Fail To State a Claim for Abuse of Process

"The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Smith v. Pepsi Bottling Group*, 2007 WL 2572241, at 11 (D.S.C. Aug. 31, 2007). "The essential elements of abuse of process are: first, an ulterior purpose and second, a willful act in the use of process *not proper in the regular conduct of the proceeding*." *Rycroft v. Gaddy*, 314 S.E.2d 39, 43 (S.C. App. 1984) (emphasis added); *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 567 S.E.2d 251, 253 (S.C. App. 2002) ("An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process."

Defendants Winkopp and Dukes' abuse of process claim against Petitioners is that Petitioners' appeal of the City of Clemson Board of Architectural Review ("BAR") decision was brought not for the court to review that decision but rather to achieve an ulterior motive of "delaying or killing" the Project. Petitioner's appeal was brought under SC Code § 6-29-900, which allows any person who may have a substantial interest in any decision of the Board of Architectural Review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the Clerk

of Court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. As a matter of law, no ulterior purpose can be shown where, as here, an action is taken for an "entirely legitimate purpose." *See Rycroft*, 314 S.E.2d at 44 (dismissing claim).

Defendants Winkopp and Dukes correctly state that the second abuse of process element, a willful act, has three parts: "1) a 'willful' or overt act 2) 'in the use of the process" 3) that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Food Lion*, 567 S.E.2d at 254.

Defendants inaccurately state, however, that the Court's decision in *LaMotte v. Punchline of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988), was based on deficient wording. This misconstrues the Court's holding, which was based on the Appellant's failure to demonstrate the impropriety of the Petitioner's conduct in that case. The court's decision in *Food Lion* relied on the same reasoning, holding that the complaint failed on the third component of the willfulness element by failing to allege "in what manner the willful acts enumerated are improper.... In other words, although properly alleging an act involving the process of the court, Food Lion failed to assert how the process was perverted or abused." *Food Lion* at 255 (dismissing complaint). The same is true here of Defendants Winkopp and Dukes' counterclaim. As in *Food Lion*, Defendants Winkopp and Dukes allege that Petitioner "undertook the acts 'for collateral purposes"' without "sufficiently alleg[ing] the improper nature of the acts .... An allegation of an ulterior purpose or 'bad motive,' standing alone, is insufficient to assert a claim for abuse of process." *Id.* While ulterior purpose may be inferred from a willful act, the converse is not true: "it is not possible to infer [improper] acts from the existence of an improper motive alone." *Id.* (quoting Prosser & Keeton on Torts, § 121, p. 899 (5th ed. 1984)).

Simply put, no abuse of process liability exists "where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Id.* (quoting *Hainer v. Am. Med. Int'l, Inc.*, 492 S.E.2d 103, 107 (1997)); *accord*, *Rycroft*, S.E.2d at 44. "[E]ven a pure spite motive is not sufficient *where process is used only to accomplish the result for which it was created.*"[2] *Id.* (quoting Keeton, *supra*, § 121, p. 897) (emphasis added).

To hold otherwise would vitiate the requirement of having to allege both elements of the tort-an "ulterior purpose" and an improper "willful act"-because a bald allegation that various acts were undertaken for collateral purposes would, in effect, be simply alleging an ulterior purpose. *Food Lion* at 75.

Relying upon the Restatement of Torts, the court in *Food Lion* explained the distinction between the two requirements, focusing on the significance of the presence of an incidental motive as opposed to a primary motive underlying a claim for abuse of process. "One who uses a legal process, whether criminal or civil, against another *primarily* to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." *Id* at 256 (citing Restatement (Second) of Torts § 682 (1977)) (emphasis added). As the Court observed in the Restatement comment, "[t]he significance of ['primarily'] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Restatement (Second) of Torts § 682 cmt. b. at 475 (1977).

Despite the fact that there has been no evidence presented indicating any true ulterior motive on the part of Petitioners, under *Food Lion* and the Restatement of Torts, liability will still not exist even if Petitioner was merely seeking to gain a collateral advantage by using the legal process. Rather, liability will only be found because the collateral objective was its sole or

paramount reason for acting. *See id.*; Harper, *supra,* § 4.9 at 4:84-85 ("The process must be used 'primarily' to accomplish the ulterior end."); *Scozari v. Barone,* 546 So.2d 750, 751 (Fla.Dist.Ct.App.1989) ("For the cause of action to exist, there must be a use of the process for an *immediate* purpose other than that for which it was designed. There is no abuse of process, however, when the process is used to accomplish the result for which it was created, regardless of an incidental or *concurrent* motive of spite or ulterior purpose.") (emphasis added). It therefore follows that when a claim for abuse of process is predicated on an alleged act "aimed at an object not legitimate in the use of the process," the ulterior purpose allegation must be accompanied by an allegation that the process was misused by the undertaking of the alleged act, not for the purpose for which it was intended but for the primary purpose of achieving a collateral aim. *Food Lion*at75, 255-56.

Defendants Winkopp and Dukes' claim for abuse of process fails because Petitioner properly used the court process for the purpose for which it was created. They assert only that a legitimate, commonplace act of litigation, "appealing the decision of the City of Clemson's Board of Architectural Review," was undertaken "for collateral purposes." As discussed above, "*a party who simply pursues a lawsuit with a collateral purpose in mind has done nothing improper.*" *Food Lion* at 256 (emphasis added). Defendants Winkopp and Dukes have failed to allege "any facts sufficient to show" the acts undertaken in these proceedings were not aimed at their "purported, and therefore proper, purpose of remedying alleged wrongs." *Id.* Accordingly, Defendants Winkopp and Dukes' claim for abuse of process must be dismissed.

CONCLUSION

Petitioners acted as outlined by the S.C. Code and raised a legitimate concern with this Court. While it is understandable Defendants do not agree with Petitioners and their positions, that does not rise to the level of Abuse of Process. Based on the allegations made by Petitioners

and the submitted documentation attached to the Petition, it is clear that if the Court does not remand this issue back to the BAR for a re-hearing, Petitioners should be afforded the ability to engage in discovery to determine answers and evidence about notices, design plans, and the like. Additionally, since Petitioners objective is review of the BAR's decision as outlined by the S.C. Code, Defendants cannot sustain a cause of action of Abuse of Process and it should be dismissed.

Respectfully submitted,

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July 2, 2014
Charleston, South Carolina

HSTATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner, Petitioners, v. The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski, Defendants.	)	**MOTION OF DEFENDANT TOM WINKOPP TO RECONSIDER, ALTER AND AMEND** C.A. No.: 2014-CP-39-398

TO: THE HONORABLE LETITIA H. VERDIN, ROBERT T. LYLES, JR. AND MARSHALL T. AUSTIN, ATTORNEYS FOR PETITIONERS; AND, JAMES W. LOGAN, JR., ATTORNEY FOR DEFENDANTS THE CITY OF CLEMSON AND THE BOARD OF ARCHITECTURAL REVIEW

YOU WILL PLEASE TAKE NOTICE that the Defendant Tom Winkopp ("Winkopp") will move before the Honorable Letitia H. Verdin in the Pickens County Courthouse, 214 E. Main Street, Pickens, South Carolina, on the tenth (10th) day after service hereof or as soon thereafter as counsel may be heard, for an Order pursuant to Rules 52 and 59 of the *South Carolina Rules of Civil Procedure* (*SCRCP*), along with the other applicable *Rules of Civil Procedure* and the statutory and inherent authority of the Court to reconsider, alter and amend its decisions to reconsider, alter and amend its Order in this matter dated July 7, 2014 and entered on July 10, 2014 granting the Petitioners' Motion to dismiss the Counterclaim of Winkopp in this matter pursuant to *SCRCP* Rule 12(b)(6). That Order is simply referred to as the "Order" in this Motion. This Motion moves the Court to reconsider, alter and amend its Order and to deny the Petitioners' *SCRCP* Rule 12(b)(6) Motion to dismiss the Counterclaim of Winkopp.

Winkopp, in conjunction therewith, simultaneously moves before this Court for it to reconsider, alter and amend its foregoing Order and grant his and the Defendant Dukes' Motion to Bifurcate this matter as set forth in their Motion to Bifurcate dated May 22, 2014, and filed June 2, 2014. The granting of Winkopp's Motion To Reconsider, Alter and Amend the Order to allow the Counterclaim to proceed will necessarily revive the Motion To Bifurcate.

The Defendants Winkopp received written notice of the entry of the Order on July 14, 2014.

This Motion to Reconsider, Alter and Amend its aforesaid Order granting the Petitioners' Rule 12(b)(6) Motion to Dismiss Winkopp's Counterclaim is made on the grounds that the Court has erroneously applied the law on abuse of process to this matter and erroneously dismissed the Counterclaim pursuant to *SCRCP* Rule 12(b)(6) and it has failed to properly apply *SCRCP* Rule 12(b)(6).

The pleadings in this case show that Winkopp was developing his Project in the City of Clemson, and in order to accomplish the Project he secured the necessary re-zoning from the City of Clemson. He then further secured the approval needed of the Clemson Board of Architectural Review (BAR). Throughout the entire process he was opposed by the Petitioners. After the BAR had concluded that the Project met the checklist requirements of the architectural standards, it approved the construction of the Project. It is that approval from which the Petitioners presently take their appeal.

Winkopp's Counterclaim alleges:

1. The *sole purpose* of the appeal by the Petitioners is *not* to seek an appellate review of the decision of BAR.
2. The Petitioners had *no interest* in the merits of the appeal themselves.

3. The *sole purpose* was, instead, to delay his Project for the purposes of killing it.

4. This act of appealing for the sole purpose of delaying and killing the Project was a willful act in the use of process not proper in the conduct of these proceedings

5. This act was used to gain an objective (killing or delaying of the Project), not legitimate in the use of this process.

The foregoing allegations are set forth in Paragraph 27 of the Winkopp Answer and Counterclaim.

6. This was done willfully and intentionally. [¶28, Winkopp Answer and Counterclaim].

First, the Petitioners' Motion To Dismiss the Winkopp Counterclaim was based on *SCRCP* Rule 12(b)(6). The analysis is not one of weighing the evidence. It is simply an analysis of the allegations of the Counterclaim. "In deciding the motion, the court must view the allegations in the light most favorable to the plaintiff, 'with every doubt resolved in his favor.' [citation omitted]. The trial court, therefore, must refuse a 12(b)(6) motion if the 'facts alleged and reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Food Lion, Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 252-253 (Ct. App. 2002).

Therefore, the foregoing allegations of Winkopp must be viewed in a light most favorable to Winkopp, resolving every doubt in his favor and making reasonable inferences therefrom. The Court has erred in failing to (1) view the allegations in the light most favorable to Winkopp, (2) resolve every doubt in his favor, and (3) find that the "facts alleged and reasonably deducible therefrom would entitle" Winkopp to relief.

The Court erred in its Order when it stated: "Nowhere in the Respondents' complaint [sic] do they allege facts that would give rise to the alleged misuse of the legal process by Petitioners." (Order dated July 7, 2014, page 3). That is error. That is specifically and factually alleged.

The Court also erred in finding: "The facts alleged are not sufficient to support an essential element of this cause of action – that Petitioners are appealing the Board's decision solely to delay, sabotage, or 'kill' the project, a purpose for which the appellate process is not intended." (Order, page 3). The foregoing allegations patently make those assertions.

Similarly, the Court erred in its Order in finding: "Respondents' complaint [sic] must set forth specific facts showing the Petitioners are using the appellate process in this case primarily for a purpose for which the process is not intended. The allegations of the complaint [sic] fall short of the standard." (Order, page 3). The error is that the allegations of the Winkopp Counterclaim are sufficient to specifically plead facts necessary to support the elements of the cause of action for abuse of process and do not fall short of the standard.

The Court also erred in finding that the "only fact Respondents allege" is that "Respondent Winkopp is 'informed and believes' Petitioners are aware the appeal is 'frivolous and without merit' and are appealing the decision of the Board only in an attempt to 'kill or delay' the development project." (Order, page 3). That is not the only fact alleged by Winkopp.

The Court in its Order further erred in finding that the Winkopp Counterclaim did not allege facts specific to show an ulterior purpose on the part of the Petitioners or that they took willful acts to abuse the legal process, the error being that the allegations of the Winkopp Counterclaim did, in fact, allege such facts.

The Court also erred in failing to find and conclude that Winkopp alleged facts asserting that the Petitioners "performed 'a willful act in the use of the process that is not proper in the

regular conduct of the proceeding." (Order, page 2). That allegation is made specifically in Paragraph 27 of the Counterclaim.

The Court also errs when it appears to conclude that the Petitioners "[have] done nothing more than carry out the process to its authorized conclusion, even though with bad intentions" (Order, page 3) or "[had] an incidental or concurrent motive of spite or merely seeks to gain a collateral advantage from the process," (Order, page 4) or that there was only an ulterior motive only without more (Order, page 4).

Winkopp incorporates by reference his Reply Memorandum In Opposition To Motion To Dismiss dated June 24, 2014 without reiterating all of its contents, but he has sufficiently pled the facts to support the abuse of process cause of action. The following is the statement of law from the case of *Hainer v. American Medical Intern., Inc.*, 328 S.C. 128, 492 S.E.2d 103 (1997) upon which the Order partially relies, with the Winkopp allegations interposed in bold and in brackets for purposes of edification:

> The essential elements of abuse of process are an ulterior purpose [**[T]his appeal is done for no purpose other than attempting to sabotage the Project and to prevent him from developing this Project in accordance with his plans. Winkopp further specifically alleges that the ulterior motive of this lawsuit or Petition is not for a legitimate review and appeal of the decision of the BAR, but is instead done with the ulterior motive of delay or killing the project**] and a willful act in the use of the process not proper in the conduct of the proceeding. [**Further, Winkopp alleges that this constitutes a willful act in the use of the process not proper in the conduct of these proceed*ings* and it is used to gain an**

objective (killing or delaying of the Project) not legitimate in the use of this process.] [citation omitted]. Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required. **[[T]his constitutes a willful act in the use of process not proper in the conduct of these proceedings and it is used to gain an objective (killing or delaying of the Project) not legitimate in the use of this process.]** There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. **[[T]his appeal is done for no purpose other than attempting to sabotage the Project and to prevent him from developing this Project in accordance with his plans. Winkopp further specifically alleges that the ulterior motive of this lawsuit or Petition is not for a legitimate review and appeal of the decision of the BAR, but is instead done with the ulterior motive of delay or killing the project]**[1][citations omitted] The improper purpose usually takes the form of coercion to obtain a collateral advantage **[[T]his appeal is done for no purpose other than attempting to sabotage the Project]**, not properly involved in the proceeding itself. *Id.* Abuse of process requires both an ulterior purpose and a willful act not proper in the regular course of the proceeding.

Further, the law does not require a separate and overt act accompanying the ulterior motive, and the Winkopp Counterclaim did not have to allege such facts. The law does not require a negotiation, express extortion or a pronouncement of stated malicious intent or purpose. It does not require some separate and overt act to corroborate the ulterior motive and the

[1] See footnote 3 below and the text supported by that footnote.

malicious purpose of using the process. The act of using the process primarily to gain advantage or benefit on a collateral matter, such as killing a development project, is a sufficient "definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process." *See Hainer v. American Medical Intern., Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997).

The law instead requires what the South Carolina Supreme Court said in *Huggins v. Winn–Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967):

> The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club.
>
> *Id.* at 209, 153 S.E.2d at 694.

This Court in its Order dated July 7, 2014, that dismisses Winkopp's Counterclaim for abuse of process, misunderstands and misapplies the law with regard to abuse of process in a "hyper-technical manner...that vitiate[s] the purpose for which the cause of action exists." *Hainer v. American Medical Intern., Inc.*, 328 S.C. 128, 143, 492 S.E.2d 103, 111 (1997) (Toal, J. dissenting). Such a "hyper-technical" application of *SCRCP* Rule 12(b)(6) harkens back to the old days of Code Pleading when pleadings were works of engineering art and were more scrutinized for technical errors than fair notice pleading. However, even applying the technical reading, the allegations of the Winkopp Counterclaim are carefully crafted to allege each and every element of the cause of action for abuse of process.

Justice (now Chief Justice) Toal correctly set forth the application of the law on abuse of process in her dissent in *Hainer*. There she stated:

> If we approach the tort of abuse of process only in a hyper-technical manner, then we vitiate the purpose for which the cause of action exists. As *Huggins* explained, abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect. *Huggins*, 249 S.C. at 210, 153 S.E.2d at 695. That case further stated that it is the "abuse, the perversion, of the process, not its illegality, [that] is the foundation of the cause of action." *Huggins*, 249 S.C. at 214, 153 S.E.2d at 697.
>
> A reading of *Huggins* reveals that this Court employed a flexible approach to analyzing whether process had been abused.
>
> *Id.*

The Restatement (Second) of Torts, §682 states it clearly and succinctly: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

Consistent with this statement/restatement of the law, the "willful act in the use of the process that is not proper in the regular conduct of the proceeding" (Order, page 2) does not require a separate threat or overt act; if the process is used primarily to gain advantage on a collateral matter (to kill or delay the Project), a cause of action for abuse of process will lie. The act of so using/abusing the process to gain an advantage on a collateral matter is a sufficient "willful act in the use of the process not proper in the conduct of the proceeding" to support a cause of action for abuse of process.

The Comment to the Restatement (Second) of Torts, §682 states: "The gravamen of the misconduct for which the liability stated in this Section is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, *for any purpose* other than that which it

was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them...."

In futher Comment to the Restatement (Second) of Torts addresses the word "primarily"[2] to state: "The significance of this word is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an *incidental* motive of spite or an ulterior purpose of benefit to the defendant.[3] Thus the entirely justified prosecution of another on a criminal charge, does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm; nor does the instigation of justified bankruptcy proceedings become abuse of process merely because the instigator hopes to derive benefit from the closing down of the business of a competitor. *For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended.* The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it."[emphasis added twice].

Winkopp has alleged that the appeal was done by the Petitioners for the "sole purpose" of killing or delaying the project and that the Petitioners had NO interest in the merits of the appeal. THAT is exactly what the Restatement means when it says: "For abuse of process to

---

[2] The Restatement Second of Torts, §682 uses the word "primarily" as follows: "One who uses a legal process, whether criminal or civil, against another ***primarily*** to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process."

[3] South Carolina has equivalently stated the same thing by holding: "There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Hainer v. American Medical Intern., Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997).

occur there must be use of the process for an immediate purpose other than that for which it was designed and intended."

The Court errs in its Order in concluding: "One is not liable for abuse of process 'where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.' " (Order, page 3). When the Court focuses simply on whether the process is authorized and that it has been carried to its authorized conclusion, it completely ignores the law that abuse of process in South Carolina can lie when it is "aimed at an object not legitimate in the use of the process," such as using the appeals process from the BAR to kill or delay Winkopp's Project. When the South Carolina cases talk about "even though with bad intentions" it is referring to the "incidental motive of spite or an ulterior purpose of benefit to the defendant" set forth in the Comment to the Restatement.

Therefore, Winkopp has pled facts sufficiently to establish a cause of action for abuse of process against the Petitioners. He moves for this Court to reconsider, alter and amend its Order dated July 7, 2014 and deny the Petitioners' Motion to dismiss his Counterclaim, and he further moves that the Court grant his Motion To Bifurcate the proceedings to allow the appeal of the BAR to be decided immediately with the litigation of the abuse of process to be proceed separately.

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Attorney for Defendants Tom Winkopp and

William E. Dukes

Dated: July 24, 2014
Greenville, South Carolina

CERTIFICATION

This is to certify that this Motion pertains to a Motion To Dismiss and consultation with opposing counsel is not necessary, and, in any event, such consultation would serve no useful purpose.

THOMAS W. TRAXLER
ATTORNEY FOR DEFENDANTS WINKOPP AND DUKES

2014 JUL 24 PM 2 18
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2014CP3900398

Charles Alan Grubb *vs.* Clemson City of

CHECK ONE:

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order; ☐ Statement of Judgment by the Court:

Dated at Pickens, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the , and a copy mailed first class this July 9, 2014 , to attorneys of record or to parties (when appearing pro se) as follows:

Robert T. Lyles Jr. PO Box 773 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

Thomas W. Traxler PO Box 10828 Greenville, SC 29603-0828

ATTORNEY(S) FOR THE DEFENDANT(S)

Cheryl Watson - Deputy
Harold P Welborn, Jr. - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 06/2008

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF PICKENS	)	CASE NO.: 2014-CP-39-0398
	)	
Charles Alan Grubb, et al.,	)	
	)	
Petitioners,	)	ORDER
	)	
v.	)	
	)	
The City of Clemson, et al.,	)	
	)	
Respondents,.	)	

2014 JUL 10 P 3:56
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

THIS MATTER CAME BEFORE me on June 20, 2014, on Petitioners' Motion to Dismiss Respondents' Counterclaim, pursuant to Rule 12(b)(6), SCRCP, and Respondents' Motions for Bifurcation and for a Protective Order. For the reasons stated below, Petitioners' Motion to Dismiss is GRANTED and Respondents' Motion for a Protective Order is GRANTED.

Factual Background

Respondent Tom Winkopp, a real estate developer, proposed plans and specifications for a multi-family, mixed-use development in the city of Clemson to the city's Board of Architectural Review. The Board approved the proposal, and the Petitioners appeal. Winkopp subsequently asserted a counterclaim against Petitioners for abuse of process. Petitioners filed a Motion to Dismiss the counterclaim, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Respondent Winkopp filed a Motion to Bifurcate the counterclaim and the appeal. Respondents Winkopp and William E. Dukes filed a Motion for a Protective Order to limit any further discovery to the issues raised in the counterclaim.

A. Petitioners' Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCP

Standard of Review

In ruling on a 12(b)(6) motion to dismiss for failure to state facts sufficient to constitute a cause of action, a trial court must base its decision "solely upon the allegations set forth on the face of the complaint." *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251, 252-53 (Ct. App. 2002) (citing *State Bd. of Med. Exam'rs v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990)). The court must view the allegations in the light most favorable to the non-moving party and must resolve every doubt in his favor. *Id.* Where the defendant demonstrates the plaintiff has failed to allege facts sufficient to constitute a cause of action in the pleadings, the trial court may dismiss the claim. *See Hambrick v. GMAC Mortgage Corp.*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (Ct.App. 2006).

Analysis

A claim of abuse of process "is intended to compensate a party for harm resulting from another party's misuse of the legal system." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014) (citing *Food Lion, Inc.*, 351 S.C. 65, at 74 n. 5, 567 S.E.2d at 255 n. 5. To prevail, the claimant must show the accused (1) acted with an ulterior motive and (2) performed "a willful act in the use of the process that is not proper in the regular conduct of the proceeding." *Id.*

If one undertakes to use the judicial process to further an objective for which the process was not intended, the ulterior motive element is met. *See First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct.App. 1994) ("An ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process.") To meet the second

element, the complaint must allege "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process." *Hanier v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). Our supreme court has stated the second element includes three components: (1) a "willful" or overt act which is performed (2) through the use of the process and which is (3) "improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective." *Food Lion, Inc.*, 351 S.C. at 71, 567 S.E.2d at 254.

Nowhere in Respondents' complaint do they allege sufficient facts that would give rise to the alleged misuse of the legal process by Petitioners. "A complaint which neglects to allege a perversion or misuse of the process by omitting facts necessary to show an *improper* willful act in the use of the process has not stated a cause of action for abuse of process and fails as a matter of law." *Id.* at 77, 567 S.E. 2d at 257 (emphasis in original). The facts alleged are not sufficient to support an essential element of this cause of action— that Petitioners are appealing the Board's decision solely to delay, sabotage, or "kill" the project, a purpose for which the appellate process is not intended. That there is a delay in the resolution of a dispute is a natural consequence of any appeal. Respondents' complaint must set forth specific facts showing Petitioners are using the appellate process in this case primarily for a purpose for which the process was not intended. The allegations in the complaint fall short of this standard.

The only fact Respondents allege, with questionable specificity, is that Respondent Winkopp is "informed and believes" Petitioners are aware the appeal is "frivolous and without merit" and are only appealing the decision of the Board in an attempt to "kill or delay" the development project. One is not liable for abuse of process "where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Hanier*, 328 S.C. at 136, 492 S.E. 2d at 107; *see also Pallares*, 407 S.C. at 371, 756

S.E.2d at 133 ("[N]o action lies where a person has an incidental or concurrent motive of spite or merely seeks to gain a collateral advantage from the process."); *Food Lion, Inc.*, 351 S.C. at 74, 567 S.E.2d at 255 ("An allegation of an ulterior purpose or 'bad motive', standing alone, is insufficient to assert a claim for abuse of process.") Respondents must allege facts sufficient to not only show Petitioners filed this appeal to further an ulterior purpose, but also that Petitioners took willful acts to abuse the legal process. The vague allegations in Respondents' complaint are insufficient to support the abuse of process claim.

Conclusion

Viewing the complaint in the light most favorable to the Respondents, this Court finds the bare allegations offered to support the claim are insufficient to sustain an abuse of process cause of action. Petitioners' Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, is granted and Respondents' counterclaim is dismissed without prejudice.

B. Motion for Protective Order

The parties agree South Carolina Code subsection §6-29-900(A) (Supp. 2013) governs appeals from the Board of Architectural Review and provides for an expedited appeal process. The circuit court must hear the appeal "on the certified record of the board proceedings" and is prohibited from taking additional evidence. S.C. Code Ann. §6-29-930(A)(Supp. 2013). The only way to expand the evidence presented to the circuit court is for the court to remand the matter to the Board for rehearing. *Id.* Petitioners seek leave to take discovery they deem "necessary to ensure that the record of the [Board of Architectural Review] is complete and accurate" on appeal. The record of the Board of Architectural Review has been certified to this Court, and no party has challenged the record. No further discovery is required or allowed in the

appeal of this matter, therefore Respondent's Motion for Protective Order from further discovery is hereby granted.

C. Motion to Bifurcate

Respondents filed a Motion to Bifurcate the appeal and counterclaim. This Court declines to address this motion because the Motion to Dismiss is dispositive of the issue.

IT IS SO ORDERED.

7/7 2014

Letitia H. Verdin
Circuit Court Judge

STATE OF SOUTH CAROLINA	) COURT OF COMMON PLEAS
COUNTY OF PICKENS	) Case No(s).:2014CP3900398
Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner,	)
Plaintiff,	)
-VS-	) TRANSCRIPT OF RECORD
The City of Clemson and the Board of Architectural Review, Tom Winkopp, William E. Dukes, Monica Zeilinski,	)
Defendant.	)

June 20, 2014
Pickens, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

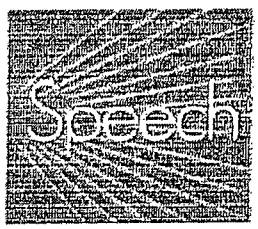
A P P E A R A N C E S:

ROBERT T. LYLES, JR., Esquire
Attorney for the Plaintiffs

THOMAS W. TRAXLER, Esquire
Attorney for Defendant Tom Winkopp and
Defendant William E. Dukes

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are taken and produced via



I N D E X

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EXHIBITS PAGE

NO.	DESCRIPTION	ID	EV

PLAINTIFF EXHIBITS

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 20th day of June, 2014 at approximately 10:49 a.m.)

THE COURT: Grubb versus City of Clemson.

(Pause.)

All right. Looks like we've got two motions here. There's a motion for a protective order and a motion to dismiss the counterclaims of Respondent, uh, Tom Winkopp. Uh, do either of the attorneys have any preference as to which motion be heard first?

MR. TRAXLER: There's also a third motion, a motion to bifurcate.

THE COURT: All right.

MR. TRAXLER: I have the motion to bifurcate and the motion for protective order. Mr. Lyles has the motion to dismiss.

THE COURT: All right. Let's start, Mr. Lyles, with you. How about that?

MR. LYLES: Okay.

THE COURT: All right.

MR. LYLES: May it please the Court?

THE COURT: Yes, sir.

MR. LYLES: Uh, Your Honor, I emailed a memorandum to you. I don't know if you have a

printed copy of it.

THE COURT: Do you have a copy with you?

MR. LYLES: I do.

THE COURT: Okay. Thank you.

MR. LYLES: I do have a copy. One for you and one for Mr. Traxler.

Oh, you got it? Good deal.

Your Honor, may I approach?

THE COURT: Certainly.

MR. LYLES: May I ask for a stapler?

THE CLERK: There you go.

MR. LYLES: I printed copies this morning, but I didn't have a stapler. Thank you very much. Thank you.

Your Honor, this is a -- this is a petition that was filed as an appeal from a decision of the BAR in Clemson which approved a project that is being developed or is seeking to be developed by Mr. Winkopp. I represent a number of the citizens in Clemson who believe they have standing to pursue this appeal. The appeal was filed pursuant to statutory section 6-29-300 which is the South Carolina statute which authorizes an appeal from -- and I'll quote from the statute -- any decision of the

board to the circuit court. The grounds for the appeal are set forth in the petition. We're not here today to address the merits of that.

In response to the appeal -- well, let me back up. We have named the City of Clemson and we've named the Clemson BAR. We also named, uh, Mr. Dukes and Mr. Winkopp believing them to be necessary parties to the appeal. If ultimately it is determined that they are not necessary parties, then we're happy to dismiss them. But I didn't want to risk the timeliness of the appeal by failing to bring into the claim a necessary party. That's why we brought Mr. Winkopp and Mr. Dukes into the case.

Mr. Winkopp responded to the appeal petition and asserted a counterclaim for abuse of process. I have filed a motion pursuant to Rule 12(b)(6) to dismiss his claim for abuse of process.

THE COURT: All right.

MR. LYLES: In sum and substance, my clients have done nothing other than exercise their legislatively authorized right of appeal of the BAR decision. There has been no

allegation and there could be no proof that my clients have, in any way, misused or perverted the appeal process. We have asked for nothing other than what the statute gives us the right to ask for in the appeal.

Mr. Winkopp has filed this abuse of process claim. And underpinning the allegations of the claim are that my clients have abused the process by seeking to delay this project and to kill -- that's his word -- this project through this appeal. The problem with that and the reason why those allegations, even taken as true, can't support an abuse of process claim is that's exactly what the appeal process is intended to do.

We are here seeking to have the BAR's decision reversed. Ultimately, we'd like for the BAR not to approve this project. But that is a completely valid, proper and appropriate use of the appeal process.

As I indicated in my memorandum, you know, this is an important issue for the court to decide because it goes to the very heart of the right of the public to appeal a decision of the BAR. If Mr. Winkopp is right and any appeal of

a BAR decision can give rights to an abuse of process claim, it's going to deprive the public of the right to appeal BAR decisions. This is a very important issue, I think, fundamentally. Uh, and that's why I filed the motion to dismiss like I did. And I appreciate the Court's consideration. Thank you.

THE COURT: Mr. Traxler, how can availing themselves of the statutory process to appeal the BAR decision give rise to an abuse of process?

MR. TRAXLER: Well, first of all, if you recall, abuse of process, unlike malicious prosecution, simply requires the process being used for some ulterior motive other than the process for which the process was designed. It might be -- under abuse of process, there could be a reasonable cause, reasonable belief in the process but if it is done for an ulterior purpose, that's the ultimate test. If it's done for an ulterior purpose, regardless of whether there is a reasonable cause or not, it was abuse of process.

Mr. Lyles handed up the -- the question before you is -- and I'll be glad to address

the merits. I'll be glad to at the time of merits present the court evidence that we have and that we will develop where one of the keen ring leaders of the petitioners has been quoted as saying my client's got to understand that the citizens of Clemson are not going to blow over just because the project meets the current Board decision. That's what the purpose of this is.

In the 12(b)(6) motion before you, the question is, looking at the pleadings of our counterclaim, can it stand. Mr. Lyles cites in his memorandum that he just handed up to you, and I'm going to read you -- I can refer you to his memorandum to page 2 of 5. This is the memorandum of his motion to dismiss down at the very bottom. I can read you it. To properly assert an abuse of process cause of action, the defendants must establish an ulterior purpose and a willful act that use of the process is not proper in the conduct of the proceedings. An ulterior purpose exists if the process is used to gain an objective not legitimate in the abuse of the process. Then he goes on to cite some of the appellants.

I'm going to read to you paragraph 29 from our counterclaim. Therefore, this appeal is without merit and is frivolous. Winkopp is informed and believes that the petitioners are aware that their petition is frivolous and without merit. He is further informed and believes that this appeal is done for no purpose other than attempting to sabotage the project and prevent him from developing his project in accordance with his plans. Winkopp further alleged -- further specifically alleges that the ulterior motive for this lawsuit or petition is not for a legitimate review and appeal of the decision of the Board of Architectural Review but is instead done with the ulterior motive of denying, delaying or killing the project.

He goes on to allege that this is a willful act, uh, abuse of a process not proper in the conduct of these proceedings and is used to gain an objection, killing or delaying the project not legitimate in the abuse of this process. The allegations met the law as he has cited it to you.

This is legitimate to be before the Court.

The citizens have a right under the city ordinance -- under the statute to appeal. If the appeal is done for an ulterior purpose, then that is abuse of process. That is what has been pled.

If you rule that the -- you can not have an abuse of process in an appeal, what you would essentially be ruling is no matter what anybody's intention is, even if they don't believe in the appeal, if the intention is some purpose other than legitimate review, uh, -- that's not what abuse of process is.

THE COURT: Okay. Yes, sir.

MR. TRAXLER: Excuse me. That's not the legitimate use of an appeal.

THE COURT: Okay.

MR. LYLES: Just very briefly, Your Honor.

THE COURT: Sure.

MR. LYLES: I cited, uh, for you the Food Lion versus United Food and Commercial Workers case. The Food Lion case says repeatedly in what is a very lengthy opinion that it is fundamentally important for him to allege some misuse, some perversion of the process. The case says explicitly over and over again if you

use the process for its intended purpose, even if you do it with malice and bad intent, it's not abuse of process. The misuse of the process is what is fundamentally important. His complaint does not satisfy that and it can't because my clients have done nothing but used the appeal process they've been given. They've done nothing but request the right that's been given to them.

THE COURT: Yes, sir. Uh, I have not have an opportunity, of course to -- I'll just be candid with you -- to read your memo, but I want to do that before I rule. I'm going to take the matter under advisement -- that particular matter under advisement.

Mr. Traxler, you've got two motions. Is that right?

MR. TRAXLER: Yes, ma'am. As Mr. Lyles said, this started out as a petition by his clients to review the decision of the Board of Architectural Review. That initially came before this court as kind of in a separate box of its own. Under the state statute that's recited in the pleadings and the like, this court's decision in reviewing the decision of

the Board of Architectural Review is that you have to accept the findings of the board as final and conclusive. The Court -- the statute specifically says the Court shall not take additional evidence. The statute also says that if the court finds that the certified record from the Board of Architectural Review is incomplete, then to send it back for a complete record.

Now, that petition comes down and, at this point, I'm not challenging with regard to Mr. Lyles' the standing or the right to my clients as parties to this. I represent the developer, Mr. Winkopp. I also represent the seller of the project, Dr. Dukes.

We filed a motion -- the counterclaim for Mr. Winkopp, we have just discussed. Now, the thought was possibly we'd filed abuse of process and, ultimately, later when the case is over with, malicious prosecution. The problem with this particular case is -- that situation is this counterclaim is probably a compulsory counterclaim. So if you don't plead it, you lose it. It's not something you can put aside and wait.

Certainly, the abuse of process and their intent to bring this lawsuit and all of that is going to be issues separate from this court simply looking at the record from the Board of Architectural Review and decide the checks in the check boxes and all the criteria were, in fact, met. So we filed a motion to bifurcate. That's one of the motions pending before you.

The statute says that the -- basically we're looking at 6-29-930. The state statute says that when the appeal Mr. Lyles filed, the court should right away pass on that appeal. And it does it by looking at the record and assuming the record is complete in issuing it's decision. It can not challenge the findings of it. It simply looks to see if it is incorrect as a matter of law. When we get to that decision, we will show you that the Board of Architectural Review and it's approval process is basically a check list type of thing.

We agreed to bifurcate so that appeal could be heard and be decided. Bifurcated in separate discovery, separate proceedings essentially with regards to the counterclaim for abuse of process. That's the basis for our

motion.

Our motion for protective order that's also before you is based on the fact that the petitioners have served with their petition or complaint in this case, uh, discovery. We take the position that if the court on appeal is to only look at the certified record and is not allowed to take new evidence, discovery is irrelevant, especially the type of discovery that we were given.

So we have filed a motion for protective order essentially quashing or ordering the petitioners to withdraw their discovery with respect to the appeal because it serves no purpose since the court can not take additional evidence. I recognized that with the counterclaim in there, that presents an issue of discovery with respect to the counterclaim.

The motion for protective order is to deny discovery with regard to the appeal and limit the discovery available to the issues raised in the counterclaim. Like I said, you have separate proceedings essentially for the appeal and the separate proceedings for the abuse of process counterclaim. Thank you.

THE COURT: Uh, Mr. Lyles, what would the purpose of any discovery with regards to the appeal since I am limited to use it? Please just limit it to that.

MR. LYLES: That's a great question. May I hand up the memorandum?

THE COURT: Yes.

MR. LYLES: Thank you. The statute which limits the review to the certified record of the BAR does not prohibit discovery. Recognizing, however, that your review, or the court's review would be limited to the certified record, I did discovery in this case because the same statute also says in the event the judge determines that the certified record is not sufficient or -- excuse me -- is insufficient for review, the matter may be remanded to the Board of Architectural Review for rehearing.

The discovery we have sent as part of this petition is an effort to determine whether or not the certified record of the BAR is, in fact, the complete record. You have been -- when I say "you", I'm referring obviously to the court, that the court, I believe, has been

provided with a record of the BAR. Mr. Logan represents the BAR. He sent us a disk including, I think, about 800 pages of documents. I will tell you that I have not had a chance to go through those. We have organized them, but I haven't reviewed them completely. It's important for us to be able to see what information was provided to the BAR by the parties that are seeking the approval process. What may have been provided to those parties by the BAR and to make certain that the certified record that's reviewed by the Court is, in fact, the complete record. That's the purpose of our discovery.

THE COURT: All right. And let me ask you also while we're speaking about the motion to bifurcate ---

MR. LYLES: Yes, ma'am.

THE COURT: --- do y'all have a position to that?

MR. LYLES: I did oppose it. I recognize that the appeal is a separate issue from the abuse of process claim. But I don't know that bifurcation is appropriate or required or really even what the effect of bifurcation

would be. As I look through the rules and look at Rule 42(b) and read the case law, it says very clearly that bifurcation can be ordered for the convenience and to avoid prejudice. I don't think anybody's going to be prejudiced by this. Separate trials would be conducive to expedition in economy. I don't know that that's the case here. It says that a trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice.

The difficulty I've got in applying the hard criteria for bifurcation to this case is Mr. Winkopp's counterclaim rests upon his allegation that our appeal is frivolous. If our appeal is not frivolous. If the same judge who decides that our appeal, whether they grant the appeal or they deny the appeal makes an assessment about whether or not its frivolous, that's going to go to the very heart of the counterclaim that he's filed if it survives our motion to dismiss.

THE COURT: Wouldn't that seem to suggest that the appeal should be heard first, well, in advance of any trial on this -- this -- this

abuse of process claim.

MR. LYLES: Yes, ma'am. And I do think that the appeal probably needs to be heard first because, clearly, the statutes anticipate an expedited appeal process, which I think is to everybody's benefit. What I want to make sure of is that the same trial judge who hears that appeal also hears this counterclaim if it survives this motion.

THE COURT: Is bifurcation the way to accomplish this including the two matters to be scheduled on different times? Is bifurcation necessary?

MR. TRAXLER: No, ma'am. I have to disagree with Mr. Lyles. While we have pled that it is frivolous, that is not necessarily for abuse of process. We plead that it's frivolous and without merit. It's evidence of their material motive. But you said it rest about being frivolous, that's incorrect. We rest upon their ulterior motive during the appeal. So therefore, Judge Verdin, no matter what the trial court finds or the circuit court finds with regard to the appeal, we still will have a trial over what was their ulterior

purpose in doing this.

THE COURT: So you just want to have the appeal done quicker than you think the other claim would be reached, right?

MR. TRAXLER: Yes, ma'am. Mr. Lyles is right. The statute anticipates an expedited hearing. At the very least, we've got to get these things decided and not keep these projects in limbo for several years. He's right about it's expedited. I don't care what the decision -- I'll rephrase that. Regardless of what the decision of the circuit court is --

THE COURT: Mr. Lyles says continue on. This is on the record.

MR. TRAXLER: Well, I maybe should quit talking. Regardless of the decision on the appeal, we are still going to have the issue of what was the real purpose of bringing this appeal. Was it not to shut down this project?

THE COURT: All right.

MR. TRAXLER: So if the court finds that for some reason the Board of Architectural Review was incorrect, still the purpose of it -- let me give you a scenario. I'm going to make up this fact. Suppose in the course of

discovery on abuse of process, we find that the petitioners got together and they said we're going to do whatever it takes to kill this project no matter what. While we're not going to win the appeal, we're going to file it anyway to tie them up. We're going to sink this project and we're going to use judicial process to do it. If that turns out to be the case or something akin to it, that is clearly abuse of process. That stands regardless of what the decision of the appeal is.

Like I said, we could have -- but for being possibly in a compulsory counterclaim position, we could have filed this as a separate action. We would have proceeded in essentially a bifurcated mode. We need to have the administrative appeal decided immediately.

THE COURT: All right. Well, along with your motion to dismiss, I'm going to take these two matters under advisement. I want to take a look at your memorandum that you've submitted.

MR. LYLES: Your Honor, may I have just very briefly address his remarks.

THE COURT: Certainly. Certainly.

MR. LYLES: Mr. Traxler's remarks were

enlightening to me. For him to suggest that a successful appeal of a BAR decision could give rise to abuse of process claim is absolutely outrageous. What he is inviting every litigant to do is to separately litigate the motives of the parties who file lawsuits. It is exactly what the Food Lion case says you can not do. So I would like to just end with that, if I may, and call your attention again to that Food Lion case and the necessity of the perversion of the process.

THE COURT: Certainly. And I have not looked at that case. I'm going to take a look at it. I'm going to be taking -- as I said, all these matters under advisement but issue a decision very shortly.

MR. LYLES: Thank you, ma'am.

MR. TRAXLER: Thank you.

(WHEREUPON, the proceedings conclude at approximately 11:12 a.m.)

CERTIFICATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Pickens, South Carolina, on this 1st day of September, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

Teresa B. Johnson
Official Court Reporter

CERTIFICATE OF COUNSEL

The Undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

January 27, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Case No. 2014-CP-39-398
Appellate Case No.: 2014-001771

Charles Alan Grubb, Roberta Elizabeth Vogt, Eleanor Hare, Derek Hodgin, Katherine Lee Schwennsen, Linda Gahan, and Virginia Carner.....Respondents

v.

The City of Clemson and The Board of Architectural Review, Tom Winkopp, William E. Dukes and Monica Zeilinski, Defendants,

Of whom Tom Winkopp is the Appellant.....Appellant

APPELLANT'S RULE 211(b) CERTIFICATE OF COUNSEL

The undersigned attorney for Appellant certifies that the Final Brief and Final Reply Brief complies with Rule 211(b), *South Carolina Appellate Court Rules.*

February 17, 2015

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant Tom Winkopp, Final Reply Brief of Appellant Tom Winkopp, and the Rule 211(b) Certificate of Counsel, on the attorneys of record for Respondents and all other attorneys of record as listed below, by depositing a copy of it in the United States Mail, postage prepaid, on February 17, 2015, addressed as indicated below:

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February 17, 2015

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