

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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Unpublished Opinion No. 2017-UP-096 (S.C. Ct. App. Filed March 8, 2017)

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Robert and Pamela Wilkes,

Appellants,

v.

Town of Pawleys Island,  
Georgetown County Planning  
Commission,

Respondents.

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PETITION FOR WRIT OF CERTIORARI

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JUN 23 2017

**SC Court of Appeals**

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## **CERTIFICATE OF COUNSEL**

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 24, 2017.

### **QUESTIONS PRESENTED**

1. DID THE COURT ERR BY FAILING TO REVIEW THE QUESTIONS PRESENTED TO IT ON APPEAL UNDER A DE NOVO STANDARD OF REVIEW?
2. DID THE COURT ERR BY FAILING TO HOLD THAT THE UNIFIED DEVELOPMENT CHECKLIST AND TUTORIAL APPLICATION CONSTITUTE ZONING REGULATIONS THAT HAVE THE FORCE OF LAW AND COMPRISE PART OF THE TOWN OF PAWLEYS ISLAND'S ZONING REGULATIONS REGARDING ALLOWABLE BEACH WALKWAY WIDTHS?
3. DID THE COURT ERR BY FAILING TO RECOGNIZE THAT THE ZONING BOARD OF APPEALS, GEORGETOWN COUNTY PLANNING COMMISSION, AND LOWER COURT ERRED BY NOT CONSIDERING AND APPLYING ALL APPLICABLE ORDIANCES AND ZONING REGULATIONS IN DENYING PETITIONERS' VARIANCE REQUEST AND NOVEMBER 17, 2009 WALKWAY PERMIT APPLICATION?
4. DID THE COURT ERR BY FAILING TO RECOGNIZE THAT PETITIONERS ARE ENTITLED TO A PERMIT FOR THEIR NOVEMBER 17, 2009 WALKWAY APPLICATION AND CONTINUED USE OF SAID WALKWAY AS IT COMPLIED WITH THEN-EXISTING ZONING AND LAND USE REGULATIONS?

## STATEMENT OF THE CASE

Robert and Pamela Wilkes own real property within the Town of Pawleys Island, South Carolina. Petitioners applied for a building permit on June 25, 2009 to construct a beach walkway from their home at 302 Atlantic Avenue to the beachfront on the island. The Town of Pawleys Island (hereinafter “Town”) issued a stop work order on the walkway in July of 2009 on the basis that the walkway was six (6) feet in width and in contravention of Section 2-10.1 of the Town of Pawleys Island Uniform Development Code, which allowed for beach walkways four (4) feet in width. Petitioners sought a variance with the Town Zoning Board of Appeals (hereinafter “Board”) to remove the stop order and submitted a revised permit application on November 17, 2009 to the Town and the Georgetown County Planning Department (hereinafter “Planning Department”) seeking approval for a walkway that was six-feet wide with two feet of such width comprised of benches. Under the Town’s Uniform Development Ordinance, Petitioners were also required to comply with Section 3-6.2(A), which mandates that a walkway applicant complete a Uniform Development Ordinance, or “UDO,” checklist application provided by the Town to be reviewed for compliance by a member of the Town’s Planning Commission before any permit would issue. (R. p. 81) By its terms, the checklist application provided that “[b]each Walkways (only one per dwelling) may be expanded with benches not to exceed 6 feet wide but landward of the OCRM baseline.” Id.

Petitioners sought review of the stop work order, and on January 5, 2010, the Board forwarded an order denying a variance with a letter from the Town’s counsel stating that the ruling was considered a denial of both the June 25 and November 17 permit applications. (R. pp. 92-95) The Planning Department issued a letter denying the November 2011 permit application on May 14, 2010. (R. p. 96)

The matter was appealed to the circuit court on December 21, 2009. On June 28, 2011, the Court remanded the case for mediation and rehearing before the Board. A rehearing before the Board was held on March 29, 2012 and a decision denying the variance request issued on May 3, 2012. Petitioners appealed the decision of the Board on June 20, 2012. A hearing on the appeal was held before the Court on November 6, 2014, and a Final Order affirming the Board was filed on December 18, 2014. Petitioners filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCR on January 7, 2015, which was heard on October 12, 2015. The lower court denied Petitioners' Motion by written Order filed on December 21, 2015. Petitioners submitted their Notice of Appeal on January 4, 2016.

The case was submitted to the Court of Appeals on January 1, 2017, which filed two-page unpublished decision without oral argument affirming the lower court on March 8, 2017. Petitioners filed a timely Petition for Rehearing on March 22, 2017, which was denied by the Court of Appeals on May 24, 2017. This Petition follows.

Petitioners challenge the interpretation of the Court of Appeals, lower court, and Board which throughout the almost eight-year history of this matter, fail to consider regulations as a whole passed by the Town regarding the use of their beach walkway. Petitioners believe they should be subject to all applicable regulations and ordinances, including Section 3-6.2(A) and its associated checklist and tutorial that applied to the construction of beach walkways at the time they sought their permit. The Town shares the same position, as they continue to publically refer to and enforce the terms of the UDO Checklist application, which is provided publically on their website and in its sanctioned publications to homeowners.

## ARGUMENTS

The Court of Appeals, without analysis, affirmed the lower court's decision that there was only one ordinance governing the width of Petitioners' beach walkway. Inadvertently, the Court has also provided the Town the ability to "pick and choose" which, if any, ordinances and regulations it seeks to enforce against various homeowners in an improper manner and restricted Petitioners' right to judicial review of the lower court's holdings in this case. This Court should grant Certiorari to address the numerous errors presented, which will have significant effect on current enforcement of beach walkway construction and use for a significant portion of the Town's residents.

**1. DID THE COURT ERR BY FAILING TO REVIEW THE QUESTIONS PRESENTED TO IT ON APPEAL UNDER A DE NOVO STANDARD OF REVIEW?**

From the outset, the Court fails to apply the proper standard of review applicable in the case before it. It has long been established that interpretation of a statute is a question of law that is subject to de novo review. Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). On appeal, Petitioners specifically challenge the interpretation of ordinances in this matter issued by the lower court and their relationship as part of a complete statutory scheme. South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006) (citation omitted). As such, the Court should have reviewed the subject appeal de novo instead of the more deferential standard applicable to agency interpretation. Failure to do so has improperly eliminated Petitioners' right to proper judicial review of the lower court's December 21, 2015 Order, which must be reversed by this Court.

2. **DID THE COURT ERR BY FAILING TO HOLD THAT THE UNIFIED DEVELOPMENT CHECKLIST AND TUTORIAL APPLICATION CONSTITUTE ZONING REGULATIONS THAT HAVE THE FORCE OF LAW AND COMPRISE PART OF THE TOWN OF PAWLEYS ISLAND'S ZONING REGULATIONS REGARDING ALLOWABLE BEACH WALKWAY WIDTHS?**

In its March 8, 2017 opinion, the Court fails to provide any analysis in affirming the lower court, which held in its December 21, 2015 Order that only Section 2-10.1 of the Unified Development Code applied to the construction of Petitioner's walkway. (R. p. 7) Petitioners specifically sought review as to whether the lower court's determination of whether Section 3-6.2(a)'s required UDO Checklist application were part of the Town's regulatory scheme.

The Unified Development Code dictates that to obtain a permit for a beach walkway, all applicants were required to complete application paperwork for a permit with the Town under Section 3-6.2(A), which provides that:

Prior to making application for a building permit, the applicant shall complete a UDO checklist and secure a signed review by a designated member of the Pawleys Island Planning Commission. This information is available from the town clerk.

Town of Pawleys Island, S.C., Unified Development Code § 3-6.2(A) (2015) (emphasis added).

The UDO application required by the Section 3-6.2(A) and maintained by the Town, as it appeared in November of 2009, stated the following with regard to beach walkways:

Beach Walkways (only one per dwelling) may be expanded with benches not to exceed 6 feet wide but landward of the OCRM baseline.

Town of Pawleys Island, S.C., Unified Development Ordinance Checklist Tutorial, p. 4 (2008), R. p. 81.

Strict compliance with the UDO Checklist application was required to obtain any walkway construction application under Section 3-6.2(A) of the Unified Development Ordinance, and review

for conformance by a member of the Town's Planning Commission was a condition precedent to the issuance of any beach walkway permit. Town of Pawleys Island, S.C., Unified Development Code § 3-6.2(A) (2015). The terms of the UDO Checklist and Tutorial have been openly amended by the Town via ordinance, and the Town has expressed a clear and unambiguous intent to enforce the application's terms as an ordinance. Town of Pawleys Island, S.C., Ordinance 2009-16 (Dec. 7, 2009), R. p. 82, (“[a]ll other portions of the Pawleys Island Permit Procedure Handout are to remain in effect.”). Thus, the Court was bound to give a “reasonable and practical” construction of the statute consistent with the Town's expressed intent. Davis v. NationsCredit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (citation omitted).

The Court ignores the applicability of Section 3-6.2(A) of the Unified Development Ordinance and the UDO Checklist and Tutorial application and affirms, in essence, that this ordinance has no applicability to the construction of beach walkways within the Town. As such, the Court ignores the judgment and clearly expressed intent of the Town in so passing and amending its ordinances and regulations in a way that makes their existence superfluous instead of properly giving effect to their terms. Such has allowed the Town to continually inform the public and its residents that the UDO Checklist application's terms apply to all subsequent beach walkway construction and yet to actively deny the same, at the expense of Petitioners' property rights, in this case.

3. **DID THE COURT ERR BY FAILING TO RECOGNIZE THAT THE ZONING BOARD OF APPEALS, GEORGETOWN COUNTY PLANNING COMMISSION, AND LOWER COURT ERRED BY NOT CONSIDERING AND APPLYING ALL APPLICABLE ORDINANCES AND ZONING REGULATIONS IN DENYING PETITIONERS' VARIANCE REQUEST AND NOVEMBER 17, 2009 WALKWAY PERMIT APPLICATION?**

In its March 8, 2017 Opinion, the Court fails to recognize that Petitioners have not, at any date since their initial appearance before the Board, had a governing or judicial body consider the applicability of Section 3-6.2(A) and the mandated UDO Checklist application to their beach walkway. However, because these ordinances and regulations did and were intended by the Town to apply to walkway construction and permitting, the application of such statutes to Petitioners' subsequent walkway permits should have been addressed by the Court.

The Town has made clear that it expects both Section 3-6.2(A) and the terms of the UDO Checklist application to remain "in full force and effect" as an ordinance affecting land use. See Town of Pawleys Island, S.C., Ordinance 2009-16 (Dec. 7, 2009), R. p. 82. Failure to properly consider and apply all applicable beach walkway zoning ordinances in reviewing or considering Petitioners' variance request or permit applications is an error of law that should be reversed. Additionally, the Court has implicitly sanctioned the Town's ability to choose which, if any, ordinances and regulations it decides to enforce, as numerous other beach walkways have avoided the same scrutiny as Petitioners' in this case.


**4. DID THE COURT ERR BY FAILING TO RECOGNIZE THAT PETITIONERS ARE ENTITLED TO A PERMIT FOR THEIR NOVEMBER 17, 2009 WALKWAY APPLICATION AND CONTINUED USE OF SAID WALKWAY AS IT COMPLIED WITH THEN-EXISTING ZONING AND LAND USE REGULATIONS?**

The Court does not address in its March 8, 2017 Order whether the Town could continue to deny Petitioners their November 17, 2009 walkway permit as it did comply with all applicable statutes and regulations at the time it was made. By failing to address the issue before it and affirming the lower court's denial of Petitioners' interest in the use of their walkway, which is protected under the long-standing holdings of this Court even in the face of subsequent zoning changes, the Court of Appeals failed to preserve Petitioners' property rights. Pure Oil Division v. City of Columbia, 254 S.C. 28, 34-35 173 S.E.2d 140, 143 (1970) ("In both instances [application of permit and issuance of permit], the right protected is the same, that is, the good faith reliance by the owner of the right to use his property as permitted under the Zoning Ordinance in force at the time of the application for a permit . . . . [and such right] will be protected even against a change in the zoning ordinance.") (citing Kerr v. City of Columbia, 232 S.C. 405, 413, 102 S.E.2d 364, 367 (1958)). For this reason, Petitioners must be provided judicial review of the Court of Appeals and the lower court, and their holdings must be reversed.

## CONCLUSION

The Court's March 8, 2017 not only fails to address Petitioners' fundamental issue on appeal regarding the interpretation of multiple ordinances and regulations governing the use of their beach walkway, but also ignores established law guaranteeing their protected right to use of their beach walkway while deferring to improper, more deferential standards of review in a case where such deference is unwarranted. Additionally, the Court has inadvertently provided the Town, and all other similar municipal bodies, guideposts to pass and selectively enforce ordinances and zoning regulations based on political convenience or personal preference as such appear to be subject to waiver, as in this case. Petitioners request this Court to provide full consideration of their position that has been denied them time and again for the past eight years.

Respectfully submitted,



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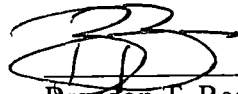
JUN 23 2017

SC Court of Appeals

PROOF OF SERVICE

I certify that I have served Petitioners' Petition for Writ of Certiorari on the Town of Pawleys Island by depositing a copy in the United States Mail, postage prepaid, on June 22, 2017, addressed to its attorneys of record, N. David DuRant and Natale Fata, at their respective addresses of P.O. Box 14722 and P.O. Box 16620, Surfside Beach, SC 29587.

June 22, 2017



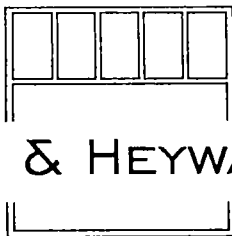
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June 22, 2017

**VIA UPS OVERNIGHT DELIVERY**

The Honorable Daniel E. Shearouse  
Clerk of Court, South Carolina Supreme Court  
1231 Gervais Street  
Columbia, SC 29201

RE: Robert and Pamela Wilkes v. Town of Pawleys Island, et al.  
Appellate Case No.: 2016-000029

Dear Mr. Shearouse:

Enclosed for filing, please find an original and six copies of Petitioners' Petition for Writ of Certiorari, two copies of the Appendix in this matter, and an original and one copy of the Proof of Service of the Petition. Also enclosed, please find our firm's check in the amount of \$100.00 for the appropriate filing fee.

Thank you for your assistance in this matter.

Sincerely,

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JUN 23 2017

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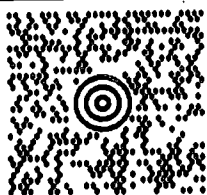
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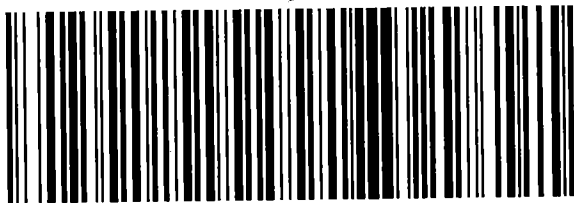
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