

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

JAN 23 2012

The Honorable Marvin H. Dukes, Master-in-Equity **S.C. Supreme Court**

Case No. 2010-CP-07-00862

Donald Newton, Jean Flagg-Newton and James C. Hudson ..... Plaintiffs,  
Of whom Donald Newton and Jean Flagg-Newton are ..... **Petitioners**,  
v.  
Zoning Board of Appeals for Beaufort County ..... Respondent.

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**APPENDIX**

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## INDEX

|  |     |
|--|-----|
| Record on Appeal .....   | 1   |
| Respondent's Supplement to Record on Appeal .....                          | 80  |
| Final Brief of Appellants.....   | 103 |
| Final Brief of Respondent Zoning Board of Appeals for Beaufort County..... | 117 |
| Final Reply Brief of Appellants .....                                      | 130 |
| Decision of Court of Appeals.....  | 145 |
| Petition for Rehearing.....  | 156 |
| Order Denying Petition for Rehearing.....                                  | 166 |

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity

Case No. 2010-CP-07-00862

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Donald Newton, Jean Flagg-Newton and James C. Hudson..... Plaintiffs,  
Of whom Donald Newton and Jean Flagg-Newton are ..... Appellants,  
v.  
Zoning Board of Appeals for Beaufort County ..... Respondent.

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**RECORD ON APPEAL**

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**INDEX**

Order of Judge Marvin Dukes dated June 21, 2010 denying appeal ..... 2

Letter dated January 28, 2010 from Beaufort County Zoning & Development to David Coleman, Beaufort County Engineering Department..... 7

Amended Appeal of the Issuance of A Special Use Permit for 99 France Jones Boulevard dated February 26, 2010..... 9

Brief of Appellant dated June 1, 2010 ..... 16

Respondent Zoning Board of Appeals Reply to Brief of Appellants dated June 4, 2010..... 34

Respondents’ Motion to Dismiss and Memorandum in Opposition to Appellants’ Notice of Appeal dated May 19, 2010 ..... 42

Respondents’ Supplemental Brief in Support of Motion to Dismiss dated May 25, 2010..... 49

Transcript of hearing on December 10, 2009..... 52

Certificate of Counsel ..... 77

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF BEAUFORT ) CIVIL ACTION NO: 2010-CP-07-00862

Donald Newton, Jean Flagg-Newton )  
and James C. Hudson )

Appellants/Plaintiffs, )

vs. )

Zoning Board of Appeals for Beaufort )  
County )

Respondents/Defendants. )

ORDER DENYING APPEAL

FILED  
MAY 22 2010  
CLERK OF COURT

This Appeal from a decision of the Beaufort County Zoning Board of Appeals (ZBOA) was heard by me on May 19, 2010. Present at this hearing was Michael Dimbauer, counsel for the Appellants, and Robert W. Achurch, counsel for Respondents. After listening to both sides and reviewing the record below and each of the parties' submissions, I am compelled to deny this appeal for all of the reasons as set forth below.

OVERVIEW

This appeal from the ZBOA concerns the current convenience center located on Daufuskie Island and the special use permit approval by the ZBOA to mitigate this nonconforming use. Terry J. Lee Contracting, Inc. applied for a special use permit for a convenience center to mitigate the "pre-existing nonconforming" convenience center on Daufuskie Island. As acknowledged during the ZBOA

hearing on December 10, 2009, the current Daufuskie Island convenience center was considered to be a pre-existing, nonconforming use under the ZDSO for Daufuskie Island – Community Preservation District. (Transcript, P. 4, ln. 17-23)

On November 18, 2009, the Design Review Team ("DRT") granted approval and made recommendations concerning the proposed improvements to a convenience center on Daufuskie Island. The ZBOA then held a public hearing on December 10, 2009. The Appellants were at this hearing, and made presentations in opposition to the special use permit. Specifically, they raised the following issues: (1) that a special use permit would not be legally permissible because it would constitute "spot zoning" (Transcript, P.7-8), (2) that it is not supported by the comprehensive plan for "high volume use DOC" ("drop off center")(Transcript, P. 9-10), and (3) the site lacks "social culture." (Transcript, P. 10-11), and (4) the County does not own the property. (Transcript, P.13-15). The ZBOA voted to approve the special use permit under §106-552, and made specific findings of fact that it met the six (6) requirements as set forth in that section. (Id., P.23-24). On January 28, 2010, the Zoning Board of Appeals for the County of Beaufort (ZBOA) granted and approved a special use permit to Beaufort County/Terry Lee Contracting, Inc. to make improvements to the convenience center at 99 Frances Jones Boulevard on Daufuskie Island, and addressed §106-552 (1-6).

On February 25, 2010, Appellants appealed the grant of this Special Use Permit to the circuit court, raising for the first time the issue of whether a Community Impact Statement (CIS) is mandatory under the ZDSO when considering an application for a special use permit for a convenience center.

### **STANDARD OF REVIEW**

South Carolina Code Ann §6-29-840 prescribes the standard of review a circuit court should apply when considering an appeal from a local zoning board. In pertinent part, the statute provides: "The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence." South Carolina Code Ann §6-29-840 (Supp. 2003). It is well-settled that "the factual findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." Sterling Dev. Co. v. Collins, 309 S.C. 237, 240, 421 S.E.2d 402, 404 (1992) (citations omitted).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Appellants argue that because the language of the Ordinance was vague and conflicting as to whether a CIS is mandatory or discretionary for a special use permit for a convenience center that the ZBOA abused its discretion by not considering a CIS before issuing a permit. Specifically, Appellants argue that §106-1362 (of Article V, Division 2) makes a community impact statement mandatory. See §106-1362 ("All Applications...shall include a community impact statement") While I understand their argument, I am not persuaded.

It is undisputed that this property is located in a zoning district that is zoned, "Daufuskie Island Community Preservation District," and such a designation has its own standards. Article V, Division 2 expressly applies only to any zoning

designations that are listed in the general land use table of §106-1098.<sup>1</sup> Community Preservation districts ("CP"), such as the Daufuskie Island Community Preservation District, are not listed on this general land use table. Moreover, §106-1126 entitled, "Scope of division", defines the scope of that portion of the ordinance which includes §106-1362. This section refers to §106-1098, and specifically excludes CP districts, such as the Daufuskie Island Community Preservation District. Thus, contrary to Appellants contention, the requirements of §106-1362 (part of Article V, Division 2) entitled "Convenience Centers" does not apply to uses that are in districts zoned "Community Preservation."

Rather, CP districts are specifically addressed in §106-959, and are considered "Special" under Table 106-922. Consequently, they are governed by specific standards which are outlined in Appendix D, entitled "COMMUNITY PRESERVATION AREAS". CP districts have their own specific general land use table as set forth in Table 4 of App. D, §8, entitled "COMMUNITY PRESERVATION USE TABLE," and Daufuskie Island is specifically mentioned therein. Thus, by the express language which governs CP districts and the express language of Article V, division 2, it is clear that the requirements of §106-1362 do not apply to uses in the Daufuskie CP district.

Additionally, the ZBOA only needed to consider the criteria for approval of a special use permit under §106-552 when considering the application. As stated clearly in 106-552(6), a CIS *"may be required, as determined by staff."* (emphasis added) Thus, when considering this application for a special use permit to make

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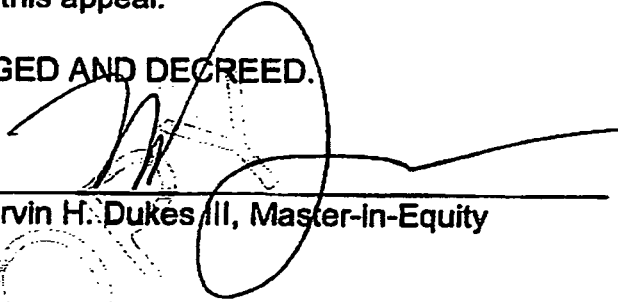
<sup>1</sup> §106-1126 entitled "Scope of Division", states (a) "This division describes the standards governing limited and special uses as designated in the general land use table 106-1098."

improvements to an already existing convenience center, the ZBOA did not need to consider a CIS, because the "impact" was already known and staff did not determine that a CIS was required.

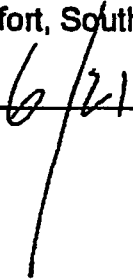
### CONCLUSION

Having heard the parties' arguments, reviewed the record, and considered the express language of the ZDSO, I am feel compelled to deny the appeal. It is clear that §106-1362 (of Article V, division 2) does not apply to property zoned as a CP district as set forth above. This appeal is hereby denied, and each side shall bear their own costs associated with this appeal.

IT IS SO ORDERED, ADJUDGED AND DECREED.

  
Marvin H. Dukés III, Master-In-Equity

Beaufort, South Carolina

  
\_\_\_\_\_, 2010



## COUNTY COUNCIL OF BEAUFORT COUNTY

Beaufort County Zoning & Development  
Multi Government Center ♦ 100 Ribaut Road  
Post Office Drawer 1228, Beaufort, SC 29901-1228  
OFFICE (843) 470-2780  
FAX (843) 470-2784

January 28, 2010

Mr. David Coleman  
Beaufort County Engineering Department  
Post Office Drawer 1228  
Beaufort, SC 29901

Re: ZBOA – Special Use Permit – Daufuskie Island – Convenience Center  
99 Frances Jones Blvd., Daufuskie Island

EXHIBIT C

Dear Mr. Coleman:

On Thursday, December 10, 2009, the Zoning Board of Appeals completed its review of your request for a Special Use Permit for the proposed Daufuskie Island Convenience Center. In accordance with Article III, Subdivision IV, Special Uses, Section 106-554, of the Zoning and Development Standards Ordinance (ZDSO), the Zoning Board of Appeals voted unanimously to approve your request for a special use permit with conditions, on the basis that the request met the requirements:

Condition 1: Applicant shall install the required storm-water/BMP.

Condition 2: Applicant shall install the required buffers.

Condition 3: Applicant shall plant back or mitigate all specimen trees proposed for removal.

Specifically, the Board finds that the application for the special use met the following criteria:

1. The proposed use is consistent with the Comprehensive Plan's purposes, goals, objectives, and policies, including standards for building and structural intensities and densities and intensities of use.
2. The proposed use is compatible with the character of land in the immediate vicinity.
3. The proposed use's design minimizes adverse effects, including the visual impact of the proposed use on adjacent lands.

Since the site will be brought into compliance to the extent possible, the DRT required the following:

1. The proposed use minimize adverse impacts on the environment, traffic and congestion, infrastructure, or governmental services.

A Community Impact Statement (CIS) or portion of the report may be required as determined by Staff.  
(Staff did not require any portion of the Community Impact Statement)

A site plan for the proposed Special Use, which includes the total site area and calculations, surrounding properties, buffers and setback, natural resources and if applicable, an end use or reclamation plan was required as part of the submittal package. The site plan includes the disturbed/construction area, surrounding properties, buffers, setbacks, natural resources, and storm-water/BMP requirements.

In addition to the above criteria, it must be demonstrated that the non-conformity, as proposed to be conducted and managed, will have minimal adverse impacts on the surrounding area. The non-conformity of the site will be corrected with the following:

- 1) The placement of the required buffers.
- 2) Plant back or mitigation of all specimen trees proposed for removal.
- 3) Install the required storm-water/BMP. The Site Plan to reflect the changes.

It is so ordered,



Thomas Gasparini  
Chairman, Zoning Board of Appeals

Beaufort, South Carolina

This 28 Day of January 2010

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 Donald Newton, Jean Flagg- Newton and )  
 James C. Hudson )  
 )  
 Appellants, )  
 )  
 v. )  
 )  
 Zoning Board of Appeals for the )  
 County of Beaufort )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-07-862

Amended Appeal of the Issuance of  
 a Special Use permit for 99 France  
 Jones Boulevard

FILED  
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 PM 4:34  
 CLERK OF COURT

Pursuant to S.C. Code Ann. §6-29-820 (Supp 2009), the Appellants, Donald Newton, Jean Flagg-Newton and James Hudson appeal the Respondent's, Zoning Board of Appeals for the County of Beaufort (ZBA), decision to issue a special use permit to Terry R. Lee Contracting Co. on behalf of the County of Beaufort.

1. The County of Beaufort (County) owns a parcel of land known as 99 Frances Jones Blvd. Daufuskie Island, Beaufort County, South Carolina (Parcel).

2. Pursuant to the County's Comprehensive Land Use Plan, the Parcel is zoned in a Community Preservation Zone and Daufuskie Island is zoned as a rural district.

3. The County has been using the Parcel as a drop off center for solid waste collections which is a non-conforming use for parcels of land which are zoned as Community Preservation.

4. The County petitioned the ZBA to issue a special use permit to allow the construction of a convenience center for the collection of solid waste.

5. A convenience center is a more intensive use for the collection of solid waste than the operation of a drop-off center. The operation of either a drop-off center or a convenience center is an impermissible use of a property zoned as Community Preservation under the County's Comprehensive Land Use Plan without the issuance of a special use permit.

6. The Appellant Hudson is an adjacent landowner to the Parcel. Appellants Don Newton and Jean Flagg-Newton's property is located within 500 feet of the Parcel. The proximity of the Appellants' land to the parcel gives them a substantial interest in the ZBA's

decision to issue a special use permit.

7. On December 10, 2009, the ZBA held a hearing to determine whether to grant the County's request to obtain a special use permit to build a convenience center at the Parcel

8. Pursuant to the County's petition for seeking a special use permit for the Parcel, the Zoning Board of Appeals held a hearing to discuss the matter on December 10, 2009.

9. On December 28, 2009, the ZBA ruled that Beaufort County receive a special use permit allowing the building of a convenience center at the Parcel as a conforming use.

10. In its letter the ZBA specifically stated, "the [ZBA] finds that the application for special use met the following criteria: 1. The proposed use is consistent with the Comprehensive Plan's purposes, goals, objectives, and policies including standards for building and structural intensities and densities and intensities of use. 2. The proposed use is compatible with the character of land in the immediate vicinity. 3. The proposed use's design minimizes adverse effects, including the visual impact of the proposed use on adjacent lands."

11. In reaching this decision and coming to these conclusions, the ZBA noted that there was no portion of a Community Impact Statement done or in front of it when it made its decision to issue the special use permit.

12. Appellants contend that the ZBA abused its discretion when it issued the special use permit because the ZBA did not have the studies and assessments that were required to be in front of it when it made its decision. Beaufort County Ordinances require that the ZBA have studies such as Community Impact Statement in front of it when deciding to issue a special use permit for a convenience center which is a waste disposal facility. In addition to failing to have the requisite studies and assessments, appellants contend the ZBA abused its discretion when it issued it permit because the proposed 1.2 acre site for the convenience center on the 6.3 acre Parcel is smaller than what the Ordinances require for the construction of a convenience center in a rural district.

13. Beaufort County local ordinance Part II Chapter 106-9 mandates the procedure a landowner must use to apply for a special use permit to make a nonconforming use become a conforming use.

14. Local Ordinance Chapter 106-9(b)(2) specifies that the "[ZBA], at their discretion, shall require the following studies and reports from the property owner as part of their consideration in deciding whether to approve the request and/or how much of the request to

grant.”

15. Local Ordinance Chapter 106-9(b)(2)(a) calls for the submission of an Operation Plan. This plan “shall include a site plan of the entire site, and narrative defining the specific elements of the use that may create problems ... as well as the general impact on the community as a whole will be considered.”

16. In addition to the operation plan, Local Ordinance Chapter 106-9(b)(2)(b) calls for the submission of a Community Impact Statement (CIS). This section specifically states there are four separate assessments to be made in a Community Impact Study. First, is the area impact assessment; Second, is the environmental impact assessment; Third, is the traffic impact assessment; and Fourth, is the archaeological and historic impact assessment. The Section states: “One or all of the assessments shall be required depending on the applicant’s proposal ... the CIS or portions thereof, will assist the [ZBA] in determining whether the proposed change in the nonconformity is more, equal or less intensive than the existing use, and if it significantly lessens the adverse impacts to the surrounding and nearby property owners. A study of how the proposed mitigation of the nonconformity affects the surrounding and nearby neighborhoods and properties shall be assessed and shall be part of the CIS.”

17. Local Ordinance 106-9(b)(3) requires the landowner seeking the issuance of a special use permit to provide more information than the Operation Plan or the CIS. “The applicant shall meet the following requirement: a. Demonstrate that the nonconformity as conducted and managed has minimal incompatibilities that have been integrated into the neighborhood’s function. Factors to evaluate this [criterion] include the following: 1. The neighborhood residents patronize or are employed at the use (for nonresidential uses); 2. Current management practices that eliminate problems such as noise, waste materials, competition for on-street parking, or similar conflicts; 3. The nonconformity’s history of complaints against it; 4. The nonconformity has been maintained in good condition or that the nonconformity represents a disincentive for such maintenance.”

18. Additionally Local Ordinance 106-9(b)(3) notes that Local Ordinance 106 Article 5 Division 2 titled Limited and Special Use Standards must also be complied with when considering whether to issue a special use permit.

19. Local Ordinance 106-1367 titled Waste Disposal Facilities lies under the provisions of Local Ordinance 106 Article 5 Division 2 and states the special standards required

for the issuance of a special use permit for a Waste Disposal Facility.

20. Subsection (b) of Local Ordinance 106-1367 is titled Reports/studies required. The first subsection under (b) states that a community impact statement is specifically required in order to approve an application for use as a waste disposal facility. "In addition to all other required studies, reports, plans, etc. all applications for this use shall include a community impact statement." Local Ordinance 106-1367(b)(1).

21. Local Ordinance 106-1362 also falls under Chapter 106 Article 5 Division 2 and is titled Convenience Center. This section mandates the standards and requirements necessary to approval a Parcel for use as a Convenience Center. Specifically, Chapter 106 Article 5 Division 2 Local Ordinance 106-1362(b) titled Report/studies required states "All application for this use shall require a community impact statement consisting of area impact assessment, environmental impact statement, traffic impact statement, archaeological and historic impact statement." Local Ordinance 106-1362(b).

22. Local Ordinance 106-1362(c) also sets forth additional requirements as it pertains to approval of use of a Parcel of Land in a rural district. Subsection (c) titled Additional standards in the rural district states "The minimum site area shall be five acres." Local Ordinance 106-1362(c). The proposed site is listed as approximately 1.20 acres which is deficient to the standards as provided in the Local Ordinance.

23. The requirement to provide a Community Impact Statement when a landowner is seeking to use a parcel of land as a waste disposal facility is not discretionary. This requirement stems from the provisions of Local Ordinance 106-9(b)(3) which states that the standards and criteria for issuance of a special use permit stated under Chapter 106 Article 5 division 2 must be complied with. "Criteria for approval of nonconformity through special use permit. In addition to the standards and criteria for special use permit approval set forth in subsection [106-9(b)(2)] of this section, in division 2 of article V of this chapter .... the applicant shall meet the following requirements." Local Ordinance 106-9(b)(3). The use of the word shall is mandatory language meaning all of the above requirements and the entire list of subsequent requirements must be met before the ZBA can issue a special use permit. Specifically, Chapter 106 Article 5 division 2 Local Ordinance 106-1367(b)(1) requires the ZBA to consider the impact of issuing a special use permit on the community. "In addition to all other required studies, reports, plans, etc. all applications for this use shall include a community impact statement." Local Ordinance 106-

1367(b)(1). Moreover, Local Ordinance 106-1362(b) also mandates the submission of a Community Impact Study before issuing a permit for use of a Parcel as a Convenience Center.

24. It is clear that the ZBA was not presented with a Community Impact Study from the landowner when it was making its decision to grant the special use permit for the Parcel as reflected from the language of its December 28, 2009, letter issuing the special use permit. "A Community Impact Statement (CIS) or portion of the report may be required as determined by Staff. (Staff did not require any portion of the Community Impact Statement)"

25. Perhaps the ZBA could argue that it had discretion to order a Community Impact Statement under the terms of Local Ordinance 106-9(b)(2), (Appellant does not agree with this position and argues that the language of Local Ordinance creates an ambiguity that mandates that the ZBA has to order a landowner to submit a Community Impact Statement when issuing a special use permit) however, the ZBA must comply with the provisions of both 106-9(b)(2) and 106-9(b)(3). 106-9(b)(3) requires a review of a Community Impact Statement for a special use permit for a Waste Disposal facility and especially as a Convenience Center as reflected in 106-1362(b). There is no discretionary language in 106-9(b)(3). The Ordinance is either complied with or it is not.

26. The standard of review used by a circuit court when reviewing a decision of a Zoning Board of Appeals is whether the decision of the Zoning Board is correct as a matter of law. Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007). "[A] decision of a city zoning board will be overturned if it is arbitrary, capricious, has no relation to a lawful purpose, or if the board has abused its discretion." Id.

27. Case law indicates that a Zoning Board's failure to comply with its local ordinances when making a decision is an abuse of discretion. "In exercising its discretion, the board of adjustment is not left free to make any determination whatever that appeals (sic) to its sense of justice. It must abide by and comply with the standard prescribed by the local ordinance[s] and zoning statutes." Stevenson v. Board of Adjustment of the City of Charleston, 230 S.C. 440, \_\_\_, 96 S.E.2d 456, 460 (1957).

28. When the ZBA approved the special use permit for the Parcel without having considered a Community Impact Statement, it violated the Beaufort County Local Ordinances and consequently abused its discretion. Therefore, the Court should reverse the ZBA's decision to grant a special use permit for the Parcel to the County of Beaufort.

29. Additionally, Local Ordinance 106-1367 has more report requirements than just the Community Impact Statement. The Ordinance requires that there be an "environmental impact assessment, operations plan, and truck routing plan on file in the planning department." Local Ordinance 106-1367(a)(1), and requires the submission of an end use plan. "An end use plan shall be submitted." Local Ordinance 106-1367(a)(3).

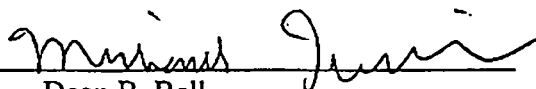
30. Upon information and belief, the ZBA did not have any or all of the environmental impact assessment, operations plan, truck routing plan, or end use plan before it when it issued the special use permit. The lack of any of these reports constitutes an abuse of discretion by the ZBA because the Local Ordinances require submission of these plans for a waste disposal facility. Pursuant to South Carolina Code Section 6-29-830(A), the appellants request that this court require the ZBA to submit a transcript of the evidence heard before the ZBA when it made its decision to determine whether these reports were submitted to the ZBA as required by the Local Ordinance.

31. Finally, the ZBA also abused its discretion when it issued the special use permit for the convenience center when 106-1362(c) requires a five acre parcel of land for the construction of a convenience center in a rural district and the Parcel of land on Daufuskie Island for which the special use permit was issued was only 1.2 acres.

WHEREFORE having set forth its grounds for appeal, the Appellants request the following relief from the Court:

1. An order reversing the ZBA's decision to issue a special use permit because of the failure of the ZBA to comply with Local Ordinances when it issued the special use permit;
2. An order requiring the ZBA to submit a transcript of the hearing detailing the evidence it considered when it issued the special use permit pursuant to S.C. Code Ann. §6-29-830(A) (Supp. 2009);
3. An order granting supersedeas pursuant to Section 6-29-830(B) which states "the judge of a circuit court may in his discretion grant a supersedeas upon such terms and conditions as may be reasonable and proper." S.C. Code Ann. §6-29-830(B) (Supp. 2009);
4. Any other relief the Court deems just and proper.

THE LAW OFFICE OF DEAN B. BELL, LLC

By:   
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Attorneys for Appellants

February 26, 2010

THE STATE OF SOUTH CAROLINA  
In the Court of Common Pleas

APPEAL FROM BEAUFORT COUNTY  
ZONING BOARD OF APPEALS

CASE NO. #: 2010-CP-07-862

2010 JUN - 1 PM 3:33  
CLERK OF COURT  
JULIA A. HARRIS

Donald Newton, Jean Flagg-Newton and James Hudson,.....Appellants

v.

Zoning Board of Appeals  
for the County of Beaufort, .....Respondent.

BRIEF OF APPELLANTS

Michael Dirnbauer  
The Law Office of Dean B. Bell, LLC  
87 Grays Highway  
Ridgeland, SC 29936  
(843) 717-2772

Attorney for Appellants

## STATEMENT OF ISSUES ON APPEAL

I. Did the Appellants' sufficiently preserve their objection to the Zoning Board of Appeals of the County of Beaufort (ZBA) issuance of a special use permit for construction of a convenience center at 99 Frances Jones Boulevard located on Daufuskie Island Beaufort County, South Carolina (Parcel), when they specifically stated in their petition that the ZBA abused its discretion when it issued the special use permit without requiring the landowner to submit a Community Impact Statement (CIS) as was required by Beaufort County Local Ordinances and

II. Did the Appellants' sufficiently preserve their objection to the ZBA's issuance of a special use permit for the construction of a convenience center on the Parcel when one of the Appellants raised a question regarding legal sufficiency of the plans during the hearing?

III. Did the ZBA abuse its discretion when it issued the special use permit to construct a convenience center on the Parcel without requiring the landowner to submit a Community Impact Statement (CIS) as was required by Beaufort County Local Ordinances?

## STANDARD OF REVIEW

The findings of fact by the ZBA shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. S.C.Code Ann. § 6-29-840(A) (Supp.2009); *see also Heilker v. Zoning Bd. of Appeals for City of Beaufort*, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct.App.2001). In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. *Id.* Furthermore, “[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). “However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” *Id.*

## FACTS

This case commenced when Beaufort County sought the issuance of a special use permit in order to construct a convenience center on a parcel of land known as 99 Frances Jones Boulevard which is located on Daufuskie Island Beaufort County, South Carolina (Parcel). Beaufort County is the landowner of the Parcel and was deeded the Parcel on December 31, 1991.

Pursuant to the County's Comprehensive Land Use Plan, the Parcel is zoned in a Community Preservation Zone on Daufuskie Island. The operation of a convenience center is an impermissible use of a property zoned as Community Preservation under Beaufort County's Comprehensive Land Use Plan without the issuance of a special use permit.

A hearing to determine whether Beaufort County should receive a special use permit was held in front of the Zoning Board of Appeals for the County of Beaufort (ZBA) on December 10, 2009. A transcript was taken of the testimony and evidence presented at the hearing and at the end of the hearing the ZBA indicated that it would issue the special use permit for the construction of the convenience center on the Parcel. The ZBA issued a letter on January 28, 2010 confirming the issuance of the special use permit.

Colloquy from the transcript of the hearing indicates the ZBA understood that the County needed the special use permit in order to construct the convenience center on the Parcel.

Mr. Gasparini [ZBA member]: And y'all need a special use permit because..

Mr. Bobby Lee [County Representative]: I believe, the use of a sold waste convenience center is not a conforming use within the CP zoning district.

Mr. Gasparini: Okay (To Ms. Austin [member of ZBA staff]) So it was there Ms. Austin before the zoning? [I]s that correct?

Ms. Austin: Yes sir. It's not permitted in the Daufuskie Island CP; but because the site was being used, it's a non-conforming...

Mr. Gasparini: So, it's a pre-existing non-conforming legal use?

Ms. Austin: Yes.

Mr. Coleman [County Representative]: Yes, I believe that it's been there longer than the zoning has -.

Mr. Gasparini: Um-hum, that wouldn't surprise me. So um-hum so [the County] needs a special use permit, which would make it a conforming use, even though it's not -.

Ms. Austin: Yes sir.

(Hearing Transcript pg. 4, lines 9-23)

In the ZBA's January 28<sup>th</sup> letter, confirming its issuance of the special use permit the ZBA stated: "A Community Impact Statement (CIS) or portion of this report may be required as determined by Staff. (Staff did not require any portion of the Community Impact Statement)." Nor is there any evidence in the transcript that an equivalent of a Community Impact Statement (CIS) was given to the ZBA by Beaufort County.

The Appellants filed their petition to appeal the ZBA's decision on February 26, 2010. Subsequent to the filing of the Appellants' petition, the County filed a motion to dismiss their appeal arguing this Court should dismiss the appeal because the Appellants failed to preserve its argument, which is that the ZBA abused its discretion when it issued the special use permit without requiring the landowner to submit a CIS. The County argues the Appellants did not preserve the argument for judicial review when they allegedly failed to object to the issuance of the special use permit for lack of a CIS during the hearing.

On page 7 of the transcript of the hearing Jean Flagg-Newton, one of the Appellants in this case, states to the ZBA: "[M]y recommendation for you tonight, is to reject the request for a special use 'outright'... The basis for my recommendations falls under three broad points; one (1) as the plans [have] been presented it may not be legally permissible ... to ... really [issue] a special use [permit]." [Hearing Transcript pg. 7, lines 7-13] Appellants' petition contains the Appellants argument within the text of the petition. "When the ZBA approved the special use permit for the Parcel without having considered a Community Impact Statement, it violated the Beaufort County Local Ordinances and consequently abused its discretion. Therefore, the Court should reverse the ZBA's decision to grant a special use permit for the Parcel to the County of Beaufort." [Paragraph 28 of Appellants' Petition]

## ARGUMENT

### I.

The Appellants sufficiently preserved their objection to the Zoning Board of Appeals of the County of Beaufort (ZBA) issuance of a special use permit for construction of a convenience center on the Parcel, when they specifically stated in their petition that the ZBA abused its discretion when it issued the special use permit without requiring the landowner to submit a Community Impact Statement (CIS)

The County argues the Appellants failed to sufficiently object to the ZBA's issuance of the special use permit during the hearing and therefore failed to preserve the issue for appellate review. The County cited Richland County v. Carolina Chloride, Inc. for the proposition that “[i]ssues cannot be raised for the first time on appeal but must be raised to and ruled upon by the trial court to preserve it for appellate review.” Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 655, 677 S.E.2d 892, 903 (Ct. App. 2009). The County also cited Kiawah Resort Associates v. South Carolina Tax Commission for the proposition that “[a reviewing Court] has a limited scope of review, and cannot ordinarily consider issues that were not raised to and ruled upon by the administrative agency.” Kiawah Resort Assocs. V. South Carolina Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995). Finally, the County cites Young v. South Carolina Department of Health and Environmental Control which states, “[E]very ground of appeal ought to be distinctly stated [so] that the Court may at once see the point which it is called upon to decide without having to ‘grope in the dark’ to ascertain the precise point at issue.” Young v. South Carolina Dep’t of Health and Environ’l Control, 383 S.C. 452, 458, 608 S.E.2d 784, 787 (Ct. App. 2009). While these statements of law are correct, the County misapprehends at which stage the objection to the ZBA's ruling must be made. It is not necessary for the Appellants to object at the hearing stage in order to preserve their argument, it is necessary for the Appellants to state the grounds for its objection at the petition stage in order to preserve the error. The cases cited by the County itself support this argument.

In Richland County, the Court of Appeals found that the Appellants in that case had failed to preserve their arguments asserting theories of governmental and promissory estoppel against the County. The Court ruled that the Carolina Chloride could not assert its governmental estoppel claim against Richland County on appeal because, “[Carolina Chloride] expressly waived this argument during trial.” Richland County, 382 S.C. at 656, 677 S.E.2d at 903. As to Carolina Chloride's promissory estoppel argument, the court stated, “Carolina Chloride waives

promissory estoppel having failed to argue this issue in its initial appellate brief. While Carolina Chloride extensively briefs governmental estoppel ... it specifically failed to address promissory estoppel as an issue on appeal as such neither of these issues are preserved for our review.” *Id.*

The facts of this case are nothing like those in Richland County. Jean Flagg-Newton specifically stated, “as the plans [have] been presented it may not be legally permissible ... to ... really [issue] a special use [permit].” In no way does this statement constitute a waiver of the argument that the ZBA did not have the plans that Beaufort Local County Ordinances required. The ZBA to have at the time of the hearing. Specifically, that the ZBA had to consider a CIS submitted by the landowner when deciding whether to issue a special use permit make a convenience center a conforming use. Additionally, the Appellants’ petition, which the equivalent of an appellate brief in this case, clearly states the error which the ZBA made when it issued special use permit: “When the ZBA approved the special use permit for the Parcel without having considered a Community Impact Statement, it violated the Beaufort County Local Ordinances and consequently abused its discretion. Therefore, the Court should reverse the ZBA’s decision to grant a special use permit for the Parcel to the County of Beaufort.” Moreover, the petition contains specific cites and references to the Ordinances in order to support the Appellants’ argument. The Appellants’ petition specifically addressed the argument being raised for this Court to consider and in no way is this Court being left to “grope in the dark” to ascertain the Appellants’ argument.

In Kiawah Island, the Supreme Court affirmed the Circuit Court’s finding that Kiawah Island arguments of res judicata and collateral estoppel were not in front of it because these issues were not raised in Kiawah Island’s petition for judicial review. Kiawah Island, 318 S.C. at 505, 458 S.E.2d at 544. While Kiawah Island’s petition may have been defective in that case, once again in this case the Appellants sufficiently raised this argument in its petition.

Finally, in Young, the Appellant in that case appealed the issuance of a dock permit by the Ocean and Coastal Resource Management (OCRM) to the Administrative Law Court. The Administrative Law Court (ALC) held a hearing and took testimony in the matter and ruled in favor of the OCRM. Young, 383 S.C. at 456, 680 S.E.2d at 786. Young then appealed the ALC’s decision to the Coastal Zone Management Appellate Panel (CZMAP), which upheld the decision of the ALC. *Id.*, 383 S.C. at 456, 680 S.E.2d at 786-87. Young then appealed the CZMAP’s decision to the South Carolina Court of Appeals. The Court upheld the CZMAP’s

decision stating, “In his brief to the CZMAP, Young merely references the regulation he now asserts was applicable to this controversy and never specifically asserted error in the ALC’s failure to follow the correct version in reaching its decision. Moreover, ... the reference contained a typographical error, ... we do not agree with Young that such a passing reference sufficed to bring this issue to the attention of the CZMAP.” Id. 383 S.C. at 458, 680 S.E.2d 787-88. In each of these cases, the defect in error preservation occurred at the petition stage and not at the hearing stage. Consequently, the petition asserting the appeal is where it is necessary for the Appellant to raise errors in order to preserve them and not at the hearing stage.

A reading of the statutes and case law governing how appeals of a zoning board are initiated and what evidence is required once an appeal is filed also supports this contention. The cardinal rule of statutory construction is to ascertain the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). If a statute’s language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning. Miller v. Doe, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994). However, where a statute is ambiguous, the Court must construe the terms of the statute according to settled rules of construction. Lester v. S.C. Workers' Compensation Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999). “It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result.” Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000).

An appeal of a ZBA decision is commenced by the filing of “a petition in writing setting forth plainly, fully and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.” S.C. Code Ann. §6-29-820 (Supp. 2009). Once the appeal is filed then the board must file “duly certified copy of the proceedings held before the [ZBA], including a transcript of evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions.” S.C. Code Ann. §6-29-830(A) (Supp. 2009). In Grant v. City of Folly Beach, the parties raised the question of whether this statutory language mandated that the County provide a transcript of the proceedings before it. Grant argued that the statutory language of Section 6-7-760, the predecessor statute of 6-29-830 using substantially the same language, See (Grant v. City of Folly Beach, 346 S.C. 74, 79 n.2, 551 S.E.2d 229, 231 n.2 (2001)) required the City to file a transcript if evidence was heard

before the Board. The Supreme Court concluded that the preparation of a transcript of the hearing is within the Board's discretion and is not mandatory. "In specifying the Board's duties at the time of the hearing, the legislature has imposed **no requirement that a verbatim recording** be made ... we conclude the legislature intended that preparation of a transcript remains within the Board's discretion." Id. 346 S.C. at 79-80, 551 S.E.2d at 232. (emphasis added).

In order for this court to analyze whether a party has made a sufficient objection to preserve an error, there must be an accurate recording of the proceedings at the hearing in order to know what was said by the parties at the hearing. Otherwise, the Court has no way of knowing whether an objection was lodged or an issue was raised to and ruled on by the ZBA. The legislature cannot have intended that objections have to be raised at the hearing level in order to preserve an error since the legislature did not require that the mechanisms of a verbatim and a transcript be prepared for perusal by a reviewing court. The legislature intended that objections to a ZBA's ruling be made in the petition filed by the party appealing the ZBA's ruling. "A person may appeal from a decision by the board to the circuit court by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to the law." S.C. Code Ann. §6-29-820(A) (Supp. 2009).

Although the legislature makes no specific mention in the statutes of when an error of the ZBA needs to be raised to be preserved, a reading of the statutes combined together indicates the legislature intended for the error to be alleged at the petition phase. It would lead to an absurd result if the legislature intended for error preservation to occur at a hearing when it provided no guaranteed mechanism by which an accurate recording, either written or verbal, need to be given to a reviewing court to determine what was said or presented during the hearing in front of the ZBA. "We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

The statutes and case law interpreting the statutes indicate that the petition is where the Appellants' arguments and objections must be raised. There is no question that the Appellants' petition raised the lack of the submission of a CIS to the ZBA as an error of law and the petition cited the Local Ordinances which led to its objection. Consequently, the error was sufficiently

preserved and this Court should deny the County's motion to dismiss the appeal for the lack of error preservation.

## II.

The Appellants' sufficiently preserved their objection to the ZBA's issuance of a special use permit for the construction of a convenience center on the Parcel when one of the Appellants raised a question regarding legal sufficiency of the plans during the hearing

Even if this Court finds that the Appellants needed to make the objection at the hearing in order to preserve the error, Appellants contend that an objection was made which was sufficient to put the ZBA on notice that it was failing to comply with Ordinances when it issued the special use permit. Jean Flagg-Newton stated during the hearing, "[M]y recommendation for you tonight, is to reject the request for a special use 'outright'... The basis for my recommendations falls under three broad points; one (1) as the plans [have] been presented it may not be legally permissible ... to ... really [issue] a special use [permit]." [Hearing Transcript pg. 7, lines 7-13]. While Ms. Flagg-Newton did not specifically reference the CIS in her statement, her statement served to notify the ZBA that the plans, of which a CIS was one, as presented were legally insufficient to issue the special use permit. Appellate courts will not apply the rules of error preservation so rigidly as to bar an otherwise properly presented issue. Chastain v. Hiltabidle, 381 S.C. 508, 516, 673 S.E.2d 826, 830 (Ct. App. 2009). Moreover, pro se litigants are held to a different standard than lawyers when considering whether a layman's statements are sufficient to preserve an error.

In Greer v. McFadden, the South Carolina Court of Appeals found that although a layman had not technically complied with the standards necessary to normally preserve an error, it would look at the substance of the layman's statement to determine whether the error was preserved.

As noted, Greer, himself a layman, prepared the exceptions on appeal. As a general rule, this court will not reverse a judgment of the circuit court, even if it is erroneous, on a ground not raised by a properly framed exception. If, however, in examining an exception to discover whether it has been framed in violation of the rules, this court ascertains that it clearly embraces a meritorious assignment of prejudicial error, it ordinarily will waive the breach

of the rules and consider the exception. The standard for determining whether an exception not raised as required by the rules clearly embraces a meritorious assignment of prejudicial error resulting in the exception being considered by the Court of Appeals is whether, despite the improperly framed exception, the issue sought to be raised is reasonably clear to the Court of Appeals and to the adverse party.

When this Court construes an exception, it will make its construction as liberal as the language will allow, in order to decide the question involved ... Finally, this Court is concerned with the substance of an appeal, not technical differences in the issues raised by the exceptions.

Greer v. McFadden, 295 S.C. 14, 17-18, 366 S.E.2d 263, 265 (Ct. App. 1988). Ms. Flagg-Newton's statement was specific enough to know that the plans in front of the ZBA at the time of the hearing were insufficient because they violated the laws which governed the issuance of a special use permit for a convenience center.

At the point Ms. Flagg-Newton made her statement, the onus was on the ZBA to show that the plans that they did have were sufficient. At no point did the County or the ZBA address Ms. Flagg-Newton's concerns regarding the legal insufficiency of the plans. In particular, no reference was made to a CIS or the ZBA's reasoning for failing to require the submission of a CIS.

Consequently, the error was preserved and this Court should deny the County's motion to dismiss the appeal.

### III.

The ZBA abused its discretion when it issued the special use permit to construct a convenience center on the Parcel without requiring the landowner to submit a Community Impact Statement (CIS) as was required by Beaufort County Local Ordinances

The County asserts that under Beaufort County Local Ordinances (BCLO) it has unfettered discretion as to whether to require the landowner to submit a CIS when seeking a special use permit to mitigate a nonconformity. We disagree because BCLO require the ZBA to have a CIS in front of it in order to issue a special use permit for a convenience center. The

cardinal rule of statutory interpretation is to ascertain and effectuate the legislature's intent. In re Campbell, 379 S.C. 593, 599-600, 666 S.E.2d 908, 911 (2008); Howell v. United States Fid. & Guar. Ins. Co., 370 S.C. 505, 509, 636 S.E.2d 626, 628 (2006); Bass v. Isochem, 365 S.C. 454, 459, 617 S.E.2d 369, 377 (Cl.App.2005); *see also* State v. Dingle, 376 S.C. 643, 649, 659 S.E.2d 101, 105 (2008) (“In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature.”). Legislative intent must prevail if it can be reasonably discovered in the language employed and that language must be construed in the light of the intended purpose of the statute. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); State v. Morgan, 352 S.C. 359, 365-366, 574 S.E.2d 203, 206 (Cl.App.2002). The plain language of the statute is the principal guidepost in discerning the General Assembly's intent. Cain v. Nationwide Prop. & Cas. Ins. Co., 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008); Grinnell Corp. v. Wood, 378 S.C. 458, 467, 663 S.E.2d 61, 66 (Cl.App.2008); *see also* Peake v. S.C. Dep't of Motor Vehicles, 375 S.C. 589, 597-598, 654 S.E.2d 284, 289 (Cl.App.2007) (“With any question regarding statutory construction and application, the court must always look to legislative intent as determined from the plain language of the statute.”)

Clear and unambiguous statutes require no statutory construction and must be applied according to the literal meaning of their terminology. State v. Sweat, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Cl.App.2008); Neal v. Brown, 374 S.C. 641, 650, 649 S.E.2d 164, 168 (Cl.App.2007). Words in the statute should be given their plain and ordinary meaning without resulting to forced or subtle construction. Auto Owners Ins. Co. v. Rollison, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008); Sonoco Prods. Co. v. S.C. Dep't of Revenue, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008). When statutes address the same subject matter, they are *in pari material* and must be construed together, if possible, to produce a single, harmonious result. Howell, 370 S.C. at 509, 636 S.E.2d at 628; Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001); Joiner ex. rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000); *see also* Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008) (“Moreover, ‘[a] statute should not be construed by concentrating on an isolated phrase.’”). “ ‘The legislature is presumed to have fully understood the meaning of the words used in a statute and, unless this meaning is vague or indefinite, intended to use them in their ordinary and common meaning or in their well-defined legal sense.’ *See Rorrer v. P.I. Club, Inc.*, 347 S.C. 560, 568, 556 S.E.2d 726, 730 (Cl.App.2001) (“[The Court] should consider not merely

the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statutes and the policy of the law.”).

However, courts will reject an interpretation leading to an absurd result clearly unintended by the legislature. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Miller v. Lawrence Robinson Trucking, 333 S.C. 576, 582, 510 S.E.2d 431, 434 (Ct.App.1998); *see also* Ray Bell Constr. Co. v. Sch. Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) (“However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature...”). In this situation, the true purpose and intentions of the legislature will prevail over the literal import of the words. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); *accord* New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310-311, 649 S.E.2d 28, 30 (2007). “Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.” TNS Mills, Inc. v. S.C. Dep’t of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998) (citing Whiteside v. Cherokee County Sch. Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 888 (1993)); *accord* Moon v. City of Greer, 348 S.C. 184, 188, 558 S.E.2d 527, 529 (Ct.App.2002)

BCLO 106-9(b) provides the procedure by which the ZBA can issue a special use permit to allow a nonconforming use of a parcel of property to become a conforming use. Under BCLO 106-9(b)(2), the Beaufort County DRT makes recommendations to the ZBA for final decision on the issuance of a special use permit. “The special use permit application is reviewed by the DRT who then provides a recommendation to the [ZBA] for a final decision. The DRT and the [ZBA], at their discretion, shall require the following studies and reports from the property owner as part of their consideration in deciding whether to approve the request and/or how much of the request to grant.” BCLO 106-9(b)(2). The two studies referred to under BCLO 106-9(b)(2) are the Operation plan and the CIS. As noted above, the ZBA, at its discretion did not require Beaufort County, the landowner of the parcel, to submit a CIS.

However, different sections of the BCLO specifically mandate that the ZBA require the landowner to submit a CIS in order to issue a special use permit. BCLO 106(b)(3) titled Criteria for approval of nonconformity through special use permit, states: “In addition to the standards and criteria for special use permit approval set forth in subsection (b)(2) of this section, in

division 2 of article V of this chapter and subdivision IV of division 3 of article III of this chapter, the applicant shall meet the following requirements:" included under division 2 under article V is BCLO 106-1362, a section that deals specifically with convenience centers. BCLO 106-1362 titled Convenience Center specifically requires the landowner to submit a CIS to the ZBA for the issuance for a special use permit for use as a convenience center. "Report/studies required. All application for [use of a parcel as a convenience center **shall require a community impact statement** consisting of [an] area impact assessment, environmental impact statement, traffic impact statement, archaeological and historic impact statement." BCLO 106-1362(b). (Emphasis added).

A reasonable reading of the ordinances mandates that while the County may have discretion to require the submission of a CIS in some cases, it does not have discretion in all cases. BCLO 106-9(b)(2) is titled Procedure for mitigating nonconformity by special use permit. A reasonable reading of 106-9(b)(2) is that the County does not violate the procedural process for issuing a special use permit when it exercises its discretion and does not require the landowner to submit a CIS. However, just because the County complied with the procedural requirements does not mean that it complies with the substantive requirements for issuing a special use permit.

BCLO 106-9(b)(3) is titled the **criteria for approval** of nonconformity through special use permit. (Emphasis added). A logical reading of BCLO 106-9(b)(3) mandates that there are several provisions of the BCLO which must be met in order to meet the criteria to approve a special use permit. The first provision is that that the applicant meets the procedure outlined in 106-9(b)(2). "[The applicant shall meet the following requirements] in addition to the standards and criteria set for in [106-9(b)(2)] of this section." BCLO 106-9(b)(3) The second provision is that the applicant comply with the standards and criteria set for in division 2 of article V of this chapter. *Id.* As mentioned above, the use of a convenience center is located within division 2 of article V of this chapter and BCLO 106-1362(b) states, "All application for [use of a parcel as a convenience center **shall require a community impact statement.**" BCLO 106-1362(b) (emphasis added). Since 106-9(b)(3) states that the applicant shall meet the requirement included division 2 Article V, and the ordinance governing convenience centers is located under division 2 Article V, it logically follows that the application for a special use permit for use as a

convenience center must include a CIS in order to meet the criteria necessary to issue the special use permit for a convenience center.

The County argued at the hearing that such a reading would eviscerate and/or subsume its discretion because division 2 of Article V contains most of the uses of Parcels of land within it. This argument is without merit for two reasons. First, 106-9(b)(2) and 106-9(b)(3) are not inconsistent provisions. It is perfectly logical for the Beaufort County Council to pass an Ordinance specifying the procedural requirements necessary for acquiring a special use permit and also pass a separate section which states the substantive criteria for what must be met by the applicant in order to receive a special use permit. Therefore, a party could not challenge the ZBA's decision to issue a special use permit without the issuance of a CIS for a procedural defect. However, a party could still assert that the ZBA failed to follow the requisite substantive criteria for issuing a special use permit for a convenience center.

Second, only some uses listed under division 2 of Article V require the submission of a CIS. See BCLO 106-1156 Agriculture; BCLO 106-1157 Forestry; BCLO 106-1159 Farmstead (examples of uses that do not require a CIS) See Also BCLO 106-1186 Planned Residential; BCLO 106-1248 Schools; BCLO 106-1251 Protective Care (examples of uses that require a CIS). Therefore, the County's argument that it could not exercise its discretion under 106-9(b)(2) fails.

Finally, the County argues that the ZBA was not required to have a CIS statement in front of it because BCLO 106-1126, which is entitled the scope of the division section for Article V Division 2, states that "this division describes the standards governing limited a special uses as designated in the general land use table 106-1098." The County asserts that properties zoned Community Preservation are not listed under the general land use table 106-1098 and therefore BLO 106-1362, which is listed under Article V division 2 and sets for the standards required for the issuance of a special use permit for a convenience center does not apply to this Parcel and therefore the ZBA did not abuse its discretion by not having a CIS. The County's argument fails.

The last line of table 106-1098 specifically lists the Community Preservation zone. As a consequence, the County's argument that properties zoned Community preservation are not listed or mentioned on the general use table is false. Moreover, BCLO 106-1126, which defines the scope of Article V division 2 states, "this division describes the standards governing limited a

special uses as designated in the general land use table 106-1098. These standards [listed in Article V division 2] are in addition to other standards required elsewhere in this chapter.” BCLO 106-1126. So, according to the text of BCLO 106-1126, the inclusion of Community Preservation in the table triggers the need to comply with the standards set forth under Article V division 2 of which 106-1362 is a part. Because BCLO 106-1126 states that the provisions in Article V division must be complied with “in addition to other standards required elsewhere in this chapter”, it is not inconsistent nor does it supplant the County’s duty to comply with the provisions of Article V division 2 if the general use table also includes reference to another table for properties zoned Community Preservation.

There is no mention of a convenience center in Appendix D, which governs Community Preservation, while it is notable that Appendix D section 7 of Chapter 106 makes specific mention of drop-off centers and also incidentally requires a CIS for that use in a Community Preservation Zone. Nor is there mention of standards regarding a convenience center in Section 10 of Appendix D. Section D deals specifically with Daufuskie Island. If the tables regarding Community Preservation Zones and Daufuskie Island were meant to replace the general use table then why don’t they include the convenience center use in those tables as like it does in the general use table? Presumably because the Beaufort County Council didn’t feel it necessary to include that use in the Appendix D tables since Community Preservation was included in the General Use table and consequently was covered by the Ordinances listed under Article V division 2. Any additional mention of a convenience center in Appendix D is duplicative and unnecessary since 106-1126 states that standards in Article V division 2 apply in addition to other standards listed in the chapter. The tables under Appendix D are other standards listed in the chapter which must be complied for those uses listed in Appendix D as well. To read the statutes in the way the County proposes would lead to an absurd result in that all the other zoning uses listed in the General Use Table would be required to comply with those standards and Community Preservation zones would not.

The standards listed in 106-1362 apply to the Parcel, the County’s discretion is not subsumed by requiring it to comply with 106-9(b)(3), and 106-9(b)(2) and 106-9(b)(3) are not inconsistent provisions. Therefore, the County was required to have a CIS in front of it when it approved the special use permit and there is no question that the ZBA failed to require a CIS statement for the Parcel.

Pursuant to South Carolina Code Section 6-29-830(A), the ZBA turned over the documents it reviewed and provided a transcript of the hearing to the clerk of the Circuit Court regarding the issuance of this special use permit. A review of the documents reveals that only the archaeological statement was provided to the ZBA by Beaufort County as part of its application for the special use permit. All of the other statements which constitute a CIS pursuant to BCLO 106-1362(b) were missing. Moreover, the ZBA's own letter issuing the special use permit states that the staff did not require a CIS. Therefore, there is no dispute of fact regarding the absence of a CIS when the ZBA issued the County this special use permit.

When making a decision to issue a special use permit, the ZBA must conform to local ordinances which govern the evidence required to be presented before it. "In exercising its discretion, the board of adjustment is not left free to make any determination whatever that appeals (sic) to its sense of justice. It must abide by and comply with the standard prescribed by the local ordinance[s] and zoning statutes." Stevenson v. Board of Adjustment of the City of Charleston, 230 S.C. 440, \_\_\_, 96 S.E.2d 456, 460 (1957). Beaufort County Local Ordinances mandate that the ZBA have a CIS prepared by the landowner in front of it when issuing a special use permit for a convenience center. There is no ambiguity in the ordinance. The ZBA ignored the standards prescribed by the local ordinance. Consequently, the ZBA abused its discretion when it issued the special use permit because it did not have the evidence in front of it that the statute required it have. This is not a dispute regarding the ZBA's interpretation of the facts. This is a case involving the complete lack of a piece of required factual evidence.

The County has intimated in prior legal arguments in motion hearings regarding this matter that this is a "grandfathered use" and therefore somehow exempt from having to provide the CIS. There is no statement in the Ordinances that allow for an exception to follow the requirements to issue a special use permit because of a "grandfathered use." Moreover, it is clear from the colloquy that the ZBA understood and knew that the County needed the issuance of the special use permit to build a convenience center on the Parcel and therefore should be held to the standard required to issue that special use permit.

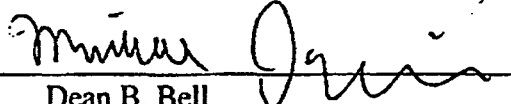
Also, the County argued during the prior motions that construction of this convenience center would have a beneficial impact on the Daufuskie Island community. This is pure speculation on the County's part and is in fact a reason for requiring that a CIS be done and presented to the ZBA when constructing a convenience center. How is the ZBA supposed to be

able to determine the impact on the community without having a CIS? The bottom line is that the duly elected legislative body of Beaufort County felt it necessary that the ZBA have a CIS in front of it in order to issue a special use permit for a convenience center to become a conforming use. The ZBA and the County as the landowner chose to ignore the statutory provision and issue the special use permit anyway. This can be characterized in no other way other than as an abuse of discretion by the ZBA.

### CONCLUSION

Appellants assert that this Court should reverse the ZBA's decision to issue the special use permit because the Appellants sufficiently preserved their argument and the ZBA abused its discretion when it issued the permit without having all statutorily mandated evidence in front of it when at the hearing when it decided to issue the permit.

THE LAW OFFICE OF DEAN B. BELL, LLC

By: 

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Attorneys for Appellants

June 1, 2010

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
COUNTY OF CHARLESTON ) CIVIL ACTION NO: 09-CP-10-1025

Donald Newton, Jean Flagg-Newton )  
and James C. Hudson )

Appellants/Plaintiffs, )

vs. )

Zoning Board of Appeals for the )  
County of Beaufort )

Respondents/Defendants. )  
\_\_\_\_\_ )

RESPONDENT ZONING BOARD  
OF APPEALS FOR THE  
COUNTY OF BEAUFORT'S  
REPLY TO BRIEF OF  
APPELLANTS

Respondent Zoning Board of Appeals for the County of Beaufort (hereinafter referred to as either the "County" or "ZBOA") now comes before this Honorable Court, further responding to the Brief of Appellants, filed on or around June 1, 2010. For all of the reasons raised in the County's briefs previously filed with this Court (See Respondent's Motion to Dismiss and Memorandum in Opposition to Notice of Appeal and Respondent's Supplemental Brief in Opposition to Notice of Appeal, attached hereto as EXHIBIT A and incorporated herein by reference) as well as those raised herein, the County would respectfully request that this appeal be dismissed.

## ARGUMENT

At the ZBOA hearing of December 10, 2009, Appellants did not raise any of the issues that have now been raised in Appellant's Petition/Notice of Appeal and Brief, and consequently this appeal must be dismissed.

Appellant's main argument in its Petition/Notice of Appeal is that the ZBOA abused its discretion by failing to require and consider a Community Impact Statement (CIS) when considering whether or not to issue a special use permit for improvements to a pre-existing convenience center located on Daufuskie Island. (See Notice of Appeal and Brief of Appellants) Appellant concedes that *this issue* was not specifically raised to or ruled upon by the ZBOA, and must concede that no post-hearing motion, such as for reconsideration, or to alter or amend, was made. (Brief of Appellant, P. 10) (*emphasis added*) Appellant believes that this issue was generally raised by Ms. Newton at the hearing, and consequently the issue was preserved for review.

Specifically, Appellant believes that Ms. Newton's statement to the ZBOA that, "as the plans [have] been presented it may not be legally permissible...to...really [issue] a special use permit", constitutes (1) a sufficient objection to preserve the issue on appeal, and (2) that even though she did not specifically mention the requirement of CIS, such an objection "served to notify the ZBOA that the plans, of which a CIS was one, as presented were legally insufficient to issue a special use permit." (Brief of Appellants, P. 10) Her statement does not satisfy the basic and longstanding rules governing issue preservation.

It is a fundamental component of appellate practice that an issue raised by an Appellant must have been preserved in order for an Appellate court to review the issue. Jean Hoefler Toal, Shahin Vafai, & Robert A. Muckenfuss, Appellate Practice in South Carolina, ch. 3, p. 55 (2d Ed., South Carolina Bar – CLE Division 2002); citing Kennedy v. South Carolina Retirement Sys., 349 S.C. 531, 564 S.E.2d 322 (2001); See also Burton v. County of Abbeville, 312 S.C. 359, 440 S.E.2d 396 (S.C. App., 1994)(Zoning issue concerning whether Abbeville County had lawfully adopted Comprehensive Plan was not preserved for appeal where neither county zoning board of appeals nor circuit court addressed issue and appellant did not seek a ruling by posttrial motion)(emphasis added); Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App.,2009)(circuit court reviewing a zoning determination on appeal); See Also Kiawah Resort Assocs. V. S.C. Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995); Young v. South Carolina Dept. of Health and Environmental Control, 383 S.C. 452, 680 S.E.2d 784 (S.C. App.,2009); Boyer v. Loftin-Woodard, Inc. 247 S.C. 167, 170-71, 146 S.E.2d 606, 607 (1966); Home Med. Sys. V. S.C. Dep't of Revenue, 382 S.C. 556, 562, 677 S.E.2d 582 (2009) (emphasizing that issue preservation is required in administrative appeals and holding Rule 59(e), SCRPC motions are permitted in ALC proceedings"). In order to preserve an issue for appeal, the specific grounds in support of the objection must be clearly stated, and must be sufficiently specific to bring into focus the precise nature of the alleged error so that it can reasonably understood by the trial judge. Toal, et al, Appellate

Practice in South Carolina, ch. 3, p. 65; (citing Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998))

Ms. Newton's statement that issuing a special use permit may be, "not legally permissible" is patently insufficient. What is or is not "legally permissible" when issuing a special use permit is a broad proposition; that is, "legally permissible" could refer to any number of regulations, statutes, case law, etc. that might be applicable when issuing a special use permit. Challenging the issuance of the special use permit at a ZBOA hearing by saying it may not be "legally permissible" is like a litigant arguing to a trial court that it ought not grant summary judgment because it is not "legally permissible." This statement begs the question; what exactly and why exactly is the issuance of the permit not legally permissible. Appellants gave no specific reasons as to why it would not be legally permissible, and as conceded by Appellants, they certainly did not mention to the ZBOA the specific sections of the ZBOA that they now seek reliance upon, nor did they mention a CIS needed to be done or was required under the ZDSO. Because they neither gave specific reasons as to why it would not be "legally permissible" to issue the permit nor provided the ZBOA with any specific citations to the ZDSO, her statement cannot be considered to have been, "sufficiently specific to bring into focus the precise nature of the alleged error so that it c[ould] reasonably understood" by the ZBOA. (Id.)

Indeed, our Courts have held that an issue was not preserved for appellate review even where it was raised to lower tribunal by reference in a brief submitted to the tribunal. In Young v. South Carolina Dept. of Health and

Environmental Control, 383 S.C. 452, 680 S.E.2d 784 (S.C. App.,2009), the Court of Appeals stated that even a reference to the regulation in an appellant's brief to the lower tribunal which appellant primarily relied upon in his appeal was insufficient in specificity and thus not preserved for appellate review.<sup>1</sup> The Appellants in this case did not submit a brief to the ZBOA, concede that they did not reference the ordinances upon which they now rely upon in this appeal, did not mention the requirement of CIS, and referred, broadly, that issuing a special use permit may not be "legally permissible." If our Appellate courts are willing to find that an issue was not preserved for appeal even where the regulation was mentioned in a written brief submitted to the lower tribunal, then it is certainly doubtful that they would find Appellants have preserved their current arguments by simply saying a permit cannot be granted because it is not "legally permissible."

Appellant also contends that, "the Legislature cannot have intended that objections have to be raised at the hearing level in order to preserve an error since the legislature did not require that the mechanisms of a verbatim and a transcript be prepared for perusal by a reviewing court." (Brief of Appellants, P.

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<sup>1</sup> Young v. South Carolina Dept. of Health and Environmental Control, 383 S.C. 452, 680 S.E.2d 784 (S.C. App.,2009); "In his brief to CZMAP, Young merely referenced the regulation he now asserts was applicable to this controversy and never specifically asserted error in the ALC's failure to follow the correct version in reaching its decision. Moreover, as he admitted in his brief to this Court, the reference contained a typographical error. Even if, as Young asserted during oral argument, the correct citation to the regulation should have been evident to those familiar with this case, we do not agree with Young that such a passing reference sufficed to bring this issue to the attention of CZMAP. Cf. Al-Shabazz v. State, 338 S.C. 354, 379, 527 S.E.2d 742, 755 (2000) (concerning a final decision of an administrative law judge in an appeal from the final decision of the Department of Corrections wherein the supreme court stated "the inmate's petition to the circuit court must distinctly and specifically direct the court's attention to the errors or abuses allegedly committed by the ALC.... A mere expression of dissatisfaction with the ruling is not sufficient.").

9) Appellant further argues that the legislature intended that objections to a ZBA's ruling be made in the petition (as opposed to objections being raised at the ZBOA hearing), because:

"it would lead to an absurd result if the legislature intended for the error preservation to occur at the hearing when it provided no guaranteed mechanism by which an accurate recording, either written or verbal, need to be given to a reviewing court to determine what was said or presented during the hearing in front of the ZBA."  
[sic]

(Brief of Appellants, P.10)

This statutory interpretation is incorrect.

First, the legislature did provide a mechanism if there is insufficient or no testimony. S.C. Code Ann §6-29-840, which governs the appeal process from a ZBOA determination, states in relevant part that a judge may simply remand the appeal back to the ZBOA if the record is insufficient for review.<sup>2</sup> In other words, if a judge is unclear as to whether an issue was preserved or not, he may remand the matter so that a transcript may be generated. That is not the situation in this matter, as a transcript was prepared in this case and copies have been provided for review by the court. A review of this transcript clearly shows the issue was not raised or ruled upon, and Appellants concede this point. Not only is there a mechanism regarding issue preservation if the record is insufficient, but our judiciary has specifically clarified the when and at what stage objections must be made.

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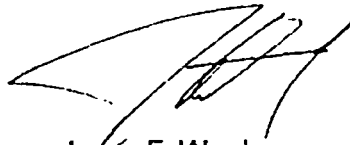
<sup>2</sup> "In the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing." S.C. Code Ann §6-29-840

In the specific context of zoning decisions of a ZBOA, an objection must be raised to and ruled upon *by the ZBOA* in order for the issue to be preserved for trial court review (while sitting in its capacity as appellate court). Burton v. County of Abbeville, 312 S.C. 359, 440 S.E.2d 396 (S.C. App., 1994)(*emphasis added*) Appellants argument to the contrary is flatly wrong. By their logic, it would be permissible to raise any issues on appeal to the circuit court as long as they are raised in the petition/notice of appeal. This would potentially lead to endless appeals and endless remands. While a circuit court may review a ZBOA's determination on appeal, they may only do so if the issues have been properly preserved, and the court will not disturb the ZBOA's rulings unless arbitrary or constitutes an abuse of discretion. Id.; Austin v. Board of Zoning Appeals, 362 S.C. 29, 606 S.E.2d 209 (S.C.App.,2004)("A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." (Internal citations omitted). "However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.")

Finally, even if the statement by Ms. Newton that "as the plans [have] been presented it may not be legally permissible...to..really [issue] a special use permit" is considered to be sufficiently specific to have preserved the issue for appeal, the Appellants never filed a Rule 59 Motion to Reconsider and/or to Alter or Amend the findings of the ZBOA. Burton v. County of Abbeville, 312 S.C. 359, 440 S.E.2d 396 (S.C. App., 1994)(Post Trial motion after Zoning Board decision required to preserve issue for appellate review). As our Courts have repeatedly

recognized, the failure to file such a motion is fatal to Appellants' case. (Id.) Because Appellants failed to raise the issues concerning the CIS to the ZBOA at the hearing and failed to file a motion to reconsider in order to get a ruling on this issue, this Honorable Court cannot consider these matters on appeal, and this case must be dismissed.

RESPECTFULLY SUBMITTED,

 6/4/10

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Attorney for Respondent Zoning Board  
of Appeals for the County of Beaufort  
Bar No: 74850

**Attorney for Respondent**

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF BEAUFORT ) CIVIL ACTION NO: 2010-CP-07-00862

Donald Newton, Jean Flagg-Newton )  
 and James C. Hudson )

Appellants/Plaintiffs, )

vs. )

Zoning Board of Appeals for Beaufort )  
 County )

Respondents/Defendants. )  
 \_\_\_\_\_ )

RESPONDENT'S MOTION TO DISMISS  
AND MEMORANDUM IN OPPOSITION  
TO APPELLANTS' NOTICE OF  
APPEAL

2010 MAY 28 2:49 PM  
 JEREMY A. ...  
 BEAUFORT ...  
 CLERK

This matter comes before the Court on the motion of the Respondent Zoning Board of Appeals for Beaufort County (ZBOA) for an Order dismissing the Appeal pending before this Court from the January 28, 2010 ZBOA decision granting a special use permit for improvements to be made to the pre-existing Daufuskie Island Convenience Center. As explained below, Appellants failed to raise any of the issues now raised in their brief, and this Appeal must be dismissed. However, even if this Court were inclined to address this Appeal on its merits, Appellants have misunderstood the Zoning and Development Standards Ordinances; as explained in detail below, a Community Impact Statement (CIS) is mandatory when an applicant seeks approval of a nonconforming use on a piece of property which has never been used in the manner contemplated by the permit and the zoning map disallows such a use, i.e. a new nonconformity. That is not the situation before this Court.

The Daufuskie Island Convenience Center and has been in existence for over twenty (20) years and has been continuously used by the residents of the Island for over twenty (20) years. A CIS was not required by the ZBOA/DRT/Staff, as it is in their discretion to require one, because they, and the residents of Daufuskie, already knew what the "Community Impact" was. The special use permit granted in this case merely allowed for improvements to an already existing use as a convenience center. This is not an abuse of discretion.

### OVERVIEW

This appeal from the ZBOA concerns the current convenience center located on Daufuskie Island and the special use permit approval by the ZBOA to mitigate this nonconforming use. Terry J. Lee Contracting, Inc. applied for a special use permit for a convenience center to mitigate the "pre-existing nonconforming" convenience center on Daufuskie Island. As acknowledged during the ZBOA hearing on December 10, 2009, the current Daufuskie Island convenience center was considered to be a pre-existing, nonconforming use under the ZDSO for Daufuskie Island – Community Preservation District. (Transcript, P. 4, ln. 17-23)

On November 18, 2009, the Design Review Team ("DRT") granted approval and made recommendations concerning the proposed improvements to a convenience center on Daufuskie Island. The ZBOA, when considering this application for a special use permit to make improvements to an already existing convenience center, did not need to consider a CIS, because the "impact" was already known. As stated clearly in 106-552(6), a CIS "may be required, as determined by staff." (emphasis added) No CIS was required by staff because the convenience center already existed. On January

28, 2010, the Zoning Board of Appeals for the County of Beaufort (ZBOA) granted and approved a special use permit to Beaufort County/Terry Lee Contracting, Inc. to make improvements to the convenience center at 99 Frances Jones Boulevard on Daufuskie Island, and addressed §106-552 (1-6).

On February 25, 2010, Appellants appealed the grant of this Special Use Permit to the circuit court.

## ARGUMENT

- I. **The Issues raised in Appellants Notice of Appeal were never raised to the ZBOA and cannot now be considered by the Circuit Court under its appellate standards of review.**

This Court now sits as an appellate court sits when reviewing a lower court's decision; that is, in its capacity as a court of appeals reviewing a decision of the Beaufort County ZBOA. Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App.,2009)(circuit court reviewing a zoning determination on appeal). In this capacity, this Honorable Court cannot consider whether the ZBOA erred by not considering a CIS, as this is an issue that was never raised to or ruled upon by the ZBOA. See Kiawah Resort Assocs. V. S.C. Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995) (“A court has a limited scope of review of the final decisions of administrative agencies and cannot ordinarily consider issues that were not raised to and ruled on by the agency from which an appeal is taken.”). It is well settled that, “Issues cannot be raised for the first time on appeal, but must be raised to and ruled upon by the trial court to preserve it for appellate review.” Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App.,2009)(circuit court reviewing a zoning determination on appeal); Young v. South Carolina Dept. of Health and Environmental Control, 383 S.C. 452, 680 S.E.2d 784(Ct. App.,2009) (“[E]very ground of appeal ought to be distinctly stated that the Court may at once see the point which it is called upon to decide without having to ‘grope in the dark’ to ascertain the precise point at issue.” Boyer v. Loftin-Woodard, Inc. 247 S.C. 167, 170-71, 146 S.E.2d 606, 607 (1966); see also Home Med. Sys. V. S.C. Dep’t of Revenue, 382 S.C. 556, 562, 677

S.E.2d 582 (2009) (emphasizing that issue preservation is required in administrative appeals and holding Rule 59(e), SCRCF motions are permitted in ALC proceedings”).

Not only did the Appellants not file an appropriate Rule 59, SCRCF, Motion to reconsider, but they failed to even raise the very issue which they now bring before this court to the ZBOA in December of 2009. At no time did the Appellants, who were present at this hearing, ever raise the issue of a CIS needing to be done, or cite any provisions of the ZDSO to support their contention that one was required. (See Transcript of Hearing, dated December 10, 2010) This Court ought not consider these issues under the basic rules of Appellate reviews; but even if it does, it will necessarily “grope in the dark” when reviewing the record in order to strain an interpretation of the ZDSO that is not warranted and is not supported by a natural, logical reading of the ZDSO.

**II. Even if this Court believes appellate review is appropriate, the ZBOA did not abuse its discretion.**

Appellant goes to great lengths to cast doubt on the ZBOA's decision granting a special use permit for the Daufuskie Island Convenience Center. Rather than reading the ZDSO in a logical and natural fashion in accordance with the rules of statutory construction<sup>1</sup>, Appellants now urge this court to substitute its judgment and strain for an interpretation of the ZDSO that is not appropriate.

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<sup>1</sup> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Berkeley County School Dist. v. South Carolina Dept. of Revenue, 383 S.C. 334, 679 S.E.2d 913 (2009)(Internal citations omitted).The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Id.* The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons. *Id.* Ordinances are interpreted similarly. Denene, Inc. v. City of Charleston, (2004)

Contrary to the Appellant's contention, a CIS is not required where the nonconformity is being mitigated under §106-9(b)(2) as is the situation in this case. Indeed, the DRT and/or ZBOA may require one be conducted, but they do not have to do so given the express discretion they are given in the ZDSO, which states "The DRT and ZBOA, **at their discretion**, emphasis added, shall require the following studies and reports".

A CIS is required when application is made for a new Convenience Center under §106-1362. A CIS is not required when the property is already a nonconforming use and is simply being "mitigated" under §106-9(b)(2), as is the case before the court now.

The property had been used for trash collection for over twenty years, and was used this way prior to the enactment of the zoning ordinances themselves. (Transcript, P.4, In.13-23) Mrs. Newton (one of the Appellant in this matter) acknowledged and understood at the hearing that the County, because it had been using the property as a trash collection site prior to the zoning ordinance, gets to use the property to do trash collection no matter whether a special use permit was issued or not. (Transcript, P. 15, In. 4-5; "Oh, I understand that. Daufuskie has trash, so we have to deal with it. I understand that."). The special use permit granted in this case merely allows the County to mitigate the convenience center by fencing it in, replanting shrubbery, providing buffers and setbacks, and the like. These are simple improvements to a pre-existing convenience center; this is not a situation where the nonconformity is being constructed where none existed before. A CIS was not necessary because the property was *already* being used as a convenience center under §106-(9)(b)(2); §106-9(b)(3) and §106-1362 contemplate a *new* use of the property as a convenience center.

Under §106-552 (Discretionary Reviews) and §106-9(b)(2), no CIS was required because the property has been used as convenience center for many years and the permit simply sought to mitigate the non-conformity and because it was not required by staff. Because of this clear language, the ZBOA did not abuse its discretion, and this appeal must be dismissed.

### CONCLUSION

Appellants failed to raise any of the issues to the ZBOA as now presented in their Appeal Brief, and consequently they will not likely succeed in this dispute. Moreover, even if they had raised these issues, they would still not likely succeed because the ZBOA appropriately considered §106-9(b)(2) and §106-552 in its approval of the grant of the special use permit. Based on the foregoing, it is respectfully submitted that this Court should grant Defendant's motion to dismiss this appeal, and award costs in accordance with applicable law.

HOWELL, GIBSON & HUGHES, P.A.

By: 

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Jason F. Ward

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(843) 522-2400

Attorney for Respondent

Bar No: 74850

Beaufort, South Carolina

May 19, 2010

|   |   |                                      |
|---|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                                 | ) | IN THE COURT OF COMMON PLEAS         |
|   | ) |                                      |
| COUNTY OF BEAUFORT                                      | ) | CIVIL ACTION NO: 2010-CP-07-00862    |
|   | ) |                                      |
| Donald Newton, Jean Flagg-Newton<br>and James C. Hudson | ) |                                      |
|   | ) |                                      |
| Appellants/Plaintiffs,                                  | ) |                                      |
|   | ) |                                      |
| vs.   | ) | <u>RESPONDENT'S SUPPLEMENTAL</u>     |
|   | ) | <u>BRIEF IN SUPPORT OF MOTION TO</u> |
|   | ) | <u>DISMISS</u>                       |
| Zoning Board of Appeals for Beaufort<br>County          | ) |                                      |
|   | ) |                                      |
|   | ) |                                      |
| Respondents/Defendants.                                 | ) |                                      |
|   | ) |                                      |

This matter comes before the Court on the motion of the Respondent to dismiss the appeal filed by Appellants in this matter. Respondent respectfully supplements it's prior Brief submitted to this Court, and submits the following for this Honorable Court's consideration as an additional ground to dismiss this appeal.

Appellants argued at this hearing on Appeal that because the language of the Ordinance was vague and conflicting as to whether a CIS is mandatory or discretionary for a special use permit for a convenience center that the ZBOA abused its discretion by not considering a CIS before issuing a permit. Specifically, Appellants argue that §106-1362 (of Article V, Division 2) makes a community impact statement mandatory. As explained below, the provisions of Article V, division 2 do not apply to districts which are zoned "Community Preservation", and thus no CIS is necessary.

It is undisputed that this property is located in a zoning district that is zoned, "Daufuskie Island Community Preservation District," and such a designation has its own

standards. Article V, Division 2 expressly applies only to any zoning designations *that are listed in the general land use table of §106-1098.*<sup>1</sup> Community Preservation districts ("CP"), such as the Daufuskie Island Community Preservation District, are not listed on this general land use table. Thus, contrary to Appellants contention, the requirements of §106-1362 (part of Article V, Division 2, entitled "Convenience Centers") does not apply to uses that are in districts zoned, "Community Preservation."

Rather, CP districts are specifically addressed in §106-959, and are considered "Special" under Table 106-922. Consequently, they are governed by specific standards which are outlined in Appendix D, entitled "COMMUNITY PRESERVATION AREAS". CP districts have their own specific general land use table as set forth in Table 4 of App. D, §8, entitled "COMMUNITY PRESERVATION USE TABLE," and Daufuskie Island is specifically mentioned therein. Thus, by the express language which governs CP districts and the express language of Article V, division 2, the requirements of §106-1362 do not apply to uses in the Daufuskie CP district. Thus, no CIS is mandatory, and this appeal must be dismissed.

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<sup>1</sup> §106-1126 entitled "Scope of Division", states (a) "This division describes the standards governing limited and special uses as designated in the general land use table 106-1098."

**CONCLUSION**

Based on the foregoing, and for all of the reasons as set forth in Respondent's prior brief, it is respectfully submitted that this Court should grant Respondent's motion to dismiss this appeal, with each side bearing their own costs associated with this action.

HOWELL, GIBSON & HUGHES, P.A.

By: 

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(843) 522-2400  
Attorney for Respondent  
Bar No: 74850

Beaufort, South Carolina

May 25, 2010

1 STATE OF SOUTH CAROLINA

ZONING BOARD OF APPEALS

2 BEAUFORT COUNTY

Case No. 2010-CP-07-00862

3  
4 IN RE:

5  
6 BEAUFORT COUNTY – DAUFUSKIE ISLAND

7 CITIZEN'S CONVENIENCE CENTER (SPECIAL USE)

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Hearing regarding the application for a Special Use permit for Beaufort County – Daufuskie Island Citizen's Convenience Center; Beaufort County Zoning Board of Appeals on the 10<sup>th</sup> day of December 2009, at the Council Chambers, Beaufort County Government Complex, 100 Ribaut Road, Beaufort, South Carolina, commencing at approximately 5:17 p.m.

ZONING BOARD OF APPEALS  
100 RIBAUT ROAD  
BEAUFORT, SOUTH CAROLINA 29902  
(843) 470-2780

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APPEARANCES

Members of the Zoning Board of Appeals (Present):

- Mr. Thomas Gasparini, Chairman
- Mr. Claude Dinkins, Member
- Mr. Phillip LeRoy, Member
- Mr. Kevin Mack, Member
- Mr. Timothy Rentz, Member

Members of the Zoning Board of Appeals (Absent):

- Mr. Edgar Williams, Vice Chairman
- Mr. Chester Williams, Member

Staff Present:

- Ms. Hillary Austin, Zoning & Development Administrator
- Mrs. Lisa Glover, Zoning Analyst III

Also Present:

- Mr. David Coleman, Beaufort County Engineering Department
- Mr. Bobby Lee, Thomas & Hutton Engineering Company, Inc.
- Mr. James Hudson, Daufuskie Island Property Owner
- Mr. Donald Newton, Daufuskie Island Property Owner
- Mrs. Gene Newton, Daufuskie Island Property Owner

Given before Lisa Glover, Zoning Analyst III, at 100 Ribaut Road, Beaufort,  
South Carolina, on Thursday, December 10, 2009.

1 MR. GASPARINI: (To David Coleman) Have you seen the recommendations that the  
2 county has made with respect to your application?

3 DAVID COLEMAN: Yes sir.

4 MR. GASPARINI: Okay. Um-hum, and I'll note for the record that the county has  
5 recommended approval of this application, with some conditions, I believe. Very well,  
6 please tell me who you are.

7  
8 MR. COLEMAN: My name is David Coleman; I'm the project manager for Beaufort  
9 County.

10 MR. BOBBY LEE: I'm Bobby Lee with Thomas & Hutton Engineering.

11 MR. GASPARINI: Okay.

12 MR. COLEMAN: We're hoping to receive a special use permit tonight for Daufuskie  
13 Island Drop Off Center, for a convenience center.

14  
15 MR. GASPARINI: A convenience center is, um-hum a trash and recycle removal place;  
16 is that um-hum...?

17 MR. COLEMAN: It's a solid waste disposal site... yes sir.

18 MR. GASPARINI: Okay.

19 MR. COLEMAN: We use it for solid waste, yes sir.

20 MR. GASPARINI: And who comes in and drops off their stuff there?

21 MR. COLEMAN: All the residents outside of the gated communities, as well as the  
22 residents inside, if they so choose.  
23  
24  
25

1 MR. GASPARINI: Okay.

2 MR. COLEMAN: Currently, what we have on the site are open containers, — from  
3 their —, and what we're trying to do is, straighten up and improve that. From several  
4 standpoints, we're going to improve the um-hum health and welfare, by fencing it and  
5 putting in compacters; we're going to reduce the hauling cost, by going to compacters,  
6 which that's a significant part of the solid waste — on Daufuskie, being that it has to be —. It  
7 will be a great improvement, much safer, much cleaner, much more sanitary, and  
8 presentable.

10 MR. GASPARINI: And y'all need a special use permit because...

11 MR. BOBBY LEE: I believe, the use of a solid waste convenience center is not a  
12 conforming use within the CP zoning district.

14 MR. GASPARINI: Okay. (To Ms. Austin) So it was there, Ms. Austin, before the  
15 zoning? Is that correct?

16 MS. AUSTIN: Yes sir. It's not permitted in the Daufuskie Island CP; but because the  
17 site was being used, it's a non-conforming...

18 MR. GASPARINI: So, it's a pre-existing non-conforming legal use?

19 MS. AUSTIN: Yes.

21 MR. COLEMAN: Yes, I believe it's been there longer than the zoning has —.

22 MR. GASPARINI: Um-hum, that wouldn't surprise me. So, um-hum; so they need to  
23 get a special use permit, which would make it a conforming use, even though it's not —. Is

24

25

1 that right?

2 MS. AUSTIN: Yes sir.

3 MR. GASPARINI: Okay. (To the ZBOA Board Members) Gentlemen, do you have any  
4 questions for these gentlemen? Have you had a chance look at the plans --? Any questions?

5 No. Okay. Thank you gentlemen. Um-hum, Ms. Austin, we read the county's  
6 recommendations.

7 MS. AUSTIN: Okay.

8 MR. GASPARINI: Um-hum, let me ask these gentlemen. (To Mr. Coleman & Mr. Bobby  
9 Lee) Sir, excuse me. Do you have any problems with the um-hum conditions that the county  
10 is suggesting for approval, which is insulation of required storm-water/BMP, buffers, and --?

11 MR. COLEMAN: The recommendations will -- forth.

12 MR. GASPARINI: Okay. Thank you. Ms. Austin.

13 MS. AUSTIN: Um-hum, the DRT reviewed the project, and recommended approval  
14 with the following conditions...

15 MR. GASPARINI: So, just so I can understand completely; once we um-hum, assuming  
16 we give them a special use permit, now it's a conforming use. But if they make any changes  
17 to it, they have to come back...right?

18 MS. AUSTIN: Yes.

19 MR. GASPARINI: They just can't come and do whatever they want to do?

20 MS. AUSTIN: We need a site plan; and once that site plan is approved, then that's it.  
21  
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1 If any changes have to be provided...

2 MR. GASPARINI: Then they would have to come back.

3 MS. AUSTIN: Correct.

4 MR. GASPARINI: Okay... I understand... that's what I thought. Okay. (To the ZBOA  
5 Board Members) Any questions for Ms. Austin? Is there any public comment?  
6

7 MRS. NEWTON: Yes.

8 MR. GASPARINI: Yes Ma'am. Did you um-hum give us a piece of paper?

9 MRS. NEWTON: Yes I did.

10 MR. GASPARINI: Okay. Um-hum, I want to be sure that I've got... (To Mr. & Mrs.  
11 Newton, and Mr. Hudson) Are you guys all together?  
12

13 MR. NEWTON: Gene and I.

14 MR. GASPARINI: Okay, so I've got Gene's husband. (To Mr. Newton) Is that right...  
15 that's you? Donald Newton... (To Mr. Newton) that's you. I have Gene. Okay. Won't you all  
16 speak in any order that you want. That's fine with us. Um-hum, you have three (3) minutes  
17 um-hum each. (To Mrs. Newton) Yes ma'am, Gene Newton.

18 MRS. NEWTON: Yes. Um-hum chair, gentlemen. Thank you for the opportunity to  
19 provide input into your decision making process. My — to Daufuskie, is through my  
20 grandmother Mary —, who grew up there, and lived in Beaufort all of her life. And also  
21 through my great grandmother, who is Sarah Hudson.  
22

23 As a —, having receiving a notification about the special use um-hum permit, I started  
24  
25

1 to think about the issues of zoning. I came across a quote that came out of the Supreme  
2 Court, where — versus —... where, um-hum a commercial area was changed and zoned  
3 residential. And of course um-hum, the courts agreed um-hum with the plaintiff. But the  
4 Supreme Court said that the community may enact reasonable laws to keep a pig out of his  
5 parlor; even if pigs cannot be prohibited from the community. And so, I think the request  
6 for a special use permit, simply because things were happening like that all of the time, is —  
7 putting the pig back in the parlor.  
8

9 I'm not an attorney, um-hum, just a citizen, a property owner at Daufuskie. My  
10 analysis is based on information that's available to the public, so I admit there may be some  
11 pieces missing; however, my recommendation for you tonight, is to reject the request for a  
12 special use "outright", or at least table the request until you have had an opportunity to  
13 view the consideration to the two comments that I'm about to make.  
14

15 The basis for my recommendations falls under three broad points; one (1) as the  
16 plans been presented, it may not be legally permissible um-hum, to um-hum really do a  
17 special use; and I'll provide some more details about that. The expansion of the Daufuskie  
18 um-hum Drop Off Center, um-hum is not expressly supported by an improved County  
19 Comprehensive Plan, and I'll provide my notes on that as well. And then there's some site  
20 related issues that I think may impact the county's ability to use the site as proposed.  
21

22 The first point, is legal permissibility. Based on my um-hum understanding of what I  
23 read um-hum; to issue a permit, based on the plans that's submitted is panned out to spot  
24  
25

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1 zoning...and that is not favored by the law. And there's this three (3), um-hum criteria to  
2 begin to look at this process. I -- that the center of operations are inconsistent with the  
3 characteristics of the surrounding properties; to the operations, negatively interfere with  
4 the development in use, or a special use property that is immediately adjacent to where um-  
5 hum the permitted property will be. And also, the attended use of the site, which is the  
6 construction of an expanded um-hum waste drop off center and recycling area, um-hum  
7 again it's not supported. Now in terms of surrounding properties; it's rural, and it's  
8 residential. And by understanding the plans that are presented, there's 6.3 acre parcel; and  
9 within this parcel, there will be a 1.2 acre site that is not separated, and extinct from the 6.3  
10 acres. So, presumably, one could um-hum choose several areas in that 6.3 acre site, and  
11 that's where a special use -- conforms; so, I think we need to look at that.  
12  
13

14 The second part um-hum, is the operations will interfere with the development of a  
15 special use property that is immediately adjacent to the site. In 1994, the county owned a  
16 9.3 acre site, and what they did was split that site into two parts; one is the 6.3 acre part of  
17 the site, on which um-hum the drop off site will be, the other is a 3.8 acre site. If you look at  
18 the shape of that site, the recreation parcel fills out the square for that odd-shape site; and  
19 basically um-hum the county paid for that recreation site with funds that came out of the  
20 Recreation Trust Fund; and the requirement there, is that it could only be used for outdoor  
21 recreation for the public. And I'm certain that further developing that area, um-hum, to  
22 bring waste and recycling activities, will interfere with the appropriate development of that  
23  
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1 site um-hum for public recreation.

2 My second point, is that the expanded DOC, is not expressly supported by the  
3 Comprehensive Plan. I looked at the 1977 plan, I looked at the 2007 plan, I read um-hum  
4 minutes from the 2009 County Council meeting, I read the minutes from the 2002 Council  
5 meeting, and here's what I found; that what the plan said in 1977, was that the insufficient  
6 sign um-hum, based on high volume use would require reconditioning and rebuilding to  
7 correct safety and operational concerns in high volume sites. The 2007 plan follows that  
8 same thing, saying that um-hum they would institute trash compacting capabilities at the  
9 high volume sites to increase efficiency, um-hum, and that would complement um-hum curb-  
10 site election, in high volume areas.

11  
12 I contend that Daufuskie Island DOC does not qualify at a high volume use DOC, and  
13 my reasoning is as follows; in 2007, the fire department did a census on Daufuskie Island,  
14 and they counted four hundred and twenty nine (429) permanent residents, on the internet  
15 it says four hundred and thirty (430), so I'll use four hundred and thirty (430). As of 1987,  
16 sixty-three (63) percent of the landmass of Daufuskie is covered by what we call the um-hum  
17 Private-Unit Developments. The thing about Private-Unit Developments is, they have the  
18 capability, as I read in the draft of the Daufuskie Plan, to do their own um-hum trash  
19 collection and recycling activities. The PUD are, as I call them, the PUD's, um-hum they um-  
20 hum... if you say because they are high density in the historic districts, the areas outside of  
21 the private community is where the county has responsibility for, um-hum collecting the  
22  
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1 trash; if we say, okay... lovely on twenty-five (25) to forty (40) percent of the four hundred  
2 and thirty (430) people that the county is responsible for, that means, what we have to do is  
3 find an effective way for the county to service one hundred and ten (110) to one hundred  
4 and seventy (170) people.

5  
6 Okay, and so, if you look at what the EPA average... um-hum, one person does for .6  
7 pounds of trash per day... if you multiply that by the one hundred and ten (110) or one  
8 hundred and seventy (170) people, and then you can carry it; just say Sheldon, who has um-  
9 hum four thousand (4,000) people, and their convenience center is, what's called a "full  
10 service convenience center". Um-hum, if you follow the plans that the county is proposing,  
11 that's essentially what you would have for Daufuskie, and taking care of up to 170 people;  
12 and so, I propose of the fact that this —. I'm not saying that what we're doing doesn't need  
13 improving, but I'm saying that it's not an effective way. Now, down to the site related  
14 issues; we need to clarify um-hum the events surrounding the county's purchase of the  
15 property... okay!

17 And then, on my last category, is that the site lacks social cultural neutrality... now,  
18 the purchase of the property; the records database, um-hum gives it a mortgage document  
19 that says, that the county of Beaufort loaned Ms. Juanita Kennedy, who's the owner of the  
20 property, eighty four thousand, eight hundred and sixty dollars (\$84,860). A lien was  
21 executed against Ms. Kennedy's property on December 31, 1991. Ms. Kennedy had until  
22 August 1<sup>st</sup>, 1993 to pay off the loan in full. The county was conveyed the property image on  
23  
24  
25

10

1 judgment role, six-eight-three-nine-zero (68390). Also in the database, is a document where  
2 the county paid Ms. Kennedy, one hundred and fifty-eight thousand, and one-hundred  
3 dollars (\$158,100.00) for the property, same date as the execution of the loan... December  
4 31<sup>st</sup>, 1991. Is the county in the practice of making loans to individual citizens?  
5

6 Last point; site lacks social culture neutrality; equally important to the physical  
7 characteristics of the site where activity, in this case, expanding DOC. The location of a site,  
8 think, is an important consideration, and in particular, in the case of Daufuskie, I think, you  
9 have to look at the population patterns. —, noise um-hum occupy on the scene the historic  
10 district to the west. Historically, the Cooper River plantations, and the Maryfield's Plantation  
11 were divided into two to ten acre parcels, and it was sold to the former slaves as they  
12 returned to the island; this is why we have a population of distribution that we do.  
13

14 The question is, Is one gonna paint the picture of waste from the more affluent side  
15 of the island, being brought to the less affluent side of the island, to process trash and  
16 waste? I think we can do better than that. Trash will always be with us, but I believe that if  
17 we really give this some thought and consideration, we can find a solution. Because I would  
18 dearly like to say, and see for the future, when I retire and come to Daufuskie, that  
19 Daufuskie is indeed a place for people, by the people, and of the people. Thank you.  
20

21 MR. GASPARINI: Thank you Ma'am. (To Mr. Hudson) Mr. Hudson.

22 MR. HUDSON: I believe she used my time as well...

23 MR. GASPARINI: Well, I'm prepared to listen.  
24  
25

11

1 MR. HUDSON: My interest in this...is — to hers; the property abuts my property,  
2 number sixty-seven (67), property sixty-nine (69), and um-hum... I — too, as she does; and I  
3 plan to do something with the property... I'm a joint owner of the property, and I um-hum...

4 MR. GASPARINI: Mr. Hudson, I am looking at the plans, and I don't see your name on  
5 here. Who do you own it with?  
6

7 MR. HUDSON: I own it with Abraham Wilks.

8 MR. GASPARINI: Oh. Okay. It helps us see where you are... his name is on here.

9 MR. HUDSON: So, we plan on doing something with the property; and that particular  
10 piece of property will not be — to what we plan to do with it. So that's my input on it.

11 MR. GASPARINI: Okay. Thank you. Um-hum, Mr. Hudson, may I ask you a few  
12 questions? (To The ZBOA Board Members) Does anyone else have any questions for Mr.  
13 Hudson? The Chair does. Um-hum, if I understood your colleague correctly, there's a piece  
14 of property that the county owns between the convenience center. When I first read the  
15 plans, I thought somebody was trying to build an A & P or a Mini mart; anyway, between the  
16 trash pick up place and your property, is a fairly large parcel that's owned by the county, and  
17 do I take that, that is recreational property... Is that right?  
18

19 MR. HUDSON: Yes, it's supposed to be.  
20

21 MR. GASPARINI: I don't know how big that is, because it doesn't say... but it looks  
22 like it's almost as big as the...

23 MR. NEWTON: It's close to three acres sir... recreation park.  
24  
25

12

1 MR. GASPARINI: Is it —?

2 MR. NEWTON: Yes.

3 MR. GASPARINI: So, it was bought for recreation purposes?

4 MR. NEWTON: Yes.

5 MR. GASPARINI: So, maybe I can ask Ms. Austin when it's her turn, but... I'll do that.

6 Okay. (To Mr. Newton) Thank you sir. I have one more question. (To Mr. Hudson and Mr. &  
7 Mrs. Newton) Do y'all live out on Daufuskie?

8 MR. NEWTON: We have property on Daufuskie.

9 MR. HUDSON: We have property on Daufuskie, and we have been out there several  
10 times.

11 MR. NEWTON: I am a descendent of Daufuskie Island. My grandfather and great-  
12 grandfather used to own a — area down there; — Miller, and you can load the map on the  
13 um-hum county's sheet, and the family had a problem with distributing from the  
14 descendants.

15 MR. GASPARINI: So y'all are Daufuskie Island property owners?

16 MR. NEWTON: Yes.

17 MR. GASPARINI: Okay. Further questions? Further public comment? (To the  
18 Audience) Is there any further public comment?

19 MR. NEWTON: (To Mr. Gasparini) May I get 30 seconds?

20 MR. GASPARINI: Um-hum, yes sir. You have to come up here though.

21

22

23

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13

1 MR. NEWTON: Okay.

2 MR. GASPARINI: (To Mr. Newton) People on TV can't hear you, if you're sitting back  
3 there.

4 MR. NEWTON: Mr. Chair. Gentlemen. Don Newton, um-hum spouse to Gene  
5 Newton. As we go forward with it, I would suggest that we need to assume that Beaufort  
6 County don't own any property there, and do their alternatives of analysis, and wherever it  
7 falls, that's where we should put our um-hum convenience center. That's just my suggestion  
8 on that, and that's because how Beaufort came about... the parcel in the beginning.

9  
10 MR. GASPARINI: (To the ZBOA Board Members) Now, are there questions? (To Mr.  
11 LeRoy) Yes sir.

12 MR. LEROY: Do I understand what 's being said here, is that Beaufort County  
13 inquired the property on the basis of it being for recreation, and then they used that  
14 property for a different purpose... for their --, is that's what being said?

15 MR. NEWTON: No sir, I think there was a judgment against a member over there,  
16 who Beaufort County got the property from; then the part about three acres was created  
17 there, and then, I think the trash and dumpster started coming out; I think that's the  
18 sequence of events.

19 MRS. NEWTON: Yes. First they required the property; a couple of years later, they  
20 split the property into two parts, and um-hum made it recreation parcel. Funds from the  
21 Recreation Trust Fund was used to purchase it; of course it was a nominal amount, but it's --  
22  
23  
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25

1 that the money that paid for it came from the Recreation Trust Fund; that makes it a Special  
2 Use property, and designated for Public Outdoor Recreation Use.

3 MR. GASPARINI: We'll ask Ms. Austin about that. Let me ask, let me ask...

4 MR. NEWTON: Yes sir.

5 MR. GASPARINI: cause I'm confused. And I want to be sure that you understand  
6 what's going on here. We've been asked for a special use permit, so that they can upgrade  
7 the facilities that are there; it isn't a permit to let them do a trash collection there... they get  
8 to do that no matter what we do. So, I'm not sure I quite understand; assuming they're  
9 gonna continue to do it there, the way they're doing it, with open containers, and that are  
10 less efficient... and a less attractive way, to be honest with you; I don't understand why  
11 you're oppose with this, because understand that we aren't gonna decide to make it go  
12 away.  
13  
14

15 MRS. NEWTON: Oh, I understand that. Daufuskie has trash, so we have to deal with  
16 it. I understand that.

17 MR. GASPARINI: My guess is, that they're gonna deal with it there.

18 MRS. NEWTON: Absolutely! Here's the concern; in 1982, the board gave an interim  
19 um-hum Special Use, which carried with it about five years. So um-hum, my assumption is  
20 that, that interim was not renewed, and therefore, my concern is to go, "not interim", but a  
21 "Special Use-No Qualifications"; um-hum, and then, what they're gonna create is, a  
22 ...something with a much larger footprint than is now.  
23  
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15

1 Um-hum, my understanding is, that there will be three- (3) trash compacters... um-  
2 hum, there will be a facility there for staff... um-hum, there will be a swale um-hum for  
3 waste-water runoff, and then there will be fuel lines. And so I'm seeing something that has a  
4 much larger footprint than the current activities. Um-hum, I understand that they have to  
5 collect the trash, I understand that they need a place to do it until something else happens;  
6 yes, they may have to stay there.  
7

8 Why I'm saying that, is that I believe the county can make it healthy, um-hum keep it  
9 self-serviced, and also initiate a recycling. Um-hum, as I researched this, there are places in  
10 New York, Mecklenburg County, North Carolina, um-hum Pennsylvania, where they... where  
11 I saw um-hum self-service waste collection and recycling places... where they used um-hum  
12 enervative equipment, like containers or dumpsters that prevented rain water entry and  
13 animals from compromising. Um-hum, I'm saying it's okay if you have to do something  
14 temporarily... fine; um-hum get some new equipment, make it healthy, um-hum... if they  
15 need an interim Special Use, that's okay. Another option...  
16

17 MR. GASPARINI: (To Mrs. Newton) Excuse me! We're getting a little bit far field here;  
18 I'm not an expert on how you handle trash...  
19

20 MRS. NEWTON: Me either; only where I live.

21 MR. GASPARINI: So, I do want to talk to Ms. Austin, but I will confirm this with her.  
22 (To Ms. Austin) But it is my understanding that this use pre-exist the zoning, which makes it  
23 legal, but non-conforming. So there is not an existing Special Use permit on the property?  
24  
25

16

1 MS. AUSTIN: No Sir.

2 MR. GASPARINI: So they can kind of do whatever they want to do there; if they do  
3 anything different, they're coming for a special use permit. My understanding is their  
4 proposal is to do much of what you're talking about; — cleaner, more attractive, because of  
5 the buffers around it, and less sort of um-hum... what's the word I'm looking for... less um-  
6 hum intrusive on the neighborhood. (To Mr. & Mrs. Newton and Mr. Hudson) And so,  
7 assuming that's the case just for the moment, I guess I don't understand what your  
8 objection is.  
9

10 MRS. NEWTON: My concern, as one looks at the development plan for  
11 Daufuskie; right now, sixty-three (63) percent of the mass are the Private Unit  
12 Developments. Um-hum, based on the new Daufuskie plan, when you look at the gateway  
13 area, when you look at the development of the Webb Tract, um-hum, eighty-five (85)  
14 percent of Daufuskie Land Mass will be Private-Gated Communities.  
15

16 I read in the tract, Daufuskie Island Plan — on the first of November, that the county  
17 has gone to the Private-Unit developers, um-hum time and time again, and asked them,  
18 "let's work together... we will take care of your trash", and that the private developers have  
19 said, "no, we have this capability... we're gonna continue to do this ourselves". What I read  
20 in the new Daufuskie says, um-hum, "trash collection on Daufuskie is a county thing"; we  
21 don't think that the Private Unit developers... you know, should be in the business of —  
22  
23  
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17

1 piping their trash collection...

2 MR. GASPARINI: (To Mrs. Newton) Excuse me for interrupting! My question was  
3 pretty specific. What about upgrading the facilities don't you like?

4 MRS. NEWTON: The part about upgrading the facilities that I don't like... number  
5 one, they said, "expand it, and we are going to use a 1.2 acre site", that 's a much larger  
6 footprint; and to me, it becomes, as you say, "well, they was using the site already, this was  
7 before zoning, and you know, occupation becomes nine-tenths of possession." And sir,  
8 what I see is the beginnings of the county creating this big trash deal, where it's trying to  
9 secure the — rights, to um-hum bring the trash from the Private Unit Developers. And so,  
10 what I see is a transfer of trash, one — of areas, to reach the — areas; I have a problem with  
11 that.  
12

13  
14 MR. NEWTON: You know, a — to this might be the other way around. Since  
15 Daufuskie is so small, and is getting smaller, maybe we can have a  
16 memorandum... understanding with the folks behind the gate, and let them process out.  
17 And then, I think that would be reasonable; —so well.

18 MR. GASPARINI: Whether that's reasonable or not, that's clearly not in the purview  
19 of this board.

20  
21 MR. NEWTON: Oh, I know...

22 MR. GASPARINI: So, so um-hum, thank you.

23 MR. NEWTON: Yes sir.  
24  
25

18

1 MR. GASPARINI: Any further public comment? There being none, Ms. Austin, um-  
2 hum, I realize you didn't have your chance; I just wanted to clarify a few things.

3 MS. AUSTIN: Okay.

4 MR. GASPARINI: You were sitting over there when there was public comment, so,  
5 just so we get the record clear. Um-hum, the... this site has been used before the ZDSO was  
6 enacted by the county?  
7

8 MS. AUSTIN: Before the 1990 ordinance, yes.

9 MR. GASPARINI: Before the 1990 ordinance, okay. Um-hum, and so, it's a pre-  
10 existing...

11 MS. AUSTIN: I'm sorry, the 1999 ordinance.

12 MR. GASPARINI: The 1999 ordinance, okay. So it's a legal pre-existing non-  
13 conforming use?  
14

15 MS. AUSTIN: Yes.

16 MR. GASPARINI: Okay. How much space do they use now?

17 MR. COLEMAN: I can offer a little insight...

18 MR. GASPARINI: -- a half (1/2) of acre, an acre...

19 MR. COLEMAN: It's the same footprint that is currently cleared, and capable of being  
20 used for this point.  
21

22 MR. GASPARINI: Okay. So it's cleared, but all of it is not used. Is that right?

23 MR. COLEMAN: When I set the limits of construction for this project, I went to the  
24  
25

1 site; I marked off across the site little areas currently used. I went to the back of the truck,  
2 got a tape out, pulled the tape across, brought that data back to the office, and constructed  
3 this um-hum drawing here of the limits of the site.

4 MR. BOBBY LEE: Which would have accommodated the buffers from the — that we  
5 needed to bring it into conformance with the zoning ordinance.

6 MR. GASPARINI: Okay, so...

7 MR. COLEMAN: It wasn't my intention to expand it in anyway shape or form. So...

8 MR. GASPARINI: My question was, whether or not your intention would, in fact  
9 expand it, or is it the same footprint?  
10

11 MR. COLEMAN: It's the same footprint that's out there... that's available to be —  
12 now.

13 MR. LEROY: Is it the capacity... is that what's expanding?

14 MR. COLEMAN: What we done is... surely if you go to the site now, you're find two  
15 (2) to four (4) open top containers and trash everywhere. When the container gets full,  
16 trash is placed on the ground —. What we're trying to do, is because it is an island, and it's a  
17 difficult situation to get back and forth to empty the containers, we'll put two (2) units out  
18 there instead; so we're have three compacting units out there, so that we'll be able to have  
19 a working compacting when the residents come down to dump their trash. It should cut our  
20 haul by about sixty (60) percent... fifty (50) percent. Now, I can't speak for Jim Minor, the  
21 Solid Waste Manager, but it is one of our project goals, is to reduce the hauling.  
22  
23  
24  
25

20

1 MR. LEROY: And for the most part, this is non-PUD...?

2 MR. COLEMAN: Yes sir. This is a county facility, and by definition, it's going to be  
3 open to the public. The PUD is not in the habit of putting their trash...

4 MR. LEROY: So they don't collect it on the inside of the PUD's, and then haul it to  
5 this...?  
6

7 MR. COLEMAN: No sir, once they collect it door to door, then that becomes a  
8 commercial trash business, and commercial dumping is not available on our sites; that much  
9 I do know.

10 MR. LEROY: And this wouldn't be big enough to handle all of that, even if it's closer.

11 MR. COLEMAN: This site is not really large enough to accommodate recycling in an  
12 effective manner; a cost effective manner. But again, I don't want to venture too far and  
13 speak for Mr. Minor.  
14

15 MR. GASPARINI: So, you just want to —?

16 MR. COLEMAN: Yes sir. My job is... as um-hum —, is to put the project in motion.

17 MR. GASPARINI: Alright, I understand. Any further questions for um-hum...

18 MR. DINKINS: Yes... um-hum, maybe Mr. Bobby Lee.

19 MR. BOBBY LEE: Yes sir.  
20

21 MR. DINKINS: Um-hum, how many times — was taken away from the site now; did  
22 y'all do the calculations on that?

23 MR. COLEMAN: No sir. I'm sorry. He did not do the calculations on it. I came to him  
24  
25

1 for equipment risk, this is what I want... this is what —.

2 MR. DINKINS: So these two (2) units, are what... thirty (30) ton units, or thirty (30)  
3 yard units, or twenty (20) yard units?

4 MR. COLEMAN: Sir, I believe the container that connects to it, is a — yard container,  
5 and it's considered a three (3) yard device, that attaches to the forty (40) yard container.

6 MR. BOBBY LEE: The current open top containers will be considered twenty (20) -  
7 yard non-compacted volumes; this will be a forty (40) yard compacted volume.

8 MR. DINKINS: (To Mr. Coleman) I'm just gonna ask you this question; I've got two (2)  
9 thirty (30) ton in a — area every three (3) weeks, so I'm just trying to get a feel on... I mean,  
10 that's four hundred (400) units, that's eight hundred (800) feet; I'm just trying to get a feel  
11 for...  
12

13 MR. COLEMAN: No sir, it's a forty (40) feet yard; I don't have a — to tell you what  
14 they weigh, but I would — to say probably — tons —...  
15

16 MR. DINKINS: Oh yea...

17 MR. COLEMAN: Yes sir.

18 MR. DINKINS: I got the same yard as you... you have a forty (40) yard; I have a two  
19 (2) thirty two (32) — yard.  
20

21 MR. COLEMAN: One of the big benefits is — rainwater in the...

22 MR. DINKINS: Self-container... yes, once your door shut... you're fine; but if you get  
23 water in them... they got seals on them...  
24  
25

1 MR. COLEMAN: Yes.

2 MR. BOBBY LEE: And to also clarify, the swale that is proposed around it is for storm-  
3 water. So we also have gone to great lengths, to very much limit the environmental impact  
4 to the site; all of the surrounding areas... such things like gravel, delivering areas for the  
5 truck. So it will be pervious in nature, and we're also have very good soils on the site. So our  
6 intention is to be able to infiltrate a good amount of the storm-water runoff, to meet the  
7 BMP manual as well.

9 MR. DINKINS: I think you have to have DHEC permits; do you have to have a — trap?

10 MR. BOBBY LEE: No sir. Not for these kind of sites, because they are in sealed  
11 containers; you don't have a... that would be like a solid waste transfer station, where you  
12 would have a commercial waste dumping operation come backup their dump trucks, and  
13 dump it on the concrete slab, and the — loaders would shovel it in the compacters... stuff  
14 like that, and that's not what this is. This is...

16 MR. DINKINS: Good for you. I think —.

17 MR. GASPARINI: (To the ZBOA Board Members) Further questions for this  
18 gentleman? Okay. (To Mr. Coleman & Mr. Bobby Lee) Thank you gentlemen.

19 MR. COLEMAN: Thank you.

20 MR. GASPARINI: Okay. (To the ZBOA Board Members) Um-hum, is there any  
21 discussion? Do I have a motion for the purpose of a discussion?  
22

23 MR. RENTZ: I'll make a motion to approve...  
24  
25

23

1 MR. DINKINS: Second.

2 MR. RENTZ: the special use permit.

3 MR. GASPARINI: (To Mr. Rentz) With the conditions, as stated by the county?

4 MR. RENTZ: Yes.

5 MR. GASPARINI: Um-hum. (To Mr. Dinkins) And your second is that, with the three  
6 conditions that are listed on the county's recommendation. (To the ZBOA Board Members)  
7 Um-hum, so a motion having been made and seconded; is there any discussion? The chair  
8 understands that... that public comments... um-hum, I think there's probably some issues  
9 with the county that are more um-hum political than straighter in nature, rather than zoning  
10 to be honest with you. I mean, this is the zoning board; so, I don't feel like we're in the right  
11 spot to deal with some of the issues that have been raised.  
12

13  
14 Um-hum, and I do believe, um-hum, at least myself, that um-hum the application does  
15 meet the criteria for approval of the Special Use, contained in Section 106-552 of the Zoning  
16 & Development Standards Ordinance. Um-hum, and I would suggest that we make specific  
17 findings of fact that it does, um-hum... that would be one (1) through six (6) of that section.

18 (To the ZBOA Board Members) Any other discussion or comments? There being  
19 none, we will put this to a vote. A motion has been made, to approve the Special Use, with  
20 the conditions um-hum, as stipulated by the county; which are installation of the required  
21 storm-water/BMP, placement of required buffers, and plant back or mitigation of all  
22 specimen trees proposed for removal. Um-hum, with those conditions, all those in favor  
23

24  
25

24

1 Indicate (Dinkins, Gasparini, LeRoy, Mack, and Rentz); all opposed? It being unanimous, the  
2 special use permit, with conditions, is granted.

3 MR. NEWTON: Mr. Chair.

4 MR. GASPARINI: Yes sir.

5 MR. NEWTON: Don Newton. Um-hum, for the questions that we had for this board;  
6 you said, they could not answer them. Would you give us a recommendation, because we  
7 still have concerns... where we should take our concerns?  
8

9 MR. GASPARINI: Um-hum, I don't have an official recommendation; that's not my  
10 job. Um-hum, I would talk to the County Councilman —, that represent Daufuskie Island...  
11 would be where I would start —.

12 MR. NEWTON: Thank you.

13  
14  
15 (WHEREUPON, this hearing was concluded at approximately 5:55 p.m.)  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

25

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity

Case No. 2010-CP-07-00862

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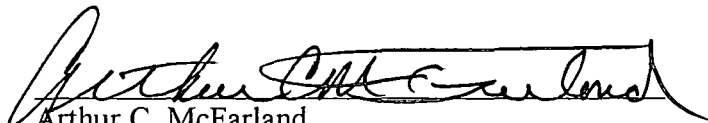
Donald Newton, Jean Flagg-Newton and James C. Hudson..... Plaintiffs,  
Of whom Donald Newton and Jean Flagg-Newton are ..... Appellants,  
v.  
Zoning Board of Appeals for Beaufort County ..... Respondent.

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**CERTIFICATE OF COUNSEL**

---

I certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



Arthur C. McFarland  
Attorney for Appellants  
1847 Ashley River Road, Suite 200  
P.O. Box 80609  
Charleston, S.C. 29416  
(843) 763-3900 ext. 3

Charleston, S.C.

February 28, 2011

## INDEX

|   |                |
|---|----------------|
| Application for Special Use Permit (11/19/09).....  | Supp. ROA (1)  |
| Daufuskie Island Citizen's Convenience Center Beaufort,<br>SC Project Narrative (11/19/09)..... | Supp. ROA (2)  |
| Daufuskie Island Natural Resource Protection Aerial Exhibit<br>(11/13/09).....                  | Supp. ROA (4)  |
| Letter from Hilary Austin to David Coleman (11/6/09).....                                       | Supp. ROA (5)  |
| County of Beaufort Development Review Team Action Form<br>(11/4/09).....                        | Supp. ROA (6)  |
| Oblique Aerial of Drop Off Center (10/16/08).....   | Supp. ROA (7)  |
| Letter from Hilary Austin to David Hughes and Action Form<br>(2/27/09).....                     | Supp. ROA (8)  |
| Daufuskie Island Citizen's Convenience Center Project<br>Narrative (10/20/09).....              | Supp. ROA (10) |
| Beaufort County Public Notice.....  | Supp. ROA (11) |
| Application for Special use Permit (10/21/09).....  | Supp. ROA (12) |
| Memorandum (DRT to ZBOA)(12/1/09).....  | Supp. ROA (13) |
| Letter from Hilary Austin to David Coleman (with Action Plan)<br>(11/20/09).....                | Supp. ROA (15) |
| Letter from Natural Resources Planner to David Coleman<br>(4/8/09).....                         | Supp. ROA (17) |
| Letter from Historic Preservationist to Bobby Lee (10/19/09).....                               | Supp. ROA (20) |
| Certificate of Counsel.....   | Supp. ROA (21) |

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Common Pleas Court  
Marvin H. Dukes, III, Beaufort County Master in Equity  
Civil Action No. 2007-CP-07-00862

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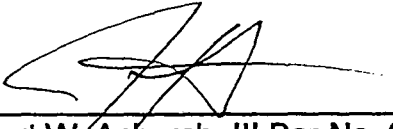
Case No.: 2010168486

Donald Newton, Jean Flagg-Newton and James C. Hudson,.....Plaintiffs,  
Of whom Donald Newton and Jean Flagg-Newton are.....Appellants,  
v.  
Zoning Board of Appeals for Beaufort County..... Respondent.

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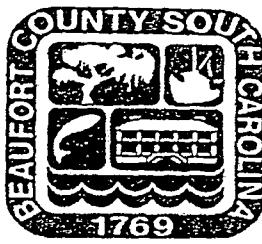
RESPONDENT'S SUPPLEMENT TO RECORD ON APPEAL

---

By:   
Robert W. Achurch, III Bar No. 064854  
Jason F. Ward Bar No: 74850  
Howell, Gibson & Hughes, P.A.  
Post Office Box 40  
Beaufort, SC 29901  
(843) 522-2400  
Attorneys for Respondent

Beaufort, South Carolina

October 4, 2011



BEAUFORT COUNTY - ZONING BOARD OF APPEALS  
APPLICATION FOR SPECIAL USE PERMIT


**INSTRUCTIONS:**

Please fill out this application form completely. Attach any pertinent materials that may help the board members to better understand your request, i.e. photos, maps, drawings, etc. Failure to follow these instructions may result in rejection of your application.

1. Property Owner Name: Beaufort County Council  
Address: 100 Ribaut Road, Beaufort, SC 29902  
Home Phone: N/A Work Phone: (843) 470-2591
2. Applicant Name (If different): Terry R. Lee Contracting Co. Inc.  
Address: P.O. Box 1788, Hardeeville, SC 29927  
Home Phone: (843) 784-5288 Work Phone: (843) 784-5288
3. Property Location: Tax District # 800 Tax Map # 24 Tax Parcel # 69 Lot #   
Street Address: 99 Frances Jones Boulevard, Daufuskie Island, SC 29915
4. Please state the reason for the Special Use Permit. (Attach additional sheets as needed):  
Beaufort County Public Works and Beaufort County Engineering Division have identified the need to construct a convenience center on the subject property which is owned by Beaufort County and is currently utilized as a drop off location for citizen's solid waste. Furthermore, Public Works and Engineering has determined that the construction of a new facility is the highest and best use of that portion of the property, and will provide a more efficient, cleaner facility to serve the Beaufort County residents of Daufuskie Island.
6. If request is for a non-conforming situation, please state how the nonconformities will be mitigated:  
The proposed convenience center will mitigate the non-conforming situation in several ways. First the proposed site will comply with the buffer, setback, and landscape requirements of the ZDSO. See the attached narrative for additional description of the site buffering and landscaping. Secondly the proposed center will provide for more efficient handling of solid waste on Daufuskie Island. This will be accomplished by utilizing sealed compactors for household waste, and providing an attendant that will be responsible for ensuring that the citizen's properly use the facility. The convenience center will promote responsible handling of solid waste and enhance the aesthetic quality of the island.
7. Date the DRT granted approval/recommendations: November 18, 2009

**NOTE: THE BOARD MAY POSTPONE OR PROCEED TO DISPOSE OF THE MATTER ON THE AGENDA IN THE ABSENCE OF THE APPLICANT.**

I hereby agree to abide by all conditions imposed by the County of Beaufort in the approval/disapproval of this appeal.

  
Signature of Applicant

Terry R. Lee  
Printed Name of Applicant

11/19/09  
Date

**Daufuskie Island Citizen's Convenience Center**  
**Beaufort County, SC**

**PROJECT NARRATIVE**

November 19, 2009

Beaufort County is proposing the development of a citizen's convenience center to be located on Frances Jones Boulevard on Daufuskie Island. The proposed project was awarded to the design-build team of Terry R. Lee Contracting Co. Inc. and Thomas & Hutton Engineering Co.

The proposed scope of work will include the construction of a convenience center consisting of three waste compactors, two open top containers for white goods, concrete slabs to support the above items, an attendant's facility with associated parking, a gravel maneuvering area, fencing, landscaping and associated infrastructure. The proposed convenience center is located on existing property that is currently owned and utilized by Beaufort County for the removal of solid waste from the island.

The existing tree cover consists mostly of young pines. The existing forest classifies as mixed upland forest young. The total protected resource land was calculated based on the project limits and the CP zoning district. The total protected resource land was calculated to be 0.12 acres. Enclosed is a natural resource protection aerial exhibit depicting the proposed limits of the protected land. The protected area has also been delineated on the enclosed conceptual site plans. Significant tree removal proposed as a part of the convenience center consists of the removal of two (2) 24" pine trees. These significant trees will be mitigated for by either preserving existing trees or planting additional trees within the construction limits to meet the plant back requirement.

The proposed site will contain a minimum undisturbed buffer of 15' along the front property line and the side property line to the south, where adjacent landowners exist. The land to the rear and north of the property is owned by Beaufort County. As mentioned in the paragraph above the site will contain a 0.12 acre natural resource protection area. The natural resource protection area, depicted on the attached aerial exhibit, consists of a strip of land 20' wide, along the southern property line. The

proposed strip includes the 15' buffer area as well as an additional 5' of undisturbed area to further screen the proposed site from adjacent property owners. With the exception of the entrance drive, the front property line will contain a minimum of a 15' strip of undisturbed vegetation to aid in screening the proposed project.

In addition to the buffering, the proposed project will include landscaping consisting of a mix of shrubs, understory and canopy trees to further screen the proposed site from the adjacent property owners, and help maintain a visually appealing convenience center for the Daufuskie Island Citizens.

Supp. ROA (4)

 NATURAL RESOURCE PROTECTION AREA - 0.12 ACRES

### DAUFUSKIE ISLAND CONVENIENCE CENTER

PROPOSED ACTIVITY:  
NATURAL RESOURCE PROTECTION

CLIENT:  
BEAUFORT COUNTY

DATE: 11/13/09  
LOCATION: BEAUFORT, SC

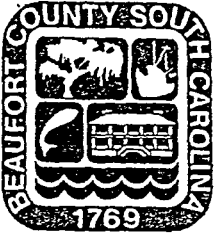
SHEET: 1 OF 1  
SCALE: 1"=100'



**THOMAS & HUTTON ENGINEERING CO.**

50 PARK OF COMMERCE WAY  
POST OFFICE BOX 2727  
SAVANNAH, GA. 31402-2727 (912)234-5300

GEORGIA • SAVANNAH, BRUNSWICK  
SOUTH CAROLINA • CHARLESTON, MYRTLE BEACH  
NORTH CAROLINA • WILMINGTON



## COUNTY COUNCIL OF BEAUFORT COUNTY

Beaufort County Zoning & Development  
Multi Government Center ♦ 100 Ribaut Road  
Post Office Drawer 1228, Beaufort, SC 29901-1228  
OFFICE (843) 470-2780  
FAX (843) 470-2784

November 06, 2009

Mr. David Coleman  
Bft. County Engineering Department  
Post Office Drawer 1228  
Beaufort, SC 29901

Re: Daufuskie Island – Convenience Center – Special Use (Conceptual)

Dear Mr. Coleman:

The Development Review Team (DRT) met on November 04, 2009 to render their decision on the subject project. Listed below is the DRT's decision.

After a unanimous vote by the member's present, the DRT recommended the project be **DEFERRED UNTIL THE NOVEMBER 18<sup>TH</sup> DRT MEETING. THE FOLLOWING INFORMATION SHALL BE SUBMITTED PRIOR TO THE MEETING:**

Applicant shall show area designated for the .44 acre of protected mixed upland forest, young, or redo the Natural Resource Calculations for the disturbed area only.

Applicant is proposing to remove two 24" pines, please indicate the location of the required 19 mitigated trees.

Applicant shall indicate if the required 15-foot side buffer is vegetated, to ensure adequate screening for the adjacent property.

Since there is not a property line located between the disturbed area and the remaining property, applicant shall remove the 5-foot setback line that is shown on the site plan.

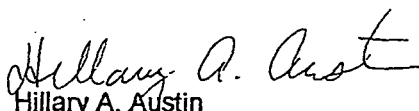
Applicant shall ensure there will be no grading within the buffer yards.

Applicant shall submit the office building elevations.

DRT has agreed to waive the Community Impact Statement submittal since the use is a grandfathered nonconforming use.

If I may be of further assistance, please do not hesitate to give me a call at 843.470.2781.

Sincerely,

  
Hillary A. Austin  
Zoning & Development Administrator

cc: DRT Members

COUNTY OF BEAUFORT

DEVELOPMENT REVIEW TEAM

ACTION FORM

ABSENT

Members Present - Hillary (FO), Delores (FO), Arthur ( ), Robert (FO)

PROJECT NAME (Special Use) PROJECT TYPE

Beaufort County - Citizen's Convenience Center

APPLICANT(DEVELOPER)NAME,ADDRESS,PHONE#

Beaufort County Council, P.O. Drawer 1228, Beaufort, SC 29901-1228

PROJECT LOCATION

PIN

LAND AREA(ACRES)

LOTS/UNITS

BLDG AREA(SQFT)

800-24-60

1.17

N/A

200

DATE OF REVIEW

OVERLAY DISTRICT

FIRE DISTRICT

ZONING DISTRICT

11/4/09

Daufuskie Island

CP

TYPE OF DRT REVIEW (x) CONCEPTUAL ( ) PRELIMINARY ( ) FINAL

APPROVED NO CONDITIONS

DISAPPROVED REASONS:

APPROVED WITH CONDITIONS CONDITIONS:

APPROVED SUBJECT TO CONDITIONS:

DEFERRED: (PLEASE SUBMIT THE FOLLOWING) APPLICANT SHALL REVISE NATURAL RESOURCE CALCULATIONS. SUBMIT MITIGATION PLAN FOR (2-24" DBH TREES) SPECIMENS. SHOW THE VEGETATED 15-FOOT SIDE BUFFER FOR ADJACENT PROPERTY. REMOVE 5-FOOT SETBACK LINE FROM SITE PLAN. APPLICANT SHALL ENSURE THAT THERE WILL BE NO GRADING WITHIN BUFFER YARDS. SUBMIT THE OFFICE BUILDING ELEVATIONS. DRT WAIVED COMMUNITY IMPACT STATEMENT.

11/4/09

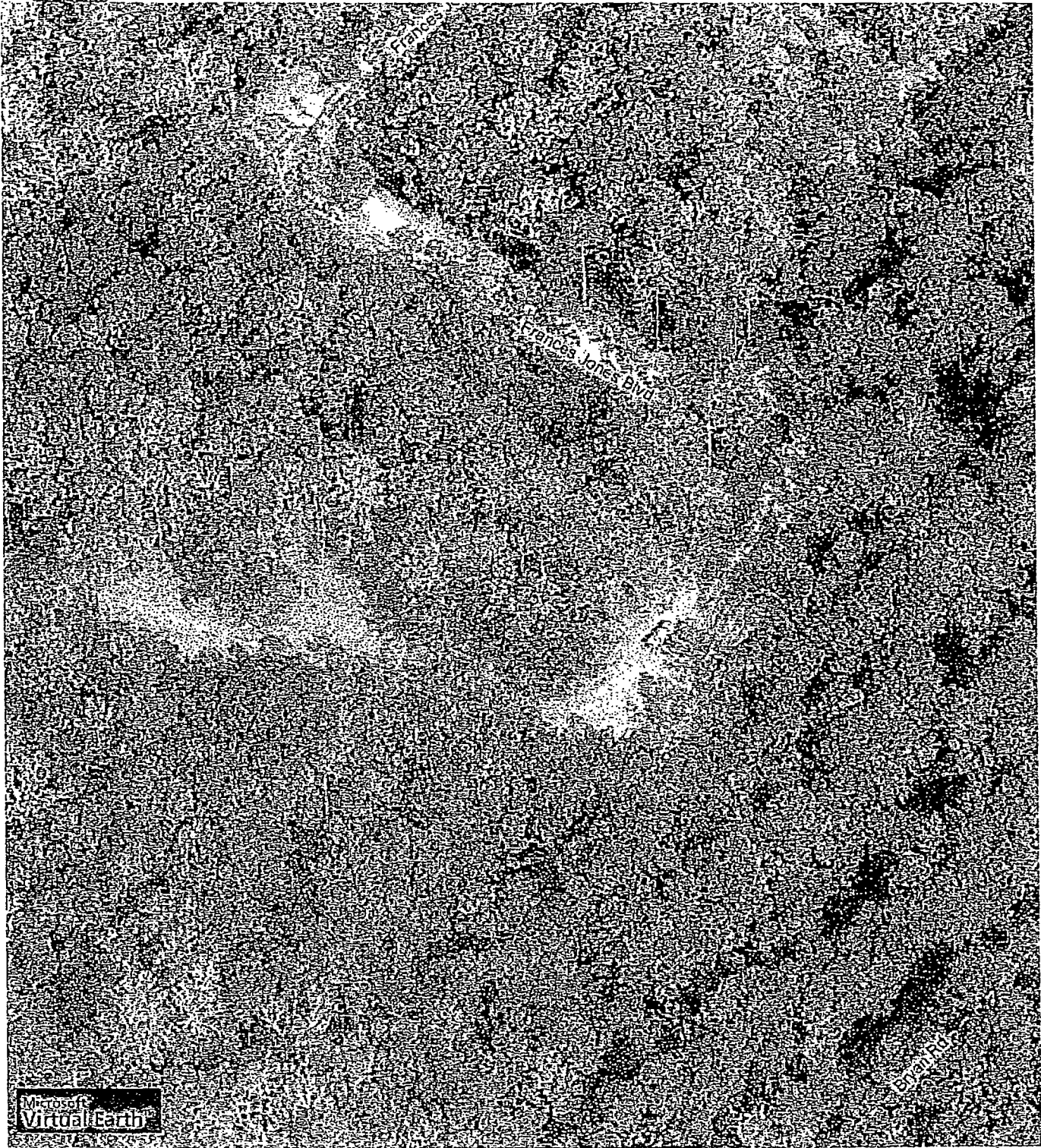
DATE

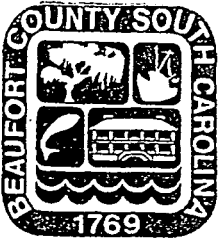
ZONING & DEVELOPMENT ADMINISTRATOR



# Oblique Aerials

Images courtesy of: Microsoft® Virtual Earth™ 2006  
Flight Date: Spring of 2007





## COUNTY COUNCIL OF BEAUFORT COUNTY

Beaufort County Zoning & Development  
Multi Government Center ♦ 100 Ribaut Road  
Post Office Drawer 1228, Beaufort, SC 29901-1228  
OFFICE (843) 470-2780  
FAX (843) 470-2784

February 27, 2009

Mr. David Hughes  
Beaufort County Engineering Dept.  
Post Office Drawer 1228  
Beaufort, SC 29901

Re: Daufuskie Island – Drop-off Center Expansion – Special Use (Pre-application Conference)

Dear David:

The Development Review Team (DRT) met on February 25, 2009 to conduct a pre-application conference on the subject project. Listed below is summary of said discussion.

The applicant is requesting to increase a nonconforming site more than 15%, in order to accomplish the increase, the project will require a Special Use Permit which will make the site conditions conforming.

The applicant was told by the DRT that an extensive community impact analysis will not be required.

Setbacks – 10-feet – street, 5-feet – side, 50-feet rear.

Buffers - 15-feet – street, 15-feet – side adjacent to property owned by others

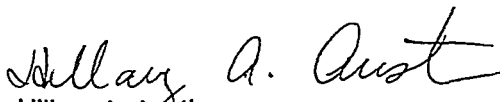
Site shall have 10% Landscape surface ratio.

Applicant shall provide the Natural Resource Calculations.

It was also explained to the applicant that approval by the Zoning Board of Appeals will be needed for the special use permit. And applicant was encouraged to submit for conceptual approval

If I may be of further assistance, please do not hesitate to give me a call at 843.470.2781.

Sincerely,

  
Hillary A. Austin  
Zoning & Development Administrator

cc: DRT Members

**COUNTY OF BEAUFORT  
DEVELOPMENT REVIEW TEAM  
ACTION FORM**

v Absent

Members Present- Hillary (FOR), Delores (FOR), Arthur (N/A), Robert (FOR)

|   |                                 |
|---|---------------------------------|
| PROJECT NAME<br>Daufuskie Island - Drop-Off Expansion | PROJECT TYPE<br>Pre-Application |
|---|---------------------------------|

APPLICANT(DEVELOPER)NAME,ADDRESS,PHONE#  
David Hughes, Beaufort County Engineering Dept., P.O. Drawer 1228

|                           |                  |                                   |            |                       |
|---------------------------|------------------|-----------------------------------|------------|-----------------------|
| PROJECT LOCATION          | PIN              | LAND AREA(ACRES)                  | LOTS/UNITS | BLDG AREA(SQFT)       |
| DATE OF REVIEW<br>2/25/09 | OVERLAY DISTRICT | FIRE DISTRICT<br>Daufuskie Island |            | ZONING DISTRICT<br>CP |

TYPE OF DRT REVIEW- (-) CONCEPTUAL- (+) PRELIMINARY- (-) FINAL-

APPROVED NO CONDITIONS \_\_\_\_\_

DISAPPROVED \_\_\_\_\_ REASONS: APPLICANT IS REQUESTING TO INCREASE A NON CONFORMING SITE MORE THAN 15%, IN ORDER TO ACCOMPLISH THE INCREASE; THE PROJECT REQUIRES A SPECIAL USE PERMIT, WHICH WOULD MAKE THE SITE CONDITIONS CONFORMING.

- APPROVED WITH CONDITIONS \_\_\_\_\_ CONDITIONS: \_\_\_\_\_
- 1) NO EXTENSIVE COMMUNITY IMPACT ANALYSIS REQUIRED.
  - 2) SETBACKS - 10' FRONT, 5' SIDES, 50' REAR.
  - 3) BUFFERS - 15' FRONT, 15' SIDE (ADJACENT TO OTHER RES. PROPERTIES)
  - 4) 10% LANDSCAPE SURFACE RATIO
  - 5) NATURAL RESOURCE CALCULATIONS.

APPROVED SUBJECT TO \_\_\_\_\_ CONDITIONS: \_\_\_\_\_

APPLICANT SHALL SUBMIT TO DRT FOR CONCEPTUAL APPROVAL / Recommendation Letter. AFTER CONCEPTUAL APPROVAL, APPLICANT SHALL APPLY TO THE ZONING BOARD OF APPEALS FOR ~~FURTHER REVIEW~~ PUBLIC HEARING.

DEFERRED. (PLEASE SUBMIT THE FOLLOWING) \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

2/25/09  
DATE

**Daufuskie Island Citizen's Convenience Center**  
**Beaufort County, SC**

**PROJECT NARRATIVE**

**October 20, 2009**

Beaufort County is proposing the development of a citizen's convenience center to be located on Frances Jones Boulevard on Daufuskie Island. The proposed project was awarded to the design-build team of Terry R. Lee Contracting Co. Inc. and Thomas & Hutton Engineering Co.

The proposed scope of work will include the construction of a convenience center consisting of three waste compactors, two open top containers for white goods, concrete slabs to support the above items, an attendant's facility with associated parking, gravel maneuvering area, fencing, landscaping and associated infrastructure. The proposed convenience center is located on existing property that is currently owned and utilized by Beaufort County for the removal of solid waste from the island.

The existing tree cover consists mostly of young pines. The existing forest classifies as mixed upland forest young. The total protected resource land was calculated based on the project limits and the CP zoning district. The total protected resource land was calculated to be 0.12 acres. Enclosed is a natural resource protection aerial exhibit depicting the proposed limits of the protected land. The protected area has also been delineated on the enclosed conceptual site plans. Significant tree removal proposed as a part of the convenience center consists of the removal of two (2) 24" pine trees. These significant trees will be mitigated for by planting a total of twenty (20) 2.5" DBH pine trees within the construction limits to meet the plant back requirement.

There are no wetlands existing on the site as shown on the attached exhibit depicting the NWI wetlands within the proximity of the site. Existing soil conditions on the site are predominately type B and B/D soils.

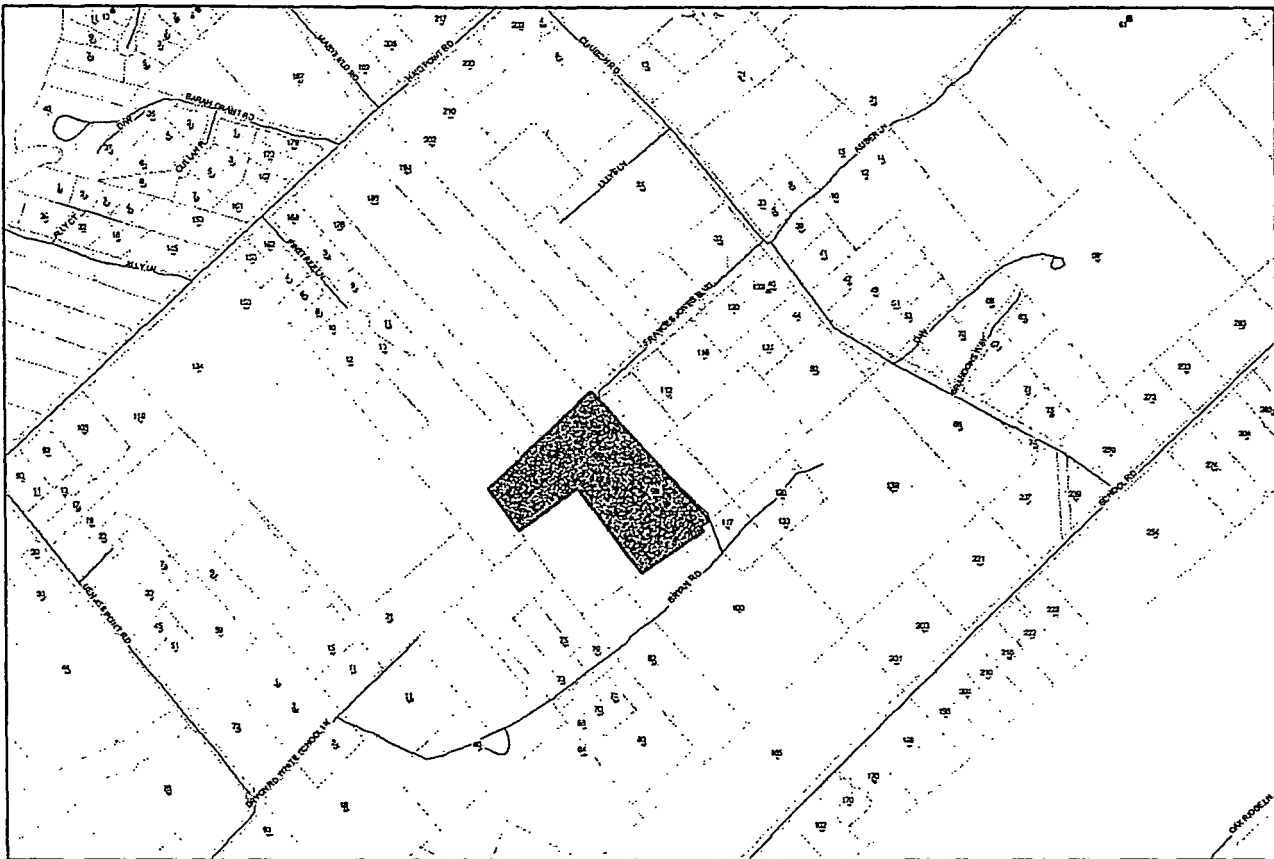
Storm drainage runoff from the site will be directed to a shallow swale surrounding the proposed project. Post developed runoff will be limited to pre-developed rates using infiltration to limit the runoff.

**Beaufort County Public Notice**

On behalf of Beaufort County, Terry R. Lee Contracting Co. is requesting special use approval with the Beaufort County Zoning Board of Appeals for property located on Frances Jones Boulevard identified by Beaufort County Tax Map number R800-024-000-0069-0000.

The meeting will be held on December 10, 2009 – 5:00 PM at the Beaufort County Council Chambers in the Administration Building found at 100 Ribaut Road Beaufort, SC. This meeting is also televised on the Beaufort County Station.

**Site Location**



**Description**

Beaufort County proposes to build a citizen’s convenience center located at 99 Frances Jones Boulevard on Daufuskie Island. The proposed project will replace the current solid waste drop off location located on the same property which is currently owned by the county. The site is approximately 1.20 acres and is identified by Beaufort County Tax Map Number R800-024-000-0069-0000. The property is currently zoned CP (Community Preservation), and the existing drop off center is a non-conforming use. We are requesting a special use approval from the Zoning Board of Appeals for the proposed Citizen’s Convenience Center. The proposed convenience center will comply with the buffer, setback, and landscape requirements of the Beaufort County ZDSO.



BEAUFORT COUNTY - ZONING BOARD OF APPEALS  
APPLICATION FOR SPECIAL USE PERMIT

**INSTRUCTIONS:**

Please fill out this application form completely. Attach any pertinent materials that may help the board members to better understand your request, i.e. photos, maps, drawings, etc. Failure to follow these instructions may result in rejection of your application.

1. Property Owner Name: Beaufort County Council  
Address: 100 Ribaut Road, Beaufort, SC 29902  
Home Phone: N/A Work Phone: (843) 470-2591

2. Applicant Name (If different): Terry R. Lee Contracting Co. Inc.  
Address: P.O. Box 1788, Hardeeville, SC 29927  
Home Phone: (843) 784-5288 Work Phone: (843) 784-5288

3. Property Location: Tax District # 800 Tax Map # 24 Tax Parcel # 69 Lot #   
Street Address: 99 Frances Jones Boulevard, Daufuskie Island, SC 29915

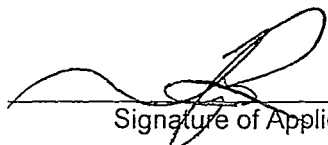
Please state the reason for the Special Use Permit. (Attach additional sheets as needed):  
Beaufort County Public Works and Beaufort County Engineering Division have identified the need to construct a convenience center on the subject property which is owned by Beaufort County and is currently utilized as a drop off location for citizen's solid waste. Furthermore, Public Works and Engineering has determined that the construction of a new facility is the highest and best use of that portion of the property, and will provide a more efficient, cleaner facility to serve the Beaufort County residents of Daufuskie Island.

If request is for a non-conforming situation, please state how the nonconformities will be mitigated:  
The proposed convenience center will mitigate the non-conforming situation in several ways. First the proposed site will comply with the buffer, setback, and landscape requirements of the ZDSO. Secondly the proposed center will provide for more efficient handling of solid waste on Daufuskie Island. This will be accomplished by utilizing sealed compactors for household waste, and providing an attendant that will be responsible for ensuring that the citizen's properly use the facility. The convenience center will promote responsible handling of solid waste and enhance the aesthetic quality of the island.

Date the DRT granted approval/recommendations: November 4, 2009

**NOTE: THE BOARD MAY POSTPONE OR PROCEED TO DISPOSE OF THE MATTER ON THE AGENDA IN THE ABSENCE OF THE APPLICANT.**

I hereby agree to abide by all conditions imposed by the County of Beaufort in the approval/disapproval of this appeal.

  
Signature of Applicant

Terry R. Lee  
Printed Name of Applicant

10-21-09  
Date

# MEMORANDUM

To: Members of the ZBOA

From: Beaufort County, Development Review Team

Date: December 1, 2009

Subj: DRT Recommendation - Proposed Special Use Permit/Daufuskie Island – Convenience Center – Expansion

---

On November 18, 2009, the Development Review Team (DRT) reviewed the submitted application request for a Special Use Permit for the Beaufort County, Daufuskie Island Convenience Center Expansion, represented by Mr. David Coleman. The property is located at 99 Frances Jones Boulevard, Daufuskie Island, and is currently zoned Daufuskie Island – Community Preservation (CP).

Mr. Coleman is requesting approval to expand the existing convenience center to a more efficient, cleaner facility. The existing use is a non-conforming use; therefore, a special use permit is required to make the non-conforming use conforming. The criteria for application and approval of a Special Use Permit include the following (Section 106-552):

The proposed use shall be consistent with the Comprehensive Plan's purposes, goals, objectives, and policies, including standards for building and structural intensities and densities and intensities of use. **The proposed expansion is consistent with the Comprehensive Plan's purposes, goals, objectives and policies. This use has been an existing convenience center use for the past 20 years.**

The proposed use shall be compatible with the character of land in the immediate vicinity. **The existing use is not compatible with the character of properties within the immediate vicinity, but with the proposed buffers and setbacks, the use will be adequately screened from the immediate properties.**

The proposed use's design shall minimize adverse effects, including visual impact of the proposed use on adjacent lands. Since the site will be brought into conformance to the extent possible, the DRT requires the following: **1) The placement of the required buffers. 2) Plant back or mitigation of all specimen trees proposed for removal. 3) Install the appropriate storm-water/BMP.**

The proposed use shall minimize adverse impacts on the environment, traffic and congestion, infrastructure, or governmental services. **Applicant is required to install the required storm-water/BMP, to ensure run-off will not adversely impact the adjacent properties. Due to the lack of cars on Daufuskie Island, a traffic study was not required.**

A Community Impact Statement (CIS) or portion of the report may be required as determined by Staff. **(Staff did not require any portion of the Community Impact Statement)**

A site plan for the proposed Special Use, which includes the total site area and calculations, surrounding properties, buffers and setback, natural resources and if applicable, an end use or reclamation plan shall be required as part of the submittal package. **The site plan includes the disturbed/construction area, surrounding properties, buffers, setbacks, natural resources, and storm-water/BMP requirements.**

In addition to the above criteria, it must be demonstrated that the non-conformity, as proposed to be conducted and managed, will have minimal adverse impacts on the surrounding area. The non-conformity of the site will be corrected with the following: **1) The placement of the required buffers. 2) Plant back or mitigation of all specimen trees proposed for removal. 3) Install the required storm-water/BMP. Site plan reflects the changes.**

**RECOMMENDATION:**

After review of the guidelines set forth in Sections 106-9 and 106-552, of the ZDSO, the DRT finds that the proposed submittal/use meets the criteria for approval of a Special Use Permit. Therefore, the DRT recommends the special use permit be APPROVED WITH THE FOLLOWING CONDITIONS:

1. Installation of the required storm-water/BMP.
2. The placement of the required buffers.
3. Plant back or mitigation of all specimen trees proposed for removal.



**COUNTY COUNCIL OF BEAUFORT COUNTY**

**Beaufort County Zoning & Development**  
Multi Government Center ♦ 100 Ribaut Road  
Post Office Drawer 1228, Beaufort, SC 29901-1228  
OFFICE (843) 470-2780  
FAX (843) 470-2784

November 20, 2009

Mr. David Coleman  
Beaufort County Engineering Department  
Post Office Drawer 1228  
Beaufort, SC 29901

Re: Daufuskie Island – Convenience Center – Special Use (Conceptual/Recommendation)

Dear Mr. Coleman:

The Development Review Team (DRT) met on November 18, 2009 to render their decision on the subject project. Listed below is the DRT's decision.

After a unanimous vote by the member's present, the DRT recommended the project be **APPROVED**  
**SUBJECT TO THE FOLLOWING CONDITION:**

At final submission, applicant shall submit a landscape plan and/or show existing trees within the disturbed area as mitigation trees. **PLEASE NOTE:** Mitigation trees shall be sizes that are less than 24 inches.

If I may be of further assistance, please do not hesitate to give me a call at 843.470.2781.

Sincerely,

Hillary A. Austin  
Zoning & Development Administrator

cc: DRT Members

COUNTY OF BEAUFORT

DEVELOPMENT REVIEW TEAM

ACTION FORM

by TIM

Members Present - Hillary (Fol), Delores (Fol), Arthur (Fol), Robert (Fol)

PROJECT NAME (Special Use/Revisit) PROJECT TYPE

Project - Citizen's Convenience Center

APPLICANT(DEVELOPER)NAME,ADDRESS,PHONE#

Beaufort County Council, P.O. Drawer 1228, Beaufort, SC 29901-1228

| PROJECT LOCATION | PIN              | LAND AREA(ACRES) | LOTS/UNITS | BLDG AREA(SQFT) |
|------------------|------------------|------------------|------------|-----------------|
| Frances Jones    | 800-24-69        | 6.0              | N/A        | 200             |
| DATE OF REVIEW   | OVERLAY DISTRICT | FIRE DISTRICT    |            | ZONING DISTRICT |
| 11/18/09         | N/A              | Daufuskie Island |            | CP              |

TYPE OF DRT REVIEW  CONCEPTUAL ( ) PRELIMINARY ( ) FINAL

APPROVED NO CONDITIONS \_\_\_\_\_

APPROVED \_\_\_\_\_ REASONS: \_\_\_\_\_

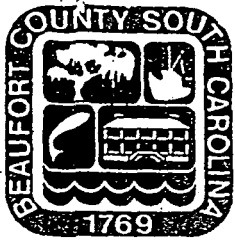
APPROVED WITH CONDITIONS \_\_\_\_\_ CONDITIONS: \_\_\_\_\_

APPROVED SUBJECT TO  CONDITIONS: SUBMIT LANDSCAPE PLAN AND/OR LITIGATION PLAN FOR THE REMOVAL OF TWO (2) SPECIMEN TREES. DRT SHALL FORWARD THIS RECOMMENDATION TO THE BOA.

REFERRED: (PLEASE SUBMIT THE FOLLOWING) \_\_\_\_\_

PLANNING & DEVELOPMENT ADMINISTRATOR

11/18/09  
DATE



COUNTY COUNCIL OF BEAUFORT COUNTY  
BEAUFORT COUNTY PLANNING DEPARTMENT

Multi Government Center, 100 Ribaut Road, Room 115  
P.O. Drawer 1228, Beaufort, SC 29901-1228  
Phone: 843-470-2724 Fax: 843-470-2731

April 8, 2009

Attn: Mr. David Coleman  
Beaufort County Engineering Department  
102 Industrial Village Rd., Bldg.3  
Beaufort, SC 29906

Re: Daufuskie Island Drop-Off Center Natural Resources Delineation and Site Capacity Analysis

Dear Mr. Coleman,

I am writing in response to your submittal of the natural resource delineation and site capacity analysis of the Daufuskie Island Drop-Off Center off of Frances Jones Blvd. on Daufuskie Island as per Chap. 106, Art. 7 – Resource Protection, Site Capacity Analysis and Open Space section (Beaufort County ZDSO). A review of your submittal has been conducted.

The natural resource delineation, protected resource calculations and site capacity analysis appear in order. It is the opinion of the Planning Department that the natural resources of the Daufuskie Island Drop-Off Center (Daufuskie Island Community Preservation zoning district) have been duly noted, described and delineated according to the current Beaufort County ZDSO.

Sincerely,

Amanda Flake  
Natural Resources Planner

Cc: Delores Frazier, Assistant Planning Director  
Hillary Austin, Zoning Administrator

*Dauphin Island Drop-off Center*

ZONING AND DEVELOPMENT STANDARDS

§ 106-1814

**Sec. 106-1814. Step 3: calculation of base site area and total protected resource land.**

Table 106-1814 provides a simple method for determining base site area and total protected resource land for a site based on existing conditions and the protected resource survey.

TABLE 106-1814. BASE SITE AREA AND TOTAL PROTECTED RESOURCE LAND

| CALCULATION 1: Determine Base Site Area   |                               |  |                                |                                    |                               |
|---|-------------------------------|--|--------------------------------|------------------------------------|-------------------------------|
| Enter gross site area as determined by actual survey  |                               |  |                                |                                    | 5.55 ac.                      |
| Subtract land within existing roads' ultimate rights-of-way; or land within major utilities' rights-of-way (minimum 50-foot width within subject property)  |                               |  |                                |                                    | - ac.                         |
| Subtract land cut off from use by railroad, highway, or water body  |                               |  |                                |                                    | - ac.                         |
| Subtract all existing natural water bodies and tidal wetlands   |                               |  |                                |                                    | - ac.                         |
| Subtract land previously dedicated as open space  |                               |  |                                |                                    | - ac.                         |
| Equals base site area   |                               |  |                                |                                    | = 5.55 ac.                    |
| CALCULATION 2: Measure all natural resources in the base site area and enter in the acres measured column 2. If resources overlap, measure only that resource with the highest resource protection ratio. These numbers provide each resource's area of land. Multiply by resource protection ratio for the district (column 3, 4, or 5) and insert result in column 6. |                               |  |                                |                                    |                               |
|   |                               | Multiply Column 2 by Resource Protection Ratio |                                |                                    |                               |
| Column 1<br>Protected Resource  | Column 2<br>Acres<br>Measured | Column 3<br>R, RQ, RC,<br>RB<br>districts      | Column 4<br>S, CS<br>districts | Column 5<br>All other<br>districts | Column 6<br>Protected<br>Land |
| Nontidal wetlands   |                               | 1.00   | 0.80                           | 0.60                               |                               |
| Beach-dune  |                               | 1.00   | 1.00                           | 1.00                               |                               |
| Headwaters buffer (RQD only)  |                               | 1.00   | 1.00                           | 1.00                               | Reserved                      |
| River buffer  |                               | 1.00   | 1.00                           | 1.00                               |                               |
| Maritime forest   |                               | 0.70   | 0.65                           | 0.60                               |                               |
| Mixed upland forest, mature   |                               | 0.55   | 0.45                           | 0.20                               |                               |
| Pine forest, mature   |                               | 0.40   | 0.30                           | 0.20                               |                               |
| Mixed upland forest, young  | 4.2                           | 0.25   | 0.20                           | 0.10                               | 0.42                          |
| Endangered species areas  |                               | 1.00   | 1.00                           | 1.00                               |                               |
| CALCULATION 3: Total resource land equals the sum of all protected resources listed above. Enter this figure to the right:  |                               | 4.2  |                                |                                    |                               |
| CALCULATION 4: Total protected resource land equals sum of column 6 at right:   |                               |  |                                |                                    | 0.42                          |

(Ord. No. 99-12, § 1 (05.130), 4-26-1999; Ord. No. 2005/40, 11-28-2005)

*R800-24-69  
Key # 488216*



COUNTY COUNCIL OF BEAUFORT COUNTY  
BEAUFORT COUNTY PLANNING DEPARTMENT  
Multi Government Center • 100 Ribaut Road, Room 115  
Post Office Drawer 1228, Beaufort, SC 29901-1228  
Phone: (843) 470-2724 • FAX: (843) 470-2731

October 19, 2009

Mr. Bobby Lee  
Thomas & Hutton  
P.O. Box 2727  
Savannah, GA 31402-2727

RE: Beaufort County Citizen's Convenience Center  
Archaeological Permit of Approval

Dear Mr. Lee:

I am writing in response to your request for an archaeology review, as required in Section 6.5.1(I) of the Beaufort County Development Standards Ordinance, for the above referenced project.

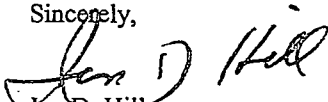
An extensive examination of existing documentation has been conducted. The documents examined include the *Cartographic Survey of Historic Sites in Beaufort County, South Carolina*; *A Comprehensive Bibliography of South Carolina Archaeology*; copies on file with Beaufort County of the topographic maps located at the South Carolina Institute of Archaeology and Anthropology that identify all the recorded archaeological sites in Beaufort County; copies of the records of all the archaeological properties listed in the National Register of Historic Places in Beaufort County; and all other documentation maintained by the Beaufort County Planning Department regarding archaeological and historic resources.

Based on our records, it is the opinion of the Planning Office that any proposed development will have no effect on any archaeological resources listed in, or eligible for listing in, the National Register of Historic Places. Therefore I am authorized by the Planning Director to issue you an Archaeological Permit of Approval. **I remind you that this does not relieve you of your responsibilities under Section 106 of the National Historic Preservation Act of 1966, as amended, and that if any state or federal permits are required for this project the permitting agency may require an archaeological survey.**

We request that you cease work to notify this office immediately if archaeological or paleontological materials are encountered prior to or during construction. Archaeological remains consist of any materials one hundred years or older made, or altered, by man which remain from past historic or prehistoric times. Examples include pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of prehistoric animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeleton.

If I can be of further assistance please call me at 843/470-2727.

Sincerely,

  
Ian D. Hill  
Historic Preservationist

10/19/09

STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY  
Common Pleas Court  
Marvin H. Dukes, III, Beaufort County Master in Equity  
Civil Action No. 2007-CP-07-00862

---

Case No.: 2010-CP-07-862

Donald Newton, Jean Flagg-Newton and James C. Hudson,.....Plaintiffs,  
Of whom Donald Newton and Jean Flagg-Newton are.....Appellants,  
v.  
Zoning Board of Appeals for Beaufort County..... Respondent.

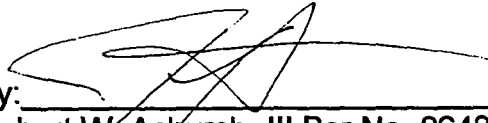
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CERTIFICATE OF COUNSEL

---

The undersigned certified that this Supplemental Record on Appeal contains all material proposed to be included of any of the parties, and no other material.

HOWELL, GIBSON & HUGHES, P.A.

By:   
Robert W. Achurch, III Bar No. 064854  
Mary B. Lohr, Bar No. 16927  
Jason F. Ward Bar No: 74850  
Howell, Gibson & Hughes, P.A.  
Post Office Box 40  
Beaufort, SC 29901  
(843) 522-2400  
Attorneys for Respondent

Beaufort, South Carolina

October 4, 2011



COUNTY COUNCIL OF BEAUFORT COUNTY  
BEAUFORT COUNTY PLANNING DEPARTMENT

Multi Government Center, 100 Ribaut Road, Room 115

P.O. Drawer 1228, Beaufort, SC 29901-1228

Phone: 843-470-2724 Fax: 843-470-2731

April 8, 2009

Attn: Mr. David Coleman  
Beaufort County Engineering Department  
102 Industrial Village Rd., Bldg.3  
Beaufort, SC 29906

Re: Daufuskie Island Drop-Off Center Natural Resources Delineation and Site Capacity Analysis

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Sincerely,

Amanda Flake  
Natural Resources Planner

Cc: Delores Frazier, Assistant Planning Director  
Hillary Austin, Zoning Administrator

*Dauphin Island Drop-Off Center*

ZONING AND DEVELOPMENT STANDARDS

§ 106-1814

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| Column 1<br>Protected Resource  | Column 2<br>Acres<br>Measured | Multiply Column 2 by Resource Protection Ratio |                                |                                    | Column 6<br>Protected<br>Land |
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| Headwaters buffer (RQD only)  |                               | 1.00   | 1.00                           | 1.00                               | Reserved                      |
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(Ord. No. 99-12, § 1 (05.130), 4-26-1999; Ord. No. 2005/40, 11-23-2005)

*R800-24-69  
Key # 488216*

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity

Case No. 2010-CP-07-00862

---

Donald Newton, Jean Flagg-Newton and James C. Hudson..... Plaintiffs,

Of whom Donald Newton and Jean Flagg-Newton are ..... Appellants,

v.

Zoning Board of Appeals for Beaufort County ..... Respondent.

---

**FINAL BRIEF OF APPELLANTS**

---

Arthur C. McFarland  
1847 Ashley River Road, Suite 200  
P.O. Box 80609  
Charleston, S.C. 29416

Veronica G. Small  
Attorney for Appellants  
1847 Ashley River Road, Suite 200  
Charleston, S.C. 29416

Attorneys for Appellants

## TABLE OF CONTENTS

|                                    |     |
|------------------------------------|-----|
| Table of Authorities .....         | iii |
| Statement of Issues on Appeal..... | 1   |
| Statement of the Case.....         | 1   |
| Standard of Review .....           | 2   |
| Argument I.....                    | 3   |
| Argument II.....                   | 5   |
| Argument III.....                  | 8   |
| Argument IV.....                   | 9   |
| Conclusion.....                    | 10  |
| Certificate of Counsel.....        | 11  |

## TABLE OF AUTHORITIES

### CASES

|  |   |
|--|---|
| <u>Peterson Outdoor Advertising v. City of Myrtle Beach</u> , 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997).....           | 2 |
| <u>Stevenson v. Board of Adjustment</u> , 98 S.E. 2d 456, 460, 230 S.C. 440, 449 (1957) .....                              | 8 |
| <u>Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals</u> , 342 S.C. 480, 536 S.E.2d 892 (S.C.App. 2000)..... | 2 |

### STATUTES

|                                       |         |
|---------------------------------------|---------|
| BCLO §106(b)(3).....                  | 5       |
| BCLO §106-9.....                      | 5       |
| BCLO §106-9(b).....                   | 3       |
| BCLO §106-9(b)(2) .....               | 4,5     |
| BCLO §106-551.....                    | 9       |
| BCLO §106-552.....                    | 5, 9    |
| BCLO §106-959.....                    | 6       |
| BCLO §106-1097.....                   | 5       |
| BCLO §106-1098.....                   | 5,6, 9  |
| BCLO §106-1126.....                   | 7       |
| BCLO §106-1362.....                   | 6,7, 10 |
| BCLO §106-1362(b).....                | 5       |
| S.C. Code Ann. §6-9-310 et. seq. .... | 5       |
| S.C. Code Ann. §6-29-840.....         | 2       |

## STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER-IN-EQUITY ERR IN FINDING THAT THE RESPONDENT DID NOT ABUSE ITS DISCRETION BY NOT REQUIRING A COMMUNITY IMPACT STATEMENT (CIS) BEFORE ISSUING A PERMIT FOR THE CONSTRUCTION OF A CONVENIENCE CENTER ON DAUFUSKIE ISLAND?
2. DID THE MASTER-IN-EQUITY ERR IN FINDING THAT THE REQUIREMENTS OF ARTICLE V, DIVISION 2 §106-1362 ENTITLED "CONVENIENCE CENTERS" DO NOT APPLY TO USES IN THE DAUFUSKIE COMMUNITY PRESERVATION DISTRICT?
3. DID THE MASTER IN EQUITY ERR IN FINDING THAT THERE ALREADY EXISTED A CONVENIENCE CENTER ON THE PARCEL AND THEREFORE, THE ZBOA DID NOT NEED TO CONSIDER A CIS BECAUSE THE IMPACT WAS ALREADY KNOWN AND STAFF DID NOT DETERMINE THAT A CIS WAS REQUIRED?
4. DID THE MASTER INEQUITY ERR IN FINDING THAT §106-552 CONTROLLED THE CONSIDERATION FOR APPROVAL OF THE SPECIAL USE PERMIT IN THE INSTANT APPLICATION?

## STATEMENT OF THE CASE

This case commenced when Beaufort County as landowner sought the issuance of a special use permit in order to construct a convenience center on a parcel of land known as 99 Frances Jones Boulevard which is located on Daufuskie Island, Beaufort County, South Carolina (Parcel). Beaufort County was deeded the Parcel on December 31, 1991. On November 18, 2009, the Design Review Team (DRT) granted approval and made recommendations concerning the proposed improvements to a convenience center on Daufuskie Island. (R p.3)

Pursuant to the County's Comprehensive Land Use Plan, the Parcel is zoned in a Community Preservation Zone on Daufuskie Island. The operation of a convenience center is an impermissible use of a property zoned as Community Preservation under

Beaufort County's Comprehensive Land Use Plan without the issuance of a special use permit.

On December 10, 2010, the Zoning Board of Appeals for the County of Beaufort (ZBOA) held a public hearing to determine whether Beaufort County should receive a special use permit. Testimony was taken from the landowner as well as Appellants. At the end of the hearing, the ZBOA indicated that it would issue the special use permit for the construction of the convenience center on the Parcel. On January 28, 2010, the ZBOA issued a letter confirming the issuance of the special use permit.

On February 25, 2010, Appellants appealed the grant of the Special Use Permit to the Circuit Court. The Appeal was heard on May 19, 2010 by the Master-in-Equity for Beaufort County. On June 21, 2010, the Master issued its Order Denying Appeal. On August 2, 2010, the Appellants served the Notice of Appeal to this Court.

#### ***STANDARD OF REVIEW***

In 1994, the Legislature enacted a new statutory scheme providing for a standard of review whereby "[t]he findings of fact by the [zoning] board of appeals shall be treated in the same manner as a finding of fact by a jury...." S.C.Code Ann. § 6-29-840. Under this Code section, the Appellate Court determines "whether the decision of the board is correct as a matter of law." See *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (S.C.App. 2000) ("[T]he decision of the zoning board will not be upheld where it is based on errors of law ... or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, ... or where, in general, the board has abused its discretion.") (quoting *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997)).

## ARGUMENT I

### **The ZBOA Lacked Legal Evidence And Abused It's Discretion By Issuing The Special Permit to Construct A Convenience Center On The Parcel Without Requiring the Landowner to Submit A Community Impact Statement (CIS) As Required By Beaufort County Local Ordinances In A Community Preservation District .**

The landowner owns a parcel of land known as 99 Frances Jones Boulevard, Daufuskie Island, Beaufort County, South Carolina, which contains approximately 6.3 acres and is zoned in a Community Preservation Zone under the County's Comprehensive Land Use Plan. Daufuskie Island is zoned as a rural district. The County has been using the Parcel as a drop-off center for solid waste collections which is a non-conforming use for parcels of land which are zoned as Community Preservation. The drop-off center consists of two to four twenty (20) yard open top containers. (R pp. 71, ll 15-16; 73, ll 7-8)

The County petitioned the ZBOA for a special use permit to allow the construction of a convenience center for the collection of solid waste. A convenience center is a more intensive use for the collection of solid waste than the operation of a drop-off center. Unlike the containers for the drop-off center, the proposed convenience center will consists of three (3) trash compacters that is a three-yard device attached to a forty-yard container; a facility for staff; a swale for waste water runoff; and field lines. (R pp. 67, ll 1-3; 73, ll 4-5).

The operation of either a drop-off center or a convenience center is an impermissible use of property zoned as Community Preservation District under the County's Comprehensive Land Use Plan without the issuance of a special permit. The Beaufort County Land Ordinance (BCLO) §106-9(b) provides the procedure by which the ZBOA can issue a special use permit to allow a nonconforming use of a parcel of

property to become a conforming use. Under BCLO §106-9(b)(2), the Beaufort County DRT makes recommendations to the ZBOA for final decision on the issuance of a special permit. BCLO §106-9(b)(2) provides as follows: “The special use permit application is reviewed by the DRT who then provides a recommendation to the [ZBOA] for final decision. The DRT and the [ZBOA], at their discretion, shall require the following studies and reports from the property owners as part of their consideration in deciding whether to approve the request and/or how much of the request to grant.” The two studies referred to under BCLO §106-9(b)(2) are the Operation plan and the CIS. The ZBOA, at its discretion, did not require the landowner to submit a CIS.

In its decision letter, the ZBOA specifically, stated “the [ZBOA] finds that the application for special use met the following criteria: 1. The proposed use is consistent with the Comprehensive Plan’s purposes, goals, objectives, and policies including standards for building and structural intensities and densities of use. 2. The proposed use is compatible with the character of land in the immediate vicinity. 3. The proposed use’s design minimizes adverse effects, including the visual impact of the proposed use on adjacent lands.” In reaching its decision, the ZBOA found that no Community Impact Statement (CIS) was required. The Master in Equity agreed that a CIS was not mandatory.

Appellants contend that the Master in Equity erred in finding that the ZBOA did not abuse its discretion when it issued the special use permit. The ZBOA did not have the studies and assessments as required by BCLO §106-9(b)(2) and therefore it lacked the legal evidence to support its decision and abused its discretion in granting the permit.

## ARGUMENT II

### **The Master-in-Equity Erred In Finding That The Requirements Of Article V, Division 2 §106-1362 Entitled “Convenience Centers” Do Not Apply To Uses In The Daufuskie Community Preservation District**

Beaufort County’s Comprehensive Land Use Plan defines all uses or structures permitted on land in Beaufort County. See, BCLO §106-1097. When a proposed use is not in keeping with the general use designed for a particular district, the ordinance allows for a landowner to request from the ZBOA a special use permit to allow a nonconforming use of a parcel. Id. Section 106-9 regulates non-confirming uses of land, buildings and structures, lots, etc. Under BCLO, §106-9(b)(2), the DRT makes recommendations to the ZBOA for final decision on issues of a special use permit.

Article V, Division 2 of the BCLO allows for the development of a convenience center and provides for limited/special standards for use in all applicable districts. See §106-1362. All districts are defined in §106-1098. As a requirement for the issuance of a special use permit for a convenience center, certain reports are mandated as outlined in §106-1362(b). One of the mandated requirements is the completion of a CIS. In considering an application for approval of a special use permit, the DRT must recommend and the ZBA must find that the proposed non-conforming use fully complies with the zoning ordinance. See §106-552. Under BCLO, §106(b)(3), titled Criteria for approval of nonconformity through special use permit, the ordinance reads:

In addition to the standards and criteria for special use permit approval set forth in subsection (b)(2) of this section, in division 2 of article V of this chapter and subdivision IV of division 3 of article III of this chapter, the applicant shall meet the following requirements:

One of the requirements for the issuance of a nonconforming special use permit is the completion of a CIS.

The Master-in-Equity found that “Article V, Division 2 expressly applies only to any zoning designations that are listed in the general land use table of §106-1098.” As a result, the Master concluded that since Daufuskie Island is in a Community Preservation District (CP), it was separately regulated and not controlled by the overall comprehensive zoning regulation and thus not controlled by the requirements of §106-1362 (part of Article V, Division 2). As a result, §1362 did not apply to uses in districts zoned “CP.” The Master-in-Equity’s reading of the law makes the requirements for a variance in a CP district exclusively controlled by Appendix D and not affected at all by the overall comprehensive general use statute. However, Section 1, Appendix D of the zoning ordinance states that the standards governing a CP district are “in addition to other standards required elsewhere in this chapter.” The Master-in-Equity found that “CP districts are specifically addressed in §106-959 and are considered “Special” under Table 10-6-922.” As a result, they are governed by the standards specifically outlined in Appendix D, entitled “COMMUNITY PRESERVATION AREAS.”

The Master-in-Equity’s interpretation of the statute leaves the County with no provision by which a convenience center can be constructed since the Community Preservation District for Daufuskie Island does not provide for a convenience center and has no provision in it for application for a non-conforming special use permit. However, table 106-1098 specifically lists the Community Preservation zone as a part of the comprehensive plan. Thusly, the provisions of §106-1126 which defines the scope of Article V division 2 states, “this division describes the standards governing limited special uses as designated in the general land use table 106-1098. These standards [listed in Article V division 2] are in addition to other standards required elsewhere in this chapter.” BCLO 106-1126. As a result, and in accordance with the text of BCLO 106-

### ARGUMENT III

#### **The Master in Equity Erred In Finding That There Already Existed A Convenience Center On Daufuskie Island And Landowner Did Not Need To Consider a CIS Because The Impact Was Already known And Staff Did Not Determine That A CIS Was Required.**

The Master in Equity found that “when considering this application for a special use permit to make improvements to an already existing convenience center, the ZBOA did not need to consider a CIS, because the “impact was already known and staff did not determine that a CIS was required.” (R pp. 5-6) The basis of this conclusion by the Master is that a convenience center already exists on the Parcel. As noted above, there exists only a drop-off center consisting of two to four open 20-foot containers. A convenience center is a more intensive use for the collection of solid waste than the operation of a drop-off center. Unlike the containers for the drop-off center, the convenience center will consist of three (3) trash compactors that is a three-yard device attached to a forty-yard container; a facility for staff; a swale for waste water runoff; and field lines. (R pp. 67, ll 1-3; 73, ll 4-5). In light of the tremendous differences in size alone between a drop-off center and a convenience center, the Master’s conclusion that the “ZBOA did not need to consider a CIS, because the “impact” was already known” is not supported by the record and is in error. Moreover, while the Master in Equity found correctly that the Staff did not determine that a CIS was required as submitted by Appellant in Argument II, hereinabove, this fact provided a sufficient basis for a finding that the ZBOA did not comply with the mandates of the BCLO.

#### ARGUMENT IV

##### **The Master in Equity Erred In Finding that The ZBOA Only Needed To Consider The Criteria For Approval Of A Special Use Permit Under §106-552 When Considering the Instant Application**

The Master-in Equity determined that the ZBOA only needed to consider the criteria for approval of a special use permit under §106-552 when considering the application. (R p. 5) The Master referenced the correct section, however, he applied only a portion of the relevant language and therefore, his conclusion constitutes an error of law.

Section 106-552 provides, in part, as follows:

All Special use permit applications shall include a special use development plan as described in this section, which clearly shows that all of the requirements set forth in division 3 of article V of this chapter pertaining to the particular special use applied for, have been met.

This language follows §106-551 which defines the scope of the subdivision as follows:

Certain land uses and developments present unique problems with respect to their property location. Such land uses and development are identified as special uses in each particular zoning district (**see table 106-1098**). Analysis and judgment of the consequences of each use and development is necessary to preserve and promote the public health, safety, and welfare. (Emphasis added)

Section 106-1098 sets out the generalized land uses and “lists the type of use permission in each district as well as definitions for each use listed.” The table further contains “references for additional limited and special use standards which are detailed in division 2 of this article.” Under the column for “convenience center,” §106-1098 identifies the additional standards by referring to §106-1362 which was rejected by the Master as applicable to consideration of this application. Appellants submit that the ZBOA and the Master in Equity committed an error of law.

In addition, the ZBOA and the Master in Equity failed to consider that §106-1362

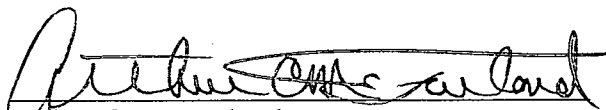
sets forth additional requirements as it pertains to approval of use of a Parcel of land in a rural district. Subsection (c) titled "Additional standards in the rural district" states: "The minimum site area shall be five acres." The proposed site is 1.2 acres which is substantially less than the standard set by the BCLO. (R pp. 15; 70, ll 16-23; 71, ll 1-12)

There is no question that Daufuskie Island presents unique problems with respect to its property location. Consequently, the requirements of §106-1362 must be considered and a CIS is required for consideration by the ZBOA in making a decision on the landowner's application.

### CONCLUSION

Appellants submit that the ZBOA failed to require a Community Impact Statement (CIS) as well as consider the size of the parcel to be developed in granting the landowner's special use permit and that the Order of the Master in Equity denying Appellants appeal should be reversed and the case remanded to the ZBOA for consideration of a CIS as part of its decision making on the landowner's application.

Respectfully Submitted,



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March 12, 2011

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity

Case No. 2010-CP-07-00862

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Donald Newton, Jean Flagg-Newton and James C. Hudson..... Plaintiffs,

Of whom Donald Newton and Jean Flagg-Newton are ..... Appellants,

v.

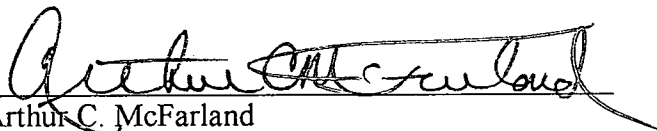
Zoning Board of Appeals for Beaufort County ..... Respondent.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Appellants complies with  
Rule 211 (b), SCACR.



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March 12, 2011

STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Common Pleas Court

Marvin H. Dukes, III, Beaufort County Master in Equity  
Civil Action No. 2007-CP-07-00862

Case No. 2010168486

Donald Newton, Jean Flagg-Newton and James C. Hudson Plaintiffs

Of whom Donald Newton and Jean Flagg-Newton are Appellants

Zoning Board of Appeals for Beaufort County Respondent

FINAL BRIEF OF RESPONDENT ZONING BOARD OF APPEALS FOR  
BEAUFORT COUNTY

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....3  
STATEMENT OF ISSUES ON APPEAL.....4  
STATEMENT OF THE CASE.....5  
ARGUMENT.....6  
CONCLUSION.....13

**TABLE OF AUTHORITIES**

Boyer v. Loftin-Woodard, Inc.  
247 S.C. 167, 170-71, 146 S.E.2d 606, 607 (1966).....6

Home Med. Sys. V. S.C. Dep't of Revenue,  
382 S.C. 556, 562, 677 S.E.2d 582 (2009).....6

Kiawah Resort Assocs. V. S.C. Tax Comm'n,  
318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995).....6

Kurschner v. City of Camden Planning Com'n,  
376 S.C. 165, 656 S.E.2d 346 (2008).....9

Richland County v. Carolina Chloride, Inc.,  
382 S.C. 634, 677 S.E.2d 892 (Ct.App.,2009).....6

Stevenson v. Board of Adjustment of City of Charleston,  
230 S.C. 440, 96 S.E.2d 456 (1957).....7

S.C. Code Ann. §6-29-840.....9

**Beaufort County Zoning Development Standards Ordinance (ZDSO)**

§106-9(b)(2).....8, 12

§106-552.....8, 12

§106-922.....11

§106-959.....11

§106-1098.....11

§106-1126.....11

§106-1362.....10, 11, 12

Table 4 of App. D, §8.....11

Appendix D "COMMUNITY PRESERVATION AREAS".....11

**STATEMENT OF ISSUES ON APPEAL**

- I. Appellants failed to raise the issues as set forth in their statement of Issues on Appeal to the ZBOA; these issues are not properly preserved for review.
- II. The ZBOA properly exercised its discretion by not requiring a Community Impact Statement.
- III. Respondents would ask that this Court affirm for any ground appearing on the record as provided by Rule 220(c).

### STATEMENT OF THE CASE

Respondent (hereinafter referred to as "ZBOA") agrees that the Appellants have accurately stated the case present before the Court, save one argumentative sentence as outlined in Respondent's Motion to Strike (filed on or around December 10, 2010). Additionally and by way of supplementing the statement of the case, the ZBOA would crave reference to the Circuit Court's Overview as set forth in its Order Dismissing the appeal, dated June 23, 2010 and incorporate this overview as if fully set forth herein verbatim.

## ARGUMENT

- I. **Appellants did not raise the issues as set forth in their statement of issues on Appeal to the ZBOA; these issues are not properly preserved for review.**

In its Order dismissing this appeal, the Circuit Court explicitly noted that, “[on February 25, 2010, Appellants appealed the grant of the special use permit to the Circuit Court, raising for the first time the issue of whether a Community Impact Statement (CIS) is mandatory under the Beaufort County Zoning and Development Standards and Ordinances (hereinafter referred to as “ZDSO”) when considering an application for a special use permit for a convenience center.” (R., p. 3 l. 20-23) This finding has not been challenged by the Appellants. In support of this finding, the Circuit Court reviewed the transcript of the hearing in front of the ZBOA, and the Court noted that the only issues raised by the Appellants to the ZBOA were (1) that a special use permit would not be legally permissible because it would constitute “spot zoning; (2) that it is not supported by the comprehensive plan as a “high volume use DOC” (“drop off center”); and (3) that the site lacks “social culture.” (R., p. 3 l. 9-12) The issues that are now raised on appeal are not preserved for review.

It is well settled that, “[i]ssues cannot be raised for the first time on appeal, but must be raised to and ruled upon by the [lower tribunal or court] to preserve them for appellate review.” Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App.,2009)(See, e.g., Circuit Court review of a zoning determination on appeal); Boyer v. Loftin-Woodard, Inc. 247 S.C. 167, 170-71, 146 S.E.2d 606, 607 (1966); see also Home Med. Sys. V. S.C. Dep’t of Revenue,

382 S.C. 556, 562, 677 S.E.2d 582 (2009) (Issue preservation is required in administrative appeals and holding Rule 59(e), SCRPC motions are permitted in ALC proceedings"). See also Kiawah Resort Assocs. V. S.C. Tax Comm'n, 318 S.C. 502, 505, 458 S.E.2d 542, 544 (1995) ("A court has a limited scope of review of the final decisions of administrative agencies and cannot ordinarily consider issues that were not raised to and ruled on by the agency from which an appeal is taken.") Appellants have now raised four new additional arguments; none were previously raised to or ruled upon by the ZBOA or Circuit Court. Because these issues were never raised to or ruled upon to or by the lower tribunal, this appeal should be dismissed.

At no time during this hearing did the Appellants ever raise the issue of a CIS being mandatory or cite any provisions of the ZDSO to support their contention that one was required. Nor were any of the four new issues addressed in Appellants' brief to this Court ever raised at any time to the lower tribunals. Beaufort County ZBOA would respectfully ask that this Honorable Court dismiss this appeal and affirm the trial court on this ground and upon any other ground appearing in the record.

**II. The ZBOA properly exercised its discretion by not requiring a Community Impact Statement.**

Should the Court choose to review the ZBOA's actions in this case, it is apparent that the ZBOA did not act with unfettered discretion<sup>1</sup>; the only evidence

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<sup>1</sup> See, e.g. Stevenson v. Board of Adjustment of City of Charleston, 230 S.C. 440, 96 S.E.2d 456 (1957)(internal citations omitted) ("In exercising its discretion, the board of adjustment

before the ZBOA was that this piece of property had been used as a convenience center for many years and that the granting of a special use permit, even without a CIS, would not change the fact that this piece of property was considered to be a <sup>not used</sup> grandfathered, non-conforming use as a convenience center and that, consequently, this piece of property would continue to be used as such. (R., p. 55 l. 18) The Appellants acknowledged this fact during the hearing. (R., pp 66-67) The ZDSO explicitly states that the DRT has the discretion to require a CIS be conducted, and specifically provides that the ZBOA, when reviewing an application for a special use permit may or may not, in its discretion, require that a CIS be conducted.<sup>2</sup>

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is not left free to make any determination whatever that appeals to its sense of justice. It must abide by and comply with the standard prescribed by the local ordinance and zoning statutes.”)

<sup>2</sup> §106-9(b)(2) provides the following:

*Procedure for mitigating nonconformity by special use permit.* Owners of nonconforming uses, buildings, structures, or lots may apply for a special use permit to become conforming without changing the use or necessarily modifying the entire physical nature of the nonconformity. **The special use permit application is reviewed by the DRT who then provides a recommendation to the ZBOA for a final decision. The DRT and ZBOA, at their discretion, shall require the following studies and reports from the property owner as part of their consideration in deciding whether to approve the request and/or how much of the request to grant:**

a. *Operation plan.* This shall include a site plan of the entire site, and narrative defining the specific elements of the use that may create problems; for example: exhaust fans, air conditioning and mechanical equipment, junk, exterior storage, lack of buffering or other landscaping, visual conditions, intrusion into yards close to neighbors, and the use of the adjoining property, as well as the general impact on the community as a whole will be considered. Reductions in hours of operation, noise, odor, dust and/or exterior storage shall be considered beneficial and will favor approval of the special use permit. Increases in landscaping, buffers, or improved building quality and materials shall also be considered beneficial.

Note: Where an expansion of a nonconforming use is proposed, elements of the use identified as a nuisance to adjoining properties by the ZBOA shall be mitigated as a condition of approval. Additional conditions shall include one or more of the following: additional buffering, fences or landscaping, relocation of doors, waste storage or exterior storage, cleaning up of the site, or mitigation of other problems with the use. The purpose of the additional conditions shall be to give the same level of protection to neighbors that would be afforded by a conforming structure. The degree to which mitigation is accomplished by additional conditions shall effect the degree of expansion or other approval granted the nonconformity.

b. *Community impact statement (CIS).* See subsection 106-366(g). The CIS consists of four separate assessments, including the following:

1. The area impact assessment;
2. The environmental impact assessment;

It is well settled that a circuit court should not disturb the findings of [a zoning] board unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority. See Kurschner v. City of Camden Planning Com'n, 376 S.C. 165, 656 S.E.2d 346 (2008); See also S.C. Code Ann. §6-29-840 ("In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law."). [A]n abuse of discretion occurs when [a decision] is based upon an error of law or, when based upon factual conclusions, is without evidentiary support. (Id.)

Here, the ZBOA, in the exercise of its discretion, did not require one to be conducted. Even though the Appellants did not raise this issue concerning a CIS at the ZBOA hearing, it is apparent as to why the DRT and ZBOA would not require a CIS – the site was already being used as a convenience center. (R., pp. 52-76) As the trial court found and as noted in its decision, the ZBOA utilized the clear language of §106-552<sup>3</sup> when analyzing whether to issue a special use

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3. The traffic impact assessment; and
  4. The archaeological and historic impact assessment.

One or all of the assessments shall be required depending on the applicant's proposal, as required by this chapter. The CIS, or portions thereof, will assist the DRT and the ZBOA in determining whether the proposed change in the nonconformity is more, equal or less intensive than the existing use, and if it significantly lessens the adverse impacts to surrounding and nearby property owners. A study of how the proposed mitigation of the nonconformity affects the surrounding and nearby neighborhoods and properties shall be assessed, and shall be part of the CIS.

[Emphasis added]

<sup>3</sup> §106-552 provides the following:

Approval of a special use application shall be dependent upon findings that the proposed use fully complies with this chapter. The application shall be filed and duly advertised. A public hearing shall be held per this article's requirements. A pre-

permit. By relying upon these provisions, the Board acted within its lawfully delegated authority and well within the wide discretion explicitly provided for by the ZDSO. The transcript is replete with the evidence that the ZBOA considered when faced with making a decision as to this special use permit; indeed, the ZBOA took testimony from both Ms. Newton and the permit applicant, and made its determination in accordance with the clear standards of the ZDSO. (R., pp. 52-76) Beaufort County ZBOA would respectfully ask this Honorable Court not to disturb the findings of the zoning board and trial court, and to affirm the trial court on this ground and upon any other ground appearing in the record.

The Appellants have misinterpreted the ZDSO and would have this Court force a construction of the ordinances at issue to require a CIS where no such

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application conference shall be required prior to submittal of an application for a special use permit. All special use permit applications shall include a special use development plan as described in this section, which clearly shows that all of the requirements set forth in division 3 of article V of this chapter pertaining to the particular special use applied for, have been met. The DRT shall review the special use development plan and provide a recommendation of approval or nonapproval to the ZBOA. The ZBOA shall consider the staff recommendation and the special use development plan, which shall include and address all of the following:

- (1)The proposed use shall be consistent with the comprehensive plan's purposes, goals, objectives, and policies, including standards for building and structural intensities and densities and intensities of use.
- (2)The proposed use shall be compatible with the character of land in the immediate vicinity.
- (3)The proposed use's design shall minimize adverse effects, including visual impact of the proposed use on adjacent lands.
- (4)The proposed use shall minimize adverse impacts on the environment, traffic and congestion, infrastructure, or governmental services. A traffic impact analysis (TIA) may be required as determined by staff.
- (5)A community impact statement (CIS) or a portion of the report may be required, as determined by staff.**
- (6)A site plan for the proposed special use which includes the total site area and calculations, surrounding properties, buffers and setbacks, natural resources and, if applicable, an end use or reclamation plan shall be required as part of the submittal package.

[Emphasis added]

requirement existed before. Appellants argue that the ZBOA (and the trial court) lacked legal evidence and abused its discretion by issuing a special use permit to construct the convenience center on the pre-existing convenience center site because ZDSO §106-1362 mandates that a CIS be conducted. However, as demonstrated below, this provision does not apply to the Daufuskie Island Community Preservation District; consequently, this provision is not applicable in this case.

The plain words of the ZDSO vest the DRT and ZBOA with the discretion to require or not to require a Community Impact Statement when considering a special use permit application in the Daufuskie Island Community Preservation Zoning designation. §106-1362 is a part of Article V, Division 2 of the ZDSO. Article V, Division 2 expressly applies only to those zoning designations that are listed in the general land use table of §106-1098.<sup>4</sup> Community Preservation Districts ("CP Districts"), such as the Daufuskie Island Community Preservation District, are not listed on this general land use table of §106-1098. Contrary to Appellants contention, the requirements of §106-1362 (part of Article V, Division 2) do not apply to uses that are in districts zoned "Community Preservation." Thus, by the express language which governs CP districts and the express language of Article V, division 2, it is clear that the requirements of §106-1362 do not apply to uses in the Daufuskie CP district.

Most importantly, the ZBOA only needed to consider the criteria for approval of a special use permit under §106-552 (Discretionary Reviews) and

§106-9(b)(2) when considering the application. (R. p. line) As stated clearly in 106-552(5), a CIS "*may be required, as determined by staff.*" (*emphasis added*) The only evidence presented to the ZBOA during the hearing was that this site had been used as a convenience center for many years and that it would continue to be used as such, and that the DRT recommended the approval of the special use permit. (R. pp. 52-76) The written order/letter from the ZBOA outlining its decision noted that no CIS was required by DRT and it was not considered. As noted by the Circuit Court, no CIS was required because the property has been used as convenience center for many years and the permit simply sought to mitigate the non-conformity. (R. pp. 2-6) This is not an abuse of discretion, and the ZBOA would ask that this Honorable Court affirm the lower tribunals.

**III. Respondents would ask that this Court affirm for any ground appearing on the record as provided by Rule 220(c).**

As provided for in Rule 220(c), SCACR, this Court may affirm the lower tribunals for any grounds appearing in the Record on Appeal. Respondent ZBOA would ask that this Court affirm the lower tribunals in this case and dismiss this appeal accordingly.

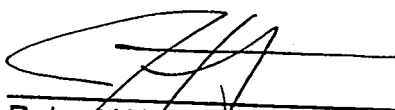
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<sup>4</sup> §106-1126 entitled "Scope of Division", states in relevant part (a) "This division describes the standards governing limited and special uses as designated in the general land use table 106-1098."

CONCLUSION

As shown by a review of the transcript in this case, the Appellants did not raise any of the issues concerning a community impact statement that they have raised before this Honorable Court (and the Circuit Court). Even if this Court were to consider these arguments, the ZBOA relied upon the clear language of the ordinances when considering the special use permit application in this case. The clear language of the ordinances vested the ZBOA with the discretion to require or not to require that a CIS be conducted before issuing a special use permit. The ZBOA chose not to require that a CIS be conducted. Consequently, the ZBOA did not abuse its discretion. Respondent ZBOA would respectfully ask that this Honorable Court not disturb the findings of the ZBOA, affirm the lower tribunals, and dismiss this appeal accordingly.

Respectfully submitted,



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March 15, 2011

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity

Case No. 2010-CP-07-00862

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Donald Newton, Jean Flagg-Newton and James C. Hudson..... Plaintiffs,

Of whom Donald Newton and Jean Flagg-Newton are ..... Appellants,

v.

Zoning Board of Appeals for Beaufort County ..... Respondent.

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**FINAL REPLY BRIEF OF APPELLANTS**

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## INDEX

|  |     |
|--|-----|
| Index .....  | ii  |
| Table of Authorities .....   | iii |
| Argument .....   |     |
| I.    The issues set forth by Appellants in their Statement of Issues<br>on Appeal were addressed in Appellants' appeal to the Circuit<br>Court, argued before and ruled upon by the Master and<br>therefore, Respondents request for dismissal must be rejected. .... | 1   |
| II.   The ZBOA erred as a matter of law in not requiring a<br>Community Impact Statement. ....   | 5   |
| Conclusion .....   | 10  |
| Certificate of Counsel.....  | 11  |

TABLE OF AUTHORITIES

CASES

City of Columbia v. Ervin, 330 S.C. 516, 500 S.E.2d 483 (1998) .....2

Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 602 S.E.2d 76  
(Ct. App. 2004).....9

Friarsgate, Inc. v. Town of Irmo, 290 S.C. 266, 349 S.E.2d 891 (SC App. 1986).....8

Grant v. City of Folly Beach, 346 S.C 74, 551 S.E.2d 229 (2001) .....3,4

Heilker v. Zoning Board of Appeals, 346 S.C. 401, 552 S.E.2d 42 .....9

Home Med. Sys v. S. Dep't of Revenue, 382 S.C. 556, 677 S.E.2d 582 (2009).....4

Kirkpatrick v. Village Council, 138 N.C.App, 79, 530 S.E.2d 338 (2000) .....9

Richland County v. Carolina Chloride, Inc., 382 S.C.634, 677 S.E. 2d 692  
(Ct.App. 2009) .....2

The Linda Mc Company, Inc. v. Shore, 26878 (SCSC 2010) .....2

Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 529 S.E.2d 280 (2000).....4

STATUTES

S.C. Code of Laws §6-7-760.....3

S.C. Code §6-29-820A.....3

S.C. Code §6-29-830.....3

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 59(e) .....4

BEAUFORT COUNTY LAND ORDINANCES

ZDSO§106 Appendix D Section 1 .....5

ZDSO§106 Appendix D Section 7 .....5

ZDSO§106-405(a) .....3

ZDSO§106-5 .....5

ZDSO§106-6 .....6

ZDSO§106-9(a) .....8

ZDSO§106-9(b)(2) .....6

ZDSO§106-9(b)(3) .....6,8

|                    |       |
|--------------------|-------|
| ZDSO§106-552.....  | 7     |
| ZDSO§106-959.....  | 8     |
| ZDSO§106-1098..... | 7     |
| ZDSO§106-1126..... | 7,8   |
| ZDSO§106-1362..... | 6,7,8 |
| ZDSO§107-7.....    | 6     |

BEAUFORT COUNTY BOARD RULES OF PROCEDURE

|                       |   |
|-----------------------|---|
| Art. 5 Section 2..... | 4 |
|-----------------------|---|

I. THE ISSUES SET FORTH BY APPELLANTS IN THEIR STATEMENT OF ISSUES ON APPEAL WERE ADDRESSED IN APPELLANTS' APPEAL TO THE CIRCUIT COURT, ARGUED BEFORE AND RULED UPON BY THE MASTER AND THEREFORE, RESPONDENT'S REQUEST FOR DISMISSAL MUST BE REJECTED.

Respondent argues that Appellants did not raise the issues as set forth in their Statement of Issues on Appeal to the ZBOA and thus these issues are not properly preserved for review. Appellants disagree and this Court must reject its request for dismissal of this appeal for the following reasons.

1. The Master did not rule that the issues raised by Appellants were not properly preserved for appeal.

In support of its position that Appellants failed to properly preserve the issues argued in this Appeal, Respondent relies upon a recital in the Order Denying Appeal wherein the Master in Equity noted the following:

On February 25, 2010, Appellants appealed the grant of the Special Use Permit to the Circuit Court raising for the first time the issue of whether a Community Impact Statement (CIS) is mandatory under the ZDSO when considering an application for a special use permit for a convenience center.

Appellants were at this hearing and made presentations in opposition to the special use permit. Specifically, they raised the following issues: (1) that a special use permit would not be legally permissible because it would constitute "spot zoning"; (2) that it is not supported by the comprehensive plan for "high volume use DOC, ("drop off center)...and (3) the site lacks "social culture."

(R p. 3) However, it is clear that the Master was only reciting the issues raised by Appellants at the ZBOA hearing and not the issues presented by the petition for appeal filed in the Circuit Court. This is confirmed by the fact that he did not make a finding regarding Appellants' alleged failure to preserve the issues before it on appeal. (R pp.2-6). More noteworthy is the fact that in his findings of fact, the Master addressed and ruled on the issues raised by Appellants in its Amended Appeal of the Issuance of a

Special Use Permit for 99 France Jones Boulevard. (R p. 2). The four issues set forth in Appellants' Statement of Issues On Appeal herein were presented in the Amended Appeal filed in the Circuit Court, and argued before and ruled upon by the Master in its Order Denying Appeal. Thus, Appellants have not raised issues in this appeal that were not addressed to and ruled upon by the Circuit Court and all issues raised in this appeal have been preserved for appellate review. See, *Richland County v. Carolina Chloride, Inc.*, 382 S.C.634 677 S.E. 2d 692 (Ct.App. 2009); see also, *The Linda Mc Company, Inc. v. Shore*, 26878 (SCSC 2010) citing *City of Columbia v. Ervin*, 330 S.C. 516, 500 S.E.2d 483 (1998) ("An argument not made to an intermediate appellate court and ruled on by that court is not preserved for review in this Court.")

2. **Under South Carolina law, the petition to the Circuit Court appealing a ruling of the ZBOA determines the issues to be considered on appeal.**

As stated above, the issues raised by Appellants in this appeal were presented in Appellants' petition on appeal and argued before and ruled upon by the Circuit Court as an intermediate appellate court. Respondent suggests that because these issues were not presented before the ZBOA, they are "new" issues raised on appeal and thus, this appeal should be dismissed. This argument fails to consider the mechanism the South Carolina legislature conceived for challenging decisions of the ZBOA. A review of the Beaufort County ordinances statutes and case law governing how appeals of a decision of a zoning board are initiated and what evidence is required once an appeal is filed is instructive.

The Beaufort County Zoning Board Rules of Procedure Article V, Section 2 provides that hearings shall be conducted as follows:

- (1) The Chair will call on interested citizens in the order that they signed up to speak. Each person will have the opportunity to speak for three

(3) minutes.

- (2) The Applicant and/or staff shall clarify any information presented by the public before the board makes a motion.

Once the public hearing has been conducted, the Beaufort County Code of Ordinances Art. III, Div. 2, Subd. 2 Section 106-405(a) requires the following actions of the ZBOA:

After the close of the public hearing held pursuant to this chapter, the body conducting the hearing shall consider the application, relevant support materials, staff report, and public testimony given at the public hearing. The body conducting the hearing shall render a decision or recommendations, as appropriate, either to approve, approve with conditions, or disapprove the application based on this chapter.

After the ZBOA issues its decisions, then South Carolina Code of Laws §6-29-820A grants the right of appeal to an aggrieved person as follows:

A person who may have a substantial interest in any decision of the board of appeals...may appeal from a decision of the board to the circuit court in and for the county, by filing a petition in writing setting forth plainly, fully and distinctly why the decision is contrary to law.

Once the appeal is filed, §6-29-830 requires the following action by the ZBOA:

Upon the filing of an appeal with a petition as provided in Section 6-29-820(A) or Section 6-29-825(F), the clerk of the circuit court must give immediate notice of the appeal to the secretary of the board and within thirty days from the time of the notice, the board must file with the clerk a duly certified copy of the proceedings held before the board of appeals, including a transcript of the evidence heard before the board, if any, and the decision of the board including its findings of fact and conclusions.

In *Grant v. City of Folly Beach*, 346 S.C 74, 551 S.E.2d 229 (2001), the parties raised the question of whether this statutory language mandated that the ZBOA provide a transcript of the proceedings before it. Grant argued that the statutory language of §6-7-760, the predecessor statute of §6-29-830 using substantially the same language required the City to file a transcript if evidence was heard before the Board. The Supreme Court concluded that the preparation of a transcript of the hearing is within the Board's

discretion and is not mandatory. "In specifying the Board's duties at the time of the hearing, the legislature has imposed no requirement that a verbatim recording be made...we conclude the legislature intended that preparation of a transcript remains within the Board's discretion." *Id.* 346 S.C. at 79-80, 551 S.E.2d at 232. Appellants maintain that without a mandatory transcript capturing the objections or issues raised by an appellant, a requirement that issue preservation occur at the hearing before the ZBOA would "defeat the plain legislative intention." See, *Unisun Ins. Co. v. Schmid.*, 339 S.C. 362, 368, 529 S.E.2d 28, 283 (2000).

The statutes and case law interpreting the statutes indicate that the petition is where the Appellants' arguments and objections must be initially raised to be considered on appeal at all levels. There is no question that the Appellants' petition raised the lack of the submission of a CIS to the ZBOA as an error of law and the petition cited the Local Ordinances which led to its objection. Consequently, all issues raised in this appeal were sufficiently preserved and this Court should deny the Respondent's request to dismiss the appeal for the lack of error preservation.

3. **Respondent failed to file a Rule 59(e) motion for reconsideration of its motion to dismiss the appeal for lack of issue preservation and is barred from raising this issue in this appeal.**

Respondent cites *Home Med. Sys v. S. Dep't of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009) in support of its contention that issue preservation is required in administrative proceedings and that Rule 59(e) motions are permitted in ALC proceedings. Appellants agree with this contention to the extent that, as argued hereinabove, in the instant case issue preservation begins with the appeal petition to the Circuit Court. We further agree that Rule 59(e) motion for reconsideration is applicable

to actions by the Circuit Court when it fails to address in a final order issues raised by a party. In the instant case, Respondent filed a motion to dismiss the appeal in the Circuit Court for failure to preserve the issues for appeal. The Master did not address or rule on that issue. Respondent did not file a motion for reconsideration. Thus, Respondent is barred from raising that issue in this Court and its request for a dismissal of the appeal must be denied.

## II. THE ZBOA ERRED AS A MATTER OF LAW IN NOT REQUIRING A COMMUNITY IMPACT STATEMENT.

Respondent argues that the ZBOA did not err as a matter of law when it exercised its discretionary authority to not require a CIS before approving a grandfathered nonconforming convenience center in the Daufuskie Island Community Preservation District. Development standards for community preservation areas are found in Appendix D of the ZDSO. However, the limited and special use standards listed in Appendix D “are in addition to other standards required elsewhere in this chapter...” ZDSO, Appendix D, Section 1. Table 4 of Appendix D of the ZDSO prohibits the use of a drop off center for household waste at waste transfer stations<sup>1</sup> also known as convenience centers<sup>2</sup> in the Daufuskie Island Community Preservation District. Where allowed, Section 7 of Appendix D requires that “all applications for this use [waste transfer station] **shall require a community impact statement.**” (Emphasis added.)

Respondent argues that the convenience center is a nonconforming grandfathered provision and as such, no CIS is necessary. However, §106-5 of Article 1 of the ZDSO

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<sup>1</sup> ZDSO( also referred to as BCLO in Appellants Brief), Table 4. Community Preservation Use Table defines *waste transfer station* as “drop-off centers for household waste to be transferred to a landfill by public or private companies”.

<sup>2</sup> ZDSO, Table 106-1098 General Use Table, defines *convenience center* as “drop-off centers (convenience centers) for household waste to be transferred to a landfill by public or private companies”.

makes the zoning ordinance applicable to all development within the unincorporated areas of the county unless otherwise provided for and provides further that "No development or use of real property shall occur unless authorized pursuant to this chapter."<sup>3</sup> Section 106-6 of Article 1 of the ZDSO provides that "All construction, modification, or use of any lot, parcel, building or structure, on land or on water, shall comply with this chapter". Exceptions to the requirements of ZDSO are listed in §107-7 of Article I of the ZDSO, however, where a nonconforming use exists, provisions are made for application for a special use permit to either mitigate the nonconformity, (see subsection 106-9(b)(2) of Article 1 of ZDSO), or to approve the nonconformity, (see §106(b)(3) of Article 1 of ZDSO). While a CIS is discretionary regarding efforts to mitigate the nonconformity<sup>4</sup>, the requirement of a CIS is mandatory when seeking approval of a nonconformity through a special use permit. Subsection 106(b)(3) of Article 1 of ZDSO provides as follows:

*Criteria for approval of nonconformity through special use permit.* In addition to the standards and criteria for special use permit approval set forth in subsection (b)(2) of this section, in Division 2 of Article V of this chapter and subdivision IV of Division 3 of article III of this chapter, the applicant shall meet the following requirements . . . .

Division 2 of Article V deals with limited and special use standards. Subdivision VIII of Division 2 of Article V specifically deals with industrial sites and in §106-1362 lists the

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<sup>3</sup>All chapter reference is to Beaufort County, South Carolina, Code of Ordinances, Part II, Building and Land Development Ordinances, Chapter 106 - Zoning and Development Standards.

<sup>4</sup> 106-9(b)(2). *Procedure for mitigating nonconformity by special use permit.* Owners of nonconforming uses, buildings, structures, or lots may apply for a special use permit to become conforming without changing the use or necessarily modifying the entire physical nature of the conformity. The special use permit application is reviewed by the DRT who then provides a recommendation to the ZBOA for a final decision. The DRT and ZBOA, **at their discretion**, shall require the following studies and reports from the property owner as part of their consideration in deciding whether to approve the request and/or how much of the request to grant:...

- b. Community impact statement (CIS). (Emphasis added.)

standards applicable to a convenience center. Section 106-1362 reads as follows:

§106-1362. - Convenience center

- (a) *Limited/special standards for use in all applicable districts.* Limited/special standards for convenience center uses in all applicable districts are as follows:
  - (1) Only residential and office wastes shall be accepted by this use. Commercial, industrial, auto or machinery generate waste shall not be accepted...
- (b) *Report/studies required.* All application for this use shall require a **community impact statement [CIS]** consisting of area impact assessment, environmental impact statement, traffic impact statement, archaeological and historic impact statement.
- (c) *Additional standards in the rural district.* The minimum site area shall be five acres.

Appellants contend that the ZBOA erred as a matter of law when it failed to require a CIS before approving the special use permit requested. The criteria for a special use application and approval is referenced in Article III, Division 3, §106-552 of ZDSO which requires that the “[a]pproval of a special use application shall be dependent upon findings that the proposed use fully complies with this chapter.” *Id.* In every reference made to the use and/or development of a convenience center in the zoning ordinance a community impact statement is required.

Respondent argues further that §106-1362 is a part of Article V, Division 2 of the ZDSO and therefore applies “only to those zoning designations that are listed in the general land use table of §106-1098.” See Initial Brief of Respondent p. 11. As stated in Appellants’ initial brief, ZDSO §106-1126, defines the scope of Article V Division 2 which states that “this Division describes the standards governing limited and special uses as designated in the general land use table §106-1098. These standards [listed in Article V Division 2] are in addition to other standards required elsewhere in this

chapter.” ZDSO, Article V, Division 2, §106-1126. Therefore, it is Appellants’ position that the inclusion of Community Preservation Districts in table §106-1098 triggers the need to comply with the standards set forth under Article V Division 2 of which section 106-1362 is a part. Since ZDSO 106-1126 states that the provisions in Article V Division 2 must be complied with “in addition to other standards required elsewhere in this chapter”, it is not inconsistent nor does it supplant the ZBOA’s duty to comply with the provisions of Article V Division 2 if the general use table also includes reference to another table for properties zoned Community Preservation.

Appendix D of ZDSO provides interim standards for Community Preservation Districts to avoid making older developments nonconforming as new standards evolve. See §106-959. This section “permits infill development and redevelopment consistent with the existing or planned character, but is not otherwise intended for use of new development or rezoning.” It is clear from the reading of the transcript, the proposed use of the site for which a permit was granted is more than what is currently in existence. (R pp. 71, ll 15-23; 73, ll 2-8). It appears from the proposed use that the facility will be enlarged and the operation expanded.<sup>5</sup> As a result, the procedure for approval of a nonconformity through a special use permit would apply. See, §106-9(a) and (b)(3). Among other things, §106-9(b)(3) requires that the application for the propose use of a convenience center (Division 2 of Article V of Chapter 106, §106-1362) include a community impact statement.

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<sup>5</sup> Mr. Coleman: What we done is ...surely if you go to the site now, you’re find two (2) to four (4) open top containers and trash everywhere. When the container gets full, trash is placed on the ground-. What we’re trying to do, is because it is an island, and it’s a difficult situation to get back and forth to empty the containers, we’ll put two (2) units out there instead; so we’re have three compacting units out there, so that we’ll be able to have a working compacting when the residents come down to dump their trash. It should cut out haul by about sixty (60) percent ...fifty (50) percent.

Appellants acknowledge that a drop off center with two (2) to four (4) top containers would be considered grandfathered in by definition, that is, the owner of property will be allowed to continue to use the property in the same manner as it was being used before the prohibitive zoning ordinance was passed. See *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 269, 349 S.E.2d 891, 892(SC App. 1986). In order to qualify for nonconforming or grandfathered status, a property owner must show that the proposed use of the property is substantially the same as it was before the act was passed. A nonconforming use is enlarged when the scope of the use is increased. See *Kirkpatrick v. Village Council*, 138 N.C.App, 79, 86, 530 S.E.2d 338, 323 (2000). A nonconforming use may continue so long as the continuance is substantially the same kind of use as that to which the premises were devoted at the time of the passage of the zoning ordinance. *Heilker v. Zoning Board of Appeals*, 346 S.C. 401, 552 S.E.2d 42, 52, dissenting opinion.

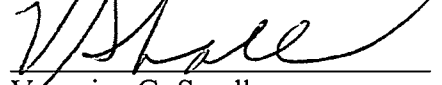
It is clear from the colloquy during the hearing before the ZBOA that a special use permit was necessary to build a convenience center on the parcel in question. As such, there was no finding that the proposed use was a continuation of the use then in existence but rather the proposed use was different in kind and in scope from the drop off center the residents of the island were accustomed to. While the Respondent argues that the proposed use would be beneficial to the Daufuskie Island Community, (R p. 55 ll 2-9), this conclusion was purely of a speculative nature and without any factual or legal foundation since the required reports including the CIS was never completed or presented to the zoning board. The failure of the ZBOA to require a CIS before issuing the special use permit was an error of law since it was arbitrary and without evidentiary support. See

*Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, \_\_\_, 602 S.E.2d 76, 78  
(Ct. App. 2004)

**CONCLUSION**

The arguments of the Respondent regarding the dismissal of the appeal, the discretionary requirement of the CIS and the grandfathering of a convenience center are not supported by the record or the law applicable to this case. Therefore, the Court should reverse the decision of the Master-in-Equity and remand this case for further proceedings before the ZBOA.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity

Case No. 2010-CP-07-00862

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Donald Newton, Jean Flagg-Newton and James C. Hudson..... Plaintiffs,

Of whom Donald Newton and Jean Flagg-Newton are ..... Appellants,

v.

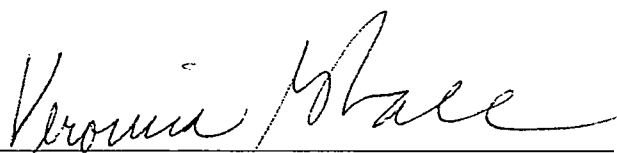
Zoning Board of Appeals for Beaufort County ..... Respondent.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Reply Brief Appellants complies  
with Rule 211 (b), SCACR.

  
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March 12, 2011

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

Donald Newton, Jean Flagg-  
Newton and James C. Hudson, Plaintiffs,  
Of whom Donald Newton and  
Jean Flagg-Newton are Appellants,

v.

Zoning Board of Appeals for  
Beaufort County, Respondent.

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Appeal From Beaufort County  
Marvin H. Dukes III, Master-in-Equity

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Opinion No. 4907  
Heard September 13, 2011 – Filed November 9, 2011

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**AFFIRMED AS MODIFIED**

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Arthur C. McFarland, and Veronica G. Small, both of  
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Robert W. Achurch, III, Jason Franklin Ward, and  
Mary Bass Lohr, all of Beaufort, for Respondent.

**PER CURIAM:** After the Zoning Board of Appeals for Beaufort County (Board) issued a special use permit for additional construction on the site of an existing convenience center<sup>1</sup> (the DOC) on Daufuskie Island, Donald Newton and Jean Flagg-Newton (collectively the Newtons) appealed the Board's decision to the circuit court. The matter was referred to a master-in-equity, who affirmed the Board's decision. The Newtons appeal, arguing the master erred in affirming the Board's decision not to require a Community Impact Statement (CIS).<sup>2</sup> They contend the master erred in finding: (1) a CIS was not required; (2) the Beaufort County (County) ordinance governing convenience centers (section 106-1362) does not apply to uses within the Daufuskie Community Preservation District; (3) the Board knew the impact of the existing DOC and, therefore, did not need to consider a CIS; and (4) section 106-552 of the Beaufort County Code of Ordinances (Code) controlled the consideration for approval of the special use permit in this case. We affirm and modify the master's decision as discussed below.

## FACTS

In 2009, a contractor acting on behalf of Beaufort County applied to the Board for a special use permit to perform additional construction on the site of the DOC, which is located within the Daufuskie Island Community Preservation District. The County proposed to bring the DOC into greater compliance with County requirements by installing a fence, a swale for stormwater runoff, and three trash compactors, thereby reducing the cost of hauling away the collected trash and making the site safer and cleaner.

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<sup>1</sup> A "convenience center" is any location authorized by the County as a collection point for residential solid waste. Beaufort Cnty. Code of Ord. § 62-3 (Art. I) (1982).

<sup>2</sup> A CIS is a report assessing the proposed change's impact on the area, the environment, traffic, and archaeological sites. Beaufort Cnty. Code of Ord. § 106-367(g)(1) (Art. III, Div. 2, Subdiv. II) (2004). "The purpose of the CIS is to (i) determine if alternatives would avoid the adverse impacts, (ii) determine that the plan selected minimizes the impact, and (iii) identify mitigation measures that would offset the impacts." *Id.*

take additional evidence and "must determine only whether the decision of the board is correct as a matter of law." S.C. Code Ann. § 6-29-840(A) (Supp. 2010).

This procedure does not allow for issue identification,<sup>4</sup> or even party identification, prior to the filing of a petition with the circuit court. The statute does not require the appellant to attend a public hearing on the Board's decision or even to communicate his concerns to the Board prior to filing his petition with the circuit court. Thus, the sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires. Here, the Board rendered its decision on January 28, 2010. The Newtons filed their petition outlining the grounds for their appeal on February 26, 2010, which was within the thirty-day filing period. The Board does not contend that this petition failed to identify the grounds for appeal. Therefore, the grounds for appeal identified in the Newtons' petition were properly before the master.

## **II. Convenience Center Ordinance (Section 106-1362)**

The Newtons assert the master erred in finding the requirements of the County ordinance governing convenience centers (section 106-1362, Article V, Division 2) do not apply to uses in the Daufuskie Community Preservation District. We disagree.

The standards governing limited and special uses in Article V, Division 2, cover uses "designated in the general land use table 106-1098. These standards are in addition to other standards required elsewhere in this chapter, as well as building code requirements, and further supersede certain standards in [A]rticle VI of this chapter." Beaufort Cnty. Code of Ord. § 106-1126 (Art. V, Div. 2, Subdiv. I) (1999). The ordinance governing convenience

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<sup>4</sup> See Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 37-38, 606 S.E.2d 209, 213-14 (Ct. App. 2004) (describing differences between adversarial trial proceedings and administrative proceedings in which circuit court acts in appellate capacity and finding statutory scheme does not permit amendment of grounds for appeal after thirty-day filing period expires).

centers appears in Article V, Division 2. See Beaufort Cnty. Code of Ord. § 106-1362 (Art. V, Div. 2, Subdiv. VIII) (2003) (describing limited and special use standards for convenience centers in "all applicable districts," including types of waste accepted, buffer zones, lighting, and CIS requirement).

The general land use table in section 106-1098 (the Table) details standards for eleven distinct types of land use districts, each of which the Table classifies as either a Priority area or a Rural area. Beaufort Cnty. Code of Ord. § 106-1098 (Art. V, Div. 1) (2009). The Table does not describe standards for Community Preservation districts, Transitional Investment areas, or special districts. Id. A note following the Table indicates Community Preservation standards are located in one of the appendices to Chapter 106.<sup>5</sup>

We affirm the master's determination that the standards described in the Table, and consequently the provisions of section 106-1362, do not govern Community Preservation districts. Although the Newtons accurately assert the Code indicates in several places the coverage of its provisions is layered, we find no indication the coverage of Article V, Division 2, or of section 106-1362 specifically, extends to Community Preservation districts. As the master observed, section 106-1126 states that Article V, Division 2, applies to the land uses designated in the Table. However, no mention of Community Preservation standards appears within the body of the Table. Instead, a note appearing below the Table offers a reference for where a reader may locate those standards. § 106-1098. Because the Table itself does not include the standards for Community Preservation districts, the master correctly reasoned that section 106-1362 does not apply to Community Preservation districts.

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<sup>5</sup> The note refers to Appendix E, which appears to be a scrivener's error. Appendix D contains Community Preservation standards, while Appendix E lists trees and plants recommended for use in landscaping. Furthermore, while Appendix D applied to the Daufuskie Community Preservation District at the time of the Board's and master's decisions, its applicability ceased in February 2011. Standards for Daufuskie Island now appear in the Daufuskie Island Code (Chapter 106, Appendix S, of the Code).

On December 10, 2009, the Board held a public hearing at which the Newtons and others spoke. According to the County, the improvements required a special use permit because the DOC predated the County's zoning ordinances and did not conform to them. The Newtons opposed the issuance of a special use permit, arguing such a permit would constitute "spot-zoning," did not comport with the County's comprehensive plan for development, and would conflict with the development of adjacent recreational property. Moreover, the Newtons expressed concern that the proposed construction would expand the DOC, making it a waste processing site for housing developments that had been handling their own waste disposal. In response to the Newtons' concerns, David Coleman of the County's Building and Engineering Department explained the proposed improvements would not expand the DOC but instead would utilize previously cleared land to surround the DOC with buffer zones as required by ordinance. In addition, the installation of compactors would enable the DOC to process the same amount of trash as before but would reduce the need for hauling by fifty to sixty percent. According to Coleman, an existing restriction against commercial dumping at the DOC would continue to prevent the dumping of waste collected within the island's housing developments.

The Board unanimously approved the request for a special use permit. On January 28, 2010, it issued the permit, subject to certain conditions, in accordance with "Article III, Subdivision IV, Special Uses, Section 106-554, of the Zoning and Development Standards Ordinance."<sup>3</sup> Shortly thereafter, the Newtons appealed the Board's decision to the circuit court.

On May 19, 2010, the master heard arguments on the issues briefed by the parties. A month later, the master issued an order "deny[ing] the appeal," in which he effectively affirmed the Board's decision. Specifically, the master found the ordinance governing convenience centers does not apply within Community Preservation districts. Rather, he determined the Board "only needed to consider the criteria for approval of a special use permit

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<sup>3</sup> Section 106-554 of the Code (1999) allows the Board to amend, extend, vary, or alter an existing special use permit "only pursuant to the standards and procedures for the approval of the original use."

under [section] 106-552" and was not required to order a CIS because the impact of the existing DOC was already known. This appeal followed.

## STANDARD OF REVIEW

Generally, appeal from a final order of the circuit court following its review of the zoning board's decision is to the court of appeals. S.C. Code Ann. § 6-29-850 (2004); Rule 203(d), SCACR. Appellate courts regard appeals from zoning decisions in the same manner as appeals from other circuit court judgments in law cases. Petersen v. City of Clemson, 312 S.C. 162, 169-70, 439 S.E.2d 317, 322 (Ct. App. 1993) (citing Bishop v. Hightower, 292 S.C. 358, 360, 356 S.E.2d 420, 421 (Ct. App. 1987)). Even if a court disagrees with a zoning board's decision, the court will refrain from substituting its judgment for that of the zoning board unless the decision "is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the [zoning] board has abused its discretion." Rest. Row Assocs. v. Horry Cnty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Cnty. of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002).

## LAW/ANALYSIS

### I. Preservation

As a threshold issue, the Board contends the Newtons' arguments on appeal are unpreserved because the Newtons failed to raise these arguments to the Board during the administrative process. We disagree.

The Board's argument overlooks the issue identification requirements of the statute governing appeals from decisions by zoning boards, as well as the non-adversarial nature of administrative proceedings. Appeal from a decision by a zoning board of appeals is to the circuit court. S.C. Code Ann. § 6-29-820 (Supp. 2010). Any "person who may have a substantial interest in any decision" by the Board may initiate an appeal of that decision by filing with the circuit court a "petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law." Id. The circuit court may not

### III. Known Impact

Next, the Newtons assert the master erred in finding that because a convenience center already existed on the parcel at issue and the reviewing staff did not determine a CIS was required, the center's impact was known and the Board did not need to consider a CIS. We disagree.

The division entitled "Discretionary Reviews" authorizes the County's staff to determine whether an applicant must submit a CIS as part of his application for a special use permit. Beaufort Cnty. Code of Ord. § 106-552 (Art. III, Div. 3, Subdiv. IV) (2004). The procedure for such a review requires that the DRT examine the applicant's special use development plan and recommend whether the Board should approve the permit. Id. The special use development plan must address whether the proposed use is consistent with the "purposes, goals, objectives, and policies" of the County's comprehensive development plan, is compatible with the character of nearby land, and minimizes any adverse effects. Id. The Board may require submission of a CIS or traffic impact analysis if its staff determines those reports are needed. Id.

We affirm the master's determination that section 106-552 permitted the Board to use information already in its possession to decide whether a CIS was necessary. The Board had to consider the impact of the improvements, not merely of the DOC itself. The prior existence of the DOC was less crucial to this determination than the information about the proposed improvements that the reviewing staff had in hand. Section 106-552 required the County to submit with its permit application a special use development plan addressing how the improvements to the DOC would affect the character of nearby land and how the County intended to minimize any adverse effects. We find such a document,<sup>6</sup> as described in section 106-552, would provide the DRT and the Board with information useful in determining the proposed

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<sup>6</sup> Neither the record nor the parties' arguments on appeal reflect a challenge to the completeness of the application as it relates to compliance with section 106-552. In particular, we note the Newtons never raised the issue of whether the County's application included a special use development plan.

improvements' compatibility with the County's comprehensive development plan and projected impact on nearby property. In addition, the County's application materials suggest any adverse effects of the proposed improvements on the area would be minimal. According to the application, the improvements would affect the manner of handling solid waste at the existing site by providing a "more efficient, cleaner facility" and would "enhance the aesthetic quality of the island." Consequently, the DRT and the Board could decide, based upon the information already in hand, whether to order a CIS.

Furthermore, the evidence in the record does not support the Newtons' contention that the proposed improvements would result in a "more intensive use" of the DOC. The Newtons appear particularly concerned that the Board lacked information that the DOC's compaction capability would invite a greater volume of waste. At the public hearing, Coleman indicated the installation of trash compactors was intended to reduce hauling costs. Coleman stated the improvements were aimed at making the DOC "much safer, much cleaner, much more sanitary, and presentable." Neither Coleman nor Bobby Lee of Thomas & Hutton Engineering Company, who also spoke, advised the Board that any proposed improvement was intended to prepare the DOC to handle an increased volume of waste. Moreover, no evidence indicated the improved DOC would begin accepting additional types of waste or waste from different sources.<sup>7</sup> Thus, the Newtons' concerns are speculative. In view of these facts, the master did not err in finding section 106-552 did not require the Board to order a CIS.

#### **IV. Discretionary Review under Section 106-552**

The Newtons also assert the master erred in finding that only section 106-552 controlled the Board's consideration of the special use permit in this case because the preceding section, which outlines the scope of the entire

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<sup>7</sup> We note the DOC predates the implementation of Appendix D, and Coleman informed the Board the DOC was restricted from accepting commercially collected waste. He further stated that restriction would remain in effect.

subdivision, invokes the Table from section 106-1098. We disagree but modify the language of the master's order as discussed below.

Article III, Division 3, Subdivision IV, governs the discretionary review of applications for special use permits:

Certain land uses and developments present unique problems with respect to their property location. Such land uses and developments are identified as special uses in each particular zoning district (see table 106-1098). Analysis and judgment of the consequences of each use and development is necessary to preserve and promote the public health, safety, and welfare.

Beaufort Cnty. Code of Ord. § 106-551 (Art. III, Div. 3, Subdiv. IV) (1999).

To the extent the Newtons argue section 106-551 invoked the Table, and therefore section 106-1362, this issue is unpreserved.<sup>8</sup> The Newtons did not identify this argument as a ground for their appeal of the Board's decision. See § 6-29-820 (requiring appeal from the Board's decision to be in the form of a "petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law"). In addition, the record does not reflect that they sought a ruling on it from the master. See First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998) (holding an issue is unpreserved for appellate review even if it was raised to the master, if he did not rule upon it and appellant failed to seek a ruling through a motion pursuant to Rule 59(e), SCRCP). Accordingly, any connection between section 106-551 and the Table or section 106-1362 is not properly before this court.

To the extent the Newtons challenge the master's finding the Board "only needed to consider the criteria for approval of a special use permit under [section] 106-552," we affirm the master's decision but modify the

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<sup>8</sup> It is also a less compelling rehash of their similar argument under section 106-1126, discussed in Section II, above.

language of the order. In his order, the master examined the Newtons' arguments concerning Article V, Division 2, and determined they did not apply to the situation at hand. Specifically, he found both the Table and section 106-1362 were inapplicable. Nonetheless, the master recognized that Community Preservation districts "are governed by specific standards which are outlined in Appendix D." Although he did not examine Appendix D's provisions,<sup>9</sup> the master clearly was aware the standards enunciated in Appendix D applied to Community Preservation Districts. The master's statement that the Board "only needed to consider the criteria for approval of a special use permit under [section] 106-552" is incongruous with his finding concerning Appendix D. Accordingly, we affirm the master's decision to the extent he found the Board needed to consider the criteria for approval of a special use permit under §106-552, and not the provisions of Article V, Division 2.

#### **V. Failure to Require a CIS (Section 106-9(b)(2) and (3))**

The Newtons assert the master erred in finding the Board did not abuse its discretion by not requiring a CIS before it issued a permit for the construction of a convenience center on Daufuskie Island. In support, they argue because the Board did not have the studies and assessments required by section 106-9(b)(2) of the Beaufort County Code of Ordinances, it "lacked the legal evidence to support its decision." We decline to reach this argument because it is unpreserved for this court's review. Although the Newtons raised it to the master, he did not rule on it in his final order, and the record does not reflect that the Newtons moved the master to alter or amend the judgment. See Soden, 333 S.C. at 568, 511 S.E.2d at 379 (holding an issue is unpreserved for appellate review if it was raised to the master but he did not rule upon it and the appellant failed to seek a ruling through a motion pursuant to Rule 59(e), SCRC).<sup>10</sup>

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<sup>9</sup> The record does not reflect that the Newtons presented any arguments under Appendix D to the master, nor did they advance an argument under Appendix D to this court prior to submission of their Reply Brief.

<sup>10</sup> At oral argument, the Newtons pointed this court to the decision of the Board, which they claim required a CIS to be developed after the Board made its decision. We do not read the order in that fashion. Section 106-57 of the

## CONCLUSION

We find the statute governing appeal from a decision by a zoning board of appeals did not require the Newtons to raise their issues on appeal to the Board in order to preserve them for review by the master. However, we find the Newtons failed to seek a ruling from the master on the issue of whether section 106-9(b) required submission of a CIS for our review. Accordingly, this issue is not preserved for our review.

For the reasons discussed above, we affirm the master's decisions that the standards described in the Table do not govern Community Preservation districts and that section 106-552 did not require the Board to order a CIS.

Furthermore, we find the master's statement that the Board "only needed to consider the criteria for approval of a special use permit under [section] 106-552" apparently conflicts with his recognition that the standards contained in Appendix D to the Code applied to Community Preservation districts such as the one on Daufuskie Island. Consequently, we affirm the master's finding that the Board properly considered the criteria for approval of a special use permit, but we modify his order to hold the Board needed to consider the criteria for approval of a special use permit under §106-552, and not the provisions of Article V, Division 2.

**AFFIRMED AS MODIFIED.**

**SHORT and GEATHERS, JJ., and CURETON, A.J., concur.**

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Code, (Art. II, Div. 1) (2004), sets forth the responsibilities of the Board vis-à-vis the DRT and states for grants of special use permits, the Board makes the final decision and the DRT only makes recommendations to the Board.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity  
Case No. 2010-CP-07-00862

RECEIVED

NOV 23 2011

SC Court of Appeals

Donald Newton and Jean Flagg-Newton..... Appellants,

vs.


Zoning Board of Appeals for Beaufort County..... Respondent.

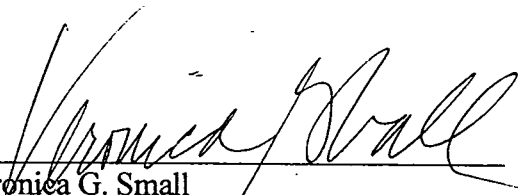
**PETITION FOR REHEARING**

The Appellants respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled case on the following grounds:

1. This Court misapprehended the purpose of the application and the information known to the DRT and the Board.
2. This Court misapprehended the fact that Section 106-552 did not mandate a CIS before the issuance of a special use permit for the development of a citizen's convenience center on Daufuskie Island.

The Petition is supported by the attached Memorandum.

  
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ATTORNEYS FOR APPELLANTS

Charleston, SC

November 28, 2011

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

The Honorable Marvin H. Dukes, Master-in-Equity  
Case No. 2010-CP-07-00862

RECEIVED

NOV 28 2011

SC Court of Appeals

Donald Newton and Jean Flagg-Newton..... Appellants,

vs.

Zoning Board of Appeals for Beaufort County.....Respondent.

**MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING**

The Appellants respectfully petition this Honorable Court for a rehearing of the appeal in the above-entitled action and files this memorandum in support of this petition. The Newtons reserve our argued position as to each of the points of appeal, but in this petition address ourselves solely to the following features of the decision where we believe the court may be convinced its result is based upon points which were overlooked or misapprehended by the court.

**1. This Court misapprehended the purpose of the application and the information known to the DRT and the Board**

This court characterized the application of the County as one for a “special use permit to perform **additional construction** on the site of the DOC which is located within the Daufuskie Island Community Preservation District.” (Decision-Facts) (Emphasis added.) This characterization is found in the December 1, 2009 Memorandum of the DRT to the Board where county’s application is identified as a “request for a

Special Use Permit for the “Beaufort County, Daufuskie Island Convenience Center Expansion,” (Supp. ROA (13)). However, this description is inconsistent with the actual purpose of the application as stated on the following documents submitted by the County and influenced the misapprehension of the facts and ultimate decision of this Court.

- a. “Beaufort County is proposing the **development of a citizen’s convenience center** to be located on Frances Jones Boulevard on Daufuskie Island. The proposed project was awarded to the design-build team of Terry R. Lee Contracting Co. Inc. and Thomas & Hutton Engineering Co.

The proposed scope of the work will include the **construction of a convenience center** consisting of three compactors, two open top containers for white goods, concrete slabs to support the above items, an attendant’s facility with associated parking, gravel maneuvering area, fencing, landscaping and associated infrastructure. The **proposed convenience center** is located on existing property that is currently owned and utilized by Beaufort County for the removal of solid waste from the island.” Supp.ROA(10) (Emphasis added.)

- b. The Beaufort County Public Notice for this application stated: “The **proposed project will replace the current solid waste drop off location** on the same property which is currently owned by the county.” Supp.ROA (11) (Emphasis added)
- c. In the October 21, 2009 application, the reason for the permit is described as follows: Beaufort County Public Works and Beaufort County

Engineering Division have identified the need to **construct a convenience center** on the subject property... and is currently utilized as a drop off location for citizen's solid waste." Supp.ROA (12). (Emphasis added)

- d. In the decision of the Board, the application was identified as a "request for a Special Use Permit for the **proposed Daufuskie Island Convenience Center.**" (R. 7) (Emphasis added.)

The impact of this characterization by this Court is reflected in its determination that a Community Impact Statement (CIS) was not required for approval of the county's application. Under this Court's Decision, Section III Known Impact, this Court affirmed the master's determination that section 106-552 permitted the Board to use information already in its possession to decide whether a CIS was necessary. But this Court also found that "the Board had to consider the impact of the improvements, not merely of the DOC itself. The prior existence of the DOC was less crucial to this determination than the information about the proposed improvements that the reviewing staff had in hand." The Board did not require a CIS because it determined that the nonconforming use was grandfathered.<sup>1</sup> Nothing in the record indicates that the DRT or the Board considered any other information about the proposed improvements in deciding that a CIS was not required. This Court found that the information in hand consisted of the following:

1. The County's application materials suggest any adverse effects of the proposed improvements on the area would be minimal.
2. According to the application, the improvements would affect the manner of handling solid waste at the existing site by providing

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<sup>1</sup> The DRT in its recommendation to the Board stated: "This use has been an existing convenience center use for the past 20 years. Supp.ROA (13)

“more efficient, cleaner facility” and would enhance the aesthetic quality of the island.”

(Decision Section III) Neither the master nor this Court detailed the record evidence of what was already known about the adverse impact on the surrounding area and the environment by the staff or the Board to justify not requiring a CIS.

In fact, the evidence of record reflects that while the use as a citizen’s convenience center is similar to a drop off center, the improvements were so substantial that the Board had to consider its impact. The County in its application materials makes a clear distinction between a drop off center and a citizen’s convenience center. The existing drop off center consists of two to four open 20-foot containers. The replacement citizen’s convenience center would consist of three forty-yard compactors in addition to the other improvements discussed above. The difference between a drop off center and a citizen’s convenience center is best reflected in the aerial photographs of the exiting drop-off center (Supp. ROA (7)) and the superimposed drawing of the convenience center on the same aerial photograph as shown on Supp. ROA (4). These views clearly dispute the testimony of David Coleman, cited by this Court, that the proposed improvements would not expand the DOC but instead would utilize previously cleared land to surround the DOC with buffer zones as required by the ordinance. The physical expansion is stark.

Moreover, the issue before the Board was not whether the improvements will provide “a more efficient, cleaner facility” but what is the impact on the surrounding area, the environmental impact and the archaeological and historic impact. The Newtons contend that neither the DRT nor the Board considered the other information available to

it about the convenience center. The Board considered this application as an expansion of a drop off center rather than new construction and a total replacement. Consequently, its determination that a CIS was not required was an abuse of discretion. The Newtons believe that this Court should review the above cited record evidence and find that it has overlooked the evidence of the real impact of the new citizens convenience center and misapprehended what was known to the staff or the Board that justified the decision not to require a CIS before granting a special use permit to the County.

**2. This Court misapprehended the fact that Section 106-552 did not mandate a CIS before the issuance of a special use permit for the development of a citizen's convenience center on Daufuskie Island.**

This Court found that the master was correct in finding that only section 106-552 controlled the ZBOA's consideration as to whether to issue a special use permit for the construction of a citizen's convenience center. Decision, Section IV. The Court recognized that the Master-In-Equity did not examine Appendix D and indicated in Footnote 9 that the Newtons had not advanced any argument under Appendix D until their Reply Brief. However, the Newtons raised this issue on page 7 of the Initial Brief of the Appellant. ("While it is notable that Appendix D section 7 of Chapter 106 makes specific mention of drop-off centers, even this use requires a CIS when operated in a Community Preservation Zone.").

The Newtons filed this appeal to require Beaufort County to complete a CIS before issuing a special use permit to determine if a citizen's convenience center should be constructed on Daufauskie Island. Both parties agree that the operation of a convenience center is an impermissible and prohibited use in the Community Preservation district. The Court found that section 106-522 on "Discretionary Reviews"

governed the process for issuance of a special use permit, however, the court failed to include in its requirement that the specific standards as articulated in Appendix D would be controlling. Decision Section IV.

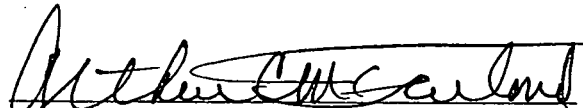
As stated above, Section 7 of Appendix D of the zoning ordinance prohibited the use of a citizen's convenience center in a Community Preservation District and specifically provided that "All applications for this use shall require a community impact statement." Further, 106-552 required that "Approval of a special use application shall be dependent upon findings that the proposed use fully complies with this Chapter" (Chapter 106 - Zoning and Development Standards). Appendix D is a part of the Zoning and Development Chapter. Given the mandate of Appendix D regarding the requirement of a CIS for the construction of a convenience center in a Community Preservation District, the Newtons merely requested that the Beaufort County ZBOA follow the requirements of the zoning ordinance. Section 7 of Appendix D mandated a CIS before a citizen's convenience center could be constructed in a Community Preservation District. Appendix D did not allow for discretion as to whether to obtain a CIS for the issuance of a special use permit to develop a convenience center in a Community Preservation District. Therefore, the Newtons believe that this Court erred when it found that a CIS was discretionary and not mandatory as a matter of law.

The Newtons request this court rehear this case and find that Section 106-552 along with Appendix D requires a CIS before the issuance of a special use permit to construct a citizen's convenience center in a Community Preservation District, the same being required as a matter of law and finding that failure to require a CIS pursuant to Appendix D was an abuse of discretion as a matter of law. The Newtons are of the

opinion that the Master-in-Equity's failure to apply the appropriate review standard should not bar the application of the requirements of the zoning ordinance. "It is well settled that when interpreting an ordinance, legislative intent must prevail if it can be reasonably discovered in the language used. *Fairfield Ocean Ridge, Inc. v. Town of Edisto Beach*, 294 S.C. 475, 366 S.E.2d 15 (Ct.App.1988). An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Spartanburg Co. D.S.S. v. Little*, 309 S.C. 122, 420 S.E.2d 499 (1992).

### CONCLUSION

For the above-stated reasons, Appellants request grant of a rehearing of the within action.



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ATTORNEYS FOR APPELLANTS

Charleston, S.C.

November 28, 2011

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM BEAUFORT COUNTY  
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The Honorable Marvin H. Dukes, Master-in-Equity

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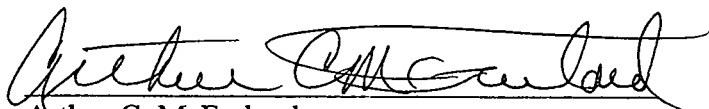
vs.

Zoning Board of Appeals for Beaufort County.....Respondent.

**PROOF OF SERVICE**

I certify that I served two (2) copies of the Petition For Rehearing and Memorandum in Support of Petition for Rehearing on Respondent by depositing a copy of same in the United States mail, postage prepaid, addressed to the attorney of record Jason F. Ward, Esquire at his address of record, P.O. Box 40, Beaufort, S.C. 29901, on November 28, 2011.

By:



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ATTORNEY FOR APPELLANTS

Charleston, S.C.

November 28, 2011



cc: Arthur C. McFarland, Esquire  
Veronica G. Small, Esquire  
Mary Bass Lohr, Esquire  
Robert W. Achurch, III, Esquire  
Jason Franklin Ward, Esquire

**FILED**

December 22, 2011