THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-000125

The Charleston County School District, ... Appellant,

vs.

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.

FINAL BRIEF OF RESPONDENTS 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

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD OF ZONING APPEALS' DECISION, WHICH CONCLUDED THAT THE SCHOOL DISTRICT FAILED TO TIMELY APPEAL THE PLANNING DIRECTOR'S DENIAL OF THE SITE PLAN ONE-YEAR EXTENSION REQUEST.

II. WHETHER THE CHARLESTON COUNTY ZONING AND LAND DEVELOPMENT REGULATIONS ORDINANCE AUTHORIZES THE PLANNING DIRECTOR TO PLACE CONDITIONS ON SITE PLAN APPROVALS.

III. WHETHER THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD OF ZONING APPEALS' FINDING THAT THE CENTRALIZED SCHOOL BUS PARKING LOT FACILITY PROPOSED BY THE SCHOOL DISTRICT IS A PRINCIPAL USE, NOT AN ACCESSORY USE.

IV. WHETHER THE SCHOOL DISTRICT WAS PREJUDICED WHEN THE CIRCUIT COURT AND BOARD OF ZONING APPEALS DECLINED TO RULE ON PROCEDURAL MATTERS RAISED BY THE SCHOOL DISTRICT REGARDING THE BOARD OF ZONING APPEALS' HEARING.

STATEMENT OF THE CASE

The Charleston County School District ("School District" or "District') is appealing the Final Order and Decision issued by the Circuit Court in an appeal of the decision of the Charleston County Board of Zoning Appeals ("Board" or "BZA"). On February 9, 2018, the District requested a one-year extension of the County's Site Plan Review Status Report ("Site Plan") granting conditional approval of a centralized school bus parking facility at the James Island Elementary School. On February 28, 2018, the Charleston County Planning Director ("Planning Director") denied the District's request for a one-year extension of the Site Plan. On April 18, 2018, the District filed an appeal of the Planning Director's one-year extension denial and accessory use determination. (R. pp. 515-17).

At the June 4, 2018, hearing, the Board issued its decision ("BZA Decision") affirming the Planning Director's decision that the School District missed the deadline to file the appeal. Included in its decision, the Board affirmed the Planning Director's interpretation that the School District's use of the property constituted a principal use not an accessory use and declared the Board did not have authority to grant vested rights to the District. The Board mailed its decision to the parties on June 15, 2018. (R. p. 466).

On June 28, 2018, the School District filed a Notice of Appeal and Request for Pre-Litigation Mediation with the Circuit Court. (R. pp. 12-20). On July 12, 2018, the Planning Director filed the certified record with the Clerk of Court for Charleston County, which included a copy of the proceedings, a transcript of the evidence at the hearing and the decision of the Board. (R. pp. 382-731). On August 2, 2018, the parties engaged in alternative dispute resolution, conducted through mediation. The mediation resulted in an impasse, and on August 2, 2018, the mediator filed the Proof of ADR. (R. pp. 23-25).

On August 29, 2018, the School District filed a Summons, Zoning Appeal Petition and Complaint (Declaratory Judgment) with Exhibits A–S. (R. pp. 26-319). On September 18, 2018, Charleston County filed its Return to the Zoning Appeal Petition and a Notice of Motion and Motion to Dismiss Pursuant to Rule 12(b)(1) and 12(b)(8), S.C.R.C.P. (R. pp. 320-27). On September 27, 2018, the County filed its Memorandum of Law in Opposition to Appellant's Zoning Appeal Petition, and the Circuit Court held its hearing on the District's Zoning Appeal Petition. (R. pp. 328-45).

On December 28, 2018, the Circuit Court filed its Final Order and Decision ("Circuit Court Order"). (R. pp. 3-10). On January 7, 2019, the School District filed a Notice of Motion and Motion to Reconsider, Alter or Amend. (R. pp. 353-81). On January 9, 2019, Judge McCoy issued a Form 4 decision denying the District's Motion to Reconsider. (R. p. 11). On January 25, 2019, the District filed its Notice of Appeal challenging the Circuit Court's Order and Form 4 decision.

STATEMENT OF FACTS

This is a zoning case where the School District challenges two administrative decisions of the Planning Director affirmed by the Board and Circuit Court on appeal. The School District owns real property located at 1872 South Grimball Road in an unincorporated portion of James Island, South Carolina, known as James Island Elementary School. (R. p. 482). The property also contains a school bus parking lot to support the elementary school.[1] On May 16, 2016, ADC Engineering, Inc. ("ADC" or "ADC Engineering") submitted a Site Plan Review Application to the Charleston County Zoning and Planning Department ("Planning Department") on behalf of the District to establish a regional school bus parking lot facility at the James Island Elementary School.[2] The District's Site Plan Review Application indicated that the "project proposes to construct a new bus parking facility, with employe [sic] parking and support facility. The support facility consists solely of a manufactured office building for administrators. Drivers will check in and out of the facility as they arrive and leave for the day. Maintenance will be performed at an off-site location." (R. p. 484).

Pursuant to the Charleston County Zoning and Land Development Regulations Ordinance ("ZLDR" or "Zoning Ordinance"), Article 3.7 Site Plan Review, § 3.7.1 Applicability, the District had to obtain site plan approval prior to establishing its proposed use. The ZLDR provides in pertinent part:

> Site Plan Review procedures shall apply to any of the following: (a) new development, redevelopment and property improvements that increase by more than 25 percent the area devoted to vehicular use, or the gross floor area of buildings; (b) any change in use to a more intensive use, as determined by the

[1] The District planned to relocate its regional school bus fleet from its present location at a middle school that is under construction to the James Island Elementary School, which is located adjacent to the small residential community. (R. p. 402, p. 74, lines 13-22).

[2] The District authorized ADC Engineering to act on its behalf regarding the processing of the Site Plan Review Application. (R. p. 516; R. p. 3; App. Br. p. 2, 7).

> Planning Director; and (c) any earth disturbing activity greater than or equal to 5,000 square feet.

ZLDR Art. 3.7, § 3.7.1 Applicability.

On January 26, 2017, the District sent a letter to the County stating the "purpose of this facility is to alleviate the District's inability to store the James Island portion of the District's school busses in one location." In the letter, the District described the proposed use of the school property included storing and parking thirty-five school buses and forty-one employee vehicles on the property. (R. p. 497). The plans show it includes the proposed construction of a staff building for drivers to check in and out before leaving and returning from their routes. (R. pp. 497-98). The support building is to be used for offices, a driver break room and bathrooms. (R. p. 497). Notwithstanding the District's letter describing its proposed uses, the Planning Director discovered after conditionally approving the Site Plan that the District failed to disclose maintenance or fueling components of the project. (R. p. 411, p. 110, line 16–p. 111, line 6; p. 112, line 18–p. 113, line 12). In addition, the District did not disclose that the James Island Elementary School only needed seven or eight buses to support its operations. (R. p. 411, p. 112, lines 5-17).[3]

Notwithstanding the District's omissions, on February 9, 2017, the Planning Director approved the Site Plan with numerous conditions. (R. p. 509).[4] Those conditions include the

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[3] Although the plan sheet approved by the Planning Department on February 7, 2017, depicted thirty-five school bus parking spaces, the omission of the maintenance and fueling of the buses and surplus bus parking caused the Planning Director to reevaluate whether the proposed use truly qualified as an Accessory Use rather than a Primary Use. The Planning Director testified at the Board hearing that "this goes back to staff – this site plan should've never been approved to begin with" and that "staff didn't ask enough questions during the whole process to what was – we didn't find out about a lot of this stuff until afterwards." (R. p. 501; R. p. 410, p. 109, lines 12-14, 17-20).

[4] The ZLDR gives the Planning Director discretion to approve a Site Plan Review Application with conditions. It provides in pertinent part that "[t]he Director of the Planning Department shall have final (local) decision-making authority" on matters to include, but not limited to, written interpretations and zoning permits. See ZLDR Chap. 2, Art. 2.4 Planning Director, § 2.4.2 Decision-Making Authority. The ZLDR further provides in pertinent "[u]nless otherwise expressly stated, Decision-Making Bodies (the Planning Director) shall be authorized to approve, approve with conditions or deny applications and permit

following: 1) a Zoning Permit is required before any land disturbance and/or site improvements; 2) a tree barricades inspection is required; 3) the inspection is required three days before receiving a zoning permit; 4) when the project is complete and ready for a final inspection, the District must allow five working days before requesting the certificate of occupancy for the inspection; 5) the project is to be held in the "TO BE PERMITTED" file for one year; and 6) any changes in the Site Plan after approval must be reviewed by the Site Plan Review Committee prior to the change. (R. p. 509). The Site Plan approval was granted on the further conditions that if the District has not obtained the permit within one year and not communicated with the Planning Department regarding this project, then the project will no longer be eligible to receive a permit. (R. p. 509). Moreover, the Site Plan indicated that "[i]f the applicant wishes to receive a permit after that time, the review process will need to be repeated." (R. p. 509).

It is undisputed that the Planning Department sent the unsigned Site Plan to Jeff Webb, a principal of ADC Engineering, Inc. on behalf of the District. (R. p. 509); see also, Footnote 8. The Site Plan approval does not contain provisions allowing for an extension of time. Furthermore, the District did not object to the conditions for approval or appeal the one-year suspense for the Site Plan.[5] In fact, the Site Plan clearly notified the District that if it wanted a permit after that period of time, it needed to repeat the site plan review process. The Site Plan further notified the

requests based on compliance with the applicable review and approval criteria." See ZLDR Chap. 3, Art. 3.1 General, § 3.1.7 Action by Decision-Making Bodies.

[5] Since the District did not challenge the conditions for approving the Site Plan, the District is time-barred from raising the one-year suspense of the Site Plan. The ZLDR provides the appellate procedure to appeal a decision of the Planning Director's Site Plan Review decision. See ZLDR Art. 3.7 Site Plan Review, § 3.7.8 Appeals ("Appeals shall be processed in accordance with the procedures of Article 3.13 of this Chapter."). Article 3.13 Appeals of Zoning-Related Administrative Decisions, § 3.13.3 requires "[a]ppeals of Administrative Decisions to grant or deny a Zoning Permit shall be filed within 30 calendar days from the date of the Administrative Decision."

District that the site plan review committee must review any changes in the site plan. (R. p. 509). Accordingly, the Site Plan's one-year suspense expired on February 9, 2018.

On February 6, 2018, three days before the Site Plan's expiration, ADC Engineering on behalf of the District contacted the Planning Department requesting a one-year extension. In its request via email, York Dilday of ADC stated: "[w]e received Planning approval for the James Is. Elem. School Bus Parking Facility (TMS – 334-07-00-047) almost a year ago and **the project was stuck in limbo for a while**." (R. p. 79; R. p. 516) (emphasis added). Moreover, the District concedes in its Brief that "[a]fter receiving Site Plan Approval . . . the **School District chose not to press forward immediately with final permitting and construction** . . . ." (App. Br. p. 6; R. p. 398, p. 59, line 18–p. 60, line 5) (emphasis added).

On February 28, 2018, the Planning Department sent a letter to York Dilday of ADC denying the District's request for the extension stating that:

> As of February 7, 2018, upon receipt of your extension request, the Charleston County Zoning and Planning Department had not been contacted to request the site inspection or the Permit. The Planning Director has determined that the Applicant has not demonstrated a hardship that would be cause to delay the project or that diligent pursuit has been made to start development, as described in the documents submitted for Site Plan Review. Thus, the extension of this Approval has been denied, and the project is no longer eligible to receive a Permit. If the Applicant wishes to pursue the project further, the Site Plan Review process will need to be repeated.

(R. p. 80). Accordingly, the deadline to file an appeal of the Planning Director's decision denying the extension to the BZA was March 30, 2018, thirty days from the date the County sent the decision to ADC. <u>See</u> ZLDR Art. 3.7, § 3.7.8 Appeals, with reference to ZLDR Art. 3.13, § 3.13.3 Application Filing, Timing; <u>see</u> <u>also</u>, Footnote 6.

The School District initiated an appeal pursuant to its submittal of an Application for Appeal of Administrative Decision dated April 18, 2018. (R. pp. 82-89; R. pp. 515-17). Prior to

filing its appeal before the BZA, the County provided the District with a written interpretation regarding how the Planning Department would administer a future request for a centralized school bus parking, fueling and maintenance facility.[6] The written interpretation states:

> 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.

(R. p. 81; R. p. 513).

In its appeal to the BZA, the School District raised two errors regarding the Planning Director's decision denying the Site Plan extension. First, the District claims that it "demonstrated a hardship or that diligent pursuit has been made to start the development." Second, the District claims that "[t]he zoning administrator reinterpreted existing zoning ordinance to deny this specific project extension due to external pressure" after the Planning Director denied the District's extension. (R. p. 83; R. p. 516). In particular, the District contends that the Planning Director's interpretation of the centralized school bus parking lot facility as a Primary Use rather than an Accessory Use violates the Zoning Ordinance.

On June 4, 2018, the Board held a public hearing to review the matter. The Board issued its Final Decision and Order on Appeal and mailed it to the parties on June 15, 2018. The Board found 1) that CCSD missed the deadline to file the appeal, 2) that the Planning Director did not err in his interpretation of "accessory use", and 3) that the Board is without authority to grant a vested right to CCSD. (R. p. 466; R. pp. 85-86). The Circuit Court affirmed the BZA's Decision on appeal. Accordingly, this Court should affirm the decisions of the Circuit Court and Board for the following reasons.

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[6] The District claims it first learned of the accessory use interpretation at a March 19, 2018, meeting between the District and County. (R. p. 399, p. 64, lines 2-9; App Br. p. 9).

STANDARD OF REVIEW

"In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law." Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 8-9, 776 S.E.2d 753, 757 (Ct.App.2015). Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Id. However, a decision of a municipal [Z]oning 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. "It is well-settled that 'the factual findings of the jury will not be disturbed unless a review of the record discloses that there is **no evidence** which reasonably supports the jury's findings." Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct.App.2004) (emphasis added).

"'[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. Although great deference is accorded the decisions of those charged with interpreting an applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns the construction of an ordinance.'" Helicopter Solutions, at 9-10, 776 S.E.2d at 757 (citations omitted).

ARGUMENTS

I. THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD OF ZONING APPEALS' DECISION, WHICH CONCLUDED THAT THE SCHOOL DISTRICT FAILED TO TIMELY APPEAL THE PLANNING DIRECTOR'S DENIAL OF THE SITE PLAN ONE-YEAR EXTENSION REQUEST.

A. Thirty Days to Appeal the Planning Director's Decision.

The Circuit Court correctly affirmed the Board's decision finding that the School District's appeal of the Planning Director's administrative decision denying the one-year extension was untimely, because the District did not file its appeal within thirty days after the Planning Director sent notice to ADC Engineering. The Circuit Court held "[t]he record before me indicates that the District failed to comply with and timely file its appeal of the planning director's decision to the BZA, because the appeal was filed on April 18, 2018." (R. p. 5). According to the ZLDR, appeals of matters regarding site plan review are governed by ZLDR Article 3.7 Site Plan Review, § 3.7.8 Appeals. Section 3.7.8 provides in pertinent part that:

> **Appeals shall be processed in accordance with the procedures of Article 3.13 of this Chapter**. Applications for Appeals of approved site plans shall clearly state the error in any order, requirement, decision or determination that was made by the administrative official when approving the site plan. (emphasis added).

The ZLDR cross-references a companion provision, which provides the procedure for perfecting an appeal to the Board. See ZLDR Art. 3.13, Appeals of Zoning-Related Administrative Decisions, § 3.13.3 Application Filing; Timing. Section 3.13.3 provides *inter alia* that:

> 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).

The Record in this case shows that on February 28, 2018, the Planning Department sent a letter to York Dilday of ADC Engineering denying the District's request for the extension. The Planning

Director testified at the BZA hearing that the denial letter was sent to ADC the same day of the denial. When asked when the thirty days began to run, the Planning Director testified:

> It's thirty days from the day – exactly – that February – February 9 – February 28, the denial of the extension that was sent to the applicant, and they got that. And the applicant didn't appeal the extension until April 18, 2018.
>
> We mailed it on February 28. . . . We sent it to them.

(R. p. 406, p. 93, line 25; R. 407, p. 94, lines 1-5; p. 94, line 24–p. 95, line 2).[7]

"Compliance with statutory time periods for filing appeals is a prerequisite for an appellate entity to have jurisdiction to hear an appeal." See Botany Bay Marina, Inc. v. Townsend, 296 S.C. 330, 334, 372 S.E.2d 584, 586-87 (1988), overruled on other grounds by Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d 392 (1995); see also, Sadisco of Greenville, Inc. v. Greenville Cnty Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000); S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 380 S.C. 349, 669 S.E.2d 899 (Ct.App.2008).

The Circuit Court concluded: "[s]ince ADC Engineering was acting as agent for the District regarding the site plan application, the District cannot claim as a matter of law that ADC Engineering was not authorized to communicate on behalf of the District." (R. p. 7). The Circuit Court relied on Rickborn v. Liberty Life Ins. Co. to hold that the acts of ADC Engineering bound the District because it placed ADC in the position that led a person of ordinary prudence to believe ADC had authority to act on the District's behalf, and the County dealt with ADC based on that assumption. See Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 297, 468 S.E.2d 292, 298 (1996). The District does not challenge these findings in its Brief. Rather, the District attempts to

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[7] The District argues: "there is no evidence in the record concerning when, if ever, the School District received actual notice of the Site Plan revocation." (App. Br. p. 18). However, the Record does not support this claim. See R. 397, p. 55, lines 20-24; p. 57, lines 7-11; R. p. 407, p. 96, lines 18-21; R. p. 408, p. 98, line 15-17; p. 100, lines 19-20; p. 101, lines 7-16; see also, Footnote 8.

marginalize the application of the ZLDR's appeal procedures by suggesting in Footnote 5 of its Brief that Article 3.13 Appeals of Zoning-Related Administrative Decisions, § 3.13.3 does not regulate the time to file an appeal.

South Carolina courts have held that "[t]he cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning . . . . The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992). The District's construction of the County's Zoning Ordinance if adopted by this Court would suspend, rather than harmonize, Article 3.7 Site Plan Review, § 3.7.8 with Article 3.13 Appeals of Zoning-Related Administrative Decisions, § 3.13.3, which requires "[a]ppeals . . . [to] be filed within 30 calendar days from the date of the Administrative Decision." Accordingly, this Court should affirm the decisions of the Circuit Court and Board because the District cannot overcome its jurisdictional infirmities by rewriting the ZLDR to conform to its failure to timely file its appeal.

B. No Actual Notice Requirement.

Notwithstanding the ZLDR's formal procedure for perfecting an appeal of the Planning Director's decision, the School District contends that the Circuit Court applied the wrong legal standard in reaching the conclusion that the appeal was untimely. (App. Br. p. 18). The District argues that the time to appeal the decision began when it received actual notice of the decision, because State law controls the appeal procedure, not the ZLDR. The District points to S.C. Code Ann. § 6-29-800(B) to advance this argument. South Carolina law provides:

> 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**. The officer from whom the appeal is taken immediately must transmit to the board all the papers constituting the record upon which the action appealed from was taken.

S.C. Code Ann. § 6-29-800(B) (Supp. 2018).

At the outset, the provision of S.C. Code Ann. § 6-29-800(B) (Supp. 2018) is not triggered, because the ZLDR provides a time for perfecting an appeal before the BZA. In the adoption of the ZLDR, Charleston County Council established a thirty-day filing period, which begins on the date of the administrative decision. It is axiomatic that the thirty-day clock starts once the Planning Director sends notice to the aggrieved party, which is what occurred here. Accordingly, the State law statutory time and heightened notice standard do not apply in this case.

Despite the inapplicability of the *actual notice* requirement in State law, the District contends its February 28, 2018 constructive notice through ADC has no bearing on this appeal. The District spends considerable effort to create an *actual notice standard* to attack the Circuit Court and Board's failures to rule that actual notice is required. Assuming *arguendo* that the District's actual notice standard is correct, by its own admission it did not appeal the Planning Director's decision within thirty days of its actual notice. When asked what steps the District took when it found out the County denied the extension, the District's Counsel stated:

> So the folks from the district can speak more specifically to this, but my understanding is that **after the February 28th denial letter was received, the top brass over at the district immediately contacted Mr. Evans and his staff, and arranged for a meeting** to discuss this issue, because frankly they were very confused by this issue. They subsequently had a series of meetings.

(R. p. 389, p. 23, lines 14-22) (emphasis added).

The District's Counsel conceded in his response to the Board that the District received actual notice of the Planning Director's decision sometime before the meeting on March 19, 2018.[8] In fact, the District received actual notice on March 9, 2018, forty-one days before the date the District filed its appeal on April 18, 2018. See Footnote 8. "The acts and omissions of an attorney are directly attributable to the client." Clark v. Clark, 271 S.C. 21, 23, 244 S.E.2d 743, 744 (1978). South Carolina law is clear:

> The employment of an attorney in a particular suit implies his client's assent that he may do everything which the court may approve in the progress of the cause. Upon this distinction in a large measure rest the certainty, verity, and finality of every judgment of a court. **Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court**, in the absence, of course, of fraud.

Collins v. Bisson Moving & Storage, 332 S.C. 290, 303-04, 504 S.E.2d 347, 354-55 (Ct.App.1998).

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[8] Since the Board hearing, the County has identified email correspondence between the District and County Planning Department corroborating the District Counsel's comments at the Board hearing. **It is undisputed that on March 9, 2018, Reggie McNeil, Executive Director of Capital Programs for the School District, contacted the County Planning Department requesting a meeting**. (emphasis added). Mr. McNeil states: "[m]y office received a letter from Mr. Dilday of ADC engineering denying Charleston County School District's waiver request for a land disturbance zoning permit. I request a meeting with you to discuss what happened between the District receiving an email approval on 2/9/18 and a letter disapproval on 2/28/18." (Email of Reggie McNeil dated March 9, 2018). "[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]." Helicopter Solutions, at 9, 776 S.E.2d at 757.

In addition, this Court may take judicial notice of the above-referenced email, which is not in dispute. See Wise v. Wise, 394 S.C. 591, 600, 716 S.E.2d 117, 122 (Ct.App.2011). As set forth in Wise:

> Notice may be taken of judicially cognizable 'facts' in administrative cases. Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of 'facts' for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the 'cold' record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original **judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.**

Id. (citations omitted) (emphasis added).

Since the District concedes it had actual notice of the Planning Director's decision denying the one-year extension request before the meeting on March 19, 2018, then its appeal is time-barred under both S.C. Code Ann. § 6-29-800(B) (Supp. 2018) and the Zoning Ordinance because the District waited more than thirty days after it had actual notice to file its appeal.

Nevertheless, the District attempts further to create a safe harbor for its actual knowledge by suggesting in Footnote 6 of its Brief that any statements made by its Counsel at the Board hearing "must simply be ignored for the purposes of this case" because statements of an attorney cannot be considered evidence. (App. Br. p. 22). However, this argument has no basis in fact or in law. "Generally, statements by an attorney concerning a matter within his employment may be admissible against the retaining client. (citation omitted). Further, a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party." United States v. Blood, 806 F.2d 1218, 1221 (4th Cir. 1986). Furthermore, when the Planning Director asked all present at the hearing if you are going to present evidence to the Board (please stand and raise your right hand and take the oath that the testimony or evidence I present to the Board will be the truth and only the truth), the District's Counsel stood and took the oath. (R. p. 385, p. 8, line 17–p. 9, line 5).

In view of the above, "the School District failed to timely file and perfect its appeal of the planning director's decision to the Board; and therefore, the District's appeal is time-barred." (R. p. 6). The District has failed to meet its burden showing an error of law of the Circuit Court and Board, and therefore, this Court should affirm the decision of the Circuit Court and Board.

II. THE CHARLESTON COUNTY ZONING AND LAND DEVELOPMENT REGULATIONS ORDINANCE AUTHORIZES THE PLANNING DIRECTOR TO PLACE CONDITIONS ON SITE PLAN APPROVALS.

A. Authority to Impose Conditions.

Notwithstanding the District's jurisdictional infirmities, which bar it from challenging the Planning Director's authority, the District mistakenly believes that the Zoning Ordinance does not authorize the Planning Director to impose time limits on site plans that lapse after a suspense date. The District contends that the Site Plan's limited duration or lapse provision violates the Zoning Ordinance; therefore, the County's denial of the Site Plan extension request is void as a matter of law. (App. Br. p. 26). Assuming the District could overcome the jurisdictional firewall to its extension appeal so that it could advance its "no authority to impose conditions" argument, this argument would suffer the same timeliness deficiency as the extension request. 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. "Compliance with statutory time periods for filing appeals is a prerequisite for an appellate entity to have jurisdiction to hear an appeal." See Botany Bay Marina, at 334, 372 S.E.2d at 586-87. Since the District accepted the conditional approval and failed to challenge it pursuant to the ZLDR, the District is precluded from challenging this requirement fourteen months later. See Footnote 5 quoting Article 3.13 Appeals of Zoning-Related Administrative Decisions, § 3.13.3 Application Filing; Timing (appeals of Administrative Decisions to grant or deny a Zoning Permit shall be filed within thirty calendar days from the date of the Administrative Decision.).

Even if the District could procedurally challenge the one-year time limit on the Site Plan, State law and the Zoning Ordinance authorize the Planning Director to impose the one-year

condition on the approval. The South Carolina Local Government Comprehensive Planning Act of 1994, codified at S.C. Code Ann. §§ 6-29-310 to -1560 (2004 & Supp. 2018) (the "Planning Act"), authorizes local governments in pertinent part to:

> . . . adopt a zoning ordinance to help implement the comprehensive plan. The zoning ordinance shall create zoning districts of such number, shape, and size as the governing authority determines to be best suited to carry out the purposes of this chapter. Within each district the governing body may regulate:
>
> . . . .
>
> 6) other aspects of the site plan including, but not limited to, tree preservation, landscaping, buffers, lighting, and curb cuts; and
>
> (7) other aspects of the development and use of land or structures necessary to accomplish the purposes set forth throughout this chapter.

S.C. Code Ann. § 6-29-720(A) (2004). The Planning Act further enables local governments to utilize ". . . zoning and planning techniques for implementation of the goals specified above. Failure to specify a particular technique does not cause use of that technique to be viewed as beyond the power of the local government choosing to use it . . . ." S.C. Code Ann. § 6-29-720(C) (Supp. 2018). Likewise, the Planning Act law allows a zoning ordinance to ". . . impose conditions, restrictions, or limitations on a permitted use that are in addition to the restrictions applicable to all land in the zoning district. The conditions, restrictions, or limitations must be set forth in the text of the zoning ordinance . . . ." S.C. Code Ann. § 6-29-720(C)(6) (Supp. 2018).

Furthermore, Zoning Ordinance Article 2.4 cited by the District provides for the review authority, decision–making authority and other powers and duties of the Planning Director. The authorities and powers are expansive, and include in Article 2.4, § 2.4.2(B), the decision–making authority of the planning director regarding zoning permits. In Article 3.1 General, § 3.1.7 Action by Decision-Making Bodies, the Planning Director is "authorized to approve, **approve with conditions**, or deny applications and permit requests based on compliance with the applicable

review and approval criteria." (emphasis added). In Article 3.1 General, § 3.1.9 Conditions of Approval, the Planning Director:

> **[S]hall be authorized to impose conditions of approval as allowed by law.** Conditions may be those deemed necessary to reduce or minimize any potential adverse impact upon other property in the area or to carry out the general purpose and intent of this Ordinance. All conditions must relate to a situation created or aggravated by the proposed use and be roughly proportional to the impact of the approved use or activity. (emphasis added).

ZLDR Art. 3.1 General, § 3.1.9 Conditions of Approval.

In spite of this clear grant of legislative authority by the Planning Act and the County's Zoning Ordinance, the District claims "[t]he ZLDR does not support any of the steps taken by the County to condition and ultimately revoke the Site Plan Approval." (App. Br. p. 27). To the contrary, "[w]hen reviewing issues involving the construction of an ordinance, the determination of legislative intent is a matter of law. (citation omitted). If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Helicopter Solutions, at 10-11, 776 S.E.2d at 758. The ZLDR Article 3.1, § 3.1.9 clearly authorizes the Planning Director to approve site plans with conditions; and therefore, the expiration of the site plan does not violate the ZLDR. For this reason, this Court should affirm the decision of the Circuit Court and Board.

B. Hardship and Diligent Pursuit.

The District claims that the ZLDR does not condition the validity of a site plan approval on demonstrating hardship that would delay the project and showing diligent pursuit to begin the project. (App. Br. pp. 27-28). Even though that is true, the Planning Director did not condition the approval of the Site Plan on "hardship" or "delay." Rather, the Planning Director denied the

District's request for a one-year extension based on delay and a lack of hardship. The Zoning Ordinance provides in pertinent part that:

> Appeals shall be processed in accordance with the procedures of Article 3.13 of this Chapter. **Applications for Appeals of approved site plans shall clearly state the error in any order, requirement, decision or determination** that was made by the administrative official when approving the site plan.

ZLDR Art. 3.7 Site Plan Review, § 3.7.8 Appeal.

It is undisputed in the record that ADC Engineering contacted the Planning Department requesting a one-year extension stating, "[w]e received Planning approval for the James Is. Elem. School Bus Parking Facility (TMS - 334-07-00-047) almost a year ago and **the project was stuck in limbo for a while.**" (R. p. 79) (emphasis added). As stated earlier, the District concedes in its Brief that "[a]fter receiving Site Plan Approval . . . the **School District chose not to press forward immediately with final permitting and construction** . . . ." (App. Br. p. 6; R. p. 398, p. 59, line 18–p. 60, line 5) (emphasis added). Based on these facts, the Planning Director concluded that:

> As of February 7, 2018, upon receipt of your extension request, the Charleston County Zoning and Planning Department had not been contacted to request the site inspection or the Permit. The Planning Director has determined that the Applicant has not demonstrated a hardship that would be cause to delay the project or that diligent pursuit has been made to start development, as described in the documents submitted for Site Plan Review.

(R. p. 80; R. p. 511).

The District is not challenging the one-year suspense date. Rather, the District is challenging the reasons the Planning Department provided as the basis for denying the one-year extension request. "'In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law.' (citations omitted). 'Furthermore, '[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.' (citation omitted). 'However, a decision of a municipal

[Z]oning 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. (citations omitted).'" Helicopter Solutions, at 9, 776 S.E.2d at 757. The Planning Director did not abuse his discretion when he denied the District's one-year extension request.

On appeal, the Board heard corroborating evidence to support the Planning Director's decision denying the one-year extension. For instance, Susann Chavis, a resident of James Island and President of The Concerned Citizens of Sol Legare, testified:

> So where the lie begins at is that, you said that you were concerned about us as a community, but yet, still, you made your plans and made your decision before you even came to us. You said you cared about us, but you were perpetrating a fraud. That's what's happening here. There is also another problem here, because if there is a hardship, we want to know where the hardship is at. Because if you have a hardship financially, then that means that you have mismanaged some money, and we are taxpayers. Taxpayers that are tired of paying for somebody else's mess up and mix up. And that's what's going to end up happening if – if this project continues on at this site. If you have already visited some 30 sites, and they kept making their plans for this school, on this site, then what was the sense of going to those other sites? That was a waste of time and money.

(R. p. 421, p. 153, lines 9-25; R. p. 422. p. 154, lines 1-3). In addition, George Prioleau, a resident of James Island who lives in the Grimball Road Community near the location of the proposed project, testified:

> I attended all three meetings, and the meetings were to inform the Grimball area community of what we're going to do. We're going to join the middle school, Camp Road Middle School. We're going to park the bus [sic] at James Island Elementary School . . . . This was already a done deal when it was presented to us by Mr. Borowy. . . . if CCSD should have met with the Grimball area community prior to spending that $300 plus thousand dollars, instead of coming here tonight to claim a hardship . . . . and trying to manipulate this board.

(R. p. 422, p. 157, lines 24-25; R. p. 423, p. 158, lines 1-22).

The Site Plan did not extend the right of perpetual existence to the District. Rather, the District knew from the outset that it had one year to obtain a permit. "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). Accordingly, the Planning Director's denial of the one-year extension was not arbitrary, capricious, or an abuse of discretion. Therefore, this Court should affirm the Circuit Court and Board's decision.

III. THE CIRCUIT COURT CORRECTLY AFFIRMED THE BOARD OF ZONING APPEALS' FINDING THAT THE CENTRALIZED SCHOOL BUS PARKING LOT FACILITY PROPOSED BY THE SCHOOL DISTRICT IS A PRINCIPAL USE, NOT AN ACCESSORY USE.

A. Statutory Construction of the ZLDR's Definition of Accessory Use.

The Circuit Court affirmed the Board's decision that the District's proposed centralized school bus parking lot facility was not an incidental use of the James Island Elementary School property. The Circuit Court determined that the Planning Director's reasoning was consistent with the accessory use definition in the Zoning Ordinance. The Zoning Ordinance defines an "Accessory Use" as "[a] use customarily incidental and subordinate to the principal use of a zoning lot or of a structure." See ZLDR, Art. 12.1, Terms and Uses Defined, Term Definition A. Equally, South Carolina courts have applied similar common law definitions to the term. See Whaley v. Dorchester Cty Zoning Bd. of Appeals, 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1999) ("Accessory uses are those which are customarily incident to the principal use."); see also, Boehm v. Town of Sullivan's Island Bd. of Zoning Appeals, 423 S.C. 169, 187, 813 S.E.2d 874, 883 (Ct.App.2018) ("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.'"). Applying these principles, the Planning Director made the following written interpretation:

> 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 the school.

(R. p. 412, p. 115, lines 17-25; R. 81; R. p. 513).

The School District contends the Planning Director's application of Accessory Use as defined in the ZLDR, along with the BZA and Circuit Court affirmation of the same is erroneous as a matter of law because they misapplied the Zoning Ordinance. (App. Br. p. 30). "'[W]ords in a statute must be construed in context,' and 'the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute.'" (citation omitted). "The language must also be read in a sense [that] harmonizes with its subject matter and accords with its general purpose." Boehm, at 185, 813 S.E.2d at 882. In the case here, the Circuit Court held that:

> The BZA's decision is correct as a matter of law because the bus parking facility was not an accessory use but a second principal use of the school property. My review of the record reveals that there is evidence, which reasonably supports the Board's findings that the bus parking facility is **not customarily incidental and subordinate** to the principal use of the James Island Elementary School. The Elementary School is educational and located in a residential area. The District designed and intended the property and its building as an elementary school, and currently occupies and maintains it as one. The District conducts the activities, practices, and operations in connection with the property's purpose, and the elementary school has its own designated parking lot with the required number of spaces to accommodate their school buses and employees.

(R. p. 9) (emphasis added). The Circuit Court correctly harmonized the text of the ZLDR with its general purpose and concluded that a centralized school bus parking lot facility is not incidental to the use of the property as an elementary school, but a principal use of the property.

Nonetheless, the School District argues the County offered no evidence before the Board to contradict the District's case regarding 'customarily incidental.' (App. Br. p. 34). To the contrary, after expressly stating the Zoning Ordinance definitions of accessory use and principal

use, and Merriam-Webster's definitions of customarily, incidental, and subordinate, the Planning Director testified:

> This is an aerial of Azalea Drive. This is – this is what the school district is parking their – these are the bus parking lots over on Azalea Drive. This is the bus parking over at Fort Johnson Middle School. In the end, this idea of accessory use – if – if we interpret the ordinance as being requested by the appellant, then the school district could hypothetically establish a five pupil, one-room school, in a residential zoning district.
>
> With bus – and fuel and maintenance for every school bus in the school district. There has to be perimeters [sic] to what an accessory use is to a school district. It can't just be wide–open. Interpreting the ordinance any other way would extremely – it would be extremely detrimental to our communities, and grossly contrary to the purposes of the ordinance in [sic] our comprehensive plan, especially since school – schools are allowed in all our zoning districts and parking lots are only allowed in commercial zoning districts.

(R. p. 413, p. 120 line 23–p. 121, line 19).

> Charleston County issued a storm water permit for the parking lot only. No maintenance or fueling was to be on this – on the storm water permit that was issued. Okay. Right here, in the narrative: New site improvements made to the site include 35 bus parking spaces, 39 employee parking spaces, two handicap spaces, a new office building, fencing to enclose the facility, a new access drive, lighting and cameras, new water distribution system, and new sanitary sewer system. There's no mention of maintenance or fueling in that narrative.

(R. p. 411, p. 110 lines 14-25).

Equally, Rhonda Walter, Board Chairperson of the Charleston County School District Constituent Board No. 3, testified and contradicted the District's position stating:

> When Mr. Borowy came, he came with the plan that that's what they were going to do, and we, the board member stated clearly, loudly, that the residents of Grimball Road will not agree, want or be in approval for a bus depot – at that time that's what we called it – on Grimball Road. And we know now, they said, no. It's a bus lot. It's a bus parking facility. But when the specifications came back, 35 bus – 35 plus buses, a maintenance shed, service trucks and 39 plus parking spaces for employees, that's a bus depot. That's huge for that area, a grass–root neighborhood that really is not conducive for such a facility.

(R. p. 421, p. 151, lines 5-18).

Jessica Norris, a resident of James Island with a PhD in ecology from Duke University, and three children that attend James Island Elementary School, testified that the building opposition came from James Island Elementary School parents and the community because of "this very bad idea of putting in an industrial development next to a child's playground." (R. p. 418, p. 141, lines 23-25).

The testimony of both the Planning Director and the Constituent School District Board member contradicts the School District's position that the centralized school bus parking lot facility was subordinate to the elementary school. The testimonies also contradict the District's contention that the opposition did not offer any expertise to refute its witnesses. The analogy of placing one principal use (an industrial development) next to another principal use (child's playground) illustrates why the school bus parking lot facility is not an accessory use. Finally, the testimonies of the individuals cited above, along with the numerous other persons that spoke in opposition to the parking lot facility contradict the District's contention that the Board's decision is "supported by no evidence whatsoever." (App. Br. p. 36).

B. No Conflict Preemption with Centralized School Bus Parking.

The School District contends the Circuit Court failed to address its preemption arguments contending that the Planning Director's application of the ZLDR (placing limits on the School District's centralized parking) directly conflicts with State law. (App. Br. p. 35). The District relies on S.C. Code Ann. § 59-67-300 (Supp. 2018) to fabricate the alleged conflict. The statute provides that "[s]tate-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. The Department of Education shall grant a waiver to the requirements of this section if a waiver is requested by the district superintendent in compliance with Department of Education policies." S.C. Code Ann. §

59-67-300 (Supp. 2018). However, the facts before this Court do not present a conflict between a state statute and county ordinance.

The South Carolina Legislature has provided by way of the Planning Act that "[a]gencies, departments, and **subdivisions of this State** that use real property, as owner or tenant, in any county or municipality in this State **are subject to the zoning ordinances**." S.C. Code Ann. § 6-29-770 (2004). (emphasis added). The District does not dispute that it is subject to local zoning. Further, Charleston County has the power to regulate land use in the unincorporated county, and this exercise of power does not conflict with State law. "Determining whether a local ordinance is valid is a two-step process. The first step is to determine whether the [county] had the power to adopt the ordinance. If no power existed, the ordinance is invalid. If the [county] had the power to enact the ordinance, the second step is to determine whether the ordinance is consistent with the Constitution and general law of the State." McKeown v. Charleston Cty Bd. of Zoning Appeals, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct.App.2001). The Planning Act provides in pertinent part that:

> Zoning ordinances must be for the general purposes of guiding development in accordance with existing and future needs and promoting the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare. To these ends, zoning ordinances must be made with reasonable consideration of the following purposes, where applicable . . . (3) to facilitate the creation of a convenient, attractive, and harmonious community; (4) to protect and preserve scenic, historic, or ecologically sensitive areas . . . and (8) to further the public welfare in any other regard specified by a local governing body.

S.C. Code Ann. § 6-29-710 (2004).

Therefore, Charleston County has the power to define and regulate accessory uses by authority of the Planning Act.

Nonetheless, the District believes that "[s]ince state law speaks clearly and directly on this [school bus parking] point, local land use regulation must yield on preemption principles." (App.

Br. p. 35). Therefore, the District must contend the ZLDR is inconsistent with the general laws of the State. The South Carolina State Ports Authority made a similar challenge to the Planning Act regarding whether it had to comply with the City of Charleston's Zoning Ordinance claiming an exemption as a State agency.[9] The South Carolina Supreme Court held in City of Charleston v. S.C. State Ports Auth.:

> '[W]e clarify any earlier intimations we may have made previously on this issue and explicitly hold that we know of no law allowing a school district or other similar agency to ignore valid, local zoning requirements and therefore they may not ignore such.' Under S.C. Code Ann. § 6-7-830 (Supp. 1991) and Charleston County School District, supra, the Ports Authority must comply with local zoning ordinances; and, if the Ports Authority refuses to comply, the City may seek injunction through the Circuit Court.

City of Charleston v. S.C. States Ports Auth., 309 S.C. 118, 120-21, 420 S.E.2d 497, 499 (1992).

Additionally, to preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. S.C. State Ports Auth. v. Jasper Cty, 368 S.C. 388, 395, 629 S.E.2d 624, 627 (2006). "In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. (citation omitted). A statute should not be construed by concentrating on an isolated phrase." Id. South Carolina courts have generally followed the same preemption in deciding whether a state law preempts a local law as it has applied in deciding whether a federal law preempts a state law or regulation. Id. For example:

> [F]ederal law may preempt a state law as follows: (1) Congress may explicitly define the extent to which it intends to preempt state law, (2) Congress may indicate an intent to occupy an entire field of regulation, or (3) federal law may preempt state law to the extent the state law actually conflicts with the federal law, such that compliance with both is impossible or the state law hinders the accomplishment of the federal law's purpose. . . . We find it appropriate to address the SCSPA's

[9] Prior to the adoption of the Planning Act, S.C. Code Ann. § 6-29-770(A) was codified as S.C. Code Ann. § 6-7-830 (Supp. 1991).

> preemption arguments using the three categories previously recognized when discussing federal law preemption, any of which is a method by which the General Assembly's intent may be made manifest.

Id., at 395-96, 629 S.E.2d at 627-28 (citations omitted).

The Legislature has not manifested intent to preempt the entire field of centralized school bus parking as provided in S.C. Code Ann. § 59-67-300 (Supp. 2018). "Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area." Id. at 397, 629 S.E.2d at 628. Equally, "[u]nder implied preemption, an ordinance is preempted when the state statutory scheme so thoroughly and pervasively covers the subject so as to occupy the field or when the subject mandates statewide uniformity." Id. However, neither doctrine is applicable in this case. Instead, the District's centralized school bus parking is regulated by the County's site plan review process.

> Where an ordinance is not preempted by State law, the ordinance is valid if there is no conflict with State law. In order for there to be a conflict between a State law and a municipal ordinance, both must contain either express or implied conditions that are inconsistent and irreconcilable with each other. If either is silent where the other speaks, there is no conflict. (citations omitted). As a general rule, 'additional regulation to that of [the] State law does not constitute a conflict therewith.'

McKeown, at 207, 553 S.E.2d at 486.

Accordingly, the District's preemption argument does not demonstrate an error of law. The evidence in the record supports the Circuit Court and Board's decisions. Therefore, the centralized school bus parking lot facility is a principal use of the elementary school property, not an accessory use.

IV. THE CIRCUIT COURT AND BOARD OF ZONING APPEALS DID NOT PREJUDICE THE SCHOOL DISTRICT BY DECLINING TO RULE ON PROCEDURAL MATTERS RAISED BY THE SCHOOL DISTRICT REGARDING THE BOARD OF ZONING APPEALS HEARING.

A. The Circuit Court and Board Considered the District's Memorandum and Exhibits at the Respective Hearings on Appeal.

The School District claims that the County failed to provide the District's memorandum in support of its appeal and exhibits to the Board, which are violations of the Zoning Ordinance, the Board's Rules of Procedure, and the District's due process rights. Although the Board did not rule on this issue, it did consider the District's memorandum and exhibits at the hearing, and heard and considered all of the District's evidence presented from the memorandum and exhibits at the hearing. In fact, the District concedes in its Brief that ". . . 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." (App. Br. p. 38). The record plainly shows the Circuit Court and BZA allowed the District to testify about all of the written materials it submitted at the BZA hearing. "Where a party shows no prejudice, the error, if any, is harmless." GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986).

The record shows that the District's Counsel presented his eight-page memorandum and fourteen exhibits to both the Board and Circuit Court, and was allowed in excess of an hour to present his documents and make arguments to both tribunals. Therefore, the District had an opportunity to be heard and was heard, introduced evidence at both hearings, and the District's Counsel had the opportunity to confront the County's witnesses before the Board. See Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 642 S.E.2d 565 (2007) (due process rights were not violated when owner of a nonconforming billboard had notice of the nonconformity and

a meaningful opportunity to be heard before the city zoning board). Consequently, exclusion of the memorandum and exhibits from the Planning Department's BZA mail-out before the hearing was harmless and not a violation of due process. Thus, the Circuit Court and Board did not violate the District's due process rights by declining to rule on the procedural matter.

B. The Supermajority Vote Requirement of the Board.

The Board voted five to three to affirm the Planning Director's decision regarding the one-year extension and accessory use interpretation. The District claims that the Board erred by requiring a two-thirds vote of the Board to reverse the Planning Director's decision, instead of a simple majority because the Board's decision is *de novo*. (App. Br. p. 41). The District cites S.C. Code Ann. § 6-29-800(E) (Supp. 2018) as authority for this argument, which provides:

> In exercising the above power, 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 board, in the execution of the duties specified in this chapter, may subpoena witnesses and in case of contempt may certify this fact to the circuit court having jurisdiction.

S.C. Code Ann. § 6-29-800(E) (Supp. 2018).

However, the Zoning Ordinance provides that at least 2/3 of the members present and voting shall be required to reverse any order, requirement, decision, or determination of any administrative officer or agency. See Art. 3.13 Appeals of Zoning Related Administrative Decisions, § 3.13.7(D). The District suggests that the ZLDR provision § 3.13.7(D) "materially prejudiced the School District, prevented a meaningful opportunity to be heard and poisoned the proceedings." (App. Br. pp. 41-42).

In sum, the District makes the dubious claim that if there were no supermajority vote standard, the vote might have been different. The facts of this case show that there were eight

Board members present at the hearing; therefore, a quorum was present. Two-thirds of those present is six members, which was required to reverse the decision of the Planning Director. The Board voted five to three to affirm the Planning Director's decision and denied the District's appeal. Because the District only garnered three votes to reverse the decision, its argument is specious at best. No one made a motion to reverse the Planning Director.

Again, South Carolina Courts have held that, "[w]here a party shows no prejudice, the error, if any, is harmless." GTE Sprint, at 181, 341 S.E.2d at 129. The District fails to show prejudice towards the outcome of the vote. Thus, the Zoning Ordinance's super majority vote requirement had no material or prejudicial effect on the District. Therefore, this Court should affirm the Circuit Court and Board of Zoning Appeals.

CONCLUSION

The School District fails to demonstrate that the Circuit Court erred in affirming the Board's decision that the District failed to file its appeal within the time required in the Zoning Ordinance and that the centralized school bus parking lot facility constituted a principal use of the elementary school property. For the reasons set forth above, Respondent Charleston County respectfully requests that this Honorable Court affirm the Circuit Court's December 28, 2018, Order affirming the decision of Respondent Charleston County Board of Zoning Appeals.

Respectfully submitted,

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

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September 13, 2019
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

The Honorable Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2019-000125

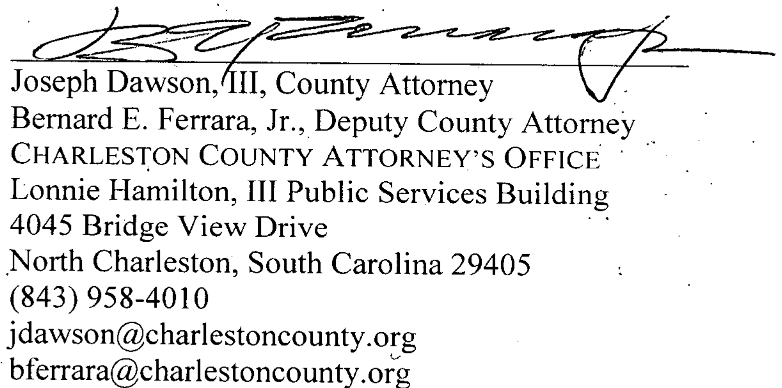
The Charleston County School District, ... Appellant,

vs.

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.

CERTIFICATE OF COUNSEL

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



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