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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case Nos. 2021-001529 and 2021-001530
Trial Court Case No.: 2021-CP-10-04366

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.

INITIAL BRIEF OF APPELLANT PRESERVATION SOCIETY OF CHARLESTON

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May 19, 2022
Charleston, South Carolina

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STATEMENT OF ISSUE ON APPEAL

I. Did the Trial Court err in ruling the Preservation Society of Charleston does not have a "substantial interest" in the City of Charleston Board of Architectural Review's decision regarding SE Calhoun, LLC's application for conceptual approval of the building design of a Proposed Development located in the Harleston Village neighborhood of the City of Charleston's Historic District?

STATEMENT OF THE CASE

This matter arises out of a Georgia-based developer's appeal of the City of Charleston Board of Architectural Review ("BAR") denying its application for conceptual approval of its building design of a massive scale mixed-use building consisting of 8 stories, 325 apartment units, retail space, and a 429-space parking deck (the "Proposed Development") at 295 Calhoun Street located in the Harleston Village neighborhood of the City of Charleston's Historic District.

The Preservation Society of Charleston ("PSC"), a membership organization since its founding in 1920, has approximately 130 members that reside in Harleston Village, the historic neighborhood in which the Proposed Development is located. If approved as currently designed, the Proposed Development would be damaging to the Harleston Village neighborhood and the PSC members residing therein, as it would significantly change the historic character of the neighborhood and negatively affect the residents' use and enjoyment of their surroundings.

PSC was significantly involved in the BAR process related to the Proposed Development and attempted to regularly communicate with the developer regarding its conceptual building design for the Proposed Development. During the BAR process, the developer twice submitted applications for BAR conceptual approval of the proposed building design. Both times the BAR denied the developer's applications. After the BAR denied the developer's application for the second time, the developer appealed the BAR's decision to the Circuit Court and contemporaneously filed a request for pre-litigation mediation to be conducted with the City of Charleston and the BAR. PSC and the Historic Charleston Foundation ("HCF") then filed Petitions to Intervene pursuant to S.C. Code § 6-29-915(A) and Rule 24 of the South Carolina Rules of Civil Procedure ("SCRCP").[1]

[1] *See* PSC Pet. to Intervene and HCF Pet. to Intervene.

The Honorable Roger M. Young, Sr. thereafter denied both PSC's and HCF's Petitions to Intervene and committed an error of law by misinterpreting the term "substantial interest" under S.C. Code § 6-29-915(A) and by ruling that neither PSC nor HCF showed a "substantial interest" in the BAR decision related to SE Calhoun's application for conceptual approval of the building design of the Proposed Development.

FACTUAL BACKGROUND

The developer, SE Calhoun, LLC ("SE Calhoun" or "the developer"), purchased the 2.1-acre parcel property located at 295 Calhoun Street on June 26, 2020 for $12,000,000.00.[2] SE Calhoun is an affiliate of Georgia-based developer, Southeastern. The parcel is located in downtown Charleston within the historic Harleston Village neighborhood.[3] Shortly after purchasing the property, SE Calhoun applied to the BAR for conceptual approval of a building design of the Proposed Development. PSC met twice with SE Calhoun representatives on December 17, 2020 and February 4, 2021 to provide feedback and comments on the proposed building design of the Proposed Development.[4]

SE Calhoun's application was placed on the BAR meeting agenda on April 14, 2021 for conceptual approval of the building design of the Proposed Development. Despite prior meetings with PSC, SE Calhoun submitted an application with a proposed building design that failed to incorporate most of the PSC's specific suggestions. At the meeting on April 14, 2021, PSC provided a position statement to the BAR opposing the Proposed Development due to its height, scale, mass, and architectural direction and strongly urging the BAR to deny the application.[5] PSC

[2] *See* Hearing Trans. 31:18–20.
[3] *See* December 6, 2021 Order.
[4] *See* PSC Memo. In Supp. of Pet. To Intervene, Ex. 6: Minnigan Aff. ¶ 6.
[5] *See* PSC Memo. In Supp. of Pet. To Intervene, Ex. 7: PSC Position Statement dated April 14, 2021.

conveyed its concern that the building design was overwhelmingly massive for the site, out of scale in relation to the Harleston Village neighborhood, and presented a design that was fundamentally at odds with the City's unique architectural character.[6] At the conclusion of the meeting on April 14, 2021, the BAR, by unanimous vote, denied SE Calhoun's application for conceptual approval of the proposed building design of the Proposed Development.[7]

Thereafter, on May 10, 2021 and June 10, 2021, the PSC team met again with SE Calhoun representatives in person to discuss the building design of the Proposed Development.[8] Despite PSC emphasizing to SE Calhoun that a complete restudy of the design was necessary prior to resubmission, PSC learned that SE Calhoun intended to submit new plans to the BAR for an August public hearing without incorporating the substantial changes PSC suggested were needed.[9] Upon learning this, PSC emailed SE Calhoun representatives on July 30, 2021 to relay that PSC would again urge the BAR to deny conceptual approval of the building design.[10]

SE Calhoun's application was placed on the BAR meeting agenda on August 25, 2021 for conceptual approval of the building design of the Proposed Development. At the meeting on August 25, 2021, as there was no meaningful change from the previously denied version of the proposed building design and a failure to respond to or incorporate the PSC's feedback or the BAR's direction, the PSC again provided a position statement to the BAR opposing the Proposed Development due to its height, scale, mass, and architectural direction and strongly urging the

[6] *See* Minnigan Aff. ¶ 8.
[7] *See* PSC Memo. In Supp. of Pet. To Intervene, Ex. 1: BAR-L Agenda Meeting Results dated April 14, 2021.
[8] *See* Minnigan Aff. ¶ 9.
[9] *See* Minnigan Aff. ¶ 10.
[10] *Id*.

BAR to deny the application.[11] The BAR again, by unanimous vote, denied SE Calhoun's application for conceptual approval of the proposed building design of the Proposed Development with objections similar to those PSC had raised on behalf of its members.[12] The BAR then deferred any conceptual approval of the building design of the Proposed Development until further articulation techniques were employed by SE Calhoun and the concerns of the BAR were fully addressed.[13]

On September 22, 2021, SE Calhoun appealed the BAR's August 25, 2021 decision denying its application for conceptual approval of the building design of the Proposed Development and named both the City of Charleston (the "City") and the BAR as Respondents.[14] SE Calhoun contemporaneously filed a Request for Pre-Litigation Mediation in which the only parties to be included were the City and the BAR.[15] Through these procedural mechanisms, SE Calhoun has made it clear that it intends to proceed with the current building design of the Proposed Development which incorporates a mass-scale building design that is fundamentally at odds with the City's unique architectural character and does not coincide with the site or context, especially in relation to the historic Harleston Village neighborhood, which is of substantial interest to PSC and its affected members residing therein. SE Calhoun's objective is to privately negotiate a "settlement" with the City and BAR behind closed doors and without involvement and input from parties, like PSC and HCF, that have a substantial interest in the final design of the Proposed Development.

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[11] *See* PSC Memo. In Supp. of Pet. To Intervene, Ex. 8: PSC Position Statement dated August 25, 2021.
[12] *See* PSC Memo. In Supp. of Pet. To Intervene, Ex. 2: BAR-L Agenda Meeting Results dated August 25, 2021.
[13] *Id.*
[14] *See* Notice of Appeal Pursuant to S.C. Code Ann. §6-29-900(B)(2).
[15] *See* Request for Pre-Litigation Mediation Pursuant to S.C. Code Ann. §6-29-915.

On October 7, 2021, PSC filed a Petition to Intervene pursuant to S.C. Code § 6-29-915 and Rule 24, SCRCP.[16] On October 22, 2021, HCF filed a Petition to Intervene on the same grounds.[17] On November 5, 2021, the Honorable Roger M. Young, Sr. heard oral arguments on both Petitions to Intervene and subsequently denied both by Order dated December 6, 2021.[18] On December 22, 2021, PSC timely filed a Notice of Appeal.[19]

STANDARD OF REVIEW

"Statutory interpretation is a question of law subject to de novo review." *Barton v. S.C. Dep't of Prob. Parole & Pardon Servs.*, 404 S.C. 395, 414, 745 S.E.2d 110, 120 (2013). Thus, this Court is free to decide questions of law "without any deference to the court below*." Brock v. Town of Mt. Pleasant,* 415 S.C. 625, 628, 785 S.E.2d 198, 200 (2016) *(*quoting *CFRE, LLC v. Greenville Cty. Assessor,* 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). Under de novo review, this Court must reverse a decision when it is controlled by an error of law. *See Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (citing *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

The Trial Court committed an error of law in finding that PSC has not shown a "substantial interest" in the BAR decision related to SE Calhoun's application for conceptual approval of the building design of the Proposed Development. In committing this error of law, the Trial Court misinterpreted the term "substantial interest" under S.C. Code Ann. § 6-29-915(A) and inappropriately utilized the City of Charleston Zoning Ordinance to guide its interpretation. If the

[16] *See* PSC Pet. to Intervene and Ex. A: Turner Affidavit.
[17] *See* HCF Pet. to Intervene.
[18] *See* December 6, 2021 Order.
[19] *See* PSC Notice of Appeal.

Trial Court's interpretation of "substantial interest" is accepted, the meaning of the term under S.C. Code Ann. § 6-29-915(A) would be overly narrow and take on a number of different meanings derived from a variety of differing local ordinances across the State of South Carolina – a result that is plainly absurd and in contravention of legislative intent.

I. THE TRIAL COURT ERRED IN INTERPRETING "SUBSTANTIAL INTEREST" UNDER S.C. CODE ANN. § 6-29-915(A) AND INAPPROPRIATELY UTILIZED A LOCAL ZONING ORDINANCE TO GUIDE ITS INTERPRETATION

A. PSC Has Statutory Standing Under S.C. Code Ann. § 6-29-915(A).

PSC has statutory standing under S.C. Code Ann. § 6-29-915(A) to intervene in SE Calhoun's appeal and request for pre-litigation mediation. S.C. Code Ann. § 6-29-915(A) provides that the Trial Court *must* grant a petition to intervene when the proposed intervener has a substantial interest in a BAR decision:

> 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 the South Carolina 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). Because standing is conferred to PSC by statute, the traditional concepts of constitutional standing are inapplicable. *See Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012).

B. PSC Has a "Substantial Interest" in the Decision of the BAR.

While our courts have yet to analyze what the term "substantial interest" means in the context of a BAR decision, this Court has examined similar statutes containing the term "substantial interest" and has provided guidance on how the term should be interpreted in the context of S.C. Code Ann. § 6-29-915(A).

In *Bevivino v. Town of Mt. Pleasant Bd. of Zoning Appeals*, this Court analyzed standing to appeal a zoning board decision under S.C. Code Ann. § 6-29-820(A), which states:

> A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law.

See S.C. Code Ann. § 6-29-820(A); *Bevivino v. Town of Mt. Pleasant Bd. of Zoning Appeals*, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013). In *Bevivino*, the plaintiffs were homeowners in the Candlewood neighborhood of Mount Pleasant who were seeking to challenge the Mount Pleasant's Board of Zoning Appeals' ("BZA") approval of the construction of a telecommunications tower on a parcel of property that was adjacent to the Candlewood neighborhood. *See Bevivino*, 402 S.C. 57, 737 S.E.2d 863 (Ct. App. 2013). This Court reasoned and found that the plaintiffs had a substantial interest in the BZA's decision under S.C. Code Ann. § 6-29-820(A). *Id*. Although this Court later affirmed the BZA's decision, the critical takeaway from *Bevivino* is that property owners in the neighborhood adjacent to the proposed telecommunications tower were held to have substantial interest in the BZA's decision and, therefore, had standing sufficient to participate in the appeal. *Id*.

In *Spanish Wells Property Owners Ass'n, Inc. v. Board of Adjustment*, this Court examined standing to appeal under the former S.C. Code Ann. § 6-7-750, which was the predecessor to S.C. Code Ann. §6-29-820(A). *See Spanish Wells Property Owners Ass'n, Inc. v. Board of Adjustment*, 292 S.C. 542, 357 S.E.2d 487 (Ct.App.1987), *reversed in part on other grounds*, 295 S.C. 67, 367 S.E.2d 160 (1988). S.C. Code Ann. § 6-7-750 stated: "[a]ny 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 …" S.C. Code Ann. §6-7-750. In interpreting this statute, this Court

reasoned and found that "Spanish Wells and its members, as the owners of property **adjacent to and in the near vicinity of** the Calibogue development, are persons with a substantial interest in the Board's decision." *Spanish Wells*, 292 S.C. at 544, 357 S.E.2d at 487 (emphasis added). In other words, the plaintiffs had substantial interest in the board of adjustment's decision because of their location adjacent to and in the near vicinity of the development that was being considered. Like the plaintiffs in *Spanish Wells*, PSC is an association of members, approximately 130 of which reside in the Harleston Village neighborhood where the Proposed Development is located.

In light of this Court using the term "vicinity" to help guide its interpretation of "substantial interest" in *Spanish Wells*, the meaning of term "vicinity" is also important. As such, in *Murphy v. S.C. Dep't of Health & Env't Control*, the Supreme Court of South Carolina examined the meaning of "vicinity" as it was used S.C. Code Ann. Regs. 61-101, which states, "[c]ertification will be denied if (a) the proposed activity permanently alters the aquatic ecosystem in the vicinity of the project such that its functions and values are eliminated or impaired." 25A S.C.Code Ann. Regs. 61–101.F.5(a) (Supp.2011); *Murphy v. S.C. Dep't of Health & Env't Control*, 396 S.C. 633, 723 S.E.2d 191 (2012). In interpreting "vicinity" in accordance with its usual and customary meaning, the Supreme Court of South Carolina noted that "Merriam–Webster defines "vicinity" as meaning "'the quality or state of being near: proximity' or 'a surrounding area or district: neighborhood.'" *Murphy*, 396 S.C. at 640, 723 S.E.2d at 195 (2012) (quoting the Merriam–Webster Dictionary definition of the term "vicinity"). The Supreme Court of South Carolina found that "[u]sing this accepted meaning of the word vicinity, the regulation clearly includes more than just the project; **it logically incorporates the surrounding area**." *Id*. (emphasis added).

By petitioning to intervene in the appeal and pre-litgation mediation, PSC is seeking to protect the rights of its members who have a substantial interest in the BAR's decision by virtue

of residing in the same neighborhood and immediate vicinity of the Proposed Development.[20] The Trial Court Order acknowledges that the Proposed Development is "technically within the Harleston Village Neighborhood,"[21] where approximately 130 PSC members reside. In this statement, the Trial Court accurately contradicts an inaccurate and crudely-drawn exhibit filed by SE Calhoun indicating that the Proposed Development is merely adjacent to the Harleston Village Neighborhood.[22]

As the record reflects, PSC has shown a particularized invasion of a legally protected interest on behalf of its members that reside in Harleston Village that is not a mere generalized grievance suffered by the public as a whole. One of PSC's members, Carter Hudgins, has made his home in Harleston Village specifically because of the neighborhood's historic character, and his appreciation of the architectural character of the neighborhood and the low-density residential scale that has been maintained in the area for more than two centuries will be negatively affected by the current conceptual design of the Proposed Development.[23] Given Mr. Hudgins' proximity to the Proposed Development, he believes the current conceptual design will be "an imposing mass that looms toward the east and our neighborhood."[24] Mr. Hudgins' statements are indicative of the fact that the height, scale, mass, and design of the Proposed Development pose a threat to PSC members' ability to enjoy the architectural character of their neighborhood.[25]

Despite established case law interpretating the meaning of "substantial interest," and despite the evidence of a particularized harm that will be suffered by those members of the PSC

[20] *See* PSC Memo. In Supp. of Pet. To Intervene, Ex. 9: Theis Aff. ¶ 3.
[21] *See* December 6, 2021 Order.
[22] *See* Appellant SE Calhoun's Memo. in Opp. to Pet. to Intervene by PSC and HCF, Ex. B: Map of Harleston Village
[23] *See* PSC Memo. In Supp. of Pet. To Intervene, Ex. 10: Hudgins Aff., ¶ 6.
[24] *Id.* at ¶ 8
[25] *Id.* at ¶ 8, ¶10.

that reside in Harleston Village, the Trial Court adopted SE Calhoun's misplaced emphasis on the term "immediate surroundings" in a local zoning ordinance to guide its interpretation of "substantial interest" under S.C. Code Ann. § 6-29-915(A). In SE Calhoun's Memorandum of Law in Opposition to Petitions to Intervene by PSC and HCF, SE Calhoun also examined the *Spanish Wells* holding, stating, "[a]lthough 'near vicinity' is not a term that is found in the Zoning Ordinance, the term 'immediate surroundings' is and it 'means abutting properties and those on both sides of the street of the block in which the building is located.'"[26] *See* City of Chas. Zoning Ordinance Sec. 54-231(h). In other words, SE Calhoun chose to define "substantial interest" by using a term – "immediate surroundings" – that is mentioned *nowhere* in S.C. Code Ann. § 6-29-915(A) or in case law that explores the meaning of "substantial interest." This was intentional. This misplaced emphasis on the term "immediate surroundings," as it is defined in a local zoning ordinance, appears to be born out of the desire to narrow the geographical reach associated with the term "substantial interest."

In relying upon City of Chas. Zoning Ordinance Sec. 54-231(h) to guide its interpretation of "substantial interest," the Trial Court has misapplied and disregarded the rules of statutory interpretation. The cardinal rule of statutory interpretation is to determine the intent of the legislature. *See Bass v. Isochem*, 617 S.E.2d 369, 377 (Ct. App. 2005). The legislature's intent should be ascertained primarily from the plain language of the statute. *State v. Landis*, 362 S.C. 97, 606 S.E.2d 503, 505 (S.C. Ct. App. 2004). The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Mun. Ass'n of S.C. v. AT&T Commc'ns of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (S.C. 2004).

[26] *See* Appellant SE Calhoun's Memo. in Opp. to Pet. to Intervene by PSC and HCF.

It seems highly improbable that the legislature intended S.C. Code Ann. § 6-29-915(A) to be interpreted and narrowly applied in conjunction with a local zoning ordinance. Nevertheless, the Trial Court adopted SE Calhoun's misplaced definition of "substantial interest," finding that "… neither PSC nor HCF owns any property adjacent to, or within the **'immediate surroundings'** of 295 Calhoun, **as defined by the City of Charleston Zoning Ordinance** (ZO)."[27] The Trial Court's Order is a product of SE Calhoun's desire to narrowly limit the operation of S.C. Code Ann. § 6-29-915(A) in direct contravention of the principle of statutory construction that "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Sloan v. S.C. Bd. of Physical Therapy Examiners*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006), *overruled on other grounds by Joseph v. S.C. Dep't of Lab., Licensing & Regul.,* 417 S.C. 436, 790 S.E.2d 763 (2016).

This artificial narrowing of the term "substantial interest" in this context leads to a harsh result of only property owners abutting or located within a block of the Proposed Development having standing to intervene in SE Calhoun's appeal of the BAR decision. Limiting standing under S.C. Code Ann. § 6-29-915(A) to this overly narrow subset of the population could hardly have been the intent of the legislature when drafting S.C. Code Ann. § 6-29-915(A). *See N.Y. Times Co. v. Spartanburg County Sch. Dist. No. 7*, 649 S.E.2d 28, 30 (S.C. 2007) (Courts should reject an interpretation that leads to results so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.)

Furthermore, adopting the Trial Court's interpretation of "substantial interest" would lead to a potentially different meaning of the term in each municipality that has codified some definition of this term. This result is deeply untenable, as a single state statute designed to create uniformity

[27] *See* December 6, 2021 Order. (emphasis added).

could then acquire a number of different meanings derived from a variety of differing local ordinances.

C. PSC's Interests Are Separate and Apart from Those of the City and BAR.

The Trial Court's Order swiftly, with little explanation, states that the general interests of the PSC and HCF are protected by the City and BAR. This is fatally incorrect.

The PSC, BAR, and City do not always agree on the conceptual approval of the building designs. The City is a governmental entity, and the BAR is a quasi-governmental entity with members appointed by the City Council. In contrast, PSC is a non-profit organization without any ties to local government. Its concerns are the concerns of its members, a narrower subset of residents who have been strong advocates for preserving the City's historical architecture and ensuring that newly constructed buildings are designed appropriately to completement the pre-existing architecture. As governmental and quasi-governmental entities, the City and BAR are propelled by interests that are different from the interests of PSC. In this particular case, the City and the BAR are tasked with representing the populace of the City as a whole while PSC is advocating for its approximately 130 members that reside in Harleston Village.

Additionally, allowing PSC to participate in the pre-litigation mediation would allow PSC a much greater hand in shaping the building design of the Proposed Development. Contrast this with a scenario where PSC is limited to merely expressing its concerns at a City Council meeting convened as a mere formality to approve a privately-mediated settlement concerning the Proposed Development's building design. By the time that the privately mediated agreement makes its way to City Council, the cake will have been baked, so to speak. It is unlikely PSC's concerns expressed during a City Council meeting to approve a privately-mediated settlement will have much, if any, impact at that point in the process. Contrary to the Trial Court's Order, PSC is not

seeking "veto rights over any settlement proposal."[28] Rather, as its intention has been all along, PSC is seeking a seat at the table at mediation in order to ensure the end result will be one that includes meaningful public discourse and that allows PSC members to continue to enjoy the character of their neighborhood.[29]

In its Petition to Intervene, PSC sought to intervene based on S.C. Code Ann. §6-29-915(A), which confers an unconditional right to intervene according to Rule 24(a)(1), SCRCP. Rule 24(a), SCRCP, entitled "Intervention of Right" states:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; **or** (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a), SCRCP (emphasis added).

Because there is a statute that defines the terms by which standing to participate in the appeal and pre-mediation litigation may be conferred, it was an error of law for the Trial Court to evaluate PSC's Petition to Intervene under Rule 24(a)(2), SCRCP, and apply the factors set forth in *Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*:

> A party moving to intervene under Rule 24(a)(2), SCRCP, must: 1) establish timely application; 2) assert an interest relating to the property or transaction which is the subject of the action; 3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and 4) demonstrate that its interest is inadequately represented by other parties.

[28] *See* December 6, 2021 Order.
[29] *See* Elizabeth Kirkland Cahill Affidavit.

See Berkeley Elec. Coop., Inc. v. Town of Mt. Pleasant, 302 S.C. 186, 394 S.E.2d 712 (1990). The Trial Court clearly considered the last two (2) factors set forth in *Berkeley* when it stated in its Order:

> In this case, the general interests of PSC and HCF are protected by the City of Charleston and the BAR, both of which are parties to the appeal and pre-litigation mediation. In addition, S.C. Code Ann § 6-29-915(D), requires that any agreement reached in mediation must be approved by City Council in public session and then by the Circuit Court. This gives PSC and HCF, as well as all other members of the public, the ability to offer their input to City Council, just as they have already done before the Planning Commission and the BAR.[30]

As discussed above, the Court's analysis under Rule 24(a)(2), SCRCP, and applying the *Berkeley* factors was improper and misplaced when standing is conferred by statute.

CONCLUSION

For these reasons, PSC requests that this Court reverse the Order of the Trial Court and permit PSC to intervene in pre-litigation mediation and the appeal between SE Calhoun, the City, and the BAR pursuant to S.C. Code § 6-29-915(A).

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[30] *See* December 6, 2021 Order.

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PROOF OF SERVICE

I hereby certify that I have served a copy of Appellant Preservation Society of Charleston's Initial Brief and Designation of Matter to be Included in the Record on Appeal by emailing said documents to the following attorneys of record at their AIS email addresses listed below:

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Subject:	Appellant Preservation Society of Charleston"s Initial Brief and Designation of Matter, SC Appellate Case Nos. 2021-1529 & 2021-1530
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Attachments:	PSC Initial Brief 5.19.22.pdf PSC Designation of Matter on Appeal 5.19.22.pdf

Good evening.

Attached please find Appellant Preservation Society of Charleston's Initial Brief and Designation of Matter in the above-referenced matter that we will be filing with the SC Court of Appeals this evening.

Please contact us with any questions or concerns regarding the attached.

Thank you.

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May 19 2022
SC Court of Appeals

May 19, 2022

VIA ELECTRONIC MAIL ONLY
The Honorable Jenny Abbott Kitchings
Clerk of Court for SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: *SE Calhoun, LLC v. City of Charleston and City of Charleston Board of Architectural Review,* Appellate Case No. 2021-001530

Dear Ms. Kitchings:

Enclosed for filing please find the Appellant Preservation Society of Charleston's Initial Brief and Designation of Matter along with the Proof of Service of same.

Please contact us with any questions or concerns about this matter.

With best regards,

s/Ellis

Ellis R. Lesemann

ERL/agc
Enclosure
cc: Alice F. Paylor, Esquire (w/ encl.)
Bijan Ghom, Esquire (w/ encl.)
Timothy A. Domin, Esquire (w/ encl.)
J. Rutledge Young, Esquire (w/ encl.)
Wilson Daniel, Esquire (w/ encl.)
Julia Copeland, Esquire (w/ encl.)