THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Ninth Judicial Court

The Honorable Bentley Price
The Honorable Markley Dennis

App. Case No. 2019-001671

J. Doe,

Appellant,

v.

Design Review Board (DRB) of the Town of Sullivans Island (S.I.), Svjetlana Bilic Damjanovic, Individually and d/b/a Alka Construction Co., Branko Damjanovic, Individually and d/b/a Alka Construction Co., Kenneth Craft, III, Individually and d/b/a Craft Design Co., and Alka Construction Co.,

Respondents.

INITIAL BRIEF

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For Appellant

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VII. Assuming jurisdiction, which is denied, the General Assembly intended to and did provide for ADR, including mediation, in all civil cases including this one, and the lower court erred in denying mediation, thereby disregarding legislative intent, the letter and spirit of the laws, the ADR statutes, and South Carolina Supreme Court Orders.

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STATEMENT OF FACTS

In 2018, developers, Svjetlana and Branko Damjanovic, submitted to the DRB an incomplete/insufficient incongruous 1616 Poe Avenue application for preliminary approval which garnered a resounding unanimous Board vote of "No." The plans were scrapped. Thereafter, in 2019, another incomplete/insufficient incongruous 1616 Poe Avenue application for preliminary approval was submitted but, on information and belief, failed to include payment in full. The neighboring and community property owners appeared at the multiple hearings to oppose the application including but not limited to, established full-time resident property owners behind, in front, on each side, contiguous, surrounding, in the vicinity, and in the community of 1616 Poe Avenue. Multiple Board members requested that the application be scaled back and/or decreased as to mass, height, size, scale, character, density, and compatibility. The record reflects little or no material changes to mass, height, size, scale, character, density, and compatibility. Regrettably, the subsequent plans materially and/or substantially differed from the changes the Board required. The right under applicable law for the appellant to timely request rehearing was wrongfully denied. Thereafter, appellant's notice of appeal, petition, and request for mediation were timely filed in the circuit court.

STANDARD OF REVIEW

Generally, appeal from a final order of the circuit court following its review of the zoning board's decision is to the court of appeals. S.C. Code § 6–29–940; Rule 203(d), SCACR. Appellate courts regard appeals from zoning decisions in the same manner as appeals from other circuit court judgments in law cases. *Petersen v. City of Clemson*, 312 S.C.162, 169-70, 439 S.E.2d 317, 322 (Ct.App.1993) (citing *Bishop v. Hightower*, 292 S.C. 358, 360, 356 S.E.2d 420, 421 (Ct.App.1987)). Even if a court disagrees with a zoning board's decision, the court will refrain from substituting its judgment for that of the zoning board unless the decision "is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the [zoning] board has abused its discretion." *Rest. Row Assocs. v. Horry Cnty.*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." *Cnty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902, 904 (Ct.App.2002). This Court is free to decide matters of law with no particular deference to the lower court. *Pressley v. REA Constr. Co.*, 374 S.C. 283, 648 S.E.2d 301, 303 (Ct.App. 2007).

The standard of review for statutory interpretation is as follows. "An issue regarding statutory interpretation is a question of law." *Lightner v. Hampton Hall Club*, Inc., 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017) (quoting *Univ. of S. California v. Moran*, 365 S.C. 270, 274, 617 S.E.2d 135, 137 (Ct. App. 2005)). As to questions of law,

this court's standard of review is de novo. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

The standard of review for declaratory judgment is as follows. "The decision to grant a declaratory judgment is a matter [that] rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse."4 *Eargle v. Horry Cty.*, 344 S.C. 449, 453, 545 S.E.2d 276, 279 (2001) (quoting *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 319 S.C. 388, 390, 461 S.E.2d 819, 820 (1995)). "An abuse of discretion occurs [when] the trial court is controlled by an error of law or [when] the [c]ourt's order is based on factual conclusions without evidentiary support." *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000). *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Planning Comm'n* (S.C. App., 2019)

The Court may apply the same standard to appeal of DRB decisions that it would apply to Zoning Board decisions. "A decision of a zoning board will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion." *Peterson Outdoor Advertising v. City of Myrtle Beach*,327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165,173-74, 656 S.E.2d 346, 351(2008)(applying Zoning Board standards). Further, "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." *Rest. Row Assocs. v. Horry Cty.*,335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

Although a review Court gives deference to those applying local zoning ordinances, ordinances are subject to "a broader and more independent review . . . when the issue concerns the construction of an ordinance." *Eagle Container LLC v. County of Newberry*,379 S.C. 564, 568 666 S.E.2d 892 894 (2008),cited in *Mikell v. County of Charleston*, 386 S.E.2d 326, 687 S.E.2d 326, 329 ((2009).

ARGUMENT

I. As a threshold matter, the lower court orders are challenged based on lack of jurisdiction and/or propriety as a matter of law. Remand is respectfully requested.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Initially, the orders on appeal fail to comply with the requirements including, but not limited to, adequate explanation for meaningful judicial review which is a due process violation. As an example, both sides filed Rule 59e, SCRCP, motions after the hearing on December 8, 2019, before a newly-minted judge, Judge Bentley Price, and the 12.08.19 transcript documents that both sides expressed lack of adequate notice and questioned what was being heard that day, thereby denying both sides adequate notice and meaningful opportunity to be heard. Remand is respectfully requested.

Moreover, the record reflects there is no jurisdiction for a new or different judge, Judge Price, at the December 8, 2019, hearing due to appellant's outstanding and pending Motion to Recuse Judge Dennis, who signed the first order filed 8.19.19 and who is the only judge with jurisdiction to rule on his own recusal.

Even assuming Judge Bentley Price had jurisdiction, which is denied, a motion to recuse takes precedence and there is lack of jurisdiction/propriety for other orders prior to resolution of the motion to recuse. Accordingly, there is no jurisdiction/propriety for Judge Bentley Price's orders.

Even assuming Judge Bentley Price had jurisdiction, which is denied, Judge Dennis is not authorized to hand-pick Judge Price to hear a motion to recuse Judge Dennis. Appellant is prejudiced thereby and requests remand with pertinent instructions.

The record reflects Motion to Recuse Judge Dennis was filed on 8.05.19. Thereafter, Judge Dennis' order filed on 8.19.19 is reversible as a matter of law because the Motion to Recuse Judge Dennis was then pending. There is lack of jurisdiction/propriety for any order entered prior to resolution of the Motion to Recuse. Judge Dennis' wrongful 8.19.19 order confirms the merits of the motion to recuse because that wrongful 8.19.19 order evidences the predetermined outcome of denial of the motion to recuse even before a hearing on the merits. Lack of impartiality, which is a substantial right, is reasonably questioned due to including but not limited to, record evidence of predetermined outcome before there has been a hearing on the merits of recusal.

Furthermore, even assuming Judge Bentley Price had jurisdiction, which is denied, the motion to recuse Judge Dennis was denied by order dated 1.17.20, which vests jurisdiction in Judge Dennis, not any other judge. Accordingly, there is no jurisdiction/propriety for Judge Bentley Price's orders. See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

II. As a threshold matter, appellant objected to and motioned for clarification/correction of the TOSI's Certification of Record entered 7.24.19.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. As a threshold matter, appellant objected to and motioned for clarification/correction of the TOSI's Certification of Record entered 7.24.19. That Certification of Record is not provided in the usual and customary manner, is not provided in chronological fashion, contains inadvertent omissions/deletions, and/or appears to include unrelated material. To the extent the irregularities cause or could cause misinformation/misstatements, confusion, and/or detract from the merits, appellant respectfully requests re-submission by the TOSI. On information and belief, the signatory is not the secretary at the time of some or all of the DRB hearings. Defendants' motion to dismiss based in whole or in part on inaccurate Certification of Record should be denied pending resolution which is hereby requested. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14;

S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

III. Denial of Due Process.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The record reflects the TOSI failed to copy the other side and failed to file certificate of service for the proposed 8.19.19 and 2.18.20 orders in violation of the Rules of Professional Conduct, prohibition against impermissible ex parte contact, fundamental fairness, and controlling case law. *Burgess v. Stern*, 428 S.E.2d 880, 311 S.C. 326 (S.C., 1992). The wrongdoing denied substantial rights including but not limited to, timely notice and meaningful opportunity to be heard. But for reliance on dated case law, there should have and would have been a different result in appellant's favor, including but not limited to, the case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019). Accordingly, appellant should be given a meaningful opportunity to respond on remand. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1)

adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

IV. Impermissible ex parte order.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The record reflects developers' counsel failed to serve the 2.10.20 motion, failed to provide a certificate of service, failed to provide the required notice thereby denying meaningful opportunity to be heard, and engaged in impermissible ex parte contact. Rule 6, SCRCP. There are no exigent circumstances, there is no evidence in the record as factual support for exigent circumstances, developers' counsel has not specified any exigent circumstances, and developers' counsel has not claimed exigent circumstances. Accordingly, appellant respectfully requests reversal. In the alternative, appellant requests meaningful opportunity to respond on remand.

Further, developers' counsel failed to copy the other side and failed to file certificate of service for his proposed 2.21.20 order in violation of the Rules of Professional Conduct, prohibition against impermissible ex parte contact, fundamental fairness, and controlling case law. *Burgess v. Stern*, 428 S.E.2d 880, 311 S.C. 326 (S.C., 1992). The wrongdoing denied substantial rights including but not limited to, timely

notice and meaningful opportunity to be heard. The 2.21.20 order is reversible as a matter of law due to error of material fact and law. Moreover, the record reflects the motion and its order are unsupported, there is insufficient, if any, evidence in the record to support the ex parte order, and the record relects the ex parte order is patently false. But for denial of appellant's substantial rights including but not limited to, denial of notice and meaningful opportunity to be heard, the outcome should have and would have been different in appellant's favor. Accordingly, appellant respectfully requests meaningful opportunity to respond on remand. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

V. The appellant has standing to and did timely request pre-litigation mediation under S.C. Code § 6-29-900 et seq.

Each assertion set forth in this document that is consistent with the following is

incorporated herein by reference as if here set forth verbatim. Our State's barrier islands and beaches are a precious public resource for the people of South Carolina. While the islands are a finite resource, a bevy of competing environmental, economic, and social uses seek to lay claim to them. The legislative branch has made policy decisions as to how those uses should be balanced in order to maximize the benefit to the people of South Carolina and enacted statutes to fulfill those policy decisions. The task falls to the courts to ensure that those statutes and regulations are correctly applied. *Kiawah Devt. Partners v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 766 S.E.2d 707, 710 (S.C. 2014).

A. The plain language of the statute supports standing to request pre-litigation mediation under S.C. Code § 6-29-900 et seq.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. "Notably, the parties agree that Appellant had standing to appear before the *Design Review Board*. In fact, Developer has admitted that Appellant's members include persons who own property and live in the immediate vicinity." *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), fn. 6 (emphasis supplied). The record reflects the petitioner herein owns property, lives in the immediate vicinity (i.e., across the street), and has a substantial interest in the Historic District where both properties are located. As an example, zoning ordinances establishing impervious surface limitations are enacted for the benefit of adjacent and neighboring property owners in order to protect them from damages caused by excessive stormwater runoff. The intended

beneficiaries of the zoning ordinances establishing impervious surface limitations are surrounding property owners who could and would be adversely affected. Respondents' interpretation would render the zoning ordinances establishing impervious surface limitations superfluous because the intended beneficiaries, surrounding property owners, would be unable to obtain that benefit.

Accordingly, the plain language of the statute supports standing to request pre-litigation mediation.

B. The statutory scheme as a whole supports standing to request pre-litigation mediation.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. Specifically, S.C. Code § 6-29-900 *et seq.* provides for mediation herein as outlined in the recent case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (COA Case No. 2017-000170 with remittitur filed in the Circuit Court on June 12, 2019). LUDRA (*South Carolina Land Use Dispute Resolution Act enacted June 2, 2003*) amends the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 by allowing a property owner whose land is the subject of a decision by the board of zoning appeals, board of architectural review or planning commission to file a notice of appeal with the circuit court, accompanied by a request for mediation. The statute could have been limited to the applicant property owner, but instead included property owners whose land is the subject of such a decision including surrounding property owners such as the appellant. Pursuant to S.C. Code § 6-29-900 *et seq.*, the request must be granted:

Subsection (D)(2) carves out the subclass of property owners and gives this subclass the option of seeking pre-litigation mediation in addition to an appeal....Hence, LUDRA amended existing provisions governing appeals from a board of architectural review (section 6-29-900) by adding the option for pre-litigation mediation. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019).

supports standing to request pre-litigation mediation.

Accordingly, the statutory scheme as a whole supports appellant's standing to request pre-litigation mediation.

C. The lower court's interpretation of the statute, S.C. Code § 6-29-900 et seq., erroneously limits the right to request pre-litigation mediation which leads to an absurd result.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), provides:

Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute. Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (citation omitted). Further, "[t]he intention of the legislature must be gleaned from the entire section and not simply clauses taken out of context." *Singletary v. S.C. Dep't of Educ.*, 316 S.C. 153, 162, 447 S.E.2d 231, 236 (Ct. App. 1994). A statute "must be read as a whole and sections [that] are part of the same general statutory law must be construed together and each one given effect." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). "We therefore should not concentrate on isolated phrases within the statute." *Id.* "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." *Id.* "In that vein, we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or

superfluous,'for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.'" *Id.* (citation omitted) (alterations in original) (quoting *State v. Sweat*, 379 S.C. 367, 377, 382, 665 S.E.2d 645, 651, 654 (Ct. App. 2008) (emphasis supplied)).

The Legislature could have limited pre-litigation mediation to the applicant property owner before the DRB but did not. Impervious surface limitations are an example of ZO's with neighboring property owners as the intended beneficiaries. Public policy supports the request for pre-litigation mediation after DRB decision which adversely affects the property owner appellant herein whose land is thereby the subject of a decision of the DRB. Limiting pre-litigation mediation to the applicant property owner leads to impermissible unequal treatment and/or absurd result. The statute supports appellant's request for pre-litigation mediation herein.

"Notably, the parties agree that Appellant had standing to appear before the *Design Review Board*. In fact, Developer has admitted that Appellant's members include persons who own property and live in the immediate vicinity." *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), fn. 6 (emphasis supplied). The record reflects the appellant herein owns property and lives across the street in the immediate vicinity within the Historic District linking the Officer's Quarters with Fort Moultrie and Battery Logan. Moreover, that case confirms petitioner's right to request mediation as follows:

In its brief, Developer argues that in LUDRA, the legislature drew a distinction between appeals from a *DRB* and appeals from a planning commission by allowing appeals from a *DRB* decision by a "person who may have a substantial interest in" the decision (*section 6-29-900*) while declining to expressly authorize anyone other than a property owner to appeal in section 6-29-1150(D). However, the standing provision in section 6-29-820 was

in place before LUDRA was enacted. Further, prior to the enactment of LUDRA in 2003, the provision in section 6-29-1150 allowing an appeal to circuit court, then located in subsection (C), did not specifically mention property owners. Following Developer's logic, even property owners did not have standing to appeal prior to LUDRA's enactment, which would render the appeal language meaningless due to the lack of standing for any class of persons wishing to appeal. Such a result is unacceptable. See *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the [l]egislature or would defeat the plain legislative intention."); *State v. Long*, 363 S.C. 360, 364,610 S.E.2d 809, 811 (2005) ("The legislature is presumed to intend that its statutes accomplish something.").

In fact, LUDRA also added the language found in subsection (D)(2), specifically mentioning property owners, to sections 6-29-820 and *6-29-900* (governing appeals from decisions of boards of zoning appeals and *boards of architectural review*). See 2003 Act No. 39, §§ 3, 8(amending sections 6-29-820 and *6-29-900 to allow property owners the option of adding a request for pre-litigation mediation to the notice of appeal*). Both of these statutes included an appellate standing provision before LUDRA amended these statutes in 2003, and the addition of LUDRA's pre-litigation mediation option for property owners did not result in a corresponding reduction in the class of possible appellants in these statutes—the appellate standing provisions in both statutes remained intact.

Therefore, it is unlikely that in enacting LUDRA, the legislature intended to diminish the class of potential appellants seeking review of a planning commission *(or DRB)* decision when it added the pre-litigation mediation option for property owners to section 6-29-1150 *(and S.C. Code § 6-29-900 et seq.)*. Rather, it left the existing provisions in *all three statutes* intact. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019), p. 11 (emphasis supplied) (bold in original).

Accordingly, the legislature intended to provide the appellant, a property owner who lives across the street in the immediate vicinity in the Historic District with a substantial interest who is adversely affected, standing and the statutory right to timely request pre-litigation mediation.

D. The statutory scheme as a whole and/or comparison of parallel statutory schemes compels a broader interpretation of property owner as a party with standing to request pre-litigation mediation.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. A parallel statutory scheme, also under the Comprehensive Planning Enabling Act (CPEA), may be found at S.C. Code Ann. § 6-29-820 regarding appeals from the zoning board. The statutory scheme there has undergone parallel changes. The original § 6-29-820 under the 1994 Act read as follows:

Section 6-29-820, A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

(Compare the original § 6-29-900 et seq appeal provision at South Carolina Local Government Comprehensive Planning Enabling Act of 1994, Act 355, 1994 Acts). Amendments in 2003 changed the section to read in a similar form to the section at issue, as follows:

Section 6-29-820. Appeal from zoning board of appeals to circuit court; pre-litigation mediation; filing requirements.

(A) A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

(B) A property owner whose land is the subject of a decision of the board of appeals may appeal either:
(1) as provided in subsection (A); or
(2) by filing a notice of appeal and request for pre-litigation mediation in accordance with Section 6-29-825.

Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

It is noted appellant timely filed both a petition and notice of appeal with mediation request within the 30 days herein.

The legislature went on to provide similar mediation guidelines, in a similar form to the section at issue herein, in a new subsection S.C. Code § 6-29-900 et seq. At least two cases have been filed with this Court under this statutory language, and neither challenged the appeal on the basis that the appellants were not property owners. This Court has noted that under this scheme, non-property owner appellants (as opposed to property owner appellants herein) who challenged whether the decision was correct as a matter of law had standing, even though their positions had not been presented at the public hearing or communicated to the Board prior to filing the appeal petition with the circuit court merely by filing their issues on appeal in a written petition before the thirty-day filing period had expired. *Newton v. Zoning Board of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (Ct. App. 2011), reh'g denied; *Bevivino v. Town of Mt. Pleasant Bd. Of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013).

In a similar situation under the prior statutory scheme, this Court found that a community group, Spanish Wells Property Owners Association (POA), had standing to appeal a planning commission's grant of a development permit under the "any person who may have a substantial interest" standard in the old S.C. Code § 6-7-750: "Spanish

Wells and its members, as the owners of property adjacent to and in the near vicinity of the Calibogue development, are persons with a substantial interest in the Board's decision. The statute, therefore, gives Spanish Wells standing to appeal." *Spanish Wells Property Owner"s Ass'n, Inc., v. Board of Adjustment of Town of Hilton Head Island*, 292 542, 357 487 (Ct. App. 1987), (overruled on other grounds, *Spanish Wells Property Owner"s Ass'n, Inc., v. Board of Adjustment of Town of Hilton Head Island, 295 67, 367 160 (1988). See also Bevivino v. Town of Mt. Pleasant Bd. Of Zoning Appeals,* 402 S.C. 57, 737 S.E.2d 863, 867 (Ct. App. 2013) (finding standing under the S.C. Code § 6-29-820 language "any person who may have a substantial interest" in the zoning board decision" in individuals who lived in proximity to the approved project to appeal a Board of Zoning Appeals decision even when they never attended a Board hearing.) It is respectfully submitted the statutory scheme as a whole and/or comparison of parallel statutory schemes compels a broader interpretation of property owner as a party with standing to request pre-litigation mediation.

The Municipal Association of South Carolina (MASC) has published a guide for its constituents on the application of the Comprehensive Land Development Enabling Act (CLDEA). The MASC guide describes the parallel provisions of the enabling statute governing boards of zoning appeals, DRB's, and planning commissions, and how the 2003 amendments provided additional remedies for a property owner, but did not ameliorate any rights of non-property owners to appeal decisions impacting their communities. Municipal Association of South Carolina, *2018 Comprehensive Planning Guide for Local Governments.* Accordingly, consistent and uniform interpretation of the ZO's and statutory language grants the property owner appellant herein, in the immediate vicinity

in the Historic District with a substantial interest who is specially damaged, the right to appeal and to timely request pre-litigation mediation as appellant herein did. S.C. Code Ann. § 6-29-900 (2019).

VI. Pursuant to the statute, S.C. Code § 6-29-900 et seq., the lower court only had jurisdiction to order pre-litigation mediation, until and unless pre-litigation mediation is unsuccessful, and the requested mediation "must be granted." The lower court erred in failing to grant mediation.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The DRB hearing on the merits vests jurisdiction in the DRB at the pre-litigation stage; statutory authority provides property owners in the immediate vicinity whose property is adversely affected by a decision of the DRB with the right to appeal and to request mediation after the hearing; pursuant to the statute, appellant timely filed notice of appeal and mediation; the lower court erred because, pursuant to S.C. Code § 6-29-900 et seq., the request for mediation "must" be granted. The lower court erred because its only jurisdiction is to order good faith mediation at the pre-litigation. There is no jurisdiction to dismiss until and unless mediation is unsuccessful. In this case, the lower court opinion is reversible for failure to comply with the unambiguously expressed legislative intent pursuant to S.C. Code § 6-29-900 et seq., which provides that the requested mediation "must be granted."

At the pre-litigation stage, it is reversible error for the lower court to summarily dismiss the case. A property owner whose land is the subject of a decision of the board of appeals may appeal by filing a notice of appeal with the circuit court accompanied by a

request for pre-litigation mediation in accordance with section 6-29-900 et seq. If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted. S.C. Code § 6-29-900 et seq. When interpretation of a statute is required, "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Blackmon*, 304 S.C. 270, 273, 403S.E.2d 660, 662 (1991).

As per the case of *Newton v. Zoning Bd. of Appeals for Beaufort Cnty.*, 396 S.C. 112, 719 S.E.2d 282 (S.C. App. 2011), the parallel statute, S.C. Code § 6–29–820(B), is designed to encourage pre-litigation mediation by NOT requiring the filing of a petition until and unless pre-litigation mediation is unsuccessful. In *Newton*, the Court made clear, "This procedure does not allow for issue identification, or even party identification, prior to the filing of a petition with the circuit court." *Id.*, p. 284 (emphasis supplied). In this case, the lower court erred as a matter of law in summarily dismissing the case at the pre-litigation stage. Accordingly, the lower court order should be reversed. See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

VII. Assuming jurisdiction, which is denied, the General Assembly intended to and did provide for ADR, including mediation, in all civil cases including this one, and the lower court erred in disregarding legislative intent, the letter and spirit of the laws, and the ADR statutes as well as South Carolina Supreme Court Orders.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The Supreme Court Order dated November 12, 2015, provides: "(W)e hereby order that the *(ADR)* program be operational in all counties in the state, effective January 1, 2016." Accordingly, the lower court erred in disregarding legislative intent, the letter and spirit of the laws, and the ADR statutes as well as South Carolina Supreme Court Orders. "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

VIII. Assuming jurisdiction, which is denied, the lower court orders are reversible based on error of law, abuse of discretion, and/or the arbitrary/capricious nature of the decision.

A. Error of Law

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. As a threshold matter, sufficient legal notice by the applicant and/or the TOSI, was not provided. The consequence of failure to provide sufficient legal notice, is invalidation of approval. The record reflects insufficient legal notice, including but not limited to, the applicant's false/misleading/incomplete application published on the TOSI's website regarding the property and its Historic District location.

As a threshold matter and on information and belief, the applicant failed to remit all or part of the required application fee, which is jurisdictional. Accordingly, without the required fees paid in full prior to the hearing, there is no DRB jurisdiction and the decision is invalid. In addition, the applicant is required to submit a complete application which was not done. The application form itself states incomplete submittals WILL NOT BE PART OF THE MEETING AGENDA. As such, no valid decision can be made on an incomplete application. An incomplete application is not a mere technicality because, including but not limited to, it provides notice to members of the DRB regarding which ZO's to apply and to the public and it creates an accurate record for future reference. Historic District standards are more stringent. Notice requirements were not met because, including but not limited to, the applicant published an incomplete application on the TOSI's website which is not fair notice to adjacent and neighboring property

owners, to the community, or to the public at large.

Moreover, the DRB essentially wrongfully re-classified the Historic District property as non- Historic District property with less stringent requirements, which the DRB has no authority to do. The DRB decision is reversible as a matter of law.

Further, it was error of law for the DRB to deny appellant's timely request for rehearing. The DRB's interpretation of the provision for timely rehearing is reversible as a matter of law, including but not limited to, it denies equal protection to property owners in the immediate vicinity with a substantial interest, adversely affected, arbitrarily and/or with no rational basis, it denies due process to property owners in the immediate vicinity with a substantial interest, adversely affected, thereby denying a meaningful opportunity to be heard at a meaningful time, and it violates principles of fundamental fairness arbitrarily and/or with no rational basis, and it violates the prohibition against unequal treatment.

Granting property owners in the immediate vicinity with a substantial interest, adversely affected, the right to request rehearing is in the best interests of the TOSI, is consistent with the letter and spirit of the Zoning Ordinances (ZO's), and assists the intended beneficiaries of the ZO's, i.e., members of the community. The right to request rehearing should not be limited to developers, especially where the DRB was denied material information submitted in advance of the hearing by members of the community. Remand is hereby requested.

Significantly and materially, the subject property located at 1616 Poe Avenue, Sullivans Island (SI), SC, is in the Historic District with more stringent guidelines, requirements, and strict compliance under the Historic District standards and zoning

ordinances in effect in a flood zone which were insufficiently applied, if at all. Regrettably, there is material and/or substantial non-compliance to the extreme prejudice of the Historic District, adjacent and neighboring property owners, and the community of Sullivans Island as well as locals, the tourist industry, historic preservationists of an iconic site marking American Independence, and the State. Adjacent and neighboring full-time residents, including the appellant, have a substantial interest in and are adversely affected by non-compliance with, including but not limited to, the Historic District standards, the comprehensive plan, and/or the zoning ordinances.

The 1616 Poe Avenue applicant requested multiple unnecessary increases and relief from ZO's and failed to meet the requirements for the requested multiple increases in the Historic District. There are no obvious obstacles, and the applicant has not claimed any, to respecting the Town's zoning ordinances, thoroughly researched, vetted, and voted. Requests for relief of multiple increases begets more requests for incompatible increases from this applicant as well as other applicants, setting an unlawful precedent. The developers and/or their out-of-state investors refused the Board's reasonable request for the developers to meet with members of the community. Moreover, the V Flood Zone and/or the anticipated change from V to AE Flood Zone has not been sufficiently considered, if at all, including but not limited to, the requirements of S.C. Code § 5-31-450 and roadway drainage.

The applicant used slurs and pejorative code words to disrespect the full-time residential neighborhood in the Historic District, including but not limited to, wrongfully characterizing the Historic District community as a teardown. For the record, the last application in the neighborhood just before the developers' was not a teardown.

The decision of the DRB was based on an error of law, in that some members of the DRB stated they believed they had no legal basis on which they could deny the plans because, including but not limited to, the applicant had been given approval for non-compliance with the Zoning Ordinances (ZO) by the Zoning Administrator (ZA) or staff and/or the Zoning Administrator (ZA) misconstrued/misrepresented that all the technical requisites of the ZO had been met. The record reflects the requirements of the ZO had not been met, including but not limited to, the requirements for legal notice and the requirements for a complete application prior to the public hearing. The appellant, the community at large, and the Historic District of Fort Moultrie are prejudiced thereby.

The DRB is the appeal mechanism for Zoning Administrator (ZA) and/or staff decisions. Clearly, if the DRB has authority to hear and act on an appeal, it has authority to disagree with a ZA and/or staff. The DRB has authority to approve or deny actions or decisions made by the ZA and/or staff. But for the DRB's admitted error of law and/or failure to apply the applicable law, the outcome should have and would have been different in favor of established full-time resident property owners behind, in front, to either side, contiguous, and surrounding 1616 Poe Avenue. Contrary to admitted error of law applied by some or all of the members, the DRB does have authority to deny plans that they believe are not in the best interests of and/or are incompatible with the Historic District and/or the community. The DRB has the authority and the responsibility to deny incomplete, insufficient, or incompatible applications. DRB considerations include, but are not limited to, the wise and efficient use of public funds, the future growth, development, and redevelopment of its area of jurisdiction, and consideration of the fiscal impact on established property owners. Pursuant to state law, the DRB has every right

to consider the applicable portions of the Comprehensive Plan while deciding matters before it. The Comprehensive Plan is a policy document which contains, including but not limited to, density considerations. The Plan is a tool to promote and maintain future growth and improve the quality of life for all residents and serves as a reference guide and a decision-making tool for local government officials.

The 1616 Poe Avenue property and Appellant's property across the street are located in the Historic District. All of the area concerned with this appeal is designated a V Flood Zone, transitioning to AE. The density is the requirement for maintaining the character of the area and defining potential impacts on the infrastructure. Allowable density is defined by the citizens (property owners) in a zoned area using a legally approved process. The applicant failed to meet the requirements for the requested multiple increases which adversely affect, including but not limited to, density and, therefore, should be denied. But for the DRB's failure to apply applicable law, there would have and should have been a different outcome with denial of unnecessary, unsubstantiated, incongruous, arbitrary increases. The DRB decision is reversible as a matter of law.

It was clear from more than one statement from members of the DRB during the hearings that they desired to deny approval of the application, but believed they were compelled by law to approve it; and such belief was an error of law. Moreover, applicants knowingly made material misrepresentations and/or material omissions which were not known until after the approval and which shpuld have and would have led to a different result. The decision is based on error of material fact and/or law and should be reversed.

Appellant requests remand to the DRB with instructions that the DRB can and

should consider the policies in the comprehensive plan, Historic District standards, the ZO's, and/or the applicable law as indicated to deny approvals and that the DRB is not bound by the recommendations of the Zoning Administrator (ZA) and/or staff, particularly given that this applicant has not met the requirements for the requested increases. "A decision of a zoning board will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion." *Peterson Outdoor Advertising v. City of Myrtle Beach*,327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165,173-74, 656 S.E.2d 346, 351(2008)(applying Zoning Board standards). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

B. Abuse of Discretion

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The decision of the DRB giving preliminary approval of the application for 1616 Poe Avenue was an abuse of discretion. The members of the audience in opposition were clearly within the description of "residents of Sullivans Island" for whom the zoning ordinances and applicable laws are intended to preserve and promote the quality of life. The developer property owner and architect are registered S.C. corporations and reside in Mt. Pleasant, SC. The established full-time residents described for the DRB the detriment to "public health, safety, economy, good order, appearance, convenience, morals, and general welfare" that the applicatiom would cause, as stated above, yet the DRB seemingly failed to give consideration to the impact on the Sullivans Island residents behind, in front, to either side, contiguous, and surrounding 1616 Poe Avenue. If future residents are considered in absentia, their public safety is in jeopardy, including but not limited to, based upon testimony given at the hearings regarding Historic District standards in a flood zone with extreme stormwater drainage issues adversely affecting the adjacent and surrounding full-time residential neighborhood and property owners as well as appellant's ingress and egress and motor vehicle access to garage, home, and property along with impaired and/or unsafe navigation of and impaired evacuation via streets, roads, and thoroughfares on the island with severe flooding when there is a hard rain unrelated to extreme weather conditions.

The application is incomplete, including but not limited to, regarding compliance with the Historic District standards. The applicant has not met the requirements for

Historic District standards and is materially non-compliant. The DRB failed to comply with the state statute for "the wise and efficient use of public funds, the future growth, development, and redevelopment of its area of jurisdiction, and consideration of the fiscal impact on property owners." The DRB decision is reversible as an abuse of discretion including but not limited to, failure to apply the applicable law and Historic District ZO's and standards regarding this Historic District property on Sullivans Island, which was settled in the late 1600's.

Land development regulations were authorized by state government, among other reasons, "to assure, in general, the wise and timely development of new areas, and redevelopment of previously developed areas in harmony with the comprehensive plans of municipalities and counties." SC Code 6-29-1120(5), 1976, as amended. Aerial maps shown by the applicant at the hearing and pointed out by statements of the community demonstrate that this application is not in harmony with and is incongruous with the existing Historic District neighboring properties, on the smaller, if not some of the smallest, of lot sizes in the TOSI. This evidence clearly demonstrates a density and usage out of harmony and incongruous with the Historic District.

Aerial maps and testimony demonstrated the existing Historic District in a flood zone. Four out of five properties on that block of smaller lot sizes have ground floor living space; the application is not in harmony with either the comprehensive plan or the current usage. Testimony included adverse impact on the appellant and other full-time residents and surrounding property owners resulting in wrongful regulatory taking.

A professional engineer has concluded the following:

1. Impermissible alteration of the historical drainage patterns, including but not limited to, direction and/or flow rate adversely impacts neighboring properties in a flood zone. (The neighbors' request for evaluation of the drainage issues fell on deaf ears though such evaluations and certifications have been routinely requested and and required of other applicants at the same time in the immediate vicinity, in the neighborhood, and around the community which begs the question why the unequal treatment.)

2. Inadequate stormwater management and excess stormwater discharge in a flood zone causes adverse effects on, including but not limited to, the water supply, water quality, health, safety, and well-being, and environmental concerns.

3. It was pointed out that because of the slope of the applicant's property and/or failure to comply with S.C. Code § 5-31-450, roadway drainage, any excess stormwater runoff would exacerbate existing flooding, including but not limited to, threatening existing single story, ground floor living space and homes in close proximity in the immediate vicinity in a flood zone.

The application wrongfully claims the established neighborhood of full-time residents is a tear-down. For the record, the last application in the neighborhood just before this one was not a tear-down and was compatible with the existing scale and character.

In failing to, including but not limited to, require a complete application with adequate notice for the benefit of interested parties, the DRB ignored the ZO, the comprehensive plans, reference guides, and standards for the Historic District in a flood zone. Moreover, the DRB approved an incompatible application which is non-compliant with Historic District ZO's and standards, and thereby abused its discretion.

The DRB abused its discretion by essentially reclassifying this Historic District application as Non-Historic District, which the DRB has no legal authority to do, and by applying inapplicable, less stringent Non-Historic District ZO's, all to the neighboring property owners' extreme prejudice, including the appellant's. The DRB decision is

reversible as a matter of law because the DRB abused its discretion by including but not limited to, failing to apply the applicable laws and Historic District ZO's, requirements, and standards. "A decision of a zoning board will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion." *Peterson Outdoor Advertising v. City of Myrtle Beach*,327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165,173-74, 656 S.E.2d 346, 351(2008)(applying Zoning Board standards). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

C. Arbitrary and Capricious Decision

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. "(A) decision of a municipal

Design Review 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." *Rest. Row Assocs. v. Horry Cty.*,335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999) (emphasis supplied). The DRB decision is unsustainable, arbitrary, and unreasonable. It ignores documented, meritorious concerns voiced by property owners behind, in front, on either side, contiguous, surrounding, and in the immediate vicinity of 1616 Poe Avenue and it fails to apply the applicable law: Historic District regulations, standards, guidelines, and ZO's in a flood zone. The DRB decision is reversible as arbitrary.

This applicant's previous application had been denied. With the next application, the DRB at the hearing requested that the applicant make changes to mass, height, size, scale, character, density, and compatibility. The record reflects developers made little or no material changes to mass, height, size, scale, character, density, and compatibility. Thereafter, the incomplete May 15, 2019, application without substantive changes to mass, height, size, scale, character, density, and compatibility was wrongfully approved without incorporating the changes needed to bring mass, height, size, scale, character, density, and compatibility into compliance as the DRB requested. The DRB decision is reversible as arbitrary.

The application as approved is internally inconsistent, incomplete, and wrongfully includes attributes and elements which were previously denied at prior hearings on previous plans. The DRB's denial of the neighbors' reasonable request for a complete application prior to approval was arbitrary and in violation of governing law. A community member noted that the DRB's denial of another applicant's requested increase while granting the developer's unsubstantiated, unnecessary, non-compliant,

and incompatible request for increase is arbitrary and capricious and contrary to applicable law. Adjacent property owners raised the following concerns:

My wife and I are looking forward to meeting our new neighbors. Our hopes and expectation are they respect the setback and height restrictions that are in place and our expectation of the DRB is they do their part to enforce the guidelines so we maintain our great island. My main points are as follows...

i. There are setback requirements in place for a reason. If the homeowner wants to achieve a certain size house, then the DRB should deny their request and encourage them to find a lot on the island that suits their square footage requirements. There are other lots on the island.

ii. What is the real reason why the homeowners need the variance? The only logical reason I can see is they want more space. If it's not for space purposes, then they should design something in accordance with the building guidelines. It's that simple. If it is for space, the DRB should deny their request and encourage the property owners to obtain a larger property on the island to build their ideal home.

iii. What are the guiding principles that the DRB uses to determine when a setback or height restriction should be granted versus denied? What are the extenuating circumstance for this homeowner where they need to go beyond the setback and height restrictions? Knowing this would be beneficial. I have not heard or read anything that makes this a unique situation. This looks to be a situation where the homeowner is doing this for either (a) an investment / future profit potential via a sale or (b) trying to get the best deal possible by purchasing a smaller lot and building a larger home or (c) disregarding the rules and guidelines that have been established to maintain the historic and consistency of our unique island. If any of these is the case, then the homeowner should be denied and encouraged to re-submit their plans once they have obtained a lot that can support their larger design where setback or height exceptions aren't needed.

Accordingly, the DRB decision is reversible as arbitrary.

Moreover, it was arbitrary for the DRB to deny appellant's timely request for rehearing under the ZO's. Granting constituents and property owners the right to request rehearing is in the best interests of the Town, is consistent with the letter and spirit of the Zoning Ordinances (ZO's), is consistent with equal protection, and assists the intended beneficiaries of the ZO's, i.e., residents and property owners of the community. The right to request rehearing should not be limited to developers especially where the developer provided an incomplete application and the DRB was denied material

information submitted in advance for the hearing by members of the community which the DRB did not receive and which could have and would have led to a different result in favor of the neighboring property owners. The arbitrary and capricious DRB decision is reversible as a matter of law. "A decision of a zoning board will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the board has abused its discretion." *Peterson Outdoor Advertising v. City of Myrtle Beach*,327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165,173-74, 656 S.E.2d 346, 351(2008)(applying Zoning Board standards). "The touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), or denial of fundamental procedural fairness, see, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972) (the procedural due process guarantee protects against "arbitrary takings"). *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). See *Moore v. Moore*, 376 S.C. 467, 657 S.E.2d 743 (2008) (procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses). See S.C. Const. art. I, sec. 2, 3, 4, 9, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. See *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

IX. Pursuant to S.C. Code § 6-29-930, the taking claim is proper.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. S.C. Code § 6-29-930 provides:

SECTION 6-29-930

Nothing in this subsection prohibits a property owner from subsequently electing to assert a pre-existing right to trial by jury of any issue beyond the subject matter jurisdiction of the board of architectural review *(DRB)*, such as, but not limited to, a determination of the amount of damages due for an unconstitutional taking.

The General Assembly enacted LUDRA for the purpose of improving and expediting the adjudicatory process for property owners who wish to file a claim for a purported regulatory taking. Bradford W. Wyche, *An Overview of Land Use Regulation in South Carolina*, 11 SOUTHEASTERN ENVTL. L.J. 183, 196-97 (2003). LUDRA amends the South Carolina Local Government Comprehensive Planning Enabling Act of 1994. Accordingly, pursuant to S.C. Code § 6-29-930, the dismissal of the taking claim is reversible as a matter of law. *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (COA Case No. 2017-000170).

X. Pursuant to S.C. Code § 15-53-130, 15-53-30, and/or 15-53-60 declaratory relief is proper.

Each assertion set forth in this document that is consistent with the following is incorporated herein by reference as if here set forth verbatim. The case of *Citizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27,

2019) (COA Case No. 2017-000170), provides as follows:

Appellant maintains that it had standing to file its declaratory judgment action with the circuit court pursuant to the Declaratory Judgment Act to seek a uniform standard for the Commission's application of the Comprehensive Land Use Plan. We agree.

The purpose of the Declaratory Judgment Act (the Act) "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered." S.C. Code Ann. § 15-53-130 (2005). Further, the Act provides,

Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann. § 15-53-30 (2005) (emphasis added).

Moreover, the Act gives courts of record the power to "declare rights, status and other legal relations whether or not further relief is or could be claimed" and confers on such declarations "the force and effect of a final judgment or decree."

... "Further, section 15-53-60 confers standing on Appellant because the specific ruling Appellant seeks would remove the uncertainty concerning the Commission's discretionary authority." C*itizens for Quality Rural Living, Inc., v. Greenville Cnty. Planning Comm'n* (S.C. App., February 27, 2019) (COA Case No. 2017-000170).

Moreover, appellant requests a clarification that the DRB is not required to grant increases and/or is not bound to "rubber stamp" the decisions of the ZA and/or the Building Department. Appellant qualifies as a person whose rights, status or other legal relations are affected by local legislation and/or ZO. The ZO's and regulations by the governing authority must include a specific procedure for the submission and approval or disapproval by the DRB. As such, appellant may have determined any question of construction or validity arising under the regulations and/or ZO's, namely, whether they give authority to the DRB to establish a clear, standardized, and consistently-applied

specific procedure for the submission of applications and approval or disapproval by the DRB. Accordingly, pursuant to S.C. Code § 15-53-30 and 15-53-60, the summary dismissal of the claim for declaratory relief is reversible as a matter of law.

CONCLUSION

In support of express legislative intent for mediation and for substantial justice affecting substantial rights, appellant respectfully requests reversal of the lower court orders.

Respectfully submitted,

Dated 11/8/2021

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Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price

App. Case No. 2019-001671

J. Doe,

Appellant,

v.

Design Review Board (DRB)
of the
Town of Sullivans Island (S.I.),
Alka Construction Co.,
Svjetlana Bilic Damjanovic,
Individually and d/b/a Alka
Construction Co., Branko
Damjanovic, Individually and
d/b/a Alka Construction Co.,
Kenneth Craft, III, Individually and
d/b/a Craft Design Co.,

Respondents.

PROOF OF SERVICE

I certify that a true copy of the above was served upon the respondents by regular first class mail postage pre-paid on this date at this address: Ben Traywick, 171 Church St., Ste. 340, Chas., SC 29401; GT Walker, 66 Hasell St., Chas., SC 29401; and Kenneth Craft III, 204 Spooner Ln., Mt. Pleasant, SC 29464.

Dated 11/8/2021

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RECEIVED
Nov 08 2021
SC Court of Appeals

Hard copy available on request -

Thank You!

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