

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-10-3307

The Charleston County School District.....Appellant,

v.

Charleston County, South Carolina; The Charleston County Board of Zoning Appeals; and Joel Evans in his capacity as Director of the Charleston County Zoning and Planning Department.....Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Circuit Court erred by holding the School District's time to appeal commenced when the County administratively revoked the School District's site plan approval – not when the School District received actual notice of the County's decision.
2. Whether the Circuit Court erred by finding the School District's agent's alleged notice of the County's revocation conferred actual knowledge, for appeal purposes, on the School District.
3. Whether the County has authority under its zoning ordinance to condition a final site plan approval on obtaining a zoning permit within one year of approval.
4. Whether the County has authority under its zoning ordinance to condition a one-year site plan approval extension on a showing of hardship or the commencement of construction and, if so, whether the School District met these requirements.
5. Whether the Circuit Court erred in affirming BZA's and the zoning administrator's reinterpretation of "accessory use" concerning the number of school buses allowed to be parked on school property – in contravention of the final site plan approval.
6. Whether the County violated its own Rules of Procedure and the School District's due process rights by refusing to share with the Board of Zoning Appeals the School District's memorandum and exhibits in support submitted eleven days before the hearing.
7. Whether the County violated state law and the School District's due process rights by requiring a two-thirds vote by the Board of Zoning Appeals to reverse the staff's decision, but only a majority vote to affirm.

STATEMENT OF THE CASE

This zoning appeal challenges two administrative decisions made by Charleston County (the "County") planning and zoning staff and Joel Evans in his capacity as Director of the Charleston County Zoning and Planning Department ("Evans"). Both decisions relate to a proposed school bus parking lot at James Island Elementary School owned by the Charleston County School District (the "School District"). These two decisions were subsequently affirmed by the Charleston County Board of Zoning Appeals (the "BZA") and the Circuit Court.

On April 18, 2018, the School District filed an Application for Appeal of Administrative Decision to the BZA (the "BZA Appeal"). (**Administrative Appeal, County's Certified Record at 134-136, R. at ____**). On June 4, 2018, the School District's appeal was heard by the BZA. (**June**

4, 2018 BZA Meeting Minutes, County’s Certified Record at 86-87, R. at ____). On June 15, 2018, the County mailed the BZA’s order, which denied the BZA Appeal, to the School District and other parties of interest (the “BZA Order”). **(BZA Order, County’s Certified Record at 85, R. at ____)**.

On June 28, 2018, the School District timely filed its Notice of Appeal and Request for Pre-Litigation Mediation with the Circuit Court pursuant to S.C. Code Ann. §§ 6-29-820(B)(2), -825. **(Notice of Appeal and Request for Prelitigation Mediation, R. at ____)**. On July 11, 2018, the County filed what it deemed to be a certified copy of the proceedings held before the BZA, including the transcript from the June 4, 2018 hearing, the evidence in the record, and the BZA’s final order pursuant to S.C. Code Ann. § 6-29-830 and Rule 75 of the South Carolina Rules of Civil Procedure (“SCRCP”). **(County’s Certified Record at 1-350, R. at ____)**. The County accepted service of the Notice of Appeal and Request for Pre-Litigation Mediation. **(Acceptance of Service, R. at ____)**. The School District and the County participated in mediation on August 2, 2018 with mediator Thomas J. Wills, Esq., the mediation resulted in an impasse, and the Proof of ADR was filed on August 21, 2018. **(Proof of ADR, R. at ____)**.

On August 29, 2018, the School District filed its Zoning Appeal Petition pursuant to S.C. Code Ann. § 6-29-825(F).¹ **(Zoning Appeal Petition and Exhibits, R. at ____)**. On September 18, 2018, the County filed its Return to Zoning Appeal Petition. **(Return, R. at ____)**. On September 27, 2018, the County filed its Memorandum of Law in Opposition to the School District’s Zoning Appeal Petition. **(Memorandum, R. at ____)**. On September 27, 2018, the Circuit Court held a hearing on the School District’s Zoning Appeal Petition, and on December

¹ On August 29, 2018, the School District also filed a Summons and Complaint, asserting a single cause of action for a declaratory judgment on the issue of “vested rights.” On December 12, this cause of action was dismissed without prejudice and by consent. **(Consent Stipulation of Dismissal Without Prejudice, R. at ____)**.

28, 2018 the Circuit Court entered a Final Order and Decision, affirming the BZA Order. (**Final Order and Decision, R. at ____**). On December 31, 2018, the School District received a “My Cases Notification” e-mail notice of the entry of the Final Order and Decision. (**My Cases Notification, R. at ____**).

On January 7, 2019, the School District timely filed and served a Notice of Motion and Motion to Reconsider, Alter, or Amend pursuant to Rules 52(b) and 59(e), SCRCF. (**Motion, R. at ____**). On January 9, 2019, the Circuit Court entered a Form 4 Order denying the School District’s Motion to Reconsider, Alter, or Amend. (**Form 4, R. at ____**). The Final Order and Decision plus the Form 4 Order are collectively referred to herein as the “Circuit Court Order.” On January 10, 2019, the School District received a “My Cases Notification” e-mail notice of the entry of the Form 4 Order denying the School District’s Motion to Reconsider, Alter, or Amend. (**My Cases Notification, R. at ____**).

On January 24, 2019, the School District timely filed and served its Notice of Appeal, as to the Circuit Court Order, with both the Circuit Court and the Court of Appeals.

STATEMENT OF THE FACTS

This case involves the School District’s development of a thirty-five (35) spot school bus parking lot adjacent to the James Island Elementary School (the “Parking Lot”). The School District’s Board and professional staff deemed the Parking Lot necessary to accommodate safe and timely student transportation in District Three located on James Island. District Three’s rapid growth has rendered obsolete and unacceptable the existing school bus parking arrangements on James Island. The Parking Lot solves these problems by eliminating temporary parking arrangements that interfere with School District operations, allowing the School District to conform to the State’s centralized school bus parking laws and regulations, and most importantly,

ensuring students make it to school safely and on time. **(Zoning Appeal Petition and Exhibits, R. at ____)**).

Approximately one year after the County granted final site plan and zoning approval for the Parking Lot (the final steps prior to construction drawings and permit issuance), the County issued two administrative decisions directed at the Parking Lot. Taken together, these administrative decisions killed the project. The County's actions took place against the backdrop of intense neighbor and political opposition to the Parking Lot, the dissemination of false and misleading information about the Parking Lot, open accusations of racism by the public against the School District, and the direct involvement of an elected County Council member. These decisions violate the County's zoning ordinance, specifically the Charleston County Zoning and Land Development Regulations ("ZLDR"), and the School District's constitutional rights. These are the issues central to the instant appeal. **(Zoning Appeal Petition and Exhibits, R. at ____)**).

James Island Elementary School is located on real property owned by the School District in the unincorporated County, namely 1872 S. Grimball Road (TMS # 334-07-00-047) (the "Property"). **(County Staff Report to BZA, County's Certified Record at 88, R. at ____)**. The Property is zoned S-3, Special Management School District. **(County Staff Report to BZA, County's Certified Record at 88, R. at ____)**. The School District has operated James Island Elementary School on the Property for many years, and the BZA approved a special exception for the school use in 2001. **(BZA Hearing Transcript 17:11-13, County's Certified Record at 88, R. at ____)**. None of the conditions contained in the original special exception approval for James Island Elementary School prohibit a school bus parking lot, and none appear in the record.

On February 9, 2017, after several months of close coordination with the County and at considerable expense, the County granted *final site plan approval* for the Parking Lot (the "Site

Plan Approval”) (**County’s Chronology Summary & List of Exhibits, Exhibit 4, County’s Certified Record at 128, R. at ____**). The Site Plan Approval provides “[t]he site plan for the above referenced project is Approved by the Zoning and Planning Department.” (**County’s Chronology Summary & List of Exhibits, Exhibit 4, County’s Certified Record at 128, R. at ____**).

The actual site plan referenced in the Site Plan Approval was signed by County employee Stephen Risse “approved 2/7/2017,” and it depicts thirty-five (35) school bus parking spaces along with parking spaces for school bus drivers. (**County’s Chronology Summary & List of Exhibits, Exhibit 3, County’s Certified Record at 119-126, R. at ____**). The Site Plan Approval was based on a complete application and a tremendous amount of technical and engineering work including, but not limited to, the School District’s Site Plan Review Application, Letter of Intent, Restrictive Covenants Affidavit, Stormwater Application (Type II and III), DHEC-OCRM Documents, Full Engineering Report and Permit Set, Traffic Impact Study, and Design Narrative. (**County’s Chronology Summary & List of Exhibits, Exhibit 1, County’s Certified Record at 97, 99-114; County’s Certified Record at 191-350 R. at ____**).

The Site Plan Approval establishes the County’s conclusion that the Parking Lot complies with all provisions of the ZLDR including, but not limited to, the ZLDR’s “accessory use” regulations. See Section 3.7.7, ZLDR (“A Site Plan application may not be approved unless the Planning Director finds that the proposed project complies with all applicable provisions of this Ordinance.”) (**Zoning Appeal Petition, Exhibit I, at 69, R ____**). In other words, the Site Plan Approval means the County found the proposed thirty-five (35) spot school bus parking lot to be a lawful, accessory use. This is a critical fact in this case.

According to Reginald McNeil, Executive Director of Capital Programs for the School District, the School District incurred approximately three hundred sixty thousand (\$360,000.00) dollars procuring the Site Plan Approval and engaging in other development related activities in reliance on the Site Plan Approval. **(BZA Hearing Transcript 64:22 – 65:3, County’s Certified Record at 18, R. at ___; Zoning Appeal Petition, Exhibit C, at 51-53, R. at ___)**. Mr. Jeffrey Borowy (“Borowy”), the School District’s Chief Operating Officer, testified that the School District had examined thirty (30) alternative sites, but only the Property was suitable to meet the School District’s needs. **(BZA Hearing Transcript 59:22 – 60:8, County’s Certified Record at 17, R. at ___)**.

On February 23, 2017, the County’s Public Works Department issued the School District a land disturbance (stormwater management) permit for the Parking Lot based on the Site Plan Approval. **(County’s Chronology Summary & List of Exhibits, Exhibit 7, County’s Certified Record at 153-154; Zoning Appeal Petition, Exhibit B, at 40-50, R. at ___)**. These permits meant that the Parking Lot was ready for final permitting and construction.

After receiving Site Plan Approval and the land disturbance permit, the School District chose not to press forward immediately with final permitting and construction, as it was entitled to do. Rather, according to Borowy, the School District held four (4) community meetings with neighbors to explain the Parking Lot and address perceived impacts and other matters of public concern. **(BZA Hearing Transcript 59:9-17, 62:1-8, County’s Certified Record at 17-18, R. at ___)**. In response to feedback received at those meetings, the School District commissioned voluntary technical studies on the topics of noise, traffic, and pollution adding additional expenses and delays to the project. **(BZA Hearing Transcript 59:18-22, County’s Certified Record at 17, Zoning Appeal Petition, Exhibit R, at 125-276 at R. ___)**. The noise and pollution studies

were prepared by Terracon Consultants, Inc., and the traffic study was prepared by Bihl Engineering, LLC – both well respected experts in their respective fields. **(Zoning Appeal Petition, Exhibit R, at 125-276 at R. ___)**. These studies dispelled concerns about the Parking Lot being a high impact use and were shared with the community. The School District also invited County representatives to these meetings and informed the County of these studies. **(BZA Hearing Transcript 58:21-22, 62:1-8, County’s Certified Record at 17-18, R. at ___)**.

On February 6, 2018, York Dilday (“Dilday”) with ADC Engineering e-mailed Sally Brooks with the County’s Planning and Zoning Department (“Brooks”) requesting a one-year extension for the Site Plan Approval. **(Zoning Appeal Petition, Exhibit D, at 54, R. at ___)**. On February 9, 2018, Brooks responded, stating “Yes, I will get that updated and to you next week.” **(Zoning Appeal Petition, Exhibit D, at 54, R. at ___)**. The Site Plan Approval contains the following language:

This project will be held in the "TO BE PERMITTED" file for one year. If the [Zoning Permit] has not been obtained within that time, and there has been no communication with this office regarding this project, then the project will no longer be eligible to receive a [Zoning Permit]. If the applicant wishes to receive a [Zoning Permit] after that time, the review process will need to be repeated.

(County’s Chronology Summary & List of Exhibits, Exhibit 4, County’s Certified Record at 128, R. at ___). The School District disputes that the ZLDR allows the County to condition the validity of a final site plan approval on obtaining a Zoning Permit within one year, as discussed below. However, Dilday communicated with the County for the extension anyways in the spirit of cooperation and – *within one year of the Site Plan Approval*.

Despite Brooks’ initial response, indicating the extension would be forthcoming, the certified record in this appeal contains a letter dated February 28, 2018 from Brooks and addressed to Dilday, denying the one-year extension request and administratively revoking the Site Plan

Approval (the “Site Plan Revocation”). The letter states that (1) the School District did not obtain a Zoning Permit within one year, (2) the School District “has not demonstrated a hardship that would be cause to delay the project,” and (3) the School District did not show “diligent pursuit has been made to start development” (the “Site Plan Revocation”). **(County’s Chronology Summary & List of Exhibits, Exhibit 5, County’s Certified Record at 130, R. at ___)**. The Site Plan Revocation is not signed by Sally Brooks or anybody else; is not addressed to the School District or Borowy (instead, it is addressed to York Dilday with ADC); and there is no evidence in the record that the letter was ever mailed or even e-mailed to anybody – much less the School District. **(County’s Chronology Summary & List of Exhibits, Exhibit 5, County’s Certified Record at 130, R. at ___)**. There is also no evidence of any postmarking or return receipt in the record.

The certified record in this appeal also contains a March 13, 2018 e-mail exchange between Evans and County Councilwoman Anna Johnson (“Johnson”). **(County’s Chronology Summary & List of Exhibits, Exhibit 6, County’s Certified Record at 132, R. at ___)**. Johnson’s district includes the Property and the surrounding area. Responding to Johnson’s request for “clarification regarding school bus parking, fueling, and maintenance,” Evans provided the following, new interpretation of “accessory use” in the context of school bus parking on school property:

On parcels with a legally operating school, school bus parking lots shall be allowed as an accessory use to the school provided that the majority of the bus parking is to serve the school facility on the subject property. Fuel and maintenance facilities for buses shall not be allowed as an accessory use to a school.

(the “Accessory Use Reinterpretation”) **(County’s Chronology Summary & List of Exhibits, Exhibit 6, County’s Certified Record at 132, R. at ___)**. The Accessory Use Reinterpretation is inconsistent with the Site Plan Approval, which reflected Evans’ original position that the Parking Lot, depicting thirty-five (35) school bus parking spaces, complied with all aspects of the ZLDR including, but not limited to, its “accessory use” regulations. See Section 3.7.7, ZLDR (“A Site

Plan application may not be approved unless the Planning Director finds that the proposed project complies with all applicable provisions of this Ordinance.”) (**Zoning Appeal Petition, Exhibit I, at 69, R ____**).

Presently, James Island Elementary School only requires eight (8) buses to serve that school, meaning under the Accessory Use Reinterpretation only a maximum of fifteen (15) buses would be allowed on the Property as an accessory use. (**BZA Hearing Transcript 117:3 – 118:21, County’s Certified Record at 31-32, R. at ____**). The Accessory Use Reinterpretation acknowledges that the City of Charleston “allow[s] school bus parking as an accessory use to a school whether [] 4 buses or 40 buses.” (**County’s Chronology Summary & List of Exhibits, Exhibit 6, County’s Certified Record at 132, R. at ____**). In other words, the City of Charleston contains no limit on the number of school buses that can be parked on school property as an “accessory use.”

On March 19, 2018, Borowy and the School District’s Director of Operational Planning Sean Hughes (“Hughes”) met with Evans and his supervisor, Deputy County Administrator Walter Smalls (“Smalls”). (**BZA Hearing Transcript 64:2-9, County’s Chronology Summary & List of Exhibits, County’s Certified Record at 18, 98 R. at ____**). The County first learned about the Accessory Use Reinterpretation at this meeting. (**County’s Chronology Summary & List of Exhibits, County’s Certified Record at 98 R. at ____**). While there is no direct evidence of this point in the record, presumably, Borowy and Hughes also were made aware of the Site Plan Revocation at this meeting as well. Certainly, Borowy and Hughes were made aware at this meeting that the Accessory Use Reinterpretation guaranteed that the Parking Lot, depicting thirty-five (35) school bus parking spaces, would not be approved if the School District were simply to reapply for a site plan approval process. The School District met once more with the County on

April 11, 2018 in an effort to head off a zoning appeal and further contention with the County; however, no resolution was reached and the County recommended the School District proceed with an appeal. (**BZA Hearing Transcript 64:2-9, County's Certified Record at 18 R. at ____**).

On April 18, 2018, exactly thirty (30) days after the March 19, 2018 meeting with the County, the School District filed the BZA Appeal. (**Administrative Appeal, County's Certified Record at 134-136, R. at ____**). The BZA Appeal challenged both the Site Plan Revocation and the Accessory Use Reinterpretation, as the two are inextricably related to one another. (**Administrative Appeal, County's Certified Record at 134-136, R. at ____**). These are the two administrative decisions on appeal and at issue in this case.

On May 10, 2018 and immediately after being retained, the School District's counsel reached out to Evans and his staff, requesting he confirm the deadline to submit materials in support of the BZA Appeal for inclusion in the packets sent to BZA members in advance of each hearing. (**Zoning Appeal Petition, Exhibit S, at 278, R. at ____**). County staff initially stated the deadline would be May 17, 2018. (**Zoning Appeal Petition, Exhibit S, at 279, R. at ____**). The School District's counsel then had a follow up call with staff on May 11, 2018. (**Zoning Appeal Petition, Exhibit S, at 281, R. at ____**). During this call, the County conveyed a new position that the School District was now prohibited from filing materials in support of its application prior to the hearing itself. On May 16, 2018, the School District's undersigned attorney sent Evans an e-mail objecting to this position based on various legal authorities including, but not limited to, the BZA's own Rules of Procedure. (**Zoning Appeal Petition, Exhibit S, at 283, R. at ____**). The BZA's Rules of Procedure provide as follows:

All written material submitted either in support of or in opposition to an application that is not supported by live witness testimony must be received by the administrative office of [the Charleston County Planning Department] at least five (5) working days prior to the public hearing during which the application is to be

considered and shall be delivered to BZA at least two (2) working days before the meeting.

(Zoning Appeal Petition, Exhibit J, at 81, R ____). On May 25, 2018, which was eleven (11) days before the BZA's June 4, 2018 hearing, the School District's counsel submitted its Memorandum of Law and Exhibits to the County, clarifying these materials were not the appeal itself *but rather materials in support of the appeal and, thus, timely*. **(School District's Memorandum of Law and Exhibits; Zoning Appeal Petition, Exhibit S, at 283-293, R. at ____)**.²

Despite the School District's timely submission, the County failed to provide the School District's Memorandum of Law and Exhibits to the BZA in advance of the meeting. The County did, however, share with the BZA its own summary and analysis of the BZA Appeal, concluding that it should be denied. **(County's Staff Report to BZA and County's Chronology Summary & List of Exhibits, County's Certified Record at 88-136, R. at ____)**. The County's materials specifically indicated the appeal should be dismissed as untimely. The minute the BZA Appeal was filed, the County became an adverse party to the School District.

On June 4, 2018, the BZA heard the School District's BZA Appeal. **(BZA Hearing Transcript, County's Certified Record at 2-87, R. at ____)**. The School District's counsel argued the BZA Appeal was timely and the Site Plan Revocation and the Accessory Use Reinterpretation violated both the ZLDR, state law, and the School District's constitutional rights. **(BZA Hearing Transcript 11:4 – 58:4, County's Certified Record at 5-17, R. at ____)**. The School District's Memorandum of Law and Exhibits were proffered at the hearing. **(BZA Hearing Transcript**

² The Exhibits themselves were filed with the Zoning Appeal Petition. **(Zoning Appeal Petition, Exhibits A-R, at 29-276, R. at ____)**.

15:11 – 16:14, County’s Certified Record at; School District’s Memorandum of Law and Exhibits, R. at ____).

Borowy, Hughes, McNeil, and Jeff Scott, the School District’s Executive Director for Student Transportation, (“Scott”) all provided testimony at the hearing about the history of the Parking Lot, District Three’s needs and existing operational constraints, the Site Plan Approval, the School District’s conversations with County staff, the School District’s needs for the Parking Lot, the School District’s construction efforts to date in reliance on the Site Plan Approval, the state regulations requiring centralized school bus parking, the common practice siting a School District’s bus fleet on school property elsewhere in the County, and the negative impact to the School District if the Parking Lot could not be built. **(BZA Hearing Transcript 58:13 – 66:1, 71:18 – 76:11, County’s Certified Record at 17-21 ____, R. at ____).** The School District’s technical experts responsible for the above noise, pollution, and traffic studies, namely Jennifer Bihl with Bihl Engineering, LLC and Kylie Page and Andy Rucco with Terracon Consultants, Inc., offered expert testimony at the hearing about the referenced studies and the minimal impacts on neighbors. **(BZA Hearing Transcript 69:12 – 71:17, 76:15 – 83:15, County’s Certified Record at 19-23, ____, R. at ____).** Finally, Erica Ciucci, a middle school teacher at Camp Road Middle School testified the temporary bus parking at that school, which would be alleviated by the Parking Lot, was preventing Camp Road Middle from being renovated. **(BZA Hearing Transcript 83:16 – 86:13, County’s Certified Record at 23-24, ____, R. at ____).**

Evans testified in support of the County’s position, focusing his remarks on the idea that the School District’s appeal was untimely because the Site Plan Revocation was dated February 28, 2018 and the BZA Appeal was not filed until April 18, 2018. **(BZA Hearing Transcript 87:16 – 98:21, County’s Certified Record at 24-27, ____, R. at ____).** Evans did not address when the

School District received actual notice of the Site Plan Revocation; instead, he relied purely on the date of the unsigned Site Plan Revocation letter that was never mailed to anyone, much less the addressee. Evans acknowledged the Site Plan Revocation was addressed to York Dilday with ADC, not the School District, but he believed notice was effective anyways because he believed ADC was the School District's agent at the time. **(BZA Hearing Transcript 99:1-18, County's Certified Record at 27, ____, R. at ____).**

A motion was made by a BZA member to deny the BZA Appeal on timeliness grounds, but it did not receive a "second" and it failed. **(BZA Hearing Transcript 99:19 – 100:7, County's Certified Record at 27, ____, R. at ____).**

Evans continued with his presentation, arguing why he believed the Site Plan Revocation and Accessory Use Reinterpretation was proper. **(BZA Hearing Transcript 105:19 – 136:16, County's Certified Record at 28-36, ____, R. at ____).** When asked by a BZA member whether he had the authority to revoke the Site Plan Approval after one year, he responded:

As I said, if – if – if the board of zoning appeals has an issue with that, with the one year cap, I'll be glad to go up to my office and draft a letter revoking the approval and forgetting the extension.

(BZA Hearing Transcript 127:5-9, County's Certified Record at 34, ____, R. at ____). Evans cited no authority authorizing him to unilaterally revoke the Site Plan Approval "if the board of zoning appeals has an issue."

After Evans' presentation, several neighbors offered opinions on the Parking Lot and its perceived impacts on the community. **(BZA Hearing Transcript 137:3 – 168:24, County's Certified Record at 36-45, ____, R. at ____).** Neither the County nor the opposition offered any expert testimony on the topics of school bus parking regulations, noise, traffic, or pollution.

Unfortunately, several members of the public who spoke out against the Parking Lot at the BZA hearing decided to make this a racial issue, which it is not. Specifically, Jessica Norris commented as follows:

I'd like to read just one sentence from the State of Racial Disparities in Charleston County, which is that low income residences and residents of colors, in Charleston County, continue to live in segregated communities that suffer from greater exposure to environmental hazards at sites that are differentially located predominantly in non-white and low income communities, which bear the disproportion burden of exposure to these harmful conditions.

I think that this is, you know, pertains pretty clearly to this decision, and I'm sorry that - its not personal. These sorts of things, again, to quote from this –the perniciousness of this kind of racism happens in offices, classrooms, and board meetings under the guise of bureaucracy. It's not about personalities or people as was, sort of, implied earlier.

(BZA Hearing Transcript 139:4-22, County's Certified Record at 37, ____, R. at ____). The School District vehemently disputes the decision to proceed with the Parking Lot was informed by racial motives. In response to these accusations, Borowy noted as follows:

I am disappointed that I cannot prevent this from being perceived as a race-driven issue. We have district bus lots in all of our neighborhoods. Affluent, middle-class, and poor and within the neighborhoods of all races. It's my number one job to get all the children to and from school safely and on time, while maintaining compliance with all environmental laws and regulations, while being a good steward of your taxpayer dollars. The bottom line is that not being able to proceed, as initially approved by the county, will most assuredly negatively impact our ability to give our children all the time they deserve in the classroom.

(BZA Hearing Transcript 60:13 – 61:2, County's Certified Record at 17, ____, R. at ____). Unfortunately for the School District, it appears these accusations weighed on the BZA's and the County staff's decision making. Overall, the BZA hearing was characterized by wild accusations from the opposition such as the one above along with inaccurate, baseless, and misleading information regarding the impacts associated with the Parking Lot.

A BZA member moved to reject the School District's appeal, and the ensuing vote was five (5) in favor and three (3) in opposition. **(BZA Hearing Transcript 193:14 – 195:15, County's Certified Record at 50-51, ____, R. at ____)**. Initially, the BZA chair remarked, "I'm afraid this isn't enough. It's going to take six, isn't it? For two-thirds."³ **(BZA Hearing Transcript 195:16-18, County's Certified Record at 51, ____, R. at ____)**. The BZA's counsel and Evans promptly pointed to language in the BZA's Rules of Procedure purporting to allow only majority vote to affirm, but a two-third vote to reverse. **(BZA Hearing Transcript 196:3 – 197:14, County's Certified Record at 51, ____, R. at ____)**. The School District's counsel objected to this differential vote standard as violative of state law, arguing the same rules should apply to all parties in an appeal since the BZA's review was de novo when it hears zoning appeals. **(BZA Hearing Transcript 196:7 – 198:12, County's Certified Record at 51-52, ____, R. at ____)**. Ultimately, the BZA's counsel and the County's counsel overruled this objection and declared the five (5) to three (3) vote sufficient to defeat the School District's appeal, and the meeting concluded. **(BZA Hearing Transcript 199:12 – 201:4, County's Certified Record at 52, ____, R. at ____)**.

The ensuing BZA Order found (1) Evans "did not err in his ruling;" (2) the School District "missed the deadline to file an Appeal, which was not the fault of the County or the BZA;" and (3) the BZA "does not have authority to grant Vested Rights." **(BZA Order, County's Certified Record at 85, ____, R. at ____)**. The BZA Order referenced the two-third voting requirement necessary to overturn Evans' decision. **(BZA Order, County's Certified Record at 85, ____, R. at ____)**.

³ The BZA is a nine-member body. Two-thirds requires six votes.

The School District subsequently appealed the BZA Order to circuit court, demanding pre-litigation mediation pursuant to S.C. Code Ann. § 6-29-825(F). After an unsuccessful mediation, a Circuit Court hearing was held on September 27, 2018.

The Circuit Court's Order affirmed the BZA Order, finding the School District's appeal (as to the Site Plan Revocation) was untimely and the Accessory Use Reinterpretation was legally correct. (**Circuit Court Order at 1-8, R. at ____**). The Circuit Court Order did not rule on all the School District's arguments contained in the Zoning Appeal Petition. For example, the Circuit Court Order did not rule on the School District's legal arguments on appeal timeliness, procedural due process claims regarding the County's failure to provide the BZA with its Memorandum and Exhibits in support of the BZA Appeal, or the BZA's two-third voting requirement to overturn the County's administrative decisions, but only a majority to affirm. These arguments were preserved through a timely Motion to Reconsider, Alter, or Amend, which was denied. (**Motion, R. at ____**). This appeal followed.

STANDARD OF REVIEW

There are two standards of review relevant to this case. First, of course, is the Court of Appeals' standard of review with respect to the Circuit Court Order. The other relevant standard of review pertains to the BZA's standard of review when it sits in an appellate capacity and hears appeals from zoning administration officials. The latter directly addresses whether the Circuit Court Order should be reversed or affirmed and whether the entire matter should be remanded to the BZA for a rehearing. Both standards of review are presented below.

Court of Appeals Standard of Review

With zoning appeals, such as this one, the Court of Appeals "appl[ies] the same standard of review as the circuit court below." Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d

209, 211 (Ct. App. 2004). The Circuit Court’s standard of review is established by S.C. Code Ann. § 6-29-840(A), which 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. ... 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.

The Court of Appeals “shall determine only whether the decision of the [b]oard is correct as a matter of law.” Austin, 362 S.C. at 33, 606 S.E.2d at 211. “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. (quoting Rest. Row Assocs. v. Horry Cty., 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.” Newton v. Zoning Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) (quoting Cty. of Richland v. Simpkins, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct. App. 2002)). “A jury’s factual findings will not be disturbed on appeal unless the record contains no evidence reasonably supporting the jury’s findings.” Boehm v. Town of Sullivan’s Isl. Bd. Of Zoning Appeals, 423 S.C. 169, 182, 813 S.E.2d 874, 880 (Ct. App. 2018).

The Court of Appeals has the authority to affirm or reverse the Circuit Court Order. See, id. (affirming circuit court reversal of zoning board denial). The Court of Appeals also has authority to remand the case for a rehearing before the zoning board “[i]n the event the judge determines that the certified record is insufficient for review.” S.C. Code Ann. § 6-29-840(A).

BZA Standard of Review

The BZA’s standard of review in hearing appeals from zoning officials is de novo. Clear Channel Outdoor v. City of Myrtle Beach, 602 S.E.2d 76, 79 (S.C. Ct. App. 2004) (board exercises "substantial power" with "[f]ew restrictions" and is authorized to apply the ordinance as dictated

by the facts before it). “[T]he board of appeals may ... reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.” S.C. Code Ann. § 6-29-800(E).

ARGUMENTS

I. THE SCHOOL DISTRICT’S TIME TO APPEAL THE SITE PLAN REVOCATION COMMENCED UPON ITS ACTUAL NOTICE OF THE DECISION, NOT THE DATE OF THE DECISION ITSELF, AND THERE IS NO EVIDENCE IN THE RECORD THE SCHOOL DISTRICT EVER RECEIVED ACTUAL NOTICE OF THE DECISION.

Both the BZA and the Circuit Court concluded the School District’s appeal of the Site Plan Revocation was untimely.⁴ This prevented both the BZA and the Circuit Court from reaching the School District’s substantive arguments concerning the validity of the Site Plan Revocation itself. However, both the Circuit Court and the BZA applied the wrong legal authority in reaching their untimeliness conclusion. The School District’s time to appeal was triggered upon actual notice – not the date of the Site Plan Revocation as the lower decisions wrongly concluded. Moreover, even if the Circuit Court applied the correct actual notice standard, there is no evidence in the record concerning when, if ever, the School District received actual notice of the Site Plan Revocation.

The South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the Enabling Act”) comprehensively governs board of zoning appeals procedures. S.C. Code Ann. §§ 6-29-780, et seq. The board of zoning appeals has the power “to hear and decide appeals where it

⁴ There can be no question the Accessory Use Reinterpretation appeal was timely appealed to the BZA. Evans communicated the Accessory Use Interpretation to Councilwoman Johnson on March 13, 2018 and, by the County’s own admission, it was first communicated it to the School District during a meeting on March 19, 2018. (**County’s Chronology Summary & List of Exhibits, County’s Certified Record at 98, R. at ____**). The BZA Appeal was filed on April 18, 2018 (thirty (30) days from March 19, 2018); therefore, the School District’s appeal of the Accessory Use Reinterpretation was timely pursuant to S.C. Code Ann. § 6-29-800(B). The Circuit Court Order recognizes as much, as it addresses the School District’s substantive challenges to the Accessory Use Reinterpretation. Therefore, the Circuit Court Order can be understood as finding that only the Site Plan Revocation appeal was untimely.

is alleged there is error in an order, requirement, decision, or determination made by an administrative official in the enforcement of the zoning ordinance.” S.C. Code Ann. § 6-29-800(A)(1). The Enabling Act governs the procedure the time limit for appealing these decisions as follows:

Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county. The appeal must be taken within a reasonable time, as provided by the zoning ordinance or rules of the board, or both, by filing with the officer from whom the appeal is taken and with the board of appeals notice of appeal specifying the grounds for the appeal. **If no time limit is provided**, the appeal must be taken within thirty days from the date the appealing party has received **actual notice** of the action from which the appeal is taken.

S.C. Code Ann. § 6-29-800(B) (emphasis added) Therefore, *unless the zoning ordinance specifies otherwise*, an aggrieved party has thirty (30) days from receipt of actual notice to appeal an administrative decision.

The ZLDR only modifies the statutory actual notice rule for appeals involving a “Zoning Permit,” requiring such appeals be filed thirty (30) days from the decision itself, not actual notice. The School District’s appeal concerns a final site plan revocation – not a Zoning Permit.

Section 3.7.8 of the ZLDR governs site plan related appeals, providing “[a]ppeals shall be processed in accordance with the procedures of Article 3.13 of this Chapter.” (**Zoning Appeal Petition, Exhibit I, at 69, R ____**). Section 3.13.3 of the ZLDR (“Application Filing; Timing”), which only modifies the statutory default appeal trigger for Zoning Permit related appeals, reads as follows:

Applications for Appeals of Administrative Decisions on zoning-related matters shall be submitted to the Planning Director on forms available in the Planning Department. Appeals of Administrative Decisions **to grant or deny a Zoning Permit** shall be filed within 30 calendar days from the date of the Administrative Decision.

(Emphasis added) (**Zoning Appeal Petition, Exhibit I, at 76, R ____**). This section governs both filing requirements (what form to use) and when an appeal must be filed. The latter departs from S.C. Code Ann. § 6-29-800(B) because the appeal period commences on the date of the decision itself – not actual notice. This distinction is of central importance in this case.

The BZA Order cites Sections 3.7.8 and 3.13.3 of the ZLDR and concludes “the School District had until March 28, 2018, to file the appeal of the planning director’s decision....” This assumes the School District’s appeal clock started based on the date of the unsigned Site Plan Revocation, which was neither addressed to the School District nor ever mailed to anyone, much less the School District.

The Circuit Court Order echoes and affirms the BZA Order, concluding as follows:

The ZLDR provides that appeals of administrative decisions on zoning related matters “shall be filed within 30 calendar days from the date of the Administrative Decision.” ZLDR Art. 3.13, § 3.13.3 Application Filing, Timing. The BZA correctly found that the School District was appealing a zoning related decision and that the School District failed to file its appeal on this issue within 30 days. Therefore, I agree with the BZA that the appeal is time-barred.

(**Final Order and Decision at 4, R ____**). Clearly, both the Circuit Court and the BZA calculated the School District’s deadline to appeal thirty days from the date of the Site Plan Revocation – not when the School District received actual notice of the decision.

The Circuit Court Order’s reliance on Section 3.13.3 of the ZLDR constitutes an error of law, as the School District’s appeal rights in this case are controlled by S.C. Code Ann. § 6-29-800(B). By its express terms the appeal trigger found in Section 3.13.3 applies only to “Administrative Decisions **to grant or deny a Zoning Permit.**”⁵ (emphasis added) The instant

⁵ Section 3.7.8, governing site plan related appeals, does reference Section 3.13.3. However, Section 3.13.3 speaks both to procedural requirements (what form to use) and the appeal time trigger. The former applies to “Administrative Decisions on zoning-related matters,” which would encompass a site plan related appeal, but the latter applies to “Administrative Decisions to grant or deny a Zoning Permit,” which clearly does not pertain to site plan related

case does not involve an Administrative Decisions to grant or deny a Zoning Permit. Rather, this case involves the administrative revocation of a final site plan approval. Site plan approvals and Zoning Permits are distinct land use approvals under the ZLDR. See Article 3.8, ZLDR (governing Zoning Permits); Article 3.7, ZLDR (governing site plan approvals) (**Zoning Appeal Petition, Exhibit I, at 62, 68-73 R ____**). Section 3.13.3 does not govern this case. Therefore, the actual notice default rule found in S.C. Code Ann. § 6-29-800(B) applies. The Circuit Court Order’s legal error materially prejudiced the School District because there is no evidence in the record confirming when, if ever, the School District received actual notice of Site Plan Revocation.

In enacting S.C. Code Ann. § 6-29-800(B), the General Assembly recognized the fundamental importance of an aggrieved party possessing actual notice for the appeal time clock to start. “Actual notice is synonymous with knowledge.” Blind Tiger, LLC v. City of Charleston, 366 S.C. 182, 186, 621 S.E.2d 361, 363 (Ct. App. 2005) (citing Strother v. Lexington County Recreation Comm’n, 332 S.C. 54, 63 n. 6, 504 S.E.2d 117, 122 n. 6 (1998)). The County’s position, affirmed by the Circuit Court Order, would allow the date of the administrative decision to control in lieu of actual notice to the aggrieved party (the property owner) as the statute commands. This produces absurd results because it would allow local government to make decisions impacting property rights “in the dark” and shield itself from challenge by simply not notifying anybody outside the government or notifying someone other than the property owner. This conduct not only violates the Enabling Act, it violates due process. Murdock v. Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999) (procedural due process mandates that a litigant be placed on notice).

Despite finding the School District’s appeal was untimely under Section 3.13.3 of the ZLDR, the Circuit Court Order also observes that “[t]he record equally supports the fact that the

appeals. In short, Section 3.13.3 governs only the form to appeal site plan related decision – not the timing of those appeals.

Planning Department sent correspondence to ADC denying the request for the extension.” This is not supported by any evidence and irrelevant to when *the School District* (the “aggrieved party”) obtained “actual notice” for the purposes of S.C. Code Ann. § 6-29-800(B). The Site Plan Revocation is not signed and there is no evidence of it being mailed or e-mailed by anyone to the School District.⁶ Regardless, even if ADC received actual notice, this does not legally confer actual notice on the School District.

Information received by an agent acting within the scope of his agency confers on the principal mere constructive notice – not actual notice. E.g., Independence National Bank v. Buncombe Professional Park, LLC, 411 S.C. 605, 769 S.E.2d 663 (2015) (“The rule is that a principal has constructive notice of all the material facts which its agent, while acting in the scope of his authority, receives notice.” (citations omitted)). The law is clear in South Carolina that “[c]onstructive notice and actual notice are not one and the same.” E.g., Anderson v. Buonforte 365 S.C. 482, 492, 617 S.E.2d 750, 755 (Ct. App. 2005) (citing Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 504 S.E.2d 117 (1998)). The Circuit Court Order relies entirely on agency cases discussing constructive notice – not actual notice. **(Final Order and Decision at 5-6, R. ___)**. The Circuit Court Order reads into S.C. Code Ann. § 6-29-800(B) a “constructive notice” trigger absent from the text, and this is legal error. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (If a statute's language is plain, unambiguous, and conveys a clear meaning

⁶ The Circuit Court Order references a statement made by the School District’s attorney at the June 4, 2018 BZA hearing that he believed ADC received an e-mail with the Site Plan Revocation in “early March.” As discussed herein, when ADC received notice of the revocation is irrelevant to when the School District received actual notice. Regardless, it is axiomatic that the remarks of an attorney cannot be considered evidence, especially when those remarks are not based on otherwise competent evidence in the record. See Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) (ruling the trial court properly disregarded the statements of counsel which reflected testimony appearing in depositions not otherwise entered into evidence). Here, there is no evidence from ADC, the School District, or even the County as to when actual notice was received by ADC. Therefore, the “early March” comments made by the School District’s attorney do not constitute evidence upon which the BZA, the Circuit Court, or this Court can rely on to determine when the School District received actual notice. These statements must simply be ignored for the purposes of this case.

“the rules of statutory interpretation are not needed and the court has no right to impose another meaning.”) Therefore, even if ADC was acting as the School District’s agent at all times relevant, ADC’s notice has no bearing on this appeal.

The only evidence in the record even suggesting when the School District received actual notice of Site Plan Revocation is the meeting attended by County and School District personnel on March 19, 2018. There is no dispute that the Accessory Use Reinterpretation was first made known to the School District at this March 19, 2018 meeting. Presumably, the Site Plan Revocation was also discussed at this meeting. Assuming this is when the School District first learned of the Site Plan Revocation, the School District’s thirty (30) day period to appeal commenced on this date pursuant to S.C. Code Ann. § 6-29-800(B). Fortunately for the School District, the BZA Appeal was filed exactly thirty (30) days later on April 18, 2018. Therefore, the BZA Appeal was timely, and the Circuit Court Order contains a reversible error of law and fact on this point.

Finally, even assuming the School District possessed actual notice prior to March 19, 2018, which is denied, the School District did not become an “aggrieved” party with standing to appeal the Site Plan Revocation until March 19, 2018 *when the Accessory Use Reinterpretation was first communicated*. S.C. Code Ann. § 6-29-800(B) (conditioning standing to appeal a zoning administrator’s decision on a party’s being “aggrieved”). To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. Charleston County Sch. Dist. v. Charleston County Election Comm’n, 336 S.C. 174, 519 S.E.2d 567 (1999). A party seeking to establish standing must prove the “irreducible constitutional minimum of standing,” which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable

decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S. Ct. 2130, 119 L.Ed.2d 351 (1992). An “injury in fact” has been defined as “an invasion of a legally protected interest” which is “concrete and particularized” and “actual or imminent,” not “conjectural or hypothetical.” Lujan, 504 U.S. at 561, 112 S.Ct. 2130. In order for the injury to be particularized, it must affect the plaintiff in a personal and individual way. Sea Pines Ass’n for the Prot. of Wildlife v. South Carolina Dep’t of Natural Res. & Cmty. Servs. Assocs., Inc., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). A party does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). Such imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public. Id. (citing Citizens for Lee County, Inc. v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992)).

The Site Plan Revocation, by itself, was not necessarily fatal to the School District’s plans for the Parking Lot. The School District could have simply restarted the site plan review process with the justified expectation of receiving all necessary approvals, including “accessory use” approval for the thirty-five (35) school bus spaces, as it did originally when the Site Plan Approval was granted. What made the Site Plan Revocation truly prejudicial to the School District was the Accessory Use Reinterpretation, which changed the “accessory use” rules in this context.

The Accessory Use Reinterpretation was indisputably first communicated at the March 19, 2018 meeting, approximately six (6) days after it was issued by Evans to Johnson. At this meeting, it was made unmistakably clear that a thirty-five (35) spot school bus parking lot would no longer be permitted on the Property. The Accessory Use Reinterpretation signaled the County would prospectively approve only fifteen (15) school bus parking spots on the Property – not the thirty-

five (35) originally approved as part of the Site Plan Approval. Therefore, for the first time on March 19, 2018, the School District realized that a simple reapplication for site plan approval would not allow the project, as originally approved on February 9, 2017 to proceed. The County's confirmation of these points triggered the School District's standing to appeal both the Site Plan Revocation and the Accessory Use Reinterpretation. Specifically, both the Site Plan Revocation and the Accessory Use Reinterpretation became ripe for appeal on March 19, 2018. The BZA Appeal was filed on April 18, 2018, which is thirty (30) days from March 19, 2018. The BZA Appeal was timely and the BZA and the Circuit Court erred as a matter of law by finding to the contrary.

The School District respectfully requests this Court reverse the Circuit Court's Order that the appeal was untimely and rule on the School District's substantive arguments. The Circuit Court's Order suffers from both errors of law and a complete lack of evidence concerning the School District's actual notice of the decision at issue. The School District deserves to be heard on the merits because it timely filed its appeals according to both the law and the facts in the record before this Court.

II. THE ZLDR PROVIDES THE COUNTY NO AUTHORITY TO LIMIT SITE PLAN APPROVALS TO ONE YEAR OR TO REVOKE AN APPROVAL FOR NOT OBTAINING A ZONING PERMIT, SHOWING HARDSHIP, OR COMMUNICATING WITH THE COUNTY.

The Site Plan Revocation violates the ZLDR in several ways. However, the Circuit Court failed to reach these substantive issues because, like the BZA, it found the School District's appeal was untimely. Nevertheless, all of these legal issues are preserved for this Court's review.⁷ Since

⁷ The School District's substantive arguments were presented in its Zoning Appeal Petition and its Motion to Reconsider, Alter, or Amend.

the County's actions violated the ZLDR, this Court should reverse the Circuit Court Order, declare the Site Plan Revocation void as a matter of law, and reinstate the Site Plan Approval.

The County's administrative officials must follow the express terms of the ZLDR as written pursuant to Article 2.4 of the ZLDR. (**Zoning Appeal Petition, Exhibit K, at 84, R ____**). The County's staff has no power to make up procedural or substantive requirements absent from the ZLDR text. Deviation from the strict letter of the ZLDR constitutes an unlawful usurpation of the County's legislative powers. See State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E. (2d) 633 (1982) (the legislature may not delegate its power to make laws). Therefore, the language in both the Site Plan Approval and the Site Plan Revocation must be expressly authorized by the ZLDR to stand. The conditions at issue in this case are not authorized by the ZLDR.

This Court has held time and again that land use regulations, such as the ZLDR, must be *strictly construed* in favor of property rights and property owners. The South Carolina Court of Appeals recently noted:

It is a well-founded principle of law that "statutes or ordinances in derogation of natural rights of persons over their property are to be strictly construed as they are in derogation of the common law right to use private property so as to realize its highest utility and should not be impliedly extended to cases not clearly within their scope and purpose. It follows that the terms limiting the use of the property must be liberally construed for the benefit of the property owner."

Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 13, 776 S.E.2d 753 (Ct. App. 2015) (citing Purdy v. Moise, 223 S.C. 298, 302, 75 S.E.2d 605, 607 (1953)); Keane v. Hodge, 292 S.C. 459, 465, 357 S.E.2d 193, 196 (Ct. App. 1987) (holding that while "[l]ocal governments have wide latitude to enact ordinances regulating what people can do with their property," they "must draft their ordinances so that people can have a clear understanding as to what is permitted and what is not. Otherwise, we must construe such ordinances to allow people to use their property so as to realize

its highest utility.”) Simply put, this means the ZLDR should and must be strictly construed in favor of property rights – not regulation.

The ZLDR does not support any of the steps taken by the County to condition and ultimately revoke the Site Plan Approval. The Site Plan Approval and the Site Plan Revocation both state a Zoning Permit must be obtained within one year or the site plan review process must be repeated. (**County’s Chronology Summary & List of Exhibits, Exhibits 4-5, County’s Certified Record at 128, 130, R. at ___**). *There is no authority for any of this in the ZLDR.* As mentioned above, site plan approvals and Zoning Permits are distinct land development approvals. The ZLDR does place approval lapse periods on certain approvals. See, e.g., Section 3.6.9, ZLDR (one year for *special exceptions*); Section 3.8.6, ZLDR (six months for *zoning permit* if building permit not issued); Section 3.10.10, ZLDR (one year for *variances*). (**Zoning Appeal Petition, Exhibit I, at 62, 68, 72, 75, R. at ___**). However, the ZLDR neither contains any approval lapse period for site plan approvals nor requires a Zoning Permit be obtained within one year of granting a site plan approval. *See* Article 3.7, ZLDR (“Site Plan Review”). (**Zoning Appeal Petition, Exhibit I, at 68-69, R. at ___**). Therefore, without even reaching the substantive grounds for the revocation, the County’s attempt to condition a final site plan approval on obtaining a Zoning Permit within one year violates the ZLDR and is void ab initio. If the one-year limitation was invalid, then the County had no legal basis to require the School District to seek a one-year extension – must less revoke the Site Plan Revocation on this basis.

The Site Plan Revocation offers several reasons why the School District’s requested one-year extension request was denied, and these are similarly not supported by the ZLDR text. Specifically, it says the School District had not “demonstrated a hardship that would be cause to delay the project,” and the School District had not shown “diligent pursuit has been made to start

development.” (County’s Chronology Summary & List of Exhibits, Exhibit 5, County’s Certified Record at 130, R. at ___). The ZLDR does *not* condition the ongoing validity of a site plan approval on any of these matters. *See* Article 3.7, ZLDR (“Site Plan Review”). (Zoning Appeal Petition, Exhibit I, at 68-69, R. at ___). Much like the alleged one-year requirement to obtain a Zoning Permit, these conditions are mere inventions by staff, finding no support in the text of the ZLDR. Therefore, they cannot form the basis of the Site Plan Revocation as a matter of law.

Finally, even assuming the aforementioned conditions (hardship and diligent pursuit) are valid, which is denied, the record presented at the BZA hearing supports the satisfaction of both and no evidence exists to the contrary. For instance, School District representatives testified as follows:

- The School District incurred costs of approximately \$360,000.00 in reliance on the Site Plan Approval and other County approvals;
- The School District diligently pursued the Parking Lot by, among other things, meeting with the community and commissioning various technical studies to evaluate noise, traffic, and pollution impacts;
- The School District communicated with the County repeatedly after the Site Plan Approval was issued by, among other things, involving the County in the aforementioned public hearings and technical studies performed for the benefit of the community;
- The School District’s representative communicated with the County within a year of the Site Plan Approval to request a one-year extension; and
- The School District would suffer hardship if the project was not able to proceed due to the growth of District Three and existing overcrowding issues and late student arrival times.

Neither the County nor anybody who spoke in opposition at the BZA hearing presented any evidence to refute the case for hardship and diligent pursuit established by the School District.

Therefore, there exists no justification whatsoever to deny the County's requested extension, and it represents an arbitrary and capricious decision supported by no evidence.

It goes without saying that the ZLDR does not grant the County authority to revoke the Site Plan Approval because it wants to or because certain elected officials are feeling political pressure. The Site Plan Approval satisfied all the conditions outlined in Article 3.7, ZLDR including, but not limited to, zoning compliance on the issue of "accessory use" and otherwise. Otherwise, it would not have been approved by that County and Evans himself on February 9, 2017 after several months of coordination between the School District, its consultants, and the County. After being questioned by the BZA over whether he had the authority to revoke the Site Plan Approval after one year, Evans said if the BZA agreed with the School District, he would "be glad to go up to my office and draft a letter revoking the approval and forgetting the extension." **(BZA Hearing Transcript 127:5-9, County's Certified Record at 34, ____, R. at __)**. He provided no authority for such a unilateral action. Frankly, his comment demonstrates the County's animosity towards the School District on this matter and its desire to defeat the School District's Parking Lot by any means. This unlawfully and materially prejudices the School District.

The conditions found in the Site Plan Approval and cited in the Site Plan Revocation are not authorized by the ZLDR and they constitute an abuse of staff's discretion. By affirming the BZA's denial of the School District's appeal, the Circuit Court has sanctioned this unlawful conduct in violation of the ZLDR. The School District respectfully requests this Court reverse the Circuit Court Order, find the Site Plan Revocation violative of the ZLDR, reinstate the Site Plan Approval, prohibit the County from imposing the aforementioned unlawful conditions, and grant the School District the right to proceed with final permitting and construction consistent with the Site Plan Approval.

III. THE ACCESSORY USE REINTERPRETATION VIOLATES THE ZLDR, IS PREEMPTED BY STATE LAW, AND IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE IN THE RECORD.

The Circuit Court Order concludes the Accessory Use Reinterpretation is consistent with both the ZLDR and the facts presented to the BZA. (**Final Order and Decision at 6-8, R. ___**). However, in so doing, the Circuit Court misinterpreted the ZLDR, did not acknowledge the County's original decision (when the Site Plan Approval was granted) that the thirty-five (35) parking spaces were an allowed "accessory use," ignored the lack of support for the Accessory Use Reinterpretation in the text of the ZLDR, failed to address the School District's preemption arguments, and ignored all of the competent evidence in the record relevant to the "customarily incidental" and "subordinate" elements of the "accessory use" definition. The Circuit Court Order thus suffers from errors of law, constitutes an abuse of discretion, and is supported by no evidence. This Court should reverse the Circuit Court Order and deem the Parking Lot depicted in the Site Plan Approval a valid accessory use. After all, the County itself deemed the Parking Lot to be a valid accessory use when the Site Plan Approval was approved originally.

"[I]ssues involving the construction of an ordinance are reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact." Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 9, 776 S.E.2d 753, 757 (Ct. App. 2015) (alteration by court) (quoting Mikell v. Cty. of Charleston, 386 S.C. 153, 158, 687 S.E.2d 326, 329 (2009)). "Although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance." Id. at 9-10, 776 S.E.2d at 757 (quoting Mikell, 386 S.C. at 158, 687 S.E.2d at 329). In Helicopter Solutions, Inc., 414 S.C. at 9-10, 776 S.E.2d at 757-58, this Court held that the interpretation of the zoning ordinance is legal conclusion – not a factual finding.

This Court has previously noted “we review a zoning ordinance to give it a ‘practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers.’” Vulcan Materials Co. v. Greenville Cty. Bd. Of Zoning Appeals, 342 S.C. 480, 489, 536 S.E.2d 892, 897 (Ct. App. 2000) (quoting City of Myrtle Beach v. Juel P. Corp., 337 S.C. 157, 177, 522 S.E.2d 153, 164 (Ct. App. 1999), rev'd, 344 S.C. 43, 543 S.E.2d 538 (2001)). “As with statutes, the lawmakers' intent embodied in an ordinance ‘must prevail if it can be reasonably discovered in the language used.’” Id. at 490, 536 S.E.2d at 897 (quoting Charleston Cty. Parks & Recreation Comm'n v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)).

This deferential standard of review does not mean a zoning board can never be reversed. In Wyndham Enterprises, LLC v. City of North Augusta, 401 S.C. 144, 151, 735 S.E.2d 659, 663 (Ct. App. 2012), this court reversed the circuit court's decision to affirm the BZA “because the BZA's decision was not supported by competent, substantial, and material evidence, and was based on opinion and speculation testimony.” Further, in Bannum, Inc. v. City of Columbia, 335 S.C. 202, 204-05, 516 S.E.2d 439, 439-40 (1999), the supreme court found the zoning board's denial of a permit for an exception was arbitrary and reversed the denial. The court found the zoning board “either discounted or disregarded every single bit of evidence put up by” the appellant and “[i]nstead, it based its holding on the four factors submitted by” the opponents to the exception. Id. at 205, 516 S.E.2d at 440-41. That is precisely what happened here, but the Circuit Court affirmed the BZA’s findings regardless.

The interpretation of “accessory use” is a legal question, calling for a close examination of the ZLDR and South Carolina law more generally. The South Carolina Supreme Court has defined “accessory use” as follows:

[T]hose [uses] which are customarily incident to the principal use. “In order to qualify as a use incidental to the principal use of a nonconforming premises, such

use must be clearly incidental to, and customarily found in connection with, the principal use to which it is allegedly related.” 101A C.J.S. *Zoning & Land Planning* § 154, p. 479. An accessory use must be one “so necessary or commonly to be expected that it cannot be supposed that the ordinance was intended to prevent it.” Borough of Northvale v. Blundo, 203 A.2d 721, 723 (N.J. Super. Ct. App. Div. 1964).

Whaley v. Dorchester Cty. Zoning Bd. of Appeals, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1999) (citation omitted). Article 12.1, ZLDR defines “accessory use” as “[a] use customarily incidental and subordinate to the principal use of a zoning lot or of a structure.” (**County Staff Report to BZA, County’s Certified Record at 91, R. at ____**).

On February 9, 2017, when the Site Plan Approval was granted, Evans conceded and agreed a thirty-five (35) spot school bus parking lot with limited fuel and maintenance facilities was an allowed accessory use on the Property. Otherwise, the Site Plan Approval would not have been approved because zoning compliance, including compliance with the ZLDR’s “accessory use” regulations, is a prerequisite for approval. Section 3.7.7, ZLDR (“A Site Plan application may not be approved unless the Planning Director finds that the proposed project complies with all applicable provisions of this Ordinance.”) (**Zoning Appeal Petition, Exhibit I, at 69, R. ____**).

The Accessory Use Reinterpretation represents a material departure from the County’s original position on the matter, which was relied on by the School District to its great detriment. Specifically, the Accessory Use Reinterpretation reads, in relevant part, as follows:

On parcels with a legally operating school, school bus parking lots shall be allowed as an accessory use to the school provided that the majority of the bus parking is to serve the school facility on the subject property. Fuel and maintenance facilities for buses shall not be allowed as an accessory use to a school.

(**County’s Chronology Summary & List of Exhibits, Exhibit 6, County’s Certified Record at 132, R. at ____**). This “majority rule” finds no textual support in the ZLDR. The correct legal test, pursuant to the South Carolina Supreme Court and Article 12.1, ZLDR, is whether the proposed use is “customarily incidental” and “subordinate” to the principal use on the property – as this is

what the ZLDR provides. The Accessory Use Reinterpretation does not even mention – much less address – the “customarily incidental” and “subordinate” criteria. Therefore, the Accessory Use Reinterpretation does not faithfully interpret the ZLDR, as written, and is legally flawed.

At the BZA hearing, the School District offered troves of expert testimony, evidence, and legal argument on the “customarily incidental” and “subordinate” criteria. The BZA was called upon to render a correct interpretation of “accessory use” based on the correct wording of the ZLDR. *See* S.C. Code Ann. § 6-29-800(E) (“the board of appeals may, in conformity with the provisions of this chapter, reverse or affirm, wholly or in part, or may modify the order, requirements, decision, or determination, and to that end, has all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.”) The BZA Order affirms the Accessory Use Reinterpretation in conclusory fashion without mentioning “customarily incidental” or “subordinate,” the School District’s preemption arguments (discussed below), and competent evidence offered by the School District in support of the accessory use criteria. (**BZA Order, County’s Certified Record at 85, R. at ____**). The Circuit Court Order, without addressing the “customarily incidental” or “subordinate” or the School District’s preemption arguments, similarly found the BZA’s decision to be “correct as a matter of law” because the School District’s proposed use constitutes a second principal use. (**Final Order and Decision at 6-8, R. ____**). The Circuit Court’s conclusion finds no support in either the law or fact.

A centralized, school bus parking lot is certainly “customarily incidental” to a primary school use because state law requires centralized parking and the practice is common in Charleston County and throughout the state. S.C. Code Ann. § 59-67-300 mandates “State owned school buses must be parked overnight and during the school day in a location that is central to the area in which the school buses are operated.” (Emphasis added) Moreover, the South Carolina Department of

Education’s policies call for centralized parking. See “South Carolina Department of Education School Bus Centralized Parking Policy” (**Zoning Appeal Petition, Exhibit N, at 91-112, R. at ____**); “Planning for School Bus Safety on School Sites and School Bus Parking Lots” (**Zoning Appeal Petition, Exhibit P, at 115-122, R. at ____**). Scott testified at the BZA hearing and submitted an affidavit that the aforementioned laws and regulations mandated centralized school bus parking and that the practice was commonplace in Charleston County and elsewhere in the state. (**BZA Hearing Transcript, 71:18 – 76:14, R. at ____**; **Zoning Appeal Petition, Exhibit O, at 113-114, R. ____**). Hughes offered testimony and an affidavit in support of the School District’s position, specifically observing centralized, school bus parking at St. Johns High School on Johns Island within the County’s unincorporated area, Northwoods Middle School in North Charleston, and Cairo Middle School in Mt. Pleasant. (**BZA Hearing Transcript, 83:8 – 84:13, R. at ____**); **Zoning Appeal Petition, Exhibit Q, at 123-124, R. at ____**). Finally, the Accessory Use Reinterpretation itself observes that the City of Charleston allows school bus parking as an accessory use “whether ... 4 buses of 40 buses.” (**County’s Chronology Summary & List of Exhibits, Exhibit 6, County’s Certified Record at 132, R. at ____**). In other words, the City of Charleston, the largest municipality in Charleston County, places *no limitations* on the number of school buses that can be parked at a school location. The School District’s proposed use can hardly be portrayed as not “customarily incidental,” and the County staff was not free to conclude otherwise. The County offered no evidence before the BZA to contradict the School District’s case regarding “customarily incidental.”

Given the foregoing, there can be no question that centralized, school bus parking necessary to serve the School District’s transportation needs are “customarily incidental” to the existing school use. The above legal authorities are not merely evidence of this being a customary

practice. The Accessory Use Reinterpretation, by placing limits on the School District's centralized parking, directly conflicts with state law. See South Carolina State Ports Authority v. Jasper County, 368 S.C. 388, 400-01, 629 S.E.2d 624 (2006) ("Conflict preemption occurs when the ordinance hinders the accomplishment of the statute's purpose or when the ordinance conflicts with the statute such that compliance with both is impossible."). Were the School District to move forward with the "majority rule" embraced by the Accessory Use Reinterpretation, it would violate S.C. Code Ann. § 59-67-300 and the Department of Education policies. This it cannot do, and it demonstrates the direct conflict presented by the Accessory Use Reinterpretation. In other words, the Accessory Use Reinterpretation has placed the School District in an untenable dilemma – either comply with the ZLDR or state law, but not both. Since state law speaks clearly and directly on this point, local land use regulation must yield on preemption principles.

The School District's proposed use also satisfies the "subordinate" element of the "accessory use" test. At the BZA hearing, the School District offered three expert reports and studies on the topics of noise, traffic, and pollution attendant to the School District's proposed use. **(Zoning Appeal Petition, Exhibit R, at 125-276, R ____)**. The technical experts associated with these reports (Andy Ruocco and Kylie Page with Terracon Consultants, Inc. and Jennifer Bihl with Bihl Engineering, LLC) offered live, expert testimony at the BZA hearing, all concluding the proposed use was less impactful, *i.e.* subordinate, to the existing school use on the Property. **(BZA Hearing Transcript 69:12 – 71:17, 76:15 – 83:15, County's Certified Record at 19-23, ____, R. at ____)**. All of these subject matters are technical in nature, requiring "competent evidence" from experts, and opinion, non-credentialed testimony must be disregarded by the BZA. Bannum, Inc., 335 S.C. at 204-05, 516 S.E.2d at 439-40; Wyndham Enterprises, LLC, 401 S.C. at 151, 735 S.E.2d at 663. The only evidence in the record supporting the County's opinion that the proposed

use was not subordinate comes from mere speculation, non-expert testimony. Neither the County nor the opposition offered any technical analysis or expertise to contradict the School Districts' experts.

For these reasons, the only legally competent evidence in the record as to the "subordinate" criteria supports the School District's position. Nothing in the record supports the Accessory Use Reinterpretation's "subordinate" finding to the extent any such finding was ever made in the first place by the BZA. For these reasons, the Accessory Use Reinterpretation constitutes an arbitrary and capricious decision, an abuse of discretion, and a decision supported by no evidence whatsoever. Austin, 362 S.C. at 33, 606 S.E.2d at 211 (citing S.C. Code Ann. § 6-29-840(A)). The Circuit Court erred by affirming the Accessory Use Reinterpretation, and this Court has the authority to reverse a zoning board decision polluted by errors of law and based on no competent technical evidence. Bannum, Inc. v. City of Columbia, supra.; Wyndham Enterprises, LLC v. City of North Augusta, supra.

Due to the aforementioned errors of law, the School District respectfully requests this Court reverse the Circuit Court Order affirming the Accessory Use Reinterpretation and find the Parking Lot depicted in the Site Plan Approval, originally approved by the County, constitutes a lawful accessory use on the Property.

IV. THE COUNTY VIOLATED THE BZA'S RULES OF PROCEDURE AND THE SCHOOL DISTRICT'S DUE PROCESS RIGHTS BY FAILING TO PROVIDE THE BZA WITH THE SCHOOL DISTRICT'S MEMORANDUM IN SUPPORT OF ITS APPEAL AND EXHIBITS PRIOR TO THE BZA HEARING.

The County was not a neutral party prior to and at the BZA hearing. The School District's appeal to the BZA not only challenged two separate County decisions, it also involved a politically charged subject matter. The County was an adverse party. It was, after all, a County Councilwoman who requested the Accessory Use Reinterpretation. In this politically charged climate, the County

took the unprecedented step of refusing to share the School District's memorandum and exhibits in support of its appeal with the BZA members prior to the hearing in violation of its own Rules of Procedure and longstanding practice. This substantially prejudiced the School District before the BZA and violated its due process rights.

Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. S.C. CONST. ART. 1, § 22; Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. See Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 642 S.E.2d 565 (2007) (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)).

The BZA's Rules of Procedure address providing materials in support or in opposition to agenda items as follows:

All written material submitted either in support of or in opposition to an application that is not supported by live witness testimony must be received by the administrative office of [the Charleston County Planning Department] at least five (5) working days prior to the public hearing during which the application is to be considered and shall be delivered to BZA at least two (2) working days before the meeting.

(Zoning Appeal Petition, Exhibit J, at 81, R. at ____). On May 25, 2018, which was eleven (11) days before the BZA hearing, the School District provided Evans an eight (8) page memorandum

with fourteen (14) exhibits in support of the School District's position.⁸ (**Zoning Appeal Petition, Exhibit S, at 286-293, R. at ____**). This followed weeks of communications between the School District's counsel and Evans regarding the procedure to support the School District's appeal filed on April 18, 2018.

The record reveals the County's "evolving" understanding of the requisite deadlines. At first, the County indicated the supporting materials would have to be submitted by May 17, 2018. Subsequently, Evans contacted the School District's counsel on May 15, 2018 and said the County's new position was that the material in support had to either be submitted with the original appeal application or at the hearing and no material would be accepted prior to the hearing. The School District's counsel objected to this interpretation of the BZA's Rules of Procedure, reserving the right to submit five days prior to the hearing. The School District ultimately submitted its materials in support on May 25, 2018. (**Zoning Appeal Petition, Exhibit S, at 278-285, R. at ____**).

Nevertheless, Evans failed to include these materials in the "Supplemental Packet" provided to the BZA in advance of the hearing. The School District could not send these materials to the BZA members directly, as that would have been an unethical ex parte communication. Rule 3.5(b) of the Rules of Professional Conduct ("RPC"), Rule 407, SCACR. However, at the hearing the School District formally introduced its memorandum and exhibits into the record, providing copies to each BZA member in attendance and ensuring inclusion into the record for the purposes of this appeal. (**BZA Hearing Transcript 15:11 – 16;14, County's Certified Record at 6, R. at ____**).

⁸ All of the exhibits attached to this memorandum and e-mailed to the County on May 25, 2018 were filed with the Appeal Petition in this case. These exhibits were also introduced into the record at the June 4, 2018 BZA hearing.

While the School District's supporting materials were made part of the record, the School District was nonetheless prejudiced because the BZA members were not able to review these voluminous materials in advance of the hearing. One member of the BZA remarked at the hearing, "you can't give us this much testimony and expect us to absorb it." (**BZA Hearing Transcript 170:23-24, County's Certified Record at 45, R. at ____**). The County's strict time limits were imposed on the School District at the hearing, and its representatives were allowed mere minutes to present its case. On the other hand, the BZA received and reviewed the County's hostile and biased opinion on the merits of the BZA Appeal several days before the hearing. (**County's Staff Report to BZA and County's Chronology Summary & List of Exhibits, County's Certified Record at 88-136, R. at ____**). As a result, the BZA members entered the hearing that night with a biased, one-sided view of the case. This pre-hearing, *ex parte* communication by the County poisoned the School District's chance of receiving a fair hearing before the BZA. The County, even though its interests were adverse to the School District, nonetheless was required to make sure the BZA heard both sides of the story.

In a zoning administrator appeal, the appellant faces the daunting prospect of its adversary controlling all procedural aspects of the BZA hearing. Under these circumstances, great care must be taken to ensure both sides are heard and the government's control over what information the BZA receives is not weaponized unfairly. By presenting a one-sided, self-serving, and politically expedient view of the matter and refusing to provide the School District's materials in violation of its own BZA's Rules of Procedure, the County violated the School District's due process rights by failing to provide a meaningful opportunity to be heard. Kurschner v. City of Camden Planning Comm'n, 376, S.C. 165, 172, 656 S.E.2d 346, 350 (2008) (requiring a meaningful opportunity to be heard in a quasi-judicial zoning hearing). In Kurschner, the Supreme Court held there was

sufficient due process afforded the appellant, but in that case the government provided the planning commission with the appellant's materials in support. *Id.* at 173.

The County's conduct materially prejudiced the School District's due process right to present evidence at the BZA hearing and doomed the BZA Appeal. If this Court is not inclined to reinstate the Site Plan Approval, as argued above, the School District respectfully requests a remand so that the School District's legal argument and evidence can be fairly considered by the BZA. S.C. Code Ann. § 6-29-840(A) ("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.")

V. THE COUNTY VIOLATED THE ENABLING ACT AND THE SCHOOL DISTRICT'S DUE PROCESS RIGHTS BY INFORMING THE BZA THAT A TWO-THIRDS VOTE WAS REQUIRED TO OVERTURN HIS DECISION WHILE ONLY A SIMPLE MAJORITY VOTE WAS REQUIRED TO AFFIRM.

At the hearing, the County informed the BZA that a two-third vote was required to overturn the County's decisions on appeal, while a mere majority was required to affirm. The School District objected to this voting differential at the hearing as prohibited by the Enabling Act, violative of due process, and prejudicial. (**BZA Hearing Transcript 196:3 – 198:12, County's Certified Record at 51-52, _____, R. at _____**). The resulting five (5) to three (3) vote, affirming the County's administrative decisions, was the fruit of a tainted, biased proceeding and violated the School District's due process rights to a fair and impartial hearing.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution." Kurschner v. City of Camden Planning Comm'n, 376, S.C. at 171, 656 S.E.2d at 350. Procedural due process requirements are not technical, and no particular form of procedure is necessary. Sloan v. S.C. Bd. Of Physical

Therapy Exam'rs, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. Id. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. S.C. Dep't. of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). To prevail on a claim of denial of due process, there must be a showing of substantial prejudice. Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 435, 319 S.E.2d 695, 698 (1984).

In this case, the County's due process violation stems from the conflict between its voting requirements and the standard of review governing BZA appeals. The BZA's standard of review in a zoning administrator appeal is de novo. Clear Channel Outdoor v. City of Myrtle Beach, supra.; S.C. Code Ann. § 6-29-800(E). Therefore, the BZA stands in the zoning administrator's shoes in rendering a decision and it need not grant any deference to the zoning administrator, especially on legal issues. Helicopter Sols., Inc. v. Hinde, 414 S.C. at 9, 776 S.E.2d at 757 (deference need not be given to the zoning administrator by the BZA in an appeal over the legal interpretation of a zoning ordinance). The vote differential propounded by the County conflicts with the de novo standard of review and provides deference to the County staff where none is due under the law.

Both the Site Plan Revocation and the Accessory Use Reinterpretation constitute interpretations of the ZLDR. In hearing the School District's appeal, the BZA's charge was to review both interpretations fresh based on the record presented to the BZA. By requiring a two-third vote to reverse the County's decision, but only a majority to affirm, the BZA granted ipso facto deference to the County and violated the statutory de novo standard of review. Clear Channel Outdoor v. City of Myrtle Beach, supra.; S.C. Code Ann. § 6-29-800(E). The voting differential

not only made the School District's prospects of success more difficult, it impermissibly signaled to the BZA that the County's decisions were to be given deference.

To the extent the BZA's Rules of Procedure allow for the above voting differential, these rules are preempted by state law because the Enabling Act comprehensively establishes appellate procedure, including standard of review, in zoning appeals. Sinkler v. County of Charleston, 387 S.C. 67, 76-78, 690 S.E.2d 777, 781-82 (2010) (invalidating a county ordinance deviating from the precise requirements of the Enabling Act and rejecting the county's argument that the flexibility and authority conferred by the Enabling Act authorized the county to employ measures beyond the scope of the enabling legislation); South Carolina State Ports Authority v. Jasper County, 368 S.C. at 397, 629 S.E.2d at 628 (discussing express preemption, implied field preemption, and implied conflict preemption generally). In short, the BZA's Rules of Procedure must yield to the appellate procedure established by the Enabling Act, and the two-third vote requirement violates S.C. Code Ann. § 6-29-800(E) and the de novo standard of review established by case law.

The BZA received incorrect legal advice at the hearing and applied the wrong voting standard. This materially prejudiced the School District, prevented a meaningful opportunity to be heard, and poisoned the proceedings. There is no telling how the vote would have ended up had the correct rules been communicated to the BZA and the School District's due process rights honored. The School District respectfully requests this Court reverse the Circuit Court Order and remand the matter to the BZA for a proper vote.

CONCLUSION

It is always unfortunate when local governments choose to ignore the law and undermine property rights in the face of political pressure. However, when the adversely impacted landowner is a school district, children are the ones who suffer the consequences. The student transportation

problems on James Island were to be solved by the Parking Lot, and the School District procured a final site plan approval at great expense and reliance. The County even agreed the School District's plans met all the requirements of the ZLDR. Rather than rush for permits, the School District spent a year working with the community and allaying concerns. However, this all came crashing down when the political winds shifted, and the County took every action it could to undermine the School District and kill the project. The School District's time working with the community was used against it by the County. These efforts are not only wrong – they are illegal for the reasons outlined above.

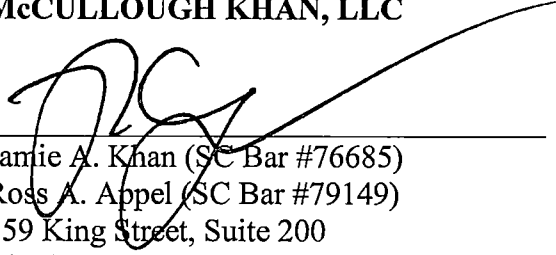
The School District respectfully requests this Court reverse the Circuit Court Order and the BZA Order, find the School District's appeal to have been timely, affirm the validity of the Site Plan Approval and void the Site Plan Revocation, recognize the Parking Lot depicted in the Site Plan Approval as a valid "accessory use" and void the Accessory Use Reinterpretation, and direct the County to allow the School District to proceed with final permitting and construction.

Alternatively, given the aforementioned procedural defects regarding memoranda submission and voting requirements, the School District respectfully requests this Court remand to the BZA so the School District's arguments and evidence can be presented to the BZA and a fair voting standard be employed.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,

McCULLOUGH KHAN, LLC



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**ATTORNEYS FOR APPELLANT
CHARLESTON COUNTY SCHOOL
DISTRICT**

3/29, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

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APR 02 2019
SC Court of Appeals

Case No. 2018-CP-10-3307

The Charleston County School District.....Appellant,

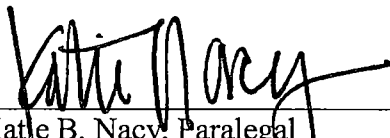
v.

Charleston County, South Carolina; The Charleston County Board of Zoning Appeals; and Joel Evans in his capacity as Director of the Charleston County Zoning and Planning Department.....Respondents.

PROOF OF SERVICE

I hereby certify that a true and correct copy of the *Initial Brief of Appellant and Designation of Matter to be Included in the Record of Appeal* has been served upon the following by mailing a copy, properly addressed and with sufficient postage affixed thereto, on this 29th day of March, 2019.

Bernard W. Ferrara, Jr., Esq.
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ATTORNEYS AT LAW

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March 29, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk
Post Office Box 11629
Columbia, SC 29211

**Re: The Charleston County School District v. Charleston County, South Carolina;
the Charleston County Board of Zoning Appeals; and Joel Evans in his
capacity as Director of the Charleston County Zoning and Planning
Department
Case No.: 2018-CP-10-3307**

Dear Ms. Kitchings:

I hope this letter finds you well. Enclosed for filing please find the original and one (1) copy of the Initial Brief of Appellant, Charleston County School District as well as the Designation of Matter to be Included in the Record on Appeal and the Proof of Service regarding the above-referenced matter. Please file the originals and return a clocked copy to our office in the enclosed self-addressed stamped envelope. By copy of this correspondence to counsel for the Respondents, I am serving him with the same.

Thanks in advance for your assistance and please do not hesitate to contact me if you have any questions or need anything further. With kind regards, I remain

Sincerely yours,

McCULLOUGH KHAN, LLC


Ross A. Appel

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APR 02 2019

SC Court of Appeals

RAA/kbn
Enclosures
cc: Bernard W. Ferrara, Jr., Esq.

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