THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2019-CP-10-1434
Appellate Case No. 2019-001910

David Abdo, Appellant,

v.

City of Charleston and
Board of Zoning Appeals-Zoning, Respondents.

RESPONDENTS' INITIAL BRIEF

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INTRODUCTION

In this zoning appeal, Appellant David Abdo ("Abdo" or "Appellant") argues that the City of Charleston's Board of Zoning Appeals-Zoning (the "Board" or "BZA") committed an error of law in determining that a flagpole is *not* a monument under the exceptions to the height limitations in the City of Charleston's Zoning Ordinance (the "CZO"). As a result, Abdo asserts that he had the right to construct a 60-foot tall flagpole on his lot within a residentially-zoned subdivision, despite the CZO's 35-foot height limitation on any structures within the zoning district. The BZA unanimously concluded that a flagpole is not a monument under the CZO, and the circuit court affirmed. **(R. p. 23; Order).**

The error in Abdo's argument is readily apparent. Under his interpretation, the owner of a residential lot within a residential subdivision would be permitted to construct a monument, water tower, observation tower, or transmission tower, of more or less unlimited height, in his or her backyard. Instead of going down this path, the circuit court appropriately applied a common sense approach to the interpretation and application of the term "monument," as required by applicable case law. The circuit court's decision in this respect is supported both as a matter of law and under the "deference doctrine."

For these reasons, and for the other reasons articulated herein, Respondents City of Charleston (the "City") and the BZA (collectively, "Respondents") respectfully assert that the circuit court's decision should be affirmed.

STATEMENT OF THE CASE

Abdo and Ilonka Sonja Taylor own property located at 29 Broughton Road (the "Property") within The Crescent, a residential subdivision in the West Ashley area of the City. **(R. p. 6; p. 28; p. 40, lines 23-25; p. 42, lines 20-25).** The Property is zoned Single-Family Residential ("SR-8"),

which limits the height of buildings and other structures on the Property to thirty-five feet (35'). **(R. p. 28; p. 33; p. 41, line 21-p. 42, line 3; p. 42, lines 20-25; p. 43, lines 15-21).**

Abdo constructed an unpermitted, 60-foot tall flagpole on the Property. **(R. p. 41, lines 3-5).** After discovering the flagpole in response to a neighbor's complaint, the City required Abdo apply for after-the-fact approval. **(R. p. 41, lines 10-16).** Abdo then submitted an application to erect a "flag monument." **(R. pp. 13-19; p. 41, lines 10-16).** Among other things, section 54-505.a of the CZO excepts "monuments, water towers, observation towers, transmission towers, masts and aerials" from the height restrictions in the CZO, subject to certain conditions relating to aircraft landing approach zones. **(R. p. 34; p. 60).**

On October 17, 2018, the City's Zoning Administrator denied zoning approval of the flagpole, explaining, in pertinent part:

> I have concluded that the flagpole cannot be considered a 'monument' under the terms of the City of Charleston Zoning Ordinance. I believe the exception listed in Sec. 54-505 for 'monuments' is intended to apply to a statue, building, or other structure erected in a public or semi-public space to commemorate a famous or notable person or event. Therefore, the request for a building permit to allow the flagpole will be denied due to the height of the flagpole exceeding the 35 foot height limit set by the zoning ordinance.

(R. p. 1) (emphasis added).

On October 31, 2018, Abdo requested that the BZA reconsider Batchelder's decision. **(R. pp. 6-11).** During the BZA's hearing of the matter on December 4, 2018, Batchelder explained:

> This is a flagpole that was constructed by the owner of the property without obtaining a permit from the City. I'm not aware that any contact with the City took place about whether a permit would be required or whether zoning regulations would apply to the placement of the flagpole on the property, but it was installed.
>
> The neighbor—(Inaudible.) Owner of the property notified us in and—and so we placed a—City placed a stop work order on the—

> on the project, and eventually the applicant came forward to seek remedy to the issue and try and obtain a permit from the City for the construction of the flagpole.
>
> During that, information came to us about the actual height of the flagpole; and it turns out that it's, I think, 60 feet tall, from what I understand.

(R. p. 41, lines 3-20) (emphasis added). Abdo appeared at this hearing, but he did not attempt to contradict or otherwise qualify Batchelder's testimony. **(R. p. 46, lines 3-4).** The BZA unanimously determined that a flagpole does not constitute a monument under section 54-505.a of the CZO. **(R. p. 11, ¶ 9; p. 54, lines 4-9; p. 54, line 20-p. 55, line 25; p. 86).**

On December 11, 2018, Abdo requested reconsideration of the Board's decision. **(R. pp. 62-68).** On February 19, 2019, the BZA held a hearing on Abdo's motion to reconsider. **(R. p. 115).** While Abdo did not attend this hearing, he had his counsel submit an email to the BZA alleging that, prior to erecting the flagpole, Batchelder informed him that he did not need a permit and that there was no height requirement. **(R. pp. 91-91).** The BZA unanimously denied the request. **(R. p. 86).** On March 20, 2019, Abdo appealed the BZA's decision to the circuit court. **(Notice & Petition for Appeal).**

The circuit court held a hearing on July 30, 2019. **(Order p. 1).** By order entered October 14, 2019, the circuit court affirmed the BZA's decision. **(Order).** On November 13, 2019, Abdo served his notice of appeal of the circuit court's decision. **(Notice of Appeal).**

STANDARD OF REVIEW

In an appeal from the decision of a board of zoning appeals, an appellate court applies the same standard of review as the circuit court. Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004). "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."

S.C. Code Ann. § 6-29-840(A). "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." Id. "A court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 234, 642 S.E.2d 565, 567 (2007). "However, a decision of a city 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.

The applicable standard of review vis-à-vis the construction, interpretation, and application of the term "monument" in section 54-505.a to a "flagpole" is discussed in more detail in Argument III, *infra*. However, as set forth in Arguments II and III, the circuit court's decision should be affirmed regardless of the application of the "deference doctrine."

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY AFFIRMED THE BZA BECAUSE, AS A MATTER OF LAW, A FLAGPOLE IS *NOT* A MONUMENT.

As a matter of law, a flagpole is not a monument as that term is used in section 54-505.a of the CZO.[1] Section 54-505.a provides as follows:

> The height limitations of this Chapter shall not apply to church spires, belfries, cupolas and domes not intended or used for human occupancy; monuments, water towers, observation towers, transmission towers, masts and aerials, provided that such uses are not within the aircraft landing approach zone. Whenever any of the above uses are proposed within aircraft approach zones, an applicant must submit written approval received from the proper aeronautical authorities before a building permit may be issued.

(R. p. 60) (emphasis added).

[1] Argument I assumes *arguendo* that the BZA is entitled to no deference in the interpretation of the CZO.

"The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature." Riverwoods, LLC v. Cty. of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 654 (2002). "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." Grant v. City of Folly Beach, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001).

A. THE CIRCUIT COURT CORRECTLY CONCLUDED, AS A MATTER OF LAW, THAT A FLAGPOLE IS *NOT* A MONUMENT UNDER ANY OF THE PROFFERED DEFINITIONS OF THE TERM.

Abdo repeatedly asserts that the term "monument" must be strictly construed to encompass a flagpole, but, as the circuit court recognized, a flagpole is not a monument under any proffered definition of the term. Abdo initially contends that a flagpole is a monument under Merriam Webster's on-line dictionary definition of "monument" as a "memorial stone or building erected in remembrance of a person or event." **(App.'s Br. pp. 8-9).** As the circuit court recognized, a flagpole is neither a memorial stone nor a building. **(Order p. 7).**

Abdo also points to a definition of "monument" included by Batchelder in a presentation to the BZA **(R. p. 36)** to contend that a monument is "an outstanding, enduring, and memorable example of something." **(App.'s Br. p. 9).** But a flagpole is not an example of anything, nor is a flagpole outstanding, enduring, or memorable. As the circuit court concluded, a flagpole is not "outstanding, enduring, or memorable, in and of itself . . . ." **(Order. p. 7).**

Batchelder defined a "monument" as "a statue, building, or other structure erected in a public or semi-public space to commemorate a famous or notable person or event." **(R. p. 1).** Abdo challenges this conclusion because it recognizes that the term "monument" connotes a public element and because it suggests that a monument must commemorate someone or something

"famous" or "notable." Respondents disagree with Abdo's challenge. See Argument II, *infra*. However, even accepting this argument, a flagpole is not a statue, building, or other structure erected to commemorate *any* person or event. As the circuit court explained, a "flagpole is not an example of anything traditionally commemorative . . . ." **(Order p. 7).**

While Abdo relies extensively on Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015), to support his position, nothing in Hinde changes the simple fact that a flagpole is not a monument in any sense of the word. The circuit court's decision should be affirmed and this appeal dismissed for this reason alone. See Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 254 (1996) (recognizing appellate court need not address other issues when one is dispositive).

B. THE CIRCUIT COURT CORRECTLY INTERPRETED THE TERM "MONUMENT" TO AVOID AN ABSURD RESULT.

Abdo represents that *his* flagpole should be considered a "monument" because he intends to attach an American flag to the flagpole in order to memorialize his family members and other who served in the United States Armed Forces. **(R. p. 50, lines 6-12).** "We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

The circuit court correctly recognized that such a construction would lead to an absurd result. Abdo's subjective intent to attach the same flag to the flagpole in perpetuity ignores that a flag is interchangeable, whereas zoning approval typically runs with title. See S.C. Code Ann. § 6-29-1550 (explaining that zoning approvals generally run with title to the land). Under Abdo's interpretation, Abdo or any successor-in-title to the Property may, by the simple expedient of

changing out the flag, convert the flagpole from a "monument" to a "mere" flagpole and back again.

Even more telling, under Abdo's interpretation, a successor-in-title who does *not* subjectively intend for the *same* flag to commemorate anyone or anything would convert what Abdo characterizes as a monument back to a "mere" flagpole. Such an interpretation would lead to an absurd result which could not have been intended by City Council. An appellate court may affirm on this ground alone. See Anderson, 322 S.C. at 420, 472 S.E.2d at 254 (recognizing appellate court need not address other issues when one is dispositive).

II. THE CIRCUIT COURT CORRECTLY AFFIRMED THE BZA'S CONCLUSION THAT THE TERM "MONUMENT," READ IN CONTEXT WITH THE OTHER PROVISIONS OF SECTION 54-505.a, INCLUDES A PUBLIC ELEMENT.

The circuit court held that "the Board's decision that the term 'monument' in Section 54-505(a) connotes a 'public' or 'semi-public' element that is missing from [Abdo]'s flagpole is correct as a matter of law." **(Order p. 8).** Section 54-505.a provides, in pertinent part:

> The height limitations of this Chapter shall not apply to church spires, belfries, cupolas and domes not intended or used for human occupancy; monuments, water towers, observation towers, transmission towers, masts and aerials, provided that such uses are not within the aircraft landing approach zone

(R. p. 34; p. 60) (emphasis added).

"The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose." Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967). "In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent." Id. "Every technical rule as to construction of a statute is subservient to and must yield to the expression of

the will of the legislature, since all rules of statutory construction have for their sole object the discovery of the legislative intent and are valuable only insofar as in their application they aid the courts in their endeavor to ascertain that intent." Id. at 391-92, 154 S.E.2d at 676.

"According to the doctrine of *noscitur a sociis*, the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991); see also Eagle Container Co., LLC v. Cty. of Newberry, 379 S.C. 564, 570, 666 S.E.2d 892, 895-96 (2008) (applying the same rules in interpreting a zoning ordinance).

Each of the terms associated with the term "monuments" in section 54-505.a—water towers, observation towers, transmission towers, masts and aerials—connotes a "public" or "semi-public" element. See, e.g., S.C. Regs. Ann. § 103-701 to -782 (regulating water plants, defined to include water towers); Ross v. Harris, 860 N.E.2d 602, 607-08 (Ind. Ct. App. 2006) (recognizing absurdity of permitting a 55-foot addition to applicant's residence in the guise of an "observation tower," when height limit is 30-feet).

To hold otherwise would require a court to assume that City Council intended these exceptions to be permitted as private, accessory uses on a residential lot within a residentially-zoned subdivision. Such an interpretation would be repugnant to the intent behind the creation of the underlying single-family residential zoning district. Cf. Charleston Cty. Parks & Rec. Comm'n v. Somers, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995) ("Here, we are guided by Council's express declaration of the purpose of a GC-1 zoning district: to foster an 'economically healthy business environment.' To be permitted within a GC-1 zoning district, therefore, the proposed municipal use must not be repugnant to that purpose."); Helicopter Sols., Inc. v. Hinde, 414 S.C. 1, 12, 776 S.E.2d 753, 759 (Ct. App. 2015) (interpreting zoning ordinance in light of the "obvious purpose

of the AC zoning district to accommodate '[e]stablishments providing entertainment primarily as a commercial activity.'"). The appellate court should affirm the circuit court's decision on this alternative ground.

III. THE CIRCUIT COURT ARTICULATED AND APPLIED THE APPROPRIATE STANDARD OF REVIEW IN THIS ZONING APPEAL.

Contrary to Abdo's assertion, the circuit court expressly recognized case law establishing that the construction of an ordinance is reviewed as a matter of law under a broader standard of review than is applied in reviewing issues of fact. **(Order pp. 4-5).** However, this appeal involves the interpretation and application of the term "monument" in the context of the exceptions to height limitations in section 54-505.a of the CZO. Thus, as the circuit court concluded, to the extent Abdo argues the CZO is silent or ambiguous on the issue, the "deference doctrine" applies.

In Kiawah Dev. Partners, II v. SCDHEC, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014), the Supreme Court of South Carolina explained the "deference doctrine" in the context of administrative appeals involving the interpretation and application of a statute or regulation by the agency charged with administering it: "Interpreting and applying statutes and regulations administered by an agency is a two-step process." "First, a court must determine whether the language of a statute or regulation directly speaks to the issue." Id. "If so, the court must utilize the clear meaning of the statute or regulation." Id. "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." Id. at 33, 766 S.E.2d at 717 (emphasis added), quoting Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984).

"[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering

those statutes and regulations." Id. at 34, 766 S.E.2d at 718. "As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ." Id. (emphasis added) (citations and internal quotation marks omitted). "Accordingly, the deference doctrine properly stated provides that where an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts . . . will defer to the agency's interpretation absent compelling reasons." Id. "We defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." Id. at 34-35, 766 S.E.2d at 718 (citations and internal quotation marks omitted).

The Supreme Court of South Carolina has long applied the "deference doctrine" in reviewing the decision of a board of zoning appeals. See, e.g., Purdy v. Moise, 223 S.C. 298, 304-5, 75 S.E.2d 605, 608 (1953) ("The Board therefore construed the ordinance as giving it power to grant permits for the erection and operation of such places of business and this construction of its own ordinance, the enforcement of which it is charged with, should be given some consideration and not overruled without cogent reason therefor.").

None of the decisions cited by Abdo address the Supreme Court's articulation of the "deference doctrine" in Kiawah Dev. Partners, II. The circuit court articulated this standard and applied it, while concluding that BZA's decision should not only be affirmed under the "deference doctrine," but also as a matter of law. See **Order p. 3** (articulating "deference doctrine"); **Order p. 5** ("As a matter of law, the Court concludes that the [BZA]'s decision that a flagpole is not a monument within the meaning of Section 54-505(a) of the CZO is correct."); **Order p. 7** (rejecting Abdo's argument because BZA's decision "not arbitrary and [] correct as a matter of law") (emphasis added); **Order p. 8** ("The Court concludes that the Board's decision that the term

'monument' in Section 54-505(a) connotes a 'public' or 'semi-public' element that is missing from Appellant's flagpole is correct as a matter of law.").

Nevertheless, the circuit court also emphasized: "To the extent [Abdo] argues that section 54-505(a) is silent or ambiguous on the issue, the Court defers to the [BZA]'s interpretation of the CZO and the term 'monument' because nothing in the record supports a finding that the [BZA]'s interpretation is arbitrary, capricious, or manifestly contrary to its purpose." **(Order p. 8)** (emphasis added).

The circuit court did not commit an error of law in articulating and applying the deference doctrine under the facts of this case. As a result, the circuit court's decision should be affirmed.

IV. ABDO MISCONSTRUES THE BZA'S STANDARD OF REVIEW IN ADDRESSING AN ADMINISTRATIVE OFFICER'S DECISION.

Abdo argues that the BZA erred in failing to limit its review to the reasoning expressed by the Zoning Administrator in his October 17, 2018 email. Not so.

The BZA has the authority "to hear and decide appeals where it 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). "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." S.C. Code Ann. § 6-29-800(E) (emphasis added).

"The Board of Zoning Appeals exercises substantial power in its review of Zoning Administrators' decisions." Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 465, 602 S.E.2d 76, 79 (Ct. App. 2004), aff'd Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 642 S.E.2d 565 (2007). "Few restrictions encumber the scope of the Board's authority." Id.

"Rather than binding the Board to the conclusion or reasoning of the zoning administrator, the forgoing statute and [Myrtle Beach's] ordinance authorizes the Board to review the basis of the zoning administrator's decision, consider the basis of the appeal, and apply the appropriate provisions of the zoning ordinance as dictated by the facts before it." Id.

Accordingly, the BZA properly "stepped into the shoes" of the Zoning Administrator instead of limiting its review to the Zoning Administrator's reasoning.

V. ABDO'S ARGUMENT THAT HIS RESIDENTIAL LOT IS LOCATED IN A "PUBLIC" OR "SEMI-PUBLIC" AREA IS UNPRESERVED AND INCORRECT ON ITS MERITS.

During oral argument before the circuit court, Abdo asserted, for the first time, that the visibility of his residential lot from public or semi-public areas complies with the "public element" interpretation adopted by the Board. **(Hrg. Tr. p. 15, line 22-p.16, line 10).** This argument was not raised in Abdo's notice of appeal under section 6-29-820 of the South Carolina Code. Therefore, it is not preserved. See Newton v. Zoning Bd. of Appeals for Beaufort Cty., 396 S.C. 112, 117, 719 S.E.2d 282, 284 (Ct. App. 2011) ("[T]he sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires."). On the merits, the circuit court properly concluded that the visibility of a residential lot within a residential neighborhood does not convert the lot into the type of public or semi-public space contemplated by section 54-505.a of the CZO.

CONCLUSION

A flagpole is not a monument under the CZO. This conclusion is warranted as a matter of law or under the "deference doctrine."

For the reasons set forth herein, the circuit court's decision should be affirmed.

Respectfully Submitted,

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May 4, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2019-CP-10-1434
Appellate Case No. 2019-001910

David Abdo, Appellant,

v.

City of Charleston and
Board of Zoning Appeals-Zoning, Respondents.

PROOF OF SERVICE

I certify that I served the Initial Brief and Designation of Matter of Respondents City of Charleston and Board of Zoning Appeals-Zoning (collectively, "Respondents") on Appellant David Abdo, by e-mail to his counsel-of-record, John A. Massalon, on May 4, 2020. See S.C. Sup. Ct. Order No. 2020-03-20-01(g)(3). A copy of the email is attached hereto and incorporated herein by reference as Exhibit 1.

May 4, 2020

s/Daniel S. McQueeney, Jr.
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Mcqueeney, Daniel Exhibit 1

From: Mcqueeney, Daniel
Sent: Monday, May 4, 2020 6:45 PM
To: John A. Massalon
Subject: Appellate Case No. 2019-001910, Abdo v. City of Charleston
Attachments: City's Initial Br & DOM 5-4-2020.pdf

John:

Attached for service upon you, please find a copy of Respondents' Initial Brief and Designation of Matter, as well as a copy of the cover letter to the Clerk of Court and proof of service of same. Hope you are well! Thank you.

Chip

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May 4, 2020

VIA FACSIMILE ONLY TO (803) 734-1839

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

RE: RE: David Abdo v. City of Charleston
Appellate Case No. 2019-001910

Dear Ms. Kitchings:

Please be advised that I represent Respondents City of Charleston and Board of Zoning Appeals-Zoning ("Respondents") in the above-referenced matter. Attached for filing, please find a copy of Respondents' Initial Brief and Designation of Matter, along with Proof of Service of same on all other counsel of record by email. Pursuant to Section (g)(3) of Order No. 2020-03-20-01 of the Supreme Court of South Carolina, a copy of the sent email is attached as Exhibit 1 to the Proof of Service.

Thank you for your consideration. With kindest regards, I am,

Very Truly Yours,

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