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THE STATE OF SOUTH CAROLINA
In The SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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Case No. 2021-CP-10-04366

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EX PARTE PRESERVATION SOCIETY OF CHARLESTON and HISTORIC CHARLESTON FOUNDATION,

Appellants,

SE CALHOUN, LLC,

Respondent,

v.

CITY OF CHARLESTON and CITY OF CHARLESTON BOARD OF ARCHITECTURAL REVIEW,

Respondents.

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**INITIAL BRIEF OF HISTORIC CHARLESTON FOUNDATION**

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May 19, 2022
Charleston, South Carolina

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## STATEMENT OF ISSUE ON APPEAL

I. Did the Circuit Court err in ruling that Historic Charleston Foundation lacks a "substantial interest" in the City of Charleston Board of Architectural Review's decision on SE Calhoun, LLC's application for approval of a new development in Charleston's Historic District?

## STATEMENT OF THE CASE

This is an appeal from the Circuit Court's denial of Historic Charleston Foundation's ("Historic Charleston") petition to intervene. In 2021, a real estate developer named SE Calhoun, LLC (the "Developer") twice applied to the City of Charleston Board of Architectural Review ("BAR") for conceptual approval of an eight-story mixed-use development at 295 Calhoun Street within the historic Harleston Village neighborhood in Charleston, South Carolina (the "Proposed Development"). After two public hearings, the BAR denied approval on both occasions. (PSC's Memo. In Supp. of Pet. to Intervene, Exs. 1 and 2: BAR Agenda Meeting Results.) The Developer appealed the BAR's decision to the Circuit Court pursuant to S.C. Code Ann. § 6-29-900. The Developer named the City of Charleston (the "City") and the BAR as respondents in its appeal. (SE Calhoun's Notice of Appeal.) The Honorable Roger M. Young, Sr. presided over the Developer's appeal in the Circuit Court.

Pursuant to S.C. Code Ann. § 6-29-915(A), the Developer immediately filed a request for pre-litigation mediation as part of its appeal. (SE Calhoun's Request for Pre-litigation Mediation.) On October 7, 2021, the Preservation Society of Charleston ("Preservation Society") filed a petition to intervene in the case pursuant to S.C. Code Ann. § 6-29-915(A). (PSC's Pet. to Intervene.) On October 22, 2021, Historic Charleston also filed a petition to intervene pursuant to S.C. Code Ann. § 6-29-915(A). (Historic Charleston's Pet. to Intervene.) After a hearing on November 5, 2021, the Circuit Court denied both petitions to intervene. (December 6, 2021 Order.) In denying the petitions to intervene, the Circuit Court ruled that neither party demonstrated a "substantial interest" as that term is used in the controlling statute. (December 6, 2021 Order.) Accordingly, the

Court held that neither Historic Charleston nor Preservation Society could intervene in the case. (Id.) On December 22, 2021, Historic Charleston timely filed a Notice of Appeal. (App. Notice of Appeal.)

## FACTS

Historic Charleston is a mission-driven, not-for-profit advocacy organization that was established in Charleston, South Carolina in 1947. (App. Memo. In Supp. of Pet. to Intervene, Ex. A: Drolet Aff. ¶ 3.) Since its inception, Historic Charleston has demonstrated a commitment to its mission of preserving Charleston's unique and historic character, protecting the city's cultural resources, and advocating for Charleston's sustainable growth. Among other things, Historic Charleston holds almost 400 preservation easements throughout Charleston's historic districts; maintains and restores the city's historic properties; operates two historic house museums as preservation training tools and education for the public; hosts educational programs related to Charleston's history and preservation; funds archeological digs and forensic investigations; maintains an archives comprised primarily of property records of historic buildings for research and documentation; and participates actively in advocating for preservation before Charleston's various public bodies such as the BAR regarding matters of public importance. Specifically relevant here, Historic Charleston holds forty-seven preservation easements in the Harleston Village neighborhood of downtown Charleston, South Carolina, which is the same neighborhood where the Developer proposes to build the Proposed Development. (Id. ¶ 6.)

On June 26, 2020, the Developer purchased the property located at 295 Calhoun Street in the Harleston Village neighborhood of downtown Charleston, South Carolina for

twelve million dollars.[1] (Hearing Trans. 31:18–20.) Although the Developer is organized under the laws of South Carolina, its members are developers from Augusta, Georgia, who develop mixed-use properties throughout the southeastern United States. (Hearing Trans. 30:10–16.) Prior to the purchase, the Developer appeared before the City of Charleston Planning Commission (the "Planning Commission"), and requested an amendment to the applicable zoning requirements that would allow the Developer to build a taller project at 295 Calhoun Steet than then-current zoning allowed. (Drolet Aff. ¶ 11.) Historic Charleston attended the Planning Commission hearing and opposed the Developer's request, recommending instead that the Developer adhere to controlling zoning and design its project to comport with the character and architecture of the Harleston Village neighborhood. (Id.) The Planning Commission granted the Developer's rezoning request. (Id.)

In the months following, Historic Charleston and the Developer met and conferred with each other several times while the Developer finalized its plans for the project. On December 17, 2020, Historic Charleston met with the Developer's team to discuss architectural plans. (Drolet Aff. ¶ 12.) A few days later, Historic Charleston provided the Developer with written comments to its initial design. (Id.) Historic Charleston again met

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[1] Before the Circuit Court, there was some dispute regarding whether the Proposed Development is located within the Harleston Village. SE Calhoun and Appellant each presented evidence in support of its position to the Circuit Court, and the Court found that the Proposed Development is "within the Harleston Village Neighborhood." Order at 2. The BAR reached the same conclusion. (PSC's Memo. In Supp. of Pet. to Intervene, Ex. 1: April 24, 2021 BAR Agenda Meeting Results.) See Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 144, 719 S.E.2d 703, 706 (Ct. App. 2011) ("[F]indings of fact will not be disturbed on appeal unless wholly unsupported by the evidence . . . ."); State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct. App. 2005) ("This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence.").

with the Developer to review a renewed design on February 4, 2020. The Developer incorporated few, if any, of Historic Charleston's suggestions into the Proposed Development's ultimate design. (Id. ¶ 13.)

On April 14, 2021, the Developer appeared before the BAR for a first public hearing on its application for conceptual approval of the project. The proposal included eight stories, 325 apartments, retail space, and a 429-space parking deck. (PSC's Memo. In Supp. of Pet. to Intervene, Ex. 1: April 24, 2021 BAR Agenda Meeting Results.) Historic Charleston attended the BAR hearing and advocated against the Proposed Development's design. (Drolet Aff. ¶ 13). At the public hearing, Historic Charleston requested that the Developer rework the massing of the structure, reduce the structure's height, and improve its design to better comport with the quality and character of Charleston's architecture. (Id.) At the conclusion of the hearing, the BAR denied conceptual approval of the building design for the Proposed Development by unanimous vote. (April 24, 2021 BAR Agenda Meeting Results.) After the BAR's denial, Historic Charleston met with the Developer again on May 10, 2021, where it again outlined specific ways in which the Developer could reduce concerns with the proposed design identified by the BAR and secure the support of Historic Charleston. (Drolet Aff. ¶ 12.) Again, the Developer chose not to incorporate Historic Charleston's suggestions into the Proposed Development's design. (Id. ¶ 13.)

On August 25, 2021, the Developer appeared before the BAR for a second public hearing on its application for approval of the project. The BAR again denied approval by unanimous vote. (PSC's Memo. In Supp. of Pet. to Intervene, Ex. 2: August 25, 2021 BAR Agenda Meeting Results.) Historic Charleston also attended this public BAR hearing, where it reiterated its comments from the April hearing and argued that the Developer had

failed to sufficiently address the concerns expressed by the BAR during the first hearing. (Drolet Aff. ¶ 12.) Comments to the BAR's second denial explain that "the [P]roposed [Development] appears to have a square footprint with long facades extending in two directions," giving it "a blocky perception and no semblance of narrow frontages." (August 25, 2021 BAR Agenda Meeting Results.) The BAR also noted that the Proposed Development's conceptual design had been the subject of "public outcry." (Id.)

On September 22, 2021, the Developer appealed the BAR's August 25, 2021 decision to the Circuit Court pursuant to S.C. Code Ann. § 6-29-900, naming the City and the BAR as respondents. (SE Calhoun's Notice of Appeal.) Pursuant to S.C. Code Ann. § 6-29-915(A), the Developer contemporaneously filed a request for pre-litigation mediation. (SE Calhoun's Request for Pre-litigation Mediation.) Preservation Society and Historic Charleston filed petitions to intervene pursuant to S.C. Code Ann. § 6-29-915(A), which provides in relevant part:

> A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the board of architectural review.

(PSC Pet. to Intervene; App. Pet. to Intervene.) In support of its petition to intervene, Historic Charleston provided the Court with an affidavit outlining its mission, the details concerning its ownership of forty-seven preservation easements in the Harleston Village neighborhood, and its history of its active involvement with the 295 Calhoun project. The Circuit Court denied Historic Charleston's petition on December 6, 2021. (December 6, 2021 Order). Historic Charleston and Preservation Society filed Notices of Appeal on December 22, 2021 and December 23, 2021, respectively. (App. Notice of Appeal; PSC Notice of Appeal.)

## STANDARD

An issue of statutory interpretation is a question of law, which calls for de novo review. Univ. of S. California v. Moran, 365 S.C. 270, 275, 617 S.E.2d 135, 137 (Ct. App. 2005); Neumayer v. Philadelphia Indem. Ins. Co., 427 S.C. 261, 265, 831 S.E.2d 406, 408 (2019). Under de novo review, this Court must reverse a decision controlled by an error of law. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016).

## ARGUMENT

This appeal presents a single, narrow issue of statutory interpretation: whether Historic Charleston in this case satisfies the "substantial interest" standard called for by the controlling statute. S.C. Code Ann. § 6-29-915(A). The language of the statute, the statute's context, and the purpose undergirding the statute all support a finding that Historic Charleston has a "substantial interest" under the language of the statute.

Historic Charleston is an organization whose very purpose is to preserve Charleston's unique historic character and to promote appropriate development within the city. (See Drolet Aff. ¶ 3). The BAR agrees that the Proposed Development presents an unacceptable deviation from Charleston's architectural design standards. Historic Charleston has participated extensively in private deliberations regarding the Proposed Development's design, as well as the BAR's public process. Historic Charleston holds forty-seven preservation easements in the same historic neighborhood in which the Proposed Developed would sit: the Harleston Village. The decision of the BAR will significantly impact each of these independent interests. Thus, Historic Charleston has demonstrated a "substantial interest" in the decision of the BAR, and this Court should reverse the Circuit Court's ruling.

## I. Historic Charleston Has Standing Pursuant to S.C. Code Ann. § 6-29-915(A)

As an initial matter, Historic Charleston's standing to intervene is authorized by S.C. Code Ann. § 6-29-915(A), meaning that Historic Charleston need not resort to doctrines of constitutional standing. A party may acquire standing "(1) by statute; (2) through the rubric of 'constitutional standing;' or (3) under the 'public importance' exception." ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (emphasis added). When a statute confers standing, "The traditional concepts of constitutional standing are inapplicable[.]" Freemantle v. Preston, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012).

Here, S.C. Code Ann. § 6-29-915(A) confers standing to Historic Charleston if it can demonstrate a "substantial interest" under the statute. Indeed, this Court has determined that a statute nearly identical to § 6-29-915 conferred standing to an appellant under similar circumstances. See Bevivino v. Town of Mount Pleasant Bd. of Zoning Appeals, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013). There, the appellant filed an appeal from a local zoning board pursuant to S.C. Code Ann. § 6-29-820(A), which authorizes those with a "substantial interest" to appeal decisions of the board. Id. at 63, 737 S.E.2d at 867. The Court found that § 6-29-820 conferred "statutory standing" to the appellant in that case without the need to resort to "traditional concepts of constitutional standing." Id. The same reasoning should hold true here.

## II. Historic Charleston Has a "Substantial Interest" in the Decision of the BAR.

Historic Charleston has a "substantial interest" in the decision of the BAR under S.C. Code Ann. § 6-29-915(A). "The cardinal rule of statutory construction is . . . to

ascertain and effectuate the actual intent of the legislature." Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606 (2006). The Court must "give words their plain and ordinary meaning" and should "not resort to forced construction that would limit or expand the statute." State v. Johnson, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011). Where statutory language is unambiguous, the Court must effectuate its plain and ordinary 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). On the other hand, where statutory language is ambiguous, the Court must endeavor to ascertain the meaning intended by the General Assembly. Id.

Section 6-29-915 provides in relevant part:

> (A) If a property owner files a notice of appeal with a request for pre-litigation mediation, the request for mediation must be granted and the mediation must be conducted in accordance with South Carolina Circuit Court Alternative Dispute Resolution Rules and this section. A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the board of architectural review.

S.C. Code Ann. § 6-29-915(A) (emphasis added). As the language indicates, where a party "has a substantial interest in the decision of the board of architectural review," the Court "must" permit the party to intervene. Id. For at least three reasons, Historic Charleston satisfies this statutory standard.

First, Historic Charleston has a "substantial interest" because its very purpose is to preserve the unique and historic landscape of Charleston and to promote sustainable development within the city through active and consistent participation at BAR hearings.

(Drolet Aff. ¶ 3.) Fundamental to that mission is ensuring that new developments in Charleston are presented publicly to the BAR for review, comment, and deliberations. Historic Charleston's members depend upon Historic Charleston to actively participate in the BAR process. As the BAR noted in its denials of the Developer's applications, the Proposed Development's design is out-of-step with the historic character of the surrounding neighborhood. Put differently, the BAR has determined that the Proposed Development is incompatible with Charleston's architectural standards, and central to Historic Charleston's mission is to preserve and protect the historic and architectural integrity of Charleston. Historic Charleston's mission and role as an advocate before the BAR gives it a "substantial interest" in this particular decision of the BAR and independently meets the statutory requirement of S.C. Code Ann. § 6-29-915(A).

In Citizens for Quality Rural Living, Inc. v. Greenville Cty. Plan. Comm'n, this Court reviewed a statute similar to the relevant statute here and within the same statutory chapter. 426 S.C. 97, 106, 825 S.E.2d 721, 726 (Ct. App. 2019). Like Historic Charleston, Citizens for Quality Rural Living is a mission-driven, non-profit advocacy organization. In that case, Citizens for Quality Rural Living appealed the Greenville County Planning Commission's decision to approve a developer's proposed subdivision. The relevant statute conferred the right to appeal upon "any party in interest," and the Court found that Citizens for Quality Rural Living "clearly" qualified as a party in interest even though it was not seeking a permit from the Greenville planning commission. Id. (citing S.C. Code Ann. § 6-29-1150(C)). In so finding, this Court indicated that Citizens for Quality Rural Living had a "substantial interest" in the planning commission's decision because, among other reasons, its "members include persons who own property and live in the immediate

vicinity of the" subject property. Citizens for Quality Rural Living, 426 S.C. at 106, 825 S.E.2d at 726 n.3 (noting that "a real party in interest for purposes of standing" is equivalent to "a party with a real, material, or substantial interest in the outcome of the litigation").

Second, Historic Charleston has a "substantial interest" because it has been an active participant in the Developer's quest for approval of this particular project from the BAR for almost two years. In accordance with its mission, Historic Charleston participated extensively in the process by which the Developer conceived the Proposed Development's design and the process by which the BAR reviewed it and twice denied approval. On June 17, 2020, before the Developer even purchased 295 Calhoun Street, Historic Charleston attended a hearing at the Planning Commission, where the Developer sought to amend the applicable zoning laws. (Drolet Aff. ¶ 11). Before the Planning Commission, Historic Charleston raised its concerns. (Id.) Months later, Historic Charleston actively participated in both public BAR hearings. (Id. ¶ 13.) Moreover, Historic Charleston privately met with the Developer on at least three occasions during the design process and communicated with the Developer's design team on several more occasions. (Id. ¶ 12.) Each time, Historic Charleston offered design modifications that would integrate the Proposed Development into the surrounding area. The Developer elected to present its preferred design, which has been twice denied. (Id. ¶ 13.) Historic Charleston has been actively engaged with issues related to this project for nearly two years. In short, Historic Charleston's extensive participation throughout the life of this issue is a second independent reason that it has a "substantial interest" in the decision of the BAR under S.C. Code Ann. § 6-29-915(A).

Finally, Historic Charleston holds forty-seven preservation easements in the Harleston Village neighborhood, where the Proposed Development would sit. Fifteen of

those easements are within one-half mile of the Proposed Development. (Drolet Aff. ¶¶ 6–9.) These easements are substantial property interests, which carry with them certain rights and responsibilities held by Historic Charleston. See Rhett v. Gray, 401 S.C. 478, 490, 736 S.E.2d 873, 879 (Ct. App. 2012). Typically, a historic property owner grants a perpetual preservation easement to an organization like Historic Charleston, which guarantees that the owner will not alter the architectural character of the structures on the property, change the use or density of the property, construct new buildings or disturb archaeological features, or subdivide the property without the approval of the easement holder. An easement gives the organization to which it is conveyed the legal authority to enforce its terms. An easement also protects the architectural integrity of a property and, by extension, the historic character of the neighborhood and surrounding areas. Historic Charleston's responsibilities include reviewing requests from the property owners to alter or change the exterior of the property, monitoring restrictions on use, annually inspecting the property, making repairs or instructing the owner to make repairs as necessary, and working to maintain the property's historical integrity. Preservation easements are one of the primary means by which Historic Charleston carries out its mission of historic preservation.

Historic Charleston's easements in the Harleston Village will be directly impacted by the BAR's decision to approve or deny conceptual approval of the Proposed Development's design. The Proposed Development will impact the integrity of the Harleston Village neighborhood's historic character; impact the value of the historic properties; impact traffic, congestion, pollution, and noise in the area; impact the viewshed and lighting of the relevant properties; impact the use and enjoyment of the relevant properties; and impact Historic Charleston's ability to access the properties. (Drolet Aff.

¶ 9.) Historic Charleston's easements, which are in the near vicinity of the Proposed Development, give Historic Charleston a third independent basis for meeting the "substantial interest" requirement of S.C. Code Ann. § 6-29-915(A).

Under similar circumstances, this Court previously held that property rights adjacent to a proposed development gave the property holder a "substantial interest" in the decision of an adjudicative board under a statute substantially similar to S.C. Code Ann. § 6-29-915(A). See Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island, 292 S.C. 542, 357 S.E.2d 487 (Ct. App. 1987), rev'd on other grounds, 295 S.C. 67, 367 S.E.2d 160 (1988). In Spanish Wells, the relevant statute stated: "Any person who may have a substantial interest in any decision of the . . . board of adjustment . . . may appeal from any decision of the board to the circuit court . . . ." Id. at 544, 357 S.E.2d at 487 (citing former S.C. Code Ann. § 6-7-750) (emphasis added). Spanish Wells, an association of members, filed an appeal pursuant to the statute, arguing that it had a "substantial interest" in the outcome of the board's decision. Id. This Court held that "Spanish Wells and its members, as the owners of property adjacent to and in the near vicinity of" the proposed development there, had a "substantial interest" in the zoning board's decision and, therefore, had standing to appeal the board's decision. Id. at 545, 357 S.E.2d at 487. Historic Charleston, like Spanish Wells, is an association of members with an interest in the BAR's decision on the Proposed Development. Also like Spanish Wells, Historic Charleston and its members own property in the near vicinity of the proposed development. Although Historic Charleston holds easements on nearby properties, rather than holding nearby properties in fee simple like the members in Spanish Wells, the reasoning of the Court's decision in Spanish Wells is applicable here. For this reason, in

addition to the others, Historic Charleston has a "substantial interest" in the decision of the BAR.

### A. The General Assembly Intended to Grant the Right to Intervene to Organizations Like Historic Charleston According to the Plain Meaning of the § 6-29-915(A).

The plain language of S.C. Code Ann. § 6-26-915(A) suggests that the General Assembly intended for advocacy groups like Historic Charleston to satisfy the statutory definition. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." State v. Sweat, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008). Therefore, "[a]ll rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used." Gay v. Ariail, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009). "Under the plain meaning rule, it is not the province of the court to change the meaning of a clear and unambiguous statute." S.C. Energy Users, 388 S.C. at 491, 697 S.E.2d at 590 (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Where a statute's language "conveys a clear, definite meaning, the rules of statutory interpretation are not needed[,] and the court has no right to impose another meaning." Id. (citing Gay, 381 S.C. at 345, 673 S.E.2d at 420). Further, "when a term is not defined in a statute, "the Court must interpret the term in accordance with its usual and customary meaning." Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 212, 845 S.E.2d 481, 487 (2020), reh'g denied (Aug. 7, 2020) (quoting Travelscape, LLC v. S.C. Dep't of Rev., 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011)).

In determining whether statutory language is ambiguous, the Court "should not concentrate on isolated phrases within the statute;" instead, it must "read the statute as a

whole and in a manner consonant and in harmony with its purpose." CFRE, LLC v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). In the same vein, the Court 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. (quoting Sweat, 379 S.C. at 382, 665 S.E.2d at 654) (internal citations omitted). If the language, considered in the context of the statute, conveys a clear meaning, the statute is unambiguous, and the Court must apply its plain meaning. Such is the case here.

As discussed above, the General Assembly conferred the right to intervene upon parties "with a substantial interest in the decision of the board of architectural review." S.C. Code Ann § 6-29-915(A) (emphasis added). Black's Law Dictionary lists the following relevant definitions for "substantial":

(1) Of, relating to, or involving substance; material[;]

(2) Real and not imaginary; having actual, not fictitious, existence[;] and

(3) Important, essential, and material; of real worth and importance[;]

SUBSTANTIAL, BLACK'S LAW DICTIONARY (11th ed. 2019). Likewise, Merriam Webster's dictionary defines "substantial" to mean "consisting of or relating to substance; not imaginary or illusory; important or essential." SUBSTANTIAL, MERRIAM WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/substantial (last accessed April 7, 2022). In accordance with those ordinary definitions, this Court has indicated that a "substantial interest" is equivalent to a real or material interest. See Bank of Am., N.A. v. Draper, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) ("A real party in interest

for purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation.").

Historic Charleston's interest in the decision of the BAR should qualify as substantial under the plain language of the statute. For the reasons discussed above, the BAR's decision holds importance to Historic Charleston. For the reasons already discussed, Historic Charleston's interests are real, not imaginary or illusory or too far removed to be meaningful. See S.C. Energy Users, 388 S.C. at 492, 697 S.E.2d at 590 (finding that a Court must interpret an undefined defined statutory term "in accord with its usual and customary meaning").

The plain meaning of other language in S.C. Code Ann. § 6-29-915(A) indicates that the General Assembly intended to permit organizations like Historic Charleston to intervene in matters like this one. In the statute, the General Assembly specifically granted the right to intervene to parties "who [are] not the owner[s] of the property[.]" S.C. Code Ann. § 6-29-915(A). The statute specifically contemplates intervention by a class of parties wider than "property owners" affected by the BAR's decision. In Citizens for Quality Rural Living, this Court considered a very similar statute, S.C. Code Ann. § 6-29-1150, in which the General Assembly created a right to appeal the decision of local planning commissions. 426 S.C. at 106, 825 S.E.2d at 726. There, this Court found significant that the General Assembly did not circumscribe § 6-29-1150(C)'s right to appeal to "property owners." Id. Likewise, the General Assembly did not limit § 6-29-915(A)'s right to intervene to "property owners." Instead, the General Assembly conferred the right to intervene to a broader class. The plain language of the statute at issue here suggests that the General Assembly intended to permit organizations with significant, demonstrable interests in the

outcome of the BAR's decision, like Historic Charleston, to intervene in the case. According to the plain meaning of "substantial interest," Historic Charleston should be permitted to intervene in this case.

### B. The General Assembly Intended to Grant the Right to Intervene to Organizations Like Historic Charleston According to the Context of § 6-29-915(A).

Aside from the plain meaning, the context of the applicable statute shows the General Assembly's intent to grant the right to intervene to organizations like Historic Charleston. "The 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). To that end, 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, 395 S.C. at 74, 716 S.E.2d at 881 (quoting S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)); see also S.C. Energy Users, 388 S.C. at 492, 697 S.E.2d at 590 ("Courts should not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.").

The South Carolina Local Government Comprehensive Planning Enabling Act (the "LGCPEA"), which is codified in Title 6, Chapter 29 of the South Carolina Code, authorizes local governments to create adjudicative bodies for matters of land use. In S.C. Code Ann. § 6-29-915(A), the General Assembly granted the right to intervene in pre-litigation mediation specifically to parties with a "substantial interest in the decision of the board of architecture review." The General Assembly did not limit that right to "property owners," "owners of adjoining land," or "adjacent or neighboring property owners." Had

the General Assembly intended to limit the class of persons authorized to intervene to the owner of the affected property or to owners of neighboring real property, it could have done so. It did not.

Elsewhere in the LGCPEA, the General Assembly did so limit certain rights. For example, in S.C. Code Ann. § 6-29-950, a section that governs the enforcement of zoning ordinances, the General Assembly conferred the right to seek an injunction to "an adjacent or neighboring property owner[.]" S.C. Code Ann. § 6-29-950(A). Also, in S.C. Code Ann. § 6-29-760, a section that addresses challenges to zoning ordinances, the General Assembly conferred standing to bring such challenges upon "an owner of adjoining land[.]" S.C. Code Ann. § 6-29-760(C). If the General Assembly intended to limit the right to intervene to owners of the subject property or neighbors, it would have used different language in the controlling statute. The General Assembly's decision to use or omit specific language is significant. Sweat, 379 S.C. at 377, 665 S.E.2d at 651 ("When interpreting a statute, courts must presume the legislature did not intend to do a futile act."); State v. Elwell, 403 S.C. 606, 613, 743 S.E.2d 802, 806 (2013) ("It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning.").

Further, in Citizens for Quality Rural Living, this Court found significant that the relevant statute there, like the relevant statute here, treats parties in interest differently than "property owners." 426 S.C. at 106, 825 S.E.2d at 726 (finding that § 6-29-1150(C) "as a whole gives different treatment to the larger class of appellants and the subclass of property owners"). Likewise, the Court should give similar weight to the General Assembly's decision not to circumscribe S.C Code Ann. § 6-29-915(A)'s right to intervene to property

owners or owners of "adjacent or neighboring property." The context of S.C. Code Ann. § 6-29-915(A) indicates that the General Assembly intended to capture organizations like Historic Charleston when it conferred the right to intervene upon parties with a "substantial interest in the decision of the board of architectural review."

### C. The General Assembly Intended to Grant the Right to Intervene to Organizations Like Historic Charleston According to the Purpose of § 6-29-915(A).

Finally, the General Assembly intended to confer to organizations like Historic Charleston the right to intervene based on the underlying policy of the relevant law. A court must construe a statute's language "in light of the intended purpose of the statute." Gay, 381 S.C. at 345, 673 S.E.2d at 420; see also S.C. Energy Users, 388 S.C. at 492, 697 S.E.2d at 590 (Statutory language must be construed "in conjunction with the purpose of the whole statute and the policy of the law."). The Court should "reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Sweat, 379 S.C. at 377, 665 S.E.2d at 650.

The relevant statute is within Title 6, Chapter 29 of the South Carolina Code, which codifies the LGCPEA. Generally, the LGCPEA grants counties and municipalities the authority to create local bodies to adjudicate matters of land use. See S.C. Code Ann. § 6-29-320. It also establishes a procedure for appeals from the decisions of those bodies. See, e.g., S.C. Code Ann. § 6-29-820 (authorizing appeals from zoning boards of appeals). Importantly, the General Assembly conferred the authority to establish the policies and procedures governing such bodies to local governments. S.C. Code Ann. § 6-29-870(D).

The LGCPEA specifically authorizes local governments to establish boards of architectural review to uphold local laws

> for the preservation and protection of historic and architecturally valuable districts and neighborhoods, . . . the unique, special, or desired character of a defined district, corridor, or development area or any combination of it[.]

S.C. Code Ann. § 6-29-870(A). The General Assembly enacted the LGCPEA "to assure, in general, the wise and timely development of new areas . . . in harmony with the comprehensive plans of municipalities and counties." S.C. Code Ann. § 6-29-1120.

To that end, the City established the BAR. Central to the function of the BAR is public participation. The BAR's rules of procedure mandate that its records be maintained as public records, that all BAR meetings be open to the public, that the public be notified of the subject matter for each meeting at least five days prior to the meeting, that twenty minutes of each BAR meeting be reserved for public comment, and that deliberations be had and votes be taken in the view of public. See Rules of Procedure of the Board of Architectural Review.[2] Transparency and public participation are intentional cornerstones of the BAR process. The City instilled transparency and public participation into nearly every facet of the BAR process because those principles are vital to its integrity and to the continued preservation of Charleston's architectural standards.

On June 2, 2003, the General Assembly passed the South Carolina Land Use Dispute Resolution Act ("LUDRA"), which amended some statutes within the LGCPEA, including S.C. Code Ann. § 6-29-915(A), to give parties appealing land-use decisions the option to utilize pre-litigation mediation. The General Assembly intended LUDRA to

[2] The BAR's Rules of Procedure are publicly available online and accessible through the BAR's website: https://www.charleston-sc.gov/293/Board-of-Architectural-Review-BAR-L-BAR-

improve the land-use adjudicative process by promoting pre-litigation mediation as means of alternative dispute resolution. See Citizens for Quality Rural Living, 426 S.C. at 108, 825 S.E.2d at 727. Conscientious that a closed-door mediation would undercut the transparency of the processes by which local land-use disputes are resolved, the General Assembly opened the door to pre-litigation mediation to parties with a "substantial interest" in the decision of the BAR, requiring that they "must" be permitted to intervene if they show a "substantial interest." S.C. Code Ann. § 6-29-915(A). In passing the LUDRA, the General Assembly promoted mediation and simultaneously ensured parties with a substantial interest in the decision of a board of architectural review would not be excluded through the privatization of an otherwise public process.

The Circuit Court's interpretation of S.C. Code Ann. § 6-29-915(A) conflicts with the purposes underlying the LGCPEA, the LUDRA, and the BAR. The LGCPEA contemplates that where a developer receives a denial from a local adjudicative board, it may either re-engage in the BAR process with a revised design or appeal the decision to the Circuit Court.[3] Both processes maintain transparency through public notice and the public availability of materials. In amending § 6-29-915(A), the General Assembly did not intend for pre-litigation mediation to authorize a developer to negotiate privately with the BAR without any input from parties with a substantial interest in the decision. The General Assembly specifically required that the pre-litigation mediation must be opened to any

[3] In the case of the latter, the Circuit Court reviews the decision of the BAR and reverses the decision only "if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." Bevivino, 402 S.C. at 62, 737 S.E.2d at 866.

party "with a substantial interest in the decisions of the board of architectural review." S.C. Code Ann. § 6-29-915(A).

The Circuit Court's decision to exclude Historic Charleston from intervening undercuts the purpose the General Assembly intended. Under the Circuit Court's decision, a developer can side-step the public process and negotiate without any input from parties with a substantial interest in the decision of the BAR. Allowing a developer to use pre-litigation mediation as a tool to exclude the public and get behind closed doors with local lawmakers is not the framework contemplated or intended by the General Assembly. Elsewhere, the General Assembly has made clear its concern for involving elected political officials in decisions of boards of architectural review. See S.C. Code Ann. § 6-29-870(C) (prohibiting members of boards of architectural review from holing other local public office). Therefore, concluding that the Historic Charleston has a "substantial interest" in the decision of the BAR comports with the policies underlying the LGCPEA, the LUDRA, the BAR. Under the Circuit Court's decision, only owners of the subject property, easement holders in the subject property, or owners of neighboring properties might arguably qualify as substantially interested parties within the language of S.C. Code Ann. § 6-29-915(A). The statute is not so limited. Historic Charleston is exactly the type of party the General Assembly intended to cover in S.C. Code Ann. § 6-29-915(A). It is hard to conceive of a non-property owner more interested in the decision of the BAR than Historic Charleston. Therefore, the Court should construe the statute as entitling Historic Charleston to intervene in this case.

### D. This Court Should Overrule the Circuit Court.

In denying Historic Charleston's motion to intervene, the Circuit Court reasoned that Historic Charleston does not satisfy the statute because it does not own any property "adjacent to, or within the immediate surroundings" of the Proposed Development "as defined by the City of Charleston Zoning Ordinance." Order at 1. In support of its reasoning, the Circuit Court cited Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014). Charleston City Ordinances should not be determinative as to whether Historic Charleston has a "substantial interest" within the terms of S.C. Code. Ann. § 6-29-915(A). The controlling statute does not limit the right to intervene to parties as defined by local zoning ordinances or to parties that own property "adjacent to, or within the immediate surroundings" of the subject property. Instead, § 6-29-915(A) confers the right to intervene upon any party with a "substantial interest" in the decision of the BAR.

Carnival Corp. is distinguishable on its facts. In Carnival Corp., the Supreme Court found that four non-profit organizations, including Historic Charleston, lacked standing under S.C. Code Ann. § 6-29-950. 407 S.C. at 79, 753 S.E.2d at 852. But S.C. Code Ann. § 6-29-950 is materially different than S.C. Code Ann. § 6-29-915(A). Section 6-29-950 grants certain rights specifically to "an adjacent or neighboring property owner." S.C. Code Ann. § 6-29-950. As discussed above, the General Assembly used intentionally different language in the controlling statute in this case. In this context, Carnival Corp. was reviewing the language of a statute that is simply different than the language in the statute at issue here.

The Circuit Court also reasoned that Historic Charleston's interest in the BAR's decision is not sufficiently substantial because its "general interests . . . are protected by the City [] and the BAR, both of which are parties to the appeal and pre-litigation mediation." (December 6, 2021Order at 3). With respect to the former, Historic Charleston is a mission-driven, non-profit organization and advocacy group that has extensive experience and special expertise in Charleston's historic architecture. Unlike the City, Historic Charleston is not a political entity, and it is not beholden to taxpayers, voters, or political influence. The BAR has a different interest as well and should not be expected to "protect" the interests of Historic Charleston. The BAR is not an advocate, but rather a decisive body, like an umpire in a baseball game or referee in a tennis match. The BAR represents compliance with the architectural design standards for the city of Charleston, and it was never intended to negotiate privately with developers who seek its approval.

Turning to S.C. Code Ann. § 6-29-915(D), the fact that any potential settlement must be approved by Charleston City Council should not serve as a substitute for Historic Charleston's right to intervene in the case. If the Court permits Historic Charleston to intervene, Historic Charleston would be able to actively participate in mediation, offer valuable insight, and shape the terms of a possible settlement. Conversely, if the Court denies intervention, Historic Charleston would be shut out from the mediation process entirely, and its role would be limited to making comments before City Council approved a settlement agreement that it had already negotiated, presumably in consideration of the practical concerns associated with securing a vote of settlement approval by Council.

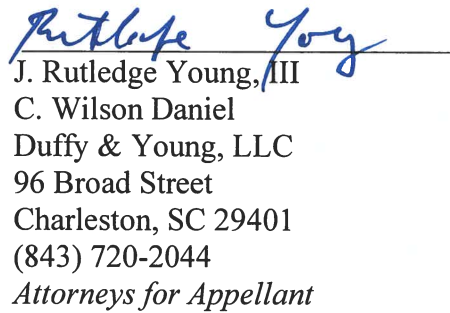
The Circuit Court reasoned that granting Historic Charleston intervention would have "the effect of giving [it] veto rights over any settlement proposal." Order at 2. The

Court's reasoning is accurate but seems misplaced here. S.C. Code Ann. § 6-29-915(A) does not give a Court discretion to evaluate the potential effects of the intervention of a party with a substantial interest in the decision of BAR; it states that the Court "must" grant a party's request to intervene where that party has a "substantial interest" in the decision of the BAR. The only inquiry before the Circuit Court should be whether Historic Charleston's satisfies the "substantial interest" standard, not what rights it might have if it does meet the standard. Because mediation is a voluntary process, every party effectively has a "veto power" in every mediation. The Court's observation is practical and shrewd. Such is the nature of any mediation. In many regards, this dynamic is part of the reason that good-faith mediations often lead to settlements that reflect compromises by all parties. This reasoning seems to reflect the General Assembly's understanding of the process and its intention for parties like Historic Charleston to be permitted to intervene upon a showing of a "substantial interest" under the statute. To that end, Historic Charleston seeks to participate in the mediation in good faith in hopes of securing a mutually agreeable settlement.[4] For the foregoing reasons, this Court should reverse the Circuit Court's denial of Historic Charleston's motion to intervene.

[4] A failed mediation simply leads to the Circuit Court's review of the BAR's decision denying the Developer's approval; a matter in which Historic Charleston has a "substantial interest" for the reasons outlined herein.

## CONCLUSION

Historic Charleston respectfully requests that this Court reverse the judgment of the Circuit Court and find that Historic Charleston has demonstrated a "substantial interest" in the decision of the BAR regarding 295 Calhoun Street.



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THE STATE OF SOUTH CAROLINA
In The SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

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Case No. 2021-CP-10-04366
Appellate Case No. 2021-001530

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EX PARTE PRESERVATION SOCIETY OF CHARLESTON and HISTORIC CHARLESTON FOUNDATION,

Appellants.

SE CALHOUN, LLC,

Respondent,

v.

CITY OF CHARLESTON and CITY OF CHARLESTON BOARD OF ARCHITECTURAL REVIEW,

Respondents.

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## PROOF OF SERVICE

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I hereby certify that on this date I have served **APPELLANT HISTORIC CHARLESTON FOUNDATION'S INITIAL BRIEF AND DESIGNATION OF MATTER** on all parties to their respective e-mail addresses, pursuant to the Order of the Supreme Court Appellate Case No. 2020-000447(g)(3).

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May 19, 2022

***VIA E- MAIL***

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RE: Ex Parte Preservation Society of Charleston and Historic Charleston Foundation v. SE Calhoun, LLC, et al.
Appellate Case No. 2021-001529

Dear Ms. Kitchings:

Enclosed for filing please find Appellant Historic Charleston Foundation's Initial Brief and Designation of Matter, as well as the Proof of Service of same.

Should you have any questions or concerns, please do not hesitate to contact me.

Respectfully,

Liane M. Berns
*Paralegal*

Enclosures
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