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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Perry Gravely, Circuit Court Judge

Appellate Case No. 2021-001063

Frances Baty, Helene Lambert, Michael Evatt, O.D. Strickland,
Keith Godfrey, Bonnie Spearman, Allison Morton, Brian Morton,
Janet Lamb and Henry Lamb.....Appellants,
v.
Greenville County Planning Commission and Mark III Properties, LLC.....Respondents.

APPELLANTS FRANCES BATY AND O.D. STRICKLAND’S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....4

STATEMENT OF THE CASE.....5

STATEMENT OF THE FACTS.....6

ARGUMENT

I. By holding that the trial court “must uphold the planning commission’s decision if there is any evidence to support it,” the lower court committed an error of law by basing its decision on an incorrect standard of review that ignored the well settled principle that a decision of a planning commission will not be upheld where it is based on errors of law, the board acts arbitrarily or unreasonably, or where, in general, the commission has abused its discretion10

II. Where a proposed development is on a state road and a Traffic Impact Study is required, the SCDOT ARMS and the LDR establish minimum requirements for Traffic Impact Studies and the Planning Commission does not have the authority to unilaterally waive or alter those specific standards, procedures, and requirements.12

III. The Planning Commission engaged in an abuse of discretion as a matter of law when, in direct violation of its By-Laws and Rules of Order, the commissioners, after a first motion to approve the Cottonwood application failed and without motion to reconsider or to rescind the original vote, again moved and voted to approve the Cottonwood application, which ultimately passed on the second vote.22

IV. By engaging in clearly disparate treatment of Appellants and Respondent, as opposing parties, with regard to the February 24, 2021 hearing, the Planning Commission negatively and materially impacted Appellants’ right to meaningfully participate and be heard, and in so doing denied Appellants the guarantee of due process and equal protection of law.24

CONCLUSION.....27

TABLE OF AUTHORITIES

Cases

Anderson Cnty. v. Joey Preston & the S.C. Ret. Sys., 420 S.C. 546, 804 S.E.2d 282 (Ct. App. 2017) 23

Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 606 S.E.2d 209 (Ct. App. 2004) 11

Carolina Chloride Inc. v. Richland Cty., 394 S.C. 154, 714 S.E.2d 869 (2011) 11

Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019)..... 5, 21, 25

Colbert v. Krawcheck, 299 S.C. 299, 384 S.E.2d 710 (1989) 11

Cooper v. S.C. Dep't of Prob., Parole & Pardon Servs., 377 S.C. 489, 661 S.E.2d 106 (2008).. 11, 22

Devaney v. Board of Zoning Appeals, 132 Conn. 537, 45 A.2d 828, 829 (Conn. 1946)..... 20

Doe v. South Carolina Dept. of Health and Human Servs., 398 S.C. 62, 727 S.E.2d 605 (2011) 16

Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007) 24

Grays Hill Baptist Church v. Beaufort Cnty., 427 S.C. 57, 65, 828 S.E.2d 234, 238 (Ct. App. 2019) 11

Grays Hill Baptist Church v. Beaufort Cnty., 431 S.C. 630, 850 S.E.2d 29 (2020)..... 11

Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1986)..... 24, 26

Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015)..... 19

Hipp v. S.C. Dep't of Motor Vehicles, 381 S.C. 323, 673 S.E.2d 416 (2009)..... 26

Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953) 20

I'ON, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)..... 20, 25

Kosciusko v. Parham, 428 S.C. 481, 836 S.E.2d 362 (Ct. App. 2019)..... 18

Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 656 S.E.2d 346 (2008)..... 11

McCrowey v. Zoning Bd. of Adjustment, 360 S.C. 301, 599 S.E.2d 617 (Ct. App. 2004) 21

McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 823 S.E.2d 193 (Ct. App. 2018)..... 26, 27

Mikell v. County of Charleston, 386 S.C. 153, 687 S.E.2d 326 (2009) 11

Olds v. City of Goose Creek, 418 S.C. 573, 795 S.E.2d 163 (Ct. App. 2016) 11, 15

Riverwoods, LLC v. Cty. of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002) 18

Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013) 16

State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002)..... 16, 17

Stevenson v. The Board of Adjustment of the City of Charleston, 230 S.C. 440, 96 S.E.2d 456 (1957)..... 12

Strickland v. State, 276 S.C. 17, 274 S.E.2d 430 (1981)..... 13

Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013) 13

Turbeville v. Morris, 203 S.C. 387, 26 S.E. 2d 821 (1943)..... 24

Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct.App.2000) 19

Statutes

S.C. Code Ann. § 6-29-1150..... 12

S.C. Code Ann. § 6-29-1150(A) 20, 25

Other Authorities

Robert's Rules of Order, HENRY M ROBERT ET AL., Section 38, Renewal of a Motion (11th ed. 2013) 22

<u>Robert's Rules of Order</u> , HENRY M ROBERT ET AL., Section 46, <u>Voting</u> (11th ed. 2013).....	22
<u>Collins Online Dictionary</u> . "Existing" https://www.collinsdictionary.com/us/dictionary/english/existing (2 Aug. 2021).....	16

Regulations

LDR 1.1.....	13
LDR 1.5.....	13
LDR 1.6.5.....	13, 14
LDR 3.1.....	8
LRD 3.2.1.....	14, 20
LDR 9.1.....	7, 13
LDR 9.2.....	7, 15, 17
LDR 9.2(A).....	17
LDR 9.2(C).....	9, 16
LDR 9.2(D).....	18
LDR 9.2(E).....	18
South Carolina Department of Transportation's Access and Roadside Management Standards Manua, Section 6A.....	18
South Carolina Department of Transportation's Access and Roadside Management Standards Manual, Section 6B.....	7, 9, 14, 17, 18, 19

STATEMENT OF ISSUES ON APPEAL

- I. By holding that the trial court “must uphold the planning commission’s decision if there is any evidence to support it,” the lower court committed an error of law by basing its decision on an incorrect standard of review that ignored the well settled principle that a decision of a planning commission will not be upheld where it is based on errors of law, the board acts arbitrarily or unreasonably, or where, in general, the commission has abused its discretion.

- II. Where the governing authority has adopted land development regulations that include specific procedures for the submission and approval or disapproval of development applications by the Planning Commission, it was an error of law for the Planning Commission to unilaterally waive or alter specific standards, procedures, and requirements prescribed by local ordinance and SCDOT to approve Respondent Mark III’s Subdivision Applications.

- III. The Planning Commission engaged in an abuse of discretion as a matter of law when, in direct violation of its By-Laws and Rules of Order, the commissioners, after a first motion to approve the Cottonwood application failed and without motion to reconsider or to rescind the original vote, again moved and voted to approve the Cottonwood application, which ultimately passed on the second vote.

- IV. By engaging in clearly disparate treatment of Appellants and Respondent, as opposing parties, with regard to the February 24, 2021 hearing, the Planning Commission negatively and materially impacted Appellants’ right to meaningfully participate and be heard, and in so doing denied Appellants the guarantee of due process and equal protection of law.

STATEMENT OF THE CASE

Fundamentally the centrally issue presented by this appeal is whether a county planning commission has the authority to unilaterally alter or waive specific standards, procedures, and requirements prescribed by local ordinance and zoning statutes. The context in which this question arose is the Greenville County Planning Commission's ("GCPC" or "Planning Commission") approval of Respondent Mark III Properties, LLC's ("Mark III") subdivision applications for Cottonwood Ridge, Subdivision File Number PP-2021-002, C.A. No. 2021-CP-23-1494 ("Cottonwood") and Cloverdale Hills, Subdivision File Number PP-2021-013, C.A. No. 2021-CP-23-1501 ("Cloverdale"). The properties on which the proposed subdivisions are to be developed are abutting properties situated between South Carolina State Highway 86 (a/k/a Bessie Road), Old Pelzer Road, and Emily Lane in southwestern Greenville County. The Cottonwood and Cloverdale subdivision applications came before and, despite the GCPC failing to abide by and comply with both the minimum requirements prescribed by local ordinances and zoning and planning statutes and its own By-Laws, were ultimately approved by the GCPC during its February 24, 2021 meeting.

Pursuant to South Carolina's Local Comprehensive Planning Enabling Act, which provides a right to appeal from planning commission decisions for any "party in interest," neighboring property owners who stand to be negatively impacted by the proposed subdivisions timely undertook an appeal of the GCPC's approval of Mark III's subdivision applications for Cottonwood and Cloverdale (the "Subdivision Applications") to the Greenville County Court of Common Pleas. See S.C. Code Ann. § 6-29-1150; see also Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019). On June 23, 2021, a consolidated hearing was held on both Cottonwood and Cloverdale before the Honorable

Perry Gravley during which Appellants sought review of the GCPC's February 24, 2021 decision and requested the trial court reverse the decision of the GCPC to approve Mark III's Subdivision Applications or, in the alternative, vacate the GCPC's February 24, 2021 decision and remand the Subdivision Applications to the GCPC for further proceedings in strict compliance with the GCPC's Bylaws and the Greenville County Land Development Regulations ("LDR"). The relief sought by Appellants was based on GCPC having committed numerous errors of law and fact in approving the Subdivision Applications.

The Order Denying Appeal was dated and filed on July 22, 2021, after which time Appellants filed a Motion to Reconsider, which was also subsequently denied on August 22, 2021 and received on August 23, 2021 by Counsel for Appellants, J.J. Andregretti, via the South Carolina E-Filing System. Appellants' Notice of Appeal was properly and timely served upon all parties of interest in this matter on September 22, 2021 seeking review of the trial court's July 22, 2021 and August 22, 2021 Orders denying Appellant's appeal and affirming the decision of the GCPC approving the Subdivision Applications.

For the reasons stated in this Brief, it was an error of law, and consequently an abuse of discretion, for the GCPC to approve the Subdivision Applications and for the trial court to affirm the approval of those applications. Accordingly, the trial court's decision must be reversed and the GCPC must be directed to withdraw the approval of Mark III's Subdivision Applications.

STATEMENT OF THE FACTS

On January 4, 2021, Mark III submitted an application to Greenville County for a major subdivision of approximately 523 lots called Cottonwood Ridge along South Carolina State Highway 86 (a/k/a Bessie Road), Old Pelzer Road, and Emily Lane. See Preliminary Subdivision Applications for Cottonwood and Cloverdale; see also Specific Requirements for Cloverdale, p. 1

(noting that the proposed development “(previously a part of Cottonwood Ridge) [is] to be located Bessie Road (SC 86), which is [a] SCDOT road”). Mark III later divided the proposed subdivision into two separate applications, Cottonwood Ridge and Cloverdale Hills, because wetlands and other site conditions prevented the two sides of the subdivision from being connected by the same road network. Mark III submitted a new application for Cloverdale Hills on February 3, 2021.

A Traffic Impact Study (“TIS”) was required for both Cottonwood Ridge and Cloverdale Hills pursuant to LDR 9.1, Table 9.1, “Guidelines for Determining need for TIS” and the determination of Planning Staff. (Cottonwood Ridge Planning Commission File, p. 16; Cloverdale Hills Planning Commission File, p. 35). The TIS submitted for both the Cottonwood Ridge and Cloverdale Hills applications was the same. The TIS was conducted by Ramey Kemp & Associates, Inc., digitally signed by Jeffrey Ingham, Professional Engineer, on January 19, 2021 and was titled “Traffic Impact Study for the Cottonwood Ridge Development.” See TIS. In both the TIS’s Executive Summary and Introduction it expressly acknowledges that the TIS was to be conducted “in accordance with Greenville County and SCDOT guidelines.” (TIS, pp. iii, 1). Despite the fact that both Section 6B of the South Carolina Department of Transportation’s (hereinafter “DOT”) Access and Roadside Management Standards Manual (hereinafter “ARMS”) and Section 9.2 of the LDR expressly require that that counts of existing peak-hour traffic volumes must be conducted within 12 months of the submittal of the TIS, the TIS submitted by Mark III on February 5, 2021 in support of the Subdivision Applications used counts for existing traffic from 2019 that “were previously conducted” for the intersection of SC 86 & Old Pelzer Road, which is the largest intersection included in the TIS. (TIS, p. 9).

Both Subdivision Applications were heard by the Planning Commission on February 24, 2021, however, whereas the GCPC only allowed Appellants to attend the February 24, 2021

meeting remotely via Zoom, the Planning Commission, unbeknownst to Appellants, allowed Mark III to attend the February 24, 2021 meeting in person to present its case to the GCPC.

Cottonwood Ridge:

Cottonwood is a proposed housing development of 459 residential lots with a typical lot size of 0.16 acres. (Cottonwood Ridge Plat). The property is located within the rural, unincorporated area of southern Greenville County near Piedmont. Appellant Frances Baty and many other nearby residents submitted comments and spoke in opposition to the application.¹ Major concerns raised at the hearing included the amount of traffic generated by the subdivision, the density of the proposed neighborhoods in comparison to the surrounding community, and the negative environmental impacts on the surviving wetlands and wildlife; all of which the Planning Commission must consider in accordance with LDR 3.1. Michael Martinez, Esq. of the South Carolina Environmental Law Project summarized concerns related to density and compatibility:

Cottonwood Ridge and Cloverdale Hills are 2 subdivisions in name only. And as you heard it's going to add 523 lots on, a total of 215 acres, but I believe I heard that 80 acres are not used for any sort of lots, so the density is even higher. The area proposed for these subdivisions is currently a sparsely developed area that will permanently and substantially altered by development of this size and magnitude... Two adjacent subdivisions that are effectively a single one, with 522 lots on 215 acres in a predominately rural and sparsely developed area of the county cannot be considered compatible with the surrounding land use density.²

(Hearing Tr., pp. 19-21). Moreover, and with specific regard to the traffic hazards generated by the proposed subdivisions, Appellant Baty specifically raised concerns that the TIS created and

¹ Immediately prior to allowing Appellant Baty to speak over Zoom, the Chair admonished that there was a ten (10) minute time limit for those signed up to speak. (Hearing Tr., p. 9).

² Paul Harrison of Mark III acknowledged at the February 24, 2021 GCPC meeting that "these are 2 subdivisions, this is basically one development, one developer. It's going to be 1 HOA and we are going to be maintaining the same common area and using that common area." (Hearing Tr., p. 22).

submitted as part of the Subdivision Applications “used 2019 numbers...and it doesn’t account for the new developments approved on Furr Road and further down Bessie Road.” (Hearing Tr., pp. 9-10; 69; see also Hearing Tr., p. 2 (stating that “[t]he TIS or traffic impact study developed for Cottonwood Ridge accounts for the entire development parcel which includes Cottonwood Ridge and Cloverdale Hill subdivision.”). During deliberations, commissioners debated traffic impacts and safety but failed to address the fact that the TIS failed to meet minimum requirements for a TIS as established by Section 6B of DOT’s ARMS, DOT’s Traffic Impact Study Technical Completeness Checklist (hereinafter “Technical Completeness Checklist”), and Section 9.2(C) of the LDR. Despite GCPC’s failure to address the TIS’s non-compliance with the ARMS and LDR, commissioners were persuaded by the opponents and the Cottonwood application, after proper motion and second, was voted down by way of a 4-4 tie vote of the commissioners. (Planning Comm’n Mins. of 2/24/21, pp. 6-7; see also Hearing Tr., pp. 49-50).

Immediately following the vote by which approval of the Cottonwood application failed and in direct contravention of the Planning Commission’s own By-Laws and its duly adopted Rules of Order, the commissioners, without motion to reconsider or to rescind the original vote, continued debate, provided Mark III additional opportunity to speak in support of the application despite expressly noting that its time to speak “expired”, and then moved to and conducted a second vote on the same motion “to approve PP-2021-002 [the Cottonwood application]”. (Hearing Tr., pp. 62-63 (“Chairman Bichel: Mr. Forrest, make your motion again.”)). Neither Appellant Baty nor any other person opposing the Subdivision Applications was given an opportunity to provide further input during the debate following the first vote denying the Cottonwood application. Also notable is that during the debate following the first vote, several commissioners explicitly stated that it was improper to consider traffic impacts or to deny a project

based on traffic impacts. (Hearing Tr., pp. 49-51; 53-54; 58-63). Ultimately, as a direct consequence of this improper application of law and improper procedure the Cottonwood application was approved by a 5-3 vote. (Planning Commission Minutes of 2/24/21, p. 7; see also Hearing Transcript, pp. 49-50).

Cloverdale Hills:

Cloverdale Hills is a proposed housing development of 63 residential lots with a typical lot size of 0.14 acres. (Cloverdale Hills Plat) and is adjacent to Cottonwood Ridge. (Cloverdale Hills Preliminary Subdivision Application). As noted above, Mark III readily admits it is a separate subdivision in name only. (Hearing Tr., p. 22). Consequently, the hearing as to Cloverdale Hills largely reiterated the same arguments for and against the proposed housing development that were previously raised during consideration of the Cottonwood Ridge application. See generally Hearing Tr., pp. 63-76. Again, despite the aforementioned failure of the TIS to comply with the minimum requirements established for counts of existing traffic in the ARMS and the LDR, the Planning Commission approved the Cloverdale application by way of a voice vote. (Planning Commission Minutes of 2/24/21, p. 7-8).

ARGUMENT

- I. By holding that the trial court “must uphold the planning commission’s decision if there is any evidence to support it,” the lower court committed an error of law by basing its decision on an incorrect standard of review that ignored the well settled principle that a decision of a planning commission will not be upheld where it is based on errors of law, the board acts arbitrarily or unreasonably, or where, in general, the commission has abused its discretion.

Although the trial court properly acknowledged that a decision of a county planning commission “will not be disturbed if there is evidence in the record to support its decision,” the court mistakenly restricts the scope of its review to the mere existence of evidence while ignoring the court’s obligation to ensure that the commission’s decision was not “based on errors of law”

or otherwise an abuse of discretion. Grays Hill Baptist Church v. Beaufort Cnty., 431 S.C. 630, 637, 850 S.E.2d 29, 33 (2020); Mikell v. County of Charleston, 386 S.C. 153, 687 S.E.2d 326, 329 (2009) (holding that “although great deference is accorded the decisions of those charged with interpreting and applying local zoning ordinances, a broader and more independent review is permitted when the issue concerns [a matter of law]”) (internal quotations and citation omitted). By focusing solely on whether there was “any evidence to support [the GCPC’s decision]” the trial court failed to recognize the numerous errors of law upon which the GCPC’s decision was based, and which, accordingly, render the GCPC’s decision an abuse of discretion that the trial court should not have permitted to stand. June 22, 2021 Order, p. 3; see also Grays Hill Baptist Church v. Beaufort Cnty., 427 S.C. 57, 65, 828 S.E.2d 234, 238 (Ct. App. 2019) (“However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.”) (quoting Austin v. Bd. of Zoning Appeals, 362 S.C. 29, 33, 606 S.E.2d 209, 211 (Ct. App. 2004)); Kurschner v. City of Camden Planning Comm’n, 376 S.C. 165, 173-74, 656 S.E.2d 346, 351 (2008) (applying zoning board standards to a planning commission decision); Cooper v. S.C. Dep’t of Prob., Parole & Pardon Servs., 377 S.C. 489, 500, 661 S.E.2d 106, 112 (2008) (holding a Board decision was arbitrary and capricious because the Board failed to follow proper procedure by considering required statutory criteria). Moreover, in focusing solely on whether there was “any evidence to support [the GCPC’s decision]” the trial court gave undue deference to the GCPC’s decision on questions of law that the court properly should have “reviewed without any deference to the [GCPC’s] decision.” Olds v. City of Goose Creek, 418 S.C. 573, 585, 795 S.E.2d 163, 170 (Ct. App. 2016); Carolina Chloride Inc. v. Richland Cty., 394 S.C. 154, 167, 714 S.E.2d 869, 875 (2011) (noting that “interpretation and implementation of a zoning ordinance...is a matter of

law...”); see also Colbert v. Krawcheck, 299 S.C. 299, 302, 384 S.E.2d 710, 712 (1989) (“In exercising its discretion, the [zoning] board of adjustment is not left free to make any determination whatever that appeals to its sense of justice. It must abide by and comply with the standard prescribed by the local ordinance and zoning statutes.”) (quoting Stevenson v. The Board of Adjustment of the City of Charleston, 230 S.C. 440, 448, 96 S.E.2d 456, 460 (1957)).

Unfortunately, the trial court’s application of an incorrect standard of review that clearly failed to consider whether the Planning Commission’s decisions and actions constituted errors of law poisoned the rest of the court’s analysis and conclusions with regard to the Planning Commission’s 1) unilateral waiver or alteration of specific standards, procedures, and requirements prescribed by local ordinance and SCDOT, 2) blatant violation of its own By-Laws and Rules of Order, and 3) disparate treatment of Appellants and Mark III with regard to the February 24, 2021 hearing that resulted in a material and deleterious impact on Appellants’ right to meaningfully participate and be heard. Accordingly, the incorrect standard of review applied by the court, in and of itself, requires at the very least that the July 22, 2021 Order be vacated and remanded to the trial court with instruction that this matter be revisited by the trial court applying the correct standard of review.

II. Where a proposed development is on a state road and a Traffic Impact Study is required, the SCDOT ARMS and the LDR establish minimum requirements for Traffic Impact Studies and the Planning Commission does not have the authority to unilaterally waive or alter those specific standards, procedures, and requirements.

As stated in S.C. Code Ann. § 6-29-1150, “[t]he land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff. These procedures may include requirements for submission of sketch plans, preliminary plans, and final plans for review and approval or disapproval.” (emphasis added). Accordingly, Greenville County enacted the LDR to

provide the specific procedures and requirements for Greenville County to review and approve various real estate development projects throughout Greenville County. As expressly stated in the LDR 1.5 and 1.6.5 regarding interpretation of the LDR, “the regulations expressed in this document...shall be considered as the minimum provisions for the protection of the health, safety, and welfare of the general public,” and “[w]herever the requirements made under authority of these regulations impose higher standards than are required in any other statute, local ordinance, or regulations, the provisions of these regulations shall govern. Wherever the provisions of any other statute, local ordinance, state or federal regulations impose higher standards than are required by these regulations, the provisions of such statute, local ordinance, or regulations shall apply.” (emphasis added).

Although the LDR address a variety of subjects in specifying the substantive and procedural requirements for applications to the GCPC, Section 1.1 of the LRD makes clear that one of the primary concerns of the LDR is the impact of land development on existing and future traffic in Greenville County.³ See Town of Hollywood v. Floyd, 403 S.C. 466, 482, 744 S.E.2d 161, 170 (2013) (citing Strickland v. State, 276 S.C. 17, 21, 274 S.E.2d 430, 432 (1981) for the proposition that the government has a legitimate interest in the safety of those using public roadways). In pursuit of the LDR’s stated purpose and to insure proper consideration is given to the impact of proposed land development on existing and future traffic in Greenville County, the LDR include

³ “[T]he Greenville County Council does hereby adopt Land Development Regulations to provide for the harmonious development of the county; coordination of streets within subdivisions with other existing or planned streets or with other features of the comprehensive development plan; adequate open spaces for traffic, recreation, light, and air; protection of the floodplain and floodways; and for a distribution of population and traffic which will create conditions favorable to the health, safety, and welfare of the general public. LDR, 1.1 (emphasis added).

Article 9, “Traffic Impact Studies”, which expressly establishes the purpose, performance triggers, and minimum requirements for the conduct of a TIS. As stated by LDR 9.1:

A traffic impact study (TIS) evaluates the effect a development’s traffic may have on existing roads. For the purposes of this ordinance, the implementation pertains to County-maintained roads. Projects on state roads must comply with the DOT’s Access & Roadside Manual; however the SCDOT Traffic Requirements form must be completed and submitted to Greenville County. The TIS helps identify significant impacts on safety, traffic and transportation operations. Ultimately, the TIS can be used to assess if the scale of the development is appropriate for a particular site and what improvements may be necessary, on and off the site, to provide safe and efficient access and traffic flow.

Due to large size of the proposed subdivisions a TIS was required for both Cottonwood and Cloverdale pursuant to LDR 9.1, Table 9.1, “Guidelines for Determining need for TIS” and the determination of Planning Staff. (Cottonwood Ridge Planning Commission File, p. 16; Cloverdale Hills Planning Commission File, p. 35). In addition to the size of the proposed subdivisions triggering the performance of a TIS, the fact that Cottonwood and Cloverdale were “to be located on Bessie Road (SC 86), which is [a] SCDOT road, the TIS also “must comply with the DOT’s Access & Roadside Manual” and the requirements established therein. See Section 9.1 of LDR (“An impact study shall analyze traffic conditions for the existing year conditions, build-out background year “no build” conditions, and build-out year “build” conditions...The study shall be conducted in accordance with the requirements of Article 9 of this ordinance.”) (emphasis added); see also Section 1.6.5 of the LDR (stating that “[i]n interpreting the regulations expressed in [the LDR], they shall be considered as the minimum provisions for the protection of the health, safety, and welfare of the general public,” and that “state...standards should be referenced when the criteria is not covered in this document.”) (emphasis added). In addition to expressly and unequivocally establishing the specific “Study Requirements” for a TIS, both the LDR and the ARMS warn applicants that “[i]ncomplete traffic studies” that do not meet “the minimum requirements for a traffic impact study to be complete” “will not be reviewed”, ARMS, Section

6B, p. 56, and that “[i]ncomplete, inaccurate, or erroneous process submittals as of the submittal deadline will not be accepted or processed....” Section 3.2.1 of LRD (emphasis added); see also GCPC’s most recent update to its Preliminary Subdivision Submittal Process and Checklist (stating “[a]ll incomplete submittals will be voided and a new application will be required. Any fees paid on an incomplete Preliminary plan application will be forfeited”) (highlighting and text color in original).

Although the court mistakenly applied the incorrect “any evidence” standard of review discussed in Section I, supra, to uphold the Planning Commission’s decision to approve the Subdivision Applications based on the information contained in the TIS, the court abused its discretion when it failed to review 1) whether the TIS satisfied the specific requirements of the LDR and ARMS and, as such, whether the TIS and Mark III’s Subdivision Applications complete and appropriate for review, and 2) if the TIS and Mark III’s Subdivision Applications were incomplete, whether the Planning Commission has the authority to unilaterally waive or alter the specific standards, procedures, and requirements established in the LDR and ARMS, both of which are questions of law that the court properly should have “reviewed without any deference to the [GCPC’s] decision.” Olds, 418 S.C. at 585, 795 S.E.2d at 170.

Turning to the explicitly enumerated minimum “Study Requirements” applicable to TIS and specifically the measurements and evaluation of existing traffic conditions, Section 9.2(C) of the LDR mandates that:

Existing Conditions

Provide a description of existing traffic conditions including existing peak-hour traffic volumes adjacent to the site and levels of service for impacted intersections in the vicinity. Use existing signal timings and AM/PM peak hour counts unless otherwise determined (i.e. school or special events). Data should reflect maximum usage periods for seasonal and daily variations. Existing counts may be used that are no more than 12 months old.

(emphasis added). In the face of the simple clarity with which Section 9.2 establishes a minimum requirement that counts of existing peak-hour traffic have been conducted within 12 months of the TIS, it was a clear error of law for the Planning Commission and the court to apply a forced and contrived interpretation to the term “existing” as it applies to “counts” in the last sentence of Section 9.2(C) of the LDR to limit the 12 month requirement only on those traffic counts that were available from “SCDOT or third parties”, i.e., existing, at the time a traffic impact study is submitted as part of a planning commission application. July 22, 2021 Order, pp. 6-7. Nowhere in the LDR is such a caveat or limitation found.

In contrast to the Planning Commission and the trial court’s forced interpretation of “existing” as it applies to the last sentence of Section 9.2(C) of the LDR, proper interpretation of the TIS “Study Requirements” for “Existing Conditions”, the regulation’s “[w]ords must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute’s operation,” and “[w]hen faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.” State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002). Moreover, where as in the case of Section 9.2(C) of the LDR where a word is utilized multiple times within “a single statutory scheme, the same word should be given consistent meaning.” Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013); Doe v. South Carolina Dept. of Health and Human Servs., 398 S.C. 62, 73 n. 11, 727 S.E.2d 605, 611 n. 11 (2011) (“We adhere to the basic principle that the same word should not be given disparate meanings within a single statutory scheme.”). In the absence of any definition of “existing” elsewhere in the LDR the term should be given a plain and ordinary reading that interprets it in accordance with its usual and customary meaning of “describe[ing] something that is now present...especially when you are contrasting it with something that is

planned for the future.” See “Existing,” Collins Online Dictionary. <https://www.collinsdictionary.com/us/dictionary/english/existing> (2 Aug. 2021). Moreover, through application of its usual and customary meaning, “existing” can also properly be given a consistent interpretation throughout Section 9.2 as referencing and establishing requirements for the TIS’s “analy[sis] []of traffic conditions for the existing year conditions.” LDR 9.2(A). Properly reading Section 9.2 as a whole it is clear that the use of “existing” is meant to require information regarding present traffic conditions, signal timings presently in operation, present AM/PM peak hour counts, and present counts of traffic within 12 months of the traffic impact study being submitted. Morgan, 352 S.C. at 366, 574 S.E.2d at 206 (“Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.”). Applying the proper interpretation of “existing” to Section 9.2 of the LDR, the “Study Requirements” plainly require at a minimum that counts of existing peak-volume traffic must have been conducted no later than 12 months prior to the date of the TIS.

Even assuming arguendo that the language of the LDR provides a more lenient requirement for “existing counts” performed for purposes of providing a description of existing traffic conditions, the language of Section 6B of the ARMS, which explicitly enumerates SCDOT’s TIS minimum “Study Requirements”, and the Traffic Impact Study Technical Completeness Checklist (hereinafter “Technical Completeness Checklist”) make clear that counts of existing peak-hour traffic volumes must be conducted within 12 months of the submittal of the traffic impact study regardless of the source of the counts. See ARMS, Section 6B, p. 56 (“The following checklist is used by the SCDOT in the review process and can aid in the preparation of a traffic impact study. This checklist shows the minimum requirements for a traffic impact study to be complete and does

not certify or guarantee adequacy or approval...Incomplete traffic studies will not be reviewed and will be immediately returned to the permittee.”); ARMS, Technical Completeness Checklist, Figures, p. 57 (“Existing Peak hour volumes (counts conducted within the last 12 months)”). Nowhere does the ARMS create or provide any distinction between a subdivision applicant versus “the SCDOT or a third-party” as the source of the counts of existing traffic or create an exception to allow a first-party applicant to use a traffic count for existing peak-hour traffic conducted more than 12 months before the submittal of the TIS. Quite to the contrary, such an allowance would be contrary to the expressly stated purpose of the traffic impact study to “analyze traffic conditions for the existing year conditions....” See ARMS, Section 6A, p. 54. The requirement that the traffic impact study analyze traffic conditions for the existing year would be in direct conflict with an interpretation that would allow a first-party applicant to avoid Section 6B’s blanket prohibition on existing traffic count data being more than 12 months old by simply “updating” the traffic count data.

Moreover, where data in a traffic impact study is to be estimated or adjusted, language permitting such estimates or adjustments is expressly included in the LDR and ARMS. See ARMS, Section 6B, Existing Conditions, p. 55 (“Data should be adjusted for daily and seasonal variations.”); ARM, Section 6B, Estimate of Trip Generation, p. 55 (“The reason for using the rate or equation should be documented.”); LDR 9.2(D) (“Estimate future background traffic growth.”); LDR 9.2(E) (“The reason for using the rate or equation should be documented.”). Therefore, the LDR and ARM’s silence on the ability to “update” existing traffic count data that was generated more than 12 months before the TIS and its submission indicates that no such ability was intended. See Kosciusko v. Parham, 428 S.C. 481, 498-99, 836 S.E.2d 362, 371 (Ct. App. 2019) (“The canon of construction ‘expressio unius est exclusio alterius’ or ‘inclusio unius est exclusio alterius’ holds

that ‘to express or include one thing implies the exclusion of another, or of the alternative.’”) (quoting Riverwoods, LLC v. Cty. of Charleston, 349 S.C. 378, 384, 563 S.E.2d 651, 655 (2002)).

Despite the clearly established “Study Requirements” imposed by the ARMS and the LDR prohibiting use of traffic counts for existing peak-hour traffic conducted more than 12 months before the submittal of the TIS, when it came time to measure the actual existing traffic volume for the biggest intersection involved in the TIS, the traffic engineer relied on counts for existing traffic that were more than a year old.

Vehicle turning movement counts were conducted during the weekday AM peak period (7:00 AM to 9:00 AM) and the weekday PM peak period (4:00 PM to 6:00 PM) at the following intersection:

- SC 86 & Old Pelzer Road
- SC 86 & Old Gunter Road
- Old Pelzer Road & Emily Lane

For the intersection of SC 86 & Old Pelzer Road, the 2019 counts previously conducted were utilized which was grown to 2021 using an annual growth rate of 4%.

(TIS, p. 9) (emphasis added). The date of the traffic count data is confirmed by “Appendix B: Traffic County Data” to the TIS, which states that the start date for the project was “05/14/2019.” Helicopter Solutions, Inc. v. Hinde, 414 S.C. 1, 9, 776 S.E.2d 753 (Ct. App. 2015) (“Furthermore, “[a] reviewing court in a zoning case may rely on uncontroverted facts [that are] not in a zoning board's findings [but appear in the record].”) (quoting Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals, 342 S.C. 480, 491, 536 S.E.2d 892, 898 (Ct.App.2000)). Use of traffic counts that were conducted more than 12 months prior to the date of the TIS’s submission for purposes of evaluating existing traffic conditions is clearly a violation of the “specific procedure[s]” and “requirements for submission” established by the LDR and ARMS. In light of the fact that the TIS submitted as part of Mark III’s Subdivision Applications did not meet “the minimum

requirements for a traffic impact study to be complete”, its TIS was “[i]ncomplete” and should not have been reviewed or considered as a part of the Subdivision Applications. ARMS, Section 6B, p. 56. Moreover, given that the Subdivision Applications did not include a completed TIS, the Subdivision Applications were also “[i]ncomplete, inaccurate, or erroneous process submittals” that should not have been “accepted or processed...” Section 3.2.1 of LRD (emphasis added). Accordingly, the Planning Commissions acceptance, review, and consideration of the incomplete TIS and Subdivision Applications, and the subsequent approval of the Subdivision Applications was an abuse of discretion and error of law that requires reversal by this Court.

Given that Mark III’s own TIS readily admits that it utilized existing traffic count data that did not comply with the expressly stated “Study Requirements” of the LDR and ARMS, the question must now turn to whether the Planning Commission abused its discretion by unilaterally waiving or altering the specific standards, procedures, and requirements of the LDR and ARMS with regard to the TIS “Study Requirements.” “In exercising its discretion, the [planning commission] is not left free to make any determination whatever that appeals to its sense of justice. It must abide by and comply with the standard prescribed by the local ordinance and zoning statutes.” Hodge v. Pollock, 223 S.C. 342, 348-49, 75 S.E.2d 752, 755 (1953) (“To attempt to give to any small group of individuals such as a zoning commission or appeal board the power to determine in the exercise of its unrestricted discretion what uses might be made of the properties in a community would not only be contrary to sound social policy but clearly unconstitutional.”) (quoting Devaney v. Board of Zoning Appeals, 132 Conn. 537, 45 A.2d 828, 829 (Conn. 1946); I’ON, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 414, 526 S.E.2d 716 (2000) (“The governing body may create a board of zoning appeals to help resolve disputes, and that board must follow specific procedures in hearing and deciding cases.”)).

The limitation on the Planning Commission's exercise of its discretion is further confirmed by the aforementioned language of S.C. Code Ann. 6-29-1150(A) which expressly states that "the land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff." Citizens for Quality Rural Living, Inc., 426 S.C. 97, 825 S.E.2d 721. Accordingly, in light of the fact that the LDR do not give the Planning Commission the power to waive or alter, modify, or waive provisions, procedures, and requirements established in the LDR, the Planning Commission did not have the authority to waive the LDR and ARMS Study Requirements for the TIS. See McCrowey v. Zoning Bd. of Adjustment, 360 S.C. 301, 306, 599 S.E.2d 617 (Ct. App. 2004) (holding "the zoning administrator did not have the authority to alter or waive the zoning ordinance in question. Rock Hill's Zoning Code gives zoning administrators the power to administer and enforce the Zoning Code. Rock Hill's Zoning Code does not grant power to an administrator to alter, modify, or waive provisions contained in the Zoning Code. Further, the zoning administrator was not granted with the authority to grant a variance. The Zoning Code only grants the Zoning Board of Appeals the discretion of whether and when to grant a variance. Because the parties do not dispute that the Property did in fact violate the zoning ordinance, the zoning administrator exceeded his authority when he approved Appellant's parking plan in October 2000"). In the absence of the Planning Commission's ability to waive the non-compliance of the TIS submitted as part of Mark III's Subdivision Applications, the Planning Commission abused its discretion by accepting, processing, considering, and ultimately approving Mark III's Subdivision Applications which were incomplete due to the absence of a TIS that satisfied all "Study Requirements" mandated in the LDR and ARMS.

III. The Planning Commission engaged in an abuse of discretion as a matter of law when, in direct violation of its By-Laws and Rules of Order, the commissioners, after a first motion to approve the Cottonwood application failed and without motion to reconsider or to rescind the original vote, again moved and voted to approve the Cottonwood application, which ultimately passed on the second vote.

Just as the questions of whether the TIS and Mark III's Subdivision Applications satisfied the requirements of the LDR and ARMS, and whether the Planning Commission had the power and authority to unilaterally waive non-compliance with the procedure, provisions, and requirements of the LDR and ARMS were matters of law which should have been the subject of an independent and non-deferential review by the trial court, whether the Planning Commission's actions during the February 24, 2021 hearing on the Subdivision Applications violated its By-Laws and Rules of Order such that they constituted an abuse of discretion is a question of law. Cooper, 377 S.C. at 500, 661 S.E.2d at 112 (holding a Board decision was arbitrary and capricious because the Board failed to follow proper procedure by considering required statutory criteria); Carolina Chloride, Inc., 394 S.C. at 167, 714 S.E.2d at 875 (noting that "interpretation and implementation of a zoning ordinance...is a matter of law..."). As an initial matter, pursuant to Section 5 of the GCPC's By-Laws establishing the Planning Commission's Rules of Order, the GCPC has expressly adopted that "Robert's Rules of Order shall govern the conduct of meetings, except as otherwise provided by these Rules of Procedure." With regard to the issue of voting and the impact of a tie vote, the By-Laws of the GCPC neither address the subject nor provide any guidance. Thus, turning to Robert's Rules of Order, and specifically Section 46 concerning voting, the Rules of Order clearly established that "[o]n a tie vote the motion is lost...." HENRY M ROBERT ET AL., (11th ed. 2013). Moreover, "[w]hen an original main motion or an amendment has been...rejected,...it, or practically the same motion, cannot be again brought before the assembly

at the same session, except by a motion to reconsider or to rescind the vote.” Id. at §38, Renewal of a Motion. In light of the fact that approval of Mark III’s Cottonwood subdivision application was properly moved to a vote before the GCPC and the original vote ended in a 4-4 tie, the motion for approval of the Cottonwood subdivision application was lost and the Cottonwood application was consequently denied. (Planning Comm’n Mins. of 2/24/21, pp. 6-7; see also Hearing Tr., pp. 49-50). Accordingly, in the absence of a motion to reconsider or rescind the original vote, neither of which were moved or voted on, no further discussion or consideration of the Cottonwood subdivision application should have been permitted at the GCPC’s February 24, 2021 meeting. Despite being in clear violation of Robert’s Rules of Order, the commissioners, without motion to reconsider or to rescind the original vote, continued debate, provided Mark III additional opportunity to speak in support of the application despite expressly noting that its time to speak “expired”, and then moved to and conducted a second vote on the same motion “to approve PP-2021-002 [the Cottonwood application]”. (Hearing Tr., pp. 62-63 (“Chairman Bichel: Mr. Forrest, make your motion again.”)). All actions by the Planning Commission with regard to the Cottonwood application subsequent to the failure of the first vote, which include further debate on the Cottonwood application, allowing the applicant, Mark III, additional time to argue in favor of its application despite the expiration of its time to comment and without permission of the Commission, and, in the absence of a motion to reconsider or rescind, revoting on the same motion and to do so was an error of law. Anderson Cnty. v. Joey Preston & the S.C. Ret. Sys., 420 S.C. 546, 572-575, 804 S.E.2d 282, 295-297 (Ct. App. 2017) (reversing decision of county council based on council’s actions in violation of Robert’s Rules of Order which governed the parliamentary acts in question).

IV. By engaging in clearly disparate treatment of Appellants and Respondent, as opposing parties, with regard to the February 24, 2021 hearing, the Planning Commission negatively and materially impacted Appellants' right to meaningfully participate and be heard, and in so doing denied Appellants the guarantee of due process and equal protection of law.

As an initial point and similar to the trial court's application of an incorrect standard of review, the trial court's reliance on Turbeville v. Morris, 203 S.C. 387, 26 S.E. 2d 821 (1943) to justify the GCPC's actions and misinterpretation of its By-Laws, the LDR, and Robert's Rules of Order, such reliance is misplaced as the Morris case, though considering an organization's rules of procedure and order, was expressly limited to ecclesiastical bodies. Although courts are right to be hesitant about telling churches how to interpret and apply their internal rules of procedure and order, not least of which includes the First Amendment and the separation of church and state, planning commissions enjoy no such constitutionally protected autonomy. Quite to the contrary, "[w]hile the appellate courts are required to be deferential to the full commission regarding questions of fact, this deference does not prevent the courts from overturning the full commission's decision when it is legally incorrect..." Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869, 872 (2007).

Although due process is not rigid and formulaic, the touchstone is always that parties be given a meaningful opportunity to be heard. Unfortunately, in this case the GCPC stacked the deck in favor of Mark III in such a way as to create the appearance of an opportunity for Appellants to be heard while denying Appellants a meaningful opportunity participate in the proceedings. Hampton v. Richland County, 292 S.C. 500, 516, 357 S.E.2d 463, 472 (Ct. App. 1986) ("[W]e hold, that the rezoning of a particular lot of land to a zoning classification inconsistent with the County Planning Commission's recommendation in the comprehensive plan because of a dispute between the owners of a particular tract of land and other people, as was the case before us, is the

act of a quasi-judicial body rather than a legislative body: in such a situation, the County Council sits to resolve a dispute--a quasi-judicial act. This seems to us to be obvious and presents the exact situation in which Chief Justice Ness by his decision in Rushing required that due process be accorded the litigants. And it is equally obvious in this case that a ruling adverse to [Appellants] when no evidence was offered to dispute [of] the voluminous evidence introduced into the record by [Appellants] is a ruling inconsistent with the most rudimentary concepts of due process.”). To create the appearance that Appellants had the opportunity to participate and be heard, the GCPC allowed Appellants to attend the February 24, 2021 GCPC meeting via Zoom, however unbeknownst to Appellants, Mark III was allowed to attend the February 24, 2021 meeting to argue its case to the GCPC in person. Furthermore, the Planning Commission failed to adhere to specific procedures in hearing and deciding matters before the Planning Commission. I’ON, LLC, 338 S.C. at 414 (“The governing body may create a board of zoning appeals to help resolve disputes, and that board must follow specific procedures in hearing and deciding cases.”); Citizens for Quality Rural Living, Inc., 426 S.C. 97, 825 S.E.2d 721 (“[T]he land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff.”) (quoting S.C. Code Ann. 6-29-1150(A) (emphasis in original)). Specifically, in violation of Article IV, Section 2 of the Planning Commission’s By-Laws, which limit speaking times in favor and against applications to ten (10) minutes each, Paul Harrison, engineer for Mark III was allowed approximately thirty (30) minutes to speak and answer questions whereas the opponents were limited to ten (10) minutes. (Hearing Recording, 2:03:58 to 2:35:15). Immediately following Paul Harrison’s remarks, the Planning Commission took a vote and it failed. The Planning Commission immediately began a second round of debate with no further comments from the opposition. However, the Planning

Commission did allow three different speakers to continue speaking in support for the Cottonwood Ridge development for another twenty minutes (Hearing Recording 2:35:15 to 2:48:00). The Planning Commission even entertained questions from the speakers, in direct contravention of Planning Commission Bylaws, Article IV, Section 2. This sort of unequal treatment between Mark III and Appellants, which was amplified and compounded by Appellants' being relegated to attending the meeting remotely via Zoom, is the very epitome of disparate treatment that destroys the foundational principles of fair play and equal protection under the law upon which the guarantee of due process rests. There is no attorney in his right mind that would agree to attend a hotly contested hearing via video conference while opposing counsel appeared in-person before a judge, jury, or commission. Though a commission hearing is not a courtroom, substantive and fundamental rights are impacted by proceedings before the GCPC, such that due process demands that parties on adverse sides of issues, such as this, be given a level playing field with regard to the opportunity to meaningfully participate and be heard. See McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 449, 823 S.E.2d 193, 198 (Ct. App. 2018) (“Procedural due process insists upon fair play.”); Hipp v. S.C. Dep't of Motor Vehicles, 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009) (“Due process is violated when a party is denied fundamental fairness.”); Hampton v. Richland County, 292 S.C. at 516, 357 S.E.2d at 472 (holding quasi-judicial hearings by planning commissions are exactly the type of adversarial situation requiring that due process be accorded the litigants .

Although due process may not require a perfectly equal division of the opportunity to be heard between parties on opposite sides of an issue, clearly disparate treatment of opposing parties that materially impacts one party's right to meaningfully participate is repugnant to the guarantee of due process and equal protection of law. In short, the GCPC hearing on Mark III's Subdivision

Applications was conducted without regard to any procedural rules governing the proceeding, which includes everything from the disparate manner in which the parties were allowed to appear, to the gross violations of GCPC's By-Laws and the applicable Robert's Rules of Order, and the refusal to allow Appellants to be heard in response to the numerous questions posed by the GCPC and Mark III after the original vote on the Cottonwood subdivision application failed. Consequently, "[a] 'harmless error' analysis...is impossible and unnecessary to undertake where the structure of the proceeding under review was fundamentally unsound." McIntyre, 425 S.C. at 452, 823 S.E.2d at 199.

CONCLUSION

Appellants Frances Baty and O.D. Strickland respectfully request that this Court REVERSE the July 22, 2021 Order of the lower court denying Appellant's Appeal and direct the lower court to remand Mark III's subdivision applications to the Greenville County Planning Commission with instruction to withdraw the approval of Mark III's subdivision applications for the reasons set forth herein.

Respectfully Submitted,

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