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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

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Case No. 2018-CP-10-03307

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Appellate Case No. 2019-000125

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The Charleston County School District,

Appellant,

v.

Charleston County, South Carolina; The  
Charleston County Board of Zoning  
Appeals; and Joel Evans in his capacity as  
Director of the Charleston County Zoning  
and Planning Department,

Respondents.

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**RESPONDENTS' RETURN TO PETITION FOR HEARING**

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AND COME NOW, the Respondents, Charleston County, South Carolina, The Charleston County Board of Zoning Appeals, and Joel Evans in his capacity as Director of the Charleston County Zoning and Planning Department (hereinafter collectively referred to as “Charleston County”), and file the following Return to Appellant’s Petition for Rehearing:

For the reasons set forth below, this Court should deny the Petition for Rehearing filed by the Appellant, The Charleston County School District (“School District”), and should retain in full force and effect its Unpublished Opinion No. 2021-UP-449 filed on December 15, 2021, affirming the finding by the Circuit Court and Board of Zoning Appeals (“BZA”) that the School District failed to timely appeal Charleston County’s denial of the School District’s request for an extension of the site plan approval and holding the School District’s challenge to the alleged accessory use “reinterpretation” is not ripe for review. Charleston County incorporates by reference, as if fully set forth herein, its Final Respondents’ Brief filed in this appeal.

### **ARGUMENTS**

“In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument.” Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E2d 322, 322 (2001); Rule 221(a), SCACR. Because the Court has not overlooked or misapprehended any arguments presented by the School District, the School District’s Petition for Rehearing should be denied.

**I. The Court correctly affirmed the finding by the BZA and Circuit Court that the School District failed to timely appeal Charleston County’s denial of the School District’s request for an extension of the site plan approval.**

Regardless of whether the School District’s time period to appeal Charleston County’s denial of its request for an extension of site plan approval began on the date of administrative action or the

date of actual notice, the School District failed to timely appeal the decision. The Court correctly held the Charleston County Zoning and Land Development Regulations (“ZLDR”) provide a specific time period of thirty (30) days from the date of administrative action to appeal decisions related to site plan review, and in applying this time period, it correctly upheld the finding by the Circuit Court and BZA that the School District’s appeal was untimely. Further, even under the arguments advanced by the School District, if the School District had thirty (30) days to appeal the administrative decision from the date the School District received actual notice of it, the School District conceded at the BZA hearing that it received actual notice of the administrative decision in early March 2018 but did not appeal the decision until April 18, 2018.

**A. The ZLDR sets forth the time period for which the School District had to appeal Charleston County’s denial of the School District’s request for an extension of the site plan approval, and the School District failed to timely file its appeal to the BZA.**

The ZLDR provides a thirty (30) day filing deadline from the date of administrative action for an appeal of site plan related actions to the BZA, and as a result, the Court correctly upheld the finding by the Circuit Court and BZA that the School District failed to timely appeal the denial of its request for an extension of the site plan approval. Article 3.7 of the ZLDR sets forth Charleston County’s development procedures for site plan review. Under these provisions, “[a]ppeals shall be processed *in accordance with the procedures of Article 3.13* of this Chapter.” ZLDR § 3.7.8 (emphasis added). In other words, the appeal procedure for any administrative decision related to site plan review mirrors that of the appeal procedure for zoning-related appeals as set forth in Article 3.13. ZLDR § 3.7.8. Under Article 3.13, an appellant must file an application for appeal of a zoning-related administrative decision within “30 calendar days from the date of the Administrative Decision.” ZLDR § 3.13.3. Because ZLDR § 3.7.8 applies this same procedure to appeals for

administrative decisions related to site plan review, an appellant must file an application for appeal of an administrative decision related to site plan review within “30 calendar days from the date of the Administrative Decision.” ZLDR § 3.7.8; ZLDR § 3.13.3.

On February 9, 2017, Charleston County approved the School District’s site plan related to a school bus parking lot facility at the James Island Elementary School with certain conditions. (R. p. 509). One of these conditions required the project to be permitted within one (1) year, and if the project was not permitted during that time period, the project would no longer be eligible to receive a permit and the School District would need to complete the site review process over again. (R. p. 509). The School District did not appeal or otherwise challenge the Site Plan Approval or its conditions. On February 6, 2018, just three days before the expiration of the Site Plan Approval, ADC Engineering, acting as the agent for the School District, sent an e-mail to Charleston County requesting a one-year extension of the Site Plan Approval. (R. p. 79). On February 28, 2018, Charleston County issued its administrative decision denying the School District’s extension request, thereby resulting in the expiration of the site plan. (R. p. 80).

Pursuant to ZLDR § 3.7.8 and § 3.13.3, the School District had thirty (30) days from the February 28, 2018, letter denying the extension request to file its appeal. This provided the School District until March 30, 2018, to file its appeal. However, the School District did not file its appeal until April 18, 2018. (R. pp. 82-89). For these reasons, the Circuit Court and BZA did not err in finding the School District failed to timely file its appeal of Charleston County’s denial of the site plan extension request.

**B. Even if the ZLDR did not set forth a deadline to appeal the decision to the BZA, the School District failed to perfect its appeal to the BZA within thirty (30) days of actual notice.**

Even if an actual notice standard applied to the School District's appeal of the extension request denial, the record demonstrates the School District still failed to timely appeal the administrative decision. The School District argues that S.C. Code Ann. § 6-29-800(B) applies to its appeal because the ZLDR does not set forth a time period for appeal for site plan administrative decisions. While this argument is incorrect as more fully set forth in (I)(A) above, application of this code section does not change the fact that the School District failed to timely appeal the administrative decision.

S.C. Code Ann. § 6-29-800(B) requires an appealing party to file its appeal within "thirty days from the date the appealing party has received actual notice of the action from which the appeal is taken." S.C. Code Ann. § 6-29-800(B). In the present case, there is evidence in the record that the School District received actual notice of the administrative decision denying the extension request in more than thirty (30) days before it filed its appeal. At the BZA hearing, counsel for the School District stated the School District became aware of the administrative decision "[v]ia e-mail sometime in early March." (R. p. 427, p. 174, lines 2 – 10; R. p. 427, p. 174, line 23 – p. 175, line 10). The School District received the e-mail with the administrative decision from its agent, ADC Engineering. (R. p. 427, p. 175, lines 2 – 10). After the School District received the letter denying the extension request, "[i]mmediately the district brass reached out to Joel and Walt for a meeting." (R. p. 427, p. 175, lines 2 – 10; R. p. 389, p. 23, lines 14 – 20). The meeting between the School District and Charleston County occurred on March 19, 2018, but the School District did not file its appeal until April 18, 2018. (R. pp. 82-89).

Even if the School District is correct that the deadline to file an appeal is thirty (30) days from the date of actual notice, there is sufficient evidence in the record to demonstrate the School District received actual notice of the administrative decision in early March 2018. The School District's own counsel concedes this fact. (R. p. 427, p. 174, lines 2 – 10; R. p. 427, p. 174, line 23 – p. 175, line 10). For these reasons, whether the thirty (30) day deadline to appeal the administrative decision denying the School District's site plan extension request started on the date of the administrative action or the date of actual notice, there is evidence in the record to support the finding that the School District failed to timely appeal the decision.

**II. The Court correctly held the School District's challenge to the alleged accessory use "reinterpretation" was not ripe for review.**

Because the School District's appeal of the accessory use "reinterpretation" would require the Court to engage in speculation and conjecture regarding the content and procedure of a possible reapplication for site plan approval by the School District, the Court correctly held the School District's challenge to the alleged accessory use "reinterpretation" was not ripe for review. The School District has not reapplied for site plan approval after the original site plan expired, and in order to rule on the School District's challenge to the accessory use "reinterpretation", the Court would need to hypothesize and speculate on whether the School District will reapply for site plan approval and the potential contents of any such application. Until such time as the School District actually reapplies for site plan approval and the precise contents of the application are set forth, the School District's challenge to the accessory use "reinterpretation" is a contingent, hypothetical, and abstract dispute which is not ripe for judicial review.

**A. The School District’s appeal of the accessory use “reinterpretation” was not yet ripe for review where the appeal called for speculation and conjecture on how the reapplication process may occur, if at all.**

The School District did not reapply for site plan approval after the original site plan expired, and as a result, the School District’s appeal of the non-binding accessory use “reinterpretation” is not ripe for review where the contents and procedure of the reapplication process are contingent, hypothetical, and abstract. “A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy.” Peoples Fed. S&L Ass’n v. Res. Planning Corp., 358, S.C. 460, 477, 596 S.E.2d 51, 60 (2004) (quoting Lennon v. S.C. Coastal Council, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998)); see also Byrd v. Irmo High Sch., 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996) (holding that “[b]efore any action can be maintained, there must exist a justiciable controversy.”). “Justiciability encompasses several doctrines, including ripeness, mootness, and standing.” James v. Anne’s, Inc., 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). “A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.” Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983). South Carolina courts have “explained ripeness by defining what is not ripe, stating ‘an issue that is contingent, hypothetical, or abstract is not ripe for judicial review.’” Jowers v. S.C. Dep’t of Health & Env’t Control, 423 S.C. 343, 353, 815 S.E.2d 445, 451 (2018) (quoting Colleton Cnty. Taxpayers Ass’n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006)). A claim is not ripe for judicial determination simply because “a threat of possible injury currently exists; the mere threat of potential injury is too contingent or remote to support present adjudication.” Waters v. S.C. Land Res. Conservation Comm’n, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996) (quoting Thrifty

Rent-A-Car Sys., Inc. v. Thrifty Auto Sales of Charleston, Inc., 849 F.Supp. 1083, 1086 (D.S.C. 1991)); see also Thrifty Rent-A-Car, 849 F.Supp. at 1085-86 (stating “a...court should not decide a controversy grounded in uncertain and contingent events that may not occur as anticipated or may not occur at all.”).

Charleston County approved the School District’s site plan related to a school bus parking lot facility at the James Island Elementary School with certain conditions on February 9, 2017. (R. p. 509). One of these conditions required the project to be permitted within one (1) year, and if the project was not permitted during that time period, the project would no longer be eligible to receive a permit and the School District would need to complete the site review process over again. (R. p. 509). On February 28, 2018, Charleston County issued its administrative decision denying the School District’s request for an extension of this one (1) year permitting deadline. (R. p. 80). As a result, the site plan approval had expired, and if the School District wanted to move forward with the bus parking lot project, it would need to reapply for site plan approval.

On March 13, 2018, Joel Evans, the Planning Director for Charleston County, sent an e-mail explaining how Charleston County would interpret the term “accessory use” as applied to the development of school bus parking lots. (R. p. 81). Mr. Evans clearly stated this interpretation would apply to “future requests”. (R. p. 81). The School District’s site plan had already expired at this time based upon its failure to permit the project within one (1) year.

At a meeting between Charleston County and the School District on March 19, 2018, Charleston County informed the School District of this interpretation of “accessory use” and how it may apply to future requests. However, as evidenced by the record, the School District had not

submitted a new site plan application at the time of the meeting, and the interpretation was not applied in any administrative action in response to any such application.

An adjudication of the School District's challenge to the alleged accessory use "reinterpretation" at the present time presumes too much. Such an adjudication would presume, first and foremost, that the School District would actually submit a new site plan application following the expiration of the first site plan approval. To date, almost four years after the expiration of the original site plan, the School District has not reapplied for site plan approval. There is no evidence in the record that the School District will or intends to submit such a reapplication. Second, it would presume that the School District's subsequent site plan application would precisely mirror the prior application and would not contain any material changes, alterations, or modifications which could affect the site plan review process. Again, the record contains no evidence for the Court to determine the content of any subsequent site plan application by the School District. For the Court to adjudicate the School District's challenge to the accessory use "reinterpretation", the Court would not only need to speculate about the intention of the School District to reapply for site plan approval, but it would also need to speculate on the precise contents of the new application, which could have a significant and material effect on any decision by Charleston County.

The School District never reapplied for site plan approval for the project, and as a result, the accessory use "reinterpretation" challenged by the School District has never been applied in any administrative action. An adjudication of the School District's challenge to the alleged accessory use "reinterpretation" would require the Court to presume that the School District would reapply for site plan approval and that the content of the application would not significantly or materially alter from the original site plan application. Under these circumstances, this Court correctly held the School

District's challenge to the accessory use "reinterpretation" was not ripe for review where it is unknown whether the School District will ever actually reapply for site plan approval, let alone the precise contents of any such application and how those contents could affect the application of the alleged accessory use "reinterpretation". See Waters v. S.C. Land Res. Conservation Comm'n, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996) (declining to address the merits of a constitutional challenge until it was ripe for determination where appellant had not yet applied for a modification of a mining permit and there was no way to determine the content of any such application); see also Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) (declining to address suit against governor seeking state constable appointment until it was ripe for determination where "such appointment has not been made and there is nothing in the record to bind the Governor to do so..."). For these reasons, the School District's challenge to the alleged accessory use "reinterpretation" is contingent, hypothetical, and abstract, and as a result, the challenge is not ripe for review.

**B. Ripeness is an issue the Court can raise *sua sponte* on appeal even if neither party raised the issue below.**

Because ripeness is an issue of justiciability and whether a case or controversy exists sufficient for judicial determination, the Court correctly raised the issue *sua sponte* and found the School District's challenge to the accessory use "reinterpretation" was not ripe for review. Appellate courts should raise and consider issues of ripeness *sua sponte*, even if it is an issue not raised by the parties below. Both South Carolina and Federal case law support this conclusion. See Baber v. Greenville Cnty., 327 S.C. 31, 44, 488 S.E.2d 314, 321 (2000) (citing Park v. Safeco Ins. Co., 251 S.C. 410, 162 S.E.2d 709 (1968)) (holding courts generally decline to rule upon issues wherein the rights of a party "are contingent upon the happening of some event which cannot be forecast and which may never take place."); see also Kremens v. Bartley, 431 U.S. 119, 136, 97 S.Ct. 1709, 52

L.Ed.2d 184 (1977) (holding ripeness involves the exercise of judicial restraint from unnecessary or premature determination of issues). In fact, the Supreme Court of the United States has found “because issues of ripeness involve, at least in part, the existence of a live ‘Case or Controversy,’ we cannot rely upon concessions of the parties and must determine whether the issues are ripe for decision in the ‘Case or Controversy’ sense” and “to the extent that questions of ripeness involve the exercise of judicial restraint from unnecessary decision of constitutional issues, the Court must determine whether to exercise that restraint and cannot be bound by the wishes of the parties.” Kremens, 431 U.S. at 136. “[T]he basic rationale of the doctrine of ripeness is to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” 2 Am.Jur.2d Administrative Law § 485 (citations omitted).

In the present case, because the School District has not reapplied for site plan approval and the alleged accessory use “reinterpretation” has not been applied to that application, the Court correctly raised the issue of ripeness and passed on ruling on the School District’s challenge to the alleged accessory use “reinterpretation” until such time as that has occurred. As more fully discussed above, if the Court were to address the School District’s challenge to the alleged accessory use “reinterpretation”, it would need to assume numerous facts. It would need to assume the School District actually reapplied for site plan approval, and it would need to assume that application was not materially different from the original application. It would also need to presume Charleston County applied the alleged accessory use “reinterpretation” exactly as described in the March 13, 2018, e-mail. All of these events are purely hypothetical and abstract under the present set of

circumstances. In order to avoid a premature determination of these issues, the Court correctly raised the issue of ripeness and found a justiciable case or controversy does not exist until such time as the School District reapplies for site plan approval, the precise contents of that application are known, and the application of the alleged accessory use “reinterpretation” has been formalized into an administrative decision by Charleston County.

### **CONCLUSION**

For the reasons set forth herein, the Court correctly found the Circuit Court and BZA did not err in finding the School District failed to timely file its appeal of Charleston County’s denial of the site plan extension request. Further, the Court correctly held the School District’s challenge to the alleged accessory use “reinterpretation” is not ripe for review.

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**PROOF OF SERVICE**

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I certify that I have served a true and correct copy of the Respondents' Return to Petition for Rehearing upon the following via e-mail and by depositing a copy of it in the United States Mail, postage prepaid, on January 24, 2022, addressed as follows:

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