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 REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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This case boils down to how many school buses the Charleston County School District (the "School District") can park at the James Island Elementary School (the "Property") under certain final land development approvals issued by Charleston County (the "County") and the County's Zoning and Land Development Regulations ("ZLDR"). District Three has experienced substantial growth over a short period of time. Additional and centralized school bus parking capacity is not only an essential and critical need impacting student safety and scholastic performance – it is necessary to comply with State law. Although the County originally approved a parking lot suitable for the School District's needs, its subsequent actions have unlawfully thwarted the School District's plans.

Neither the School District nor the County dispute that on February 9, 2017, the latter issued final site plan approval depicting thirty-five (35) parking spots on the Property (the "Site Plan Approval"). This is how many parking spots the School District needs to fulfill its mission.

However, in response to political pressure from a County councilmember and the public, on February 28, 2018 the County administratively revoked the Site Plan Approval (the "Site Plan Revocation"). Then, on March 13, 2018 the County issued a reinterpretation of the ZLDR that reduced the number of allowed parking spots on the Property to fifteen (15) (the "Accessory Use Reinterpretation"). The Accessory Use Reinterpretation, as applied to the Property, would have prevented the School District from simply restarting the approval process.

While the record is unclear when the County received actual notice of the Site Plan Revocation, there can be no dispute the School District first learned of the Accessory Use Reinterpretation during a meeting with Charleston County on March 19, 2018. On April 18, 2018, the School District appealed both the Site Plan Revocation and the Accessory Use

Reinterpretation. The BZA and the Circuit Court affirmed, primarily on procedural grounds, finding the School District's appeal to be untimely. In so doing, the lower tribunals committed material and prejudicial errors of law. This appeal followed.

The County, in its Brief, raises several new arguments and issues for the first time ever, which must be addressed in this Reply. First, the County makes the extraordinary request that this Court consider evidence never seen or reviewed by the Board of Zoning Appeals or Circuit Court. Second, the County argues the School District may not challenge certain suspect conditions on the Site Plan Approval because an appeal needed to be filed within thirty days of the Site Plan Approval's issuance in 2017. Third, the County argues even if the School District could challenge the conditions placed on the Site Plan Approval, the County's Planning Director has unfettered authority to impose any condition he wants, regardless what the ZLDR says. Finally, the County argues its failure to provide the School District's materials prior to the BZA hearing, in violation of its own Rules of Procedure, was non-prejudicial. Each of these arguments is addressed below.

I. THE COUNTY MAY NOT INTRODUCE ON APPEAL NEW EVIDENCE ABSENT FROM THE CERTIFIED RECORD FROM THE BZA HEARING.

In a footnote, the County attempts to introduce an e-mail from a School District employee dated March 9, 2018. (Resp. Br. p. 14, fn. 8) This is presumably done to suggest the School District possessed "actual notice" of the Site Plan Revocation on date that would make the appeal at issue in this case untimely. This is improper as a matter of law, and for the reasons below, this Court should ignore this e-mail, refuse to take judicial notice of it, and deem the disputed e-mail not part of the Record on Appeal in this case.[1]

[1] The County designated the disputed March 9, 2018 e-mail as entry number 16 on its Designation of Matter filed with its Brief. The School District respectfully requests and moves this Court to strike this from the Record on Appeal in this case.

At each stage of this litigation, the County has argued the School District's appeal of the Site Plan Revocation is untimely because the thirty-day period to appeal commences on the date the decision was rendered – not when the School District received actual notice. The County's aim is to avoid a substantive review of its decision, and instead defeat the School District on a procedural technicality.

The School District's Brief argues both the BZA and the Circuit Court committed a material and prejudicial error of law, regarding when the time period to appeal the Site Plan Revocation commences. Both the ZLDR and the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (the Enabling Act") provide an actual notice trigger, and the record lacks any evidence establishing when the School District possessed actual notice of the Site Plan Revocation.

Obviously concerned by the complete lack of evidence of School District "actual notice" in the certified record before this Court, the County's Brief makes an extraordinary request for this Court to consider, for the first time ever, a March 9, 2018 e-mail that was never seen by, much less ruled upon, by the BZA or the Circuit Court. (Resp. Br. p. 14, fn. 8) While this e-mail does not even establish the School District had actual notice of the Site Plan Revocation itself, the law clearly prohibits the introduction of new evidence in a zoning appeal beyond the BZA level.

The law on this point is clear. First, it goes without saying that "The Record [on Appeal] shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. Moreover, in an appeal from the BZA, "[t]he 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**." S.C. Code Ann. § 6-29-840(A). This applies to zoning appeals heard by the Circuit Court, the Court of Appeals, and the Supreme Court of South Carolina. This statute

clearly prohibits including material in the Record on Appeal that was never presented before the BZA. The County acknowledges the March 9, 2018 e-mail is not contained in the "certified record" filed by the County on July 11, 2018 with the Circuit Court 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 ___)**. Therefore, the March 9, 2018 e-mail cannot be including in the Record on Appeal or considered by this Court.

Had the disputed e-mail been presented at the BZA hearing, the School District would have had an opportunity to review, challenge, or otherwise address the newly uncovered "evidence." Allowing this e-mail at this stage would not only violate South Carolina law – it would materially prejudice the School District. These due process concerns are the policy rationale behind S.C. Code Ann. § 6-29-840(A). If the County were allowed to introduce new evidence at this stage, the School District should be allowed to as well.

The County's reliance on Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015) is misplaced. Nowhere does that case abrogate or carve out an exception to the express language of S.C. Code Ann. § 6-29-840(A). In Hinde, the Court of Appeals noted "[a] reviewing court in a zoning case may rely on uncontroverted facts [that are] not in a zoning board's findings [but appear in the record]." Id. This simply means that in a zoning appeal, a reviewing court may look beyond the four corners of the board's *final order* on appeal. This just means a court can consider material outside the final order, but otherwise part of the certified record. This would include items such as the transcript of the hearing and documents presented to the BZA. Hinde certainly does not sanction the introduction of new evidence that was never a part of the BZA hearing, as the County suggests. This would directly contravene S.C. Code Ann. § 6-29-840(A) and due process.

If the Court believes the certified record in this case is inadequate, the proper remedy is remand to the BZA for a rehearing – not to accept new evidence into the record on appeal. Specifically, "[i]n the event the judge determines that the certified record is insufficient for review, the matter may be remanded to the zoning board of appeals for rehearing." S.C. Code Ann. § 6-29-840(A).

Given the foregoing, this Court should ignore the March 9, 2018 e-mail sought to be introduced by the County, decline the County's request to take judicial notice of it, and strike it from the Record on Appeal in this case. In the alternative, the Court should order a remand to the BZA for a rehearing consistent with the Court's other findings concerning the other issues presented by the School District's appeal.

II. THE COUNTY'S TIME PERIOD TO APPEAL THE PLANNING DIRECTOR'S FINAL APPROVAL OF THE THIRTY-FIVE SPOT SCHOOL BUS PARKING LOT HAS LONG EXPIRED AND WAS NEVER APPEALED BY THE COUNTY.

The County argues the School District cannot challenge, as violative of the ZLDR, certain conditions placed on the Site Plan Approval because the School District did not appeal the Site Plan Approval within thirty (30) days after it was issued on February 9, 2017. (Resp. Br. p. 16) Assuming this is true, which is denied for the reasons expressed in the School District's Brief, the County's logic would actually produce a result quite favorable for the School District.

Specifically, it would compel reversal of the Planning Director's Accessory Use Reinterpretation, as applied to the Property, and essentially resolve this case in the School District's favor. This is because the original Site Plan Approval approved thirty-five (35) parking spaces way back in 2017, and the County never appealed that decision within thirty (30) days, although it had every right to do so. Therefore, using the County's logic, the County ought to be stuck with the Site Plan Approval's approval of thirty-five (35) spaces.

The Accessory Use Reinterpretation, also on appeal in this case and not subject to any argument of untimeliness, altered the number of allowed school bus parking spaces on the James Island Elementary School property from thirty-five (35) to fifteen (15). The Site Plan Approval issued on February 9, 2017 clearly depicts thirty-five (35) school bus parking spaces. **(County's Chronology Summary & List of Exhibits, Exhibit 3, County's Certified Record at 119-126, R. at ___)**. The Site Plan Approval states on its face that "[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 ___)**. This approval is a clear and unequivocal expression of the County's position that thirty-five (35) school bus parking spaces are an allowed use on the Property. 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 ____)**. Had the County viewed the thirty-five (35) spaces as an unpermitted use, the Site Plan Approval would have never been granted in the first place.

The Accessory Use Reinterpretation reduces the number of school bus parking spots on the Property from thirty-five (35) to fifteen (15). **(County's Chronology Summary & List of Exhibits, Exhibit 6, County's Certified Record at 132, R. at ___)**. This reduction is the central source of grief for the School District in this entire ordeal. If the Accessory Use Reinterpretation were reversed, or deemed not to apply to the Property, then this dispute would essentially be resolved.

It cannot be disputed that the Accessory Use Reinterpretation was first issued and communicated by the Planning Director to Councilwoman Anna Johnson on March 13, 2018 and first made known to the School District on March 19, 2018. **(County's Chronology Summary &**

List of Exhibits, County's Certified Record at 98 R. at ___). Prior to March 13, 2018, nobody from the County challenged the zoning decision encompassed in the Site Plan Approval or the Site Plan Approval, generally. Certainly, nobody from the County or anyone else appealed the Site Plan Approval within thirty (30) days of issuance on February 9, 2017. The County waited over a year to challenge its original interpretation, and is time barred from doing so under the same rationale presented to this Court by the County.

In its Brief, the County argues the School District was required to appeal the Site Plan Approval within thirty (30) days to challenge the conditions placed on the approval. Specifically, the County states as follows:

> Procedurally, the District was required to challenge and appeal the conditions of the Site Plan Approval upon its issuance on February 9, 2017. The District did not challenge those conditions within the ZLDR's appeal deadline. Since the District accepted the conditional approval and failed to challenge it pursuant to the ZLDR, the District is precluded from challenging the requirement fourteen months later.

(Resp. Br. P. 16) (citations omitted)

Accepting arguendo the County is correct, then the County was also under the same obligation to appeal the Site Plan Approval during the same time period. The County has standing to appeal decisions of the Planning Director. S.C. Code Ann. § 6-29-800(B) ("Appeals to the board may be taken by any person aggrieved **or by any officer, department, board, or bureau of the municipality or county**.") (Emphasis added)

As mentioned above, the Site Plan Approval encompasses an explicit approval of thirty-five (35) school bus parking spaces for the Property. The County waited over a year to issue the Accessory Use Reinterpretation. Embracing the County's own argument, the County waived the right to reverse the number of parking spaces allowed on the Property by not appealing the Site Plan Approval by March 9, 2017 (thirty days after the Site Plan Approval was issued). In fact, the County waited over a year to issue the Accessory Use Reinterpretation. This cannot serve as an

end-run around a timely filed and perfected zoning appeal. For this reason, the Accessory Use Reinterpretation should be reversed and deemed inapplicable for the purposes of the Property and the School District's development plans.

The School District in its Brief argues the conditions included in the Site Plan Approval violate the ZLDR and South Carolina law. However, the School District is prepared to concede its challenge to these conditions if this Court applies the same logic to the County and find the Accessory Use Reinterpretation does not apply to the Property of the School District. This would have the practical effect of allowing the School District's parking lot to finally move forward and address the pressing needs of students, teachers, and others. If the Court were to so find on this narrow question of law, the entire dispute would be resolved, and the School District would be permitted to proceed with finally addressing the pressing school bus parking issues in District Three.

III. THE PLANNING DIRECTOR LACKS AUTHORITY TO IMPOSE ANY CONDITION HE WANTS ON SITE PLAN APPROVALS.

In response to the School District's argument that the Planning Director was without authority to place the one-year time limit and other conditions on the Site Plan Approval, the County argues that the Planning Director's power to impose conditions is essentially without limit. (Resp. Br. p. 17-18) The ZLDR, which proscribes the Planning Director's powers, supports no such expansive and unbounded view of bureaucratic authority.

The Planning Director's power is limited to "[e]nforcing all provisions of this Ordinance." Section 2.4.3(C), ZLDR. **(Zoning Appeal Petition, Exhibit K, at 84, R ____)**. If the Planning Director were allowed to do whatever he wants whenever he wants, as the County argues, this would vest legislative powers in an unelected staff person. Certainly, the law disallows this result.

Bauer v. S.C. State Hous. Auth., 271 S.C. 219, 233, 246 S.E.2d 869, 876 (1978) ("unbridled, uncontrolled or arbitrary power" constitutes an unlawful delegation of legislative authority).

The County's reliance on Sections 3.1.7 and 3.1.9 of the ZLDR is misplaced. Although both allow the Planning Director to place conditions on certain development approvals, those conditions must at all times be "allowed by law." Section 3.1.9, ZLDR. This means the Planning Director must be able to point to something in the ZLDR sanctioning the condition in question. It does not authorize the Planning Director to come up with whatever conditions he wants whenever he wants. This would sanction "unbridled, uncontrolled or arbitrary power" by an unelected official, which is repugnant to South Carolina law.

The condition at issue for the School District is the alleged one-year time limitation on the Site Plan Approval. If this condition is deemed violative of the ZLDR, then there would have been no need for the School District to seek a one-year extension, the Site Plan Approval would remain valid to this day, and the School District could proceed with final permitting. The County's denial of the extension request is why there is litigation over this matter. Even assuming the Planning Director has some measure of flexibility to come up with conditions on development approvals, from time to time, this power surely does not extend to matters such as permit time limits. This is because the ZLDR speaks directly to and governs this issue elsewhere and extensively, but not with respect to site plan approvals.

As discussed in great length in the School District's Brief, the ZLDR places approval lapse periods on certain types of approvals, but not site plan 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 ___**). 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 ___)**. Clearly, County Council decided there should be no expiration of a site plan approval. Otherwise, County Council would have placed an explicit time limit on the approval, as it did for special exceptions, zoning permits, and variances. Under these circumstances it would be wholly inappropriate for the Planning Director to impose a time limit on the Site Plan Approval. Doing so constitutes a usurpation of legislative authority, an abuse of discretion contrary to law, and must be reversed. Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) ("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.")

Given the foregoing, the one-year limitation placed on the Site Plan Approval should be declared void ab initio and outside the power of the Planning Director to impose. The Site Plan Approval remains in effect, and the School District should be permitted to proceed with final permitting of the thirty-five (35) spot school bus parking lot.

IV. THE COUNTY'S FAILURE TO PROVIDE THE BZA WITH THE SCHOOL DISTRICT'S MEMORANDUM AND EXHIBITS IN ADVANCE OF THE MEETING WAS PREJUDICIAL.

The School District charges the County disregarded the BZA's Rules of Procedure by failing to provide the BZA the School District's memorandum and exhibits in support of its appeal before the hearing. This prejudiced the School District because the County supplied the BZA with its own materials opposing the School District's appeal eleven (11) days in advance of the hearing, which gave the BZA members more than enough time to review the County's position. The County supplied its opposition to the School District's appeal prior to the hearing – but not the School District's materials. In its Brief, the County argues the School District suffered no prejudice

because the School District's memorandum and exhibits were handed up at the hearing. (Resp. Br. p. 28) This misses the point and fails to appreciate the prejudice the County's conduct caused the School District at the BZA hearing.

The BZA did not have sufficient time to review and digest the detailed information presented by the School District at the hearing. This is not the School District's opinion. This is what the BZA members stated, on the record, at the hearing. Specifically, one member remarked, "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 ____)**. That board member is right. The BZA members were visibly frustrated and exasperated by the School District's handing up so much paper at the hearing, and this seriously prejudiced the School District at the hearing. The failure to provide the School District's memorandum and exhibits in advance of the hearing was the County's conscious decision and fault – not the School District's. The School District supplied its information eleven (11) days before the hearing. The BZA's Rules of Procedure require submissions only five (5) days in advance. The County had no legal basis to treat the School District's materials in support different that its materials in opposition, but that is precisely what the County did. As an adversary in this zoning appeal, the County violated the School District's due process rights in this regard.

This procedural error prejudiced the School District before the BZA. If the Court is not prepared to reverse and remand the BZA's and Circuit Court's orders in this case, it should order a remand pursuant to S.C. Code Ann. § 6-29-840(A).

CONCLUSION

The School District respectfully requests this Court reverse and vacate the Circuit Court and the BZA, 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 thirty-five (35) spot school bus parking lot depicted in the Site Plan Approval as a valid "accessory use," void the Accessory Use Reinterpretation, and direct the County allow the School District to proceed with final permitting and construction of a thirty-five (35) spot school bus parking lot on the Property.

Alternatively, given the procedural defects regarding memoranda submission and voting requirements identified in the School District's Brief, 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.

Respectfully Submitted,

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ATTORNEYS FOR APPELLANT CHARLESTON COUNTY SCHOOL DISTRICT

June 28, 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

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 Reply Brief of Appellant*** has been served upon the following by mailing a copy, properly addressed and with sufficient postage affixed thereto, on this 28th day of June, 2019.

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June 28, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals Clerk
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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 in the above-referenced matter, please find the original and one (1) copy of the Appellant, Charleston County School District's Initial Reply Brief and the Proof of Service. Please file the originals and return clocked copies to our office in the enclosed self-addressed stamped envelope. By copy of this correspondence to counsel for the Respondents, I am serving them 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

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