South Carolina Bar

Continuing Legal Education Division

2024 SC BAR CONVENTION

Environment & Natural Resources Section/Administrative & Regulatory Committee

"Managing Economic Growth, Natural Resource Protection, and Culturally Significant Resources on the South Carolina Coast"

Friday, January 19

SC Supreme Court Commission on CLE Course No. 240024

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DHEC's Rose in Environmental Conflicts

Bradley Churdar

DHEC's Role in Environmental Conflicts

Broad state policy per S.C. Code Ann. § 48-39-30(A):

- Protect the quality of the coastal environment; and
- Promote the economic and social improvement of the coastal zone and all the people.

Specific state policy per S.C. Code § 48-39-30(B)(1):

- Promote economic and social improvement;
- Encourage development of coastal resources … with due consideration for the environment;
- Protect the sensitive and fragile areas;
- Provide adequate environmental safeguards.

Specific state policy per S.C. Code § 48-39-30(B)(2):

- Protect and, where possible, restore or enhance the resources of the State's coastal zone for this and succeeding generations.

Specific state policy per S.C. Code § 48-39-30(D):

- "Critical areas … used to … ensure the maximum benefit to the people, … not [to] … generate measurable maximum dollar benefits…"

Prohibition against regulatory takings per S.C. Code §48-39-30(C):

- "[N]o government agency shall adopt a rule or regulation or issue any order that is unduly restrictive so as to constitute a taking of property …"

"[T]he public's interest must be the *lodestar* which guides our legal analysis in regards to the State's tidelands."

Kiawah Dev. Partners, II v. S.C. Dept. of Health and Envtl. Control, 766 S.E.2d 707, 715 (S.C. 2014).

The competing interests between the public trust doctrine and private property rights makes DHEC's Role in environmental conflicts very challenging.

Two of those challenges are:

1. Application of the deference doctrine;
2. Threat of regulatory takings litigation;

DEFERENCE DOCTRINE

Why is deference given to an agency's statutory/regulatory interpretation?

Agencies "have unique skill and expertise in administering those statutes and regulations." *Kiawah Development Partners, II. v. S.C. Dep't of Health and Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014)

Deference two-step analysis

1. Does the language of a statute or regulation directly speak to the issue?
   - If yes, the court must utilize the clear meaning of the statute or regulation.
2. Is the statute silent or ambiguous with respect to the specific issue?
   - If yes, then the agency's statutory interpretation gets deference if it is not "arbitrary, discriminatory or unreasonable."

A.O. Smith Corp. v. S.C. Dep't of Health and Envtl. Control, 428 S.C. 189, 205, 833 S.E.2d 451, 460 (Ct. App. 2019).

Chevron deference doctrine re-visited by U.S. Supreme Court in two recent cases:

[1] *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022) (Cert. granted May 1, 2023); and

[2] *Relentless, Inc. v. U.S. Department of Commerce*, 62 F.4th 621 (1st Cir. 2023) (Cert. granted October 13, 2023).

Oral argument for both cases: January 17, 2024

Both *Relentless* and *Loper* involve a regulation of the National Marine Fisheries Service requiring certain commercial fishing vessels to pay the salaries of the federal observers that they are required to carry.

Question before the U.S. Supreme Court in *Loper Bright Enterprises*:

> "Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency."

Facts in *Loper Bright Enterprises v. Raimondo*:

- Congress enacted the Magnuson-Stevens Act in 1976 to:
  1) "conserve and manage the fishery resources found [in federal waters] off the coasts of the United States," and
  2) "promote domestic commercial and recreational fishing under sound conservation and management principles." 16 U.S.C. § 1801(b)(1), (3).

Facts in *Loper Bright Enterprises v. Raimondo*:

- The Secretary of Commerce delegates their conservation responsibility to the National Marine Fisheries Service ("NMFS").

- The NMFS regional Fishery Management Councils then prepare and send a Fishery Management Plan back to the Secretary of Commerce. *Loper Bright Enterprises, Inc. v. Raimondo*, 544 F. Supp. 3d 82, 94 (D.D.C. 2021).

Facts in *Loper Bright Enterprises v. Raimondo*:

- The Magnuson-Stevens Act may require that at-sea monitors "be carried on board a vessel of the United States engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery." 16 U.S.C. § 1853(a)(8).

Facts in *Loper Bright Enterprises v. Raimondo*:

- The Act further provides that *Fishery Management Plans* may also "prescribe such other measures … [that are] … *necessary and appropriate* for the conservation and management of the fishery." 16 U.S.C. § 1853(a)(14). (Emphasis added).

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Facts in *Loper Bright Enterprises v. Raimondo*:

- Issue: Is the Department of Commerce interpretation of "other … [*necessary and appropriate]* measures …" entitled to deference?

- The Commerce Department takes the position that this broad language allows the regional Fishery Management Councils to require the commercial fishing vessels to *pay the salaries of the federal observers who oversee their operations*.

Facts in *Loper Bright Enterprises v. Raimondo*:

- The commercial fishermen sued the Department of Commerce asserting that the Act is silent on whether the Fishery Management Councils can *make these commercial vessel operators pay* for the monitoring services. *Loper Bright Enterprises, Inc. v. Raimondo*, 544 F. Supp. 3d 82, 104 (D.D.C. 2021).

Facts in *Loper Bright Enterprises v. Raimondo*:

- Accordingly, the commercial fishermen assert that the Department of Commerce' statutory interpretation of "*necessary and appropriate*" (per 16 U.S.C. § 1853(a)(14)) requiring commercial vessel operators to pay the salaries of the federal observers is a statutory interpretation that is NOT entitled to deference.

District Court Order in *Loper* focused on ambiguity, not silence:

Federal District Court held that

1) the statutory text is ambiguous and
2) the Department of Commerce' statutory interpretation was reasonable, in part because a similar fee-based observer program by another regional Fishery Management Council in the Pacific North region had already been implemented (i.e., the statute was being consistently applied).

Loper Bright Enterprises, Inc. v. Raimondo, 544 F. Supp. 3d 82, 107 (D.D.C. 2021), aff'd, 45 F.4th 359 (D.C. Cir. 2022).

D.C. Circuit Court Opinion on *statutory ambiguity*

The D.C. Circuit said that the Act was only *partially* ambiguous as to whether the National Marine Fisheries Service has the authority to ***require*** fishing vessels to incur these at-sea monitoring costs (i.e., "not … wholly unambiguous.")

Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 366 (D.C. Cir. 2022).

D.C. Circuit Court Opinion on *statutory silence*

The D.C. Circuit relied on the Act's statutory silence (not statutory ambiguity) regarding the mandatory funding requirement imposed on the commercial fishermen. Specifically, the Court held: "When Congress has not 'directly spoken to the precise question at issue,' the agency may fill this gap with a *reasonable interpretation* of the statutory text."

Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022). (Emphasis added).

D.C. Circuit Court Opinion

"When an agency establishes regulatory requirements, regulated parties generally bear the costs of complying with them."

Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 366 (D.C. Cir. 2022) (citing *Michigan v. EPA*, 576 U.S. 743, 135 S. Ct. 2699, 2711, 192 L.Ed.2d 674 (2015)).

In affirming the District Court, the D.C. Circuit Court responded to the commercial fishermen's argument below:

- Given the substantial costs of industry-funded monitoring to herring fishing companies, "Congress would not have delegated 'a decision of such economic and political significance to an agency in so cryptic a fashion as reliance on 'necessary and appropriate' authority." *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 368 (D.C. Cir. 2022).

D.C. Circuit's response to the commercial fishermen's arguments:

1) The National Marine Fisheries Service does not rely on a "necessary and appropriate" clause to claim implicitly-delegated authority beyond its regulatory lane "because its interpretation falls within the boundaries set by the Act."
2) The Act expressly envisions that monitoring programs will be created and, "through its silence, leaves room for agency discretion as to the design of such programs …"
3) "[T]he Act contains no bar on industry-funded monitoring programs."

Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 368 (D.C. Cir. 2022).

In affirming the District Court, the D.C. Circuit further held:

"[I]ndustry-funded monitoring was consistent with other provisions of the Act that impose compliance costs on industry … [and NMFS's] interpretation of the Act is therefore owed deference at *Chevron* Step Two."

Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 369 (D.C. Cir. 2022).

In affirming the District Court, the D.C. Circuit further held:

In response to the dissenting Opinion that Congressional silence on a given issue "[generally] indicates a lack of authority," the majority Opinion states that "*Chevron* instructs that judicial deference is appropriate 'if the statute is silent *or* ambiguous with respect to the specific issue,' 467 U.S. at 843, 104 S.Ct. 2778 (emphasis added)."

Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 369 (D.C. Cir. 2022). (Emphasis supplied).

How will *Loper* and *Relentless* impact the *Chevron* doctrine?

Per the Cert. Petition issue, the Supreme Court can either

- Overrule *Chevron* or
- Clarify how *statutory silence* and *ambiguity* interact in a deference analysis.

REGULATORY TAKINGS

REGULATORY TAKINGS

OCRM currently has *four* regulatory takings cases filed in Circuit Court, so this is a very real issue we deal with.

Three types of regulatory takings recognized by the U.S. Supreme Court:

1. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) - **permanent physical invasion** - (generally not applicable to coastal issues);
2. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) - **complete 100% deprivation of "all economically beneficial use" of the property**;
   - Even a 95% diminution in value not considered a "total taking." *Lucas*.
   - In 2002, the U.S. Supreme Court went so far as to describe *Lucas* as requiring the "permanent obliteration" of the parcel's value. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002).
3. *Penn Central Transp. Co. v. New York City*, 438 U.S. l04 (1978) - **partial regulatory taking** (most commonly-applicable to coastal issue).

How does a property owner's lack of vigilance factor into regulatory takings litigation? *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 580 S.E.2d 116 (2003).

In the early 1960's McQueen purchased two vacant lots on the manmade saltwater canals in Cherry Grove.

For thirty years, McQueen failed to bulkhead his two lots from the encroaching tidelands.

RESULT: both of his lots mostly transitioned to marsh.

CANAL "J"

EXISTING BULKHEAD

50'

PROPOSED BULKHEAD

EXISTING BULKHEAD

A

A

EXISTING RESIDENCE

125'

VACANT LOT

125'

EXISTING RESIDENCE

102'

CITY OF NMB SETBACK LINE FOR RESIDENTIAL CONST.

TMS # 145-02-21-023

SUBJECT PROPERTY
TMS # 145-02-21-024

TMS # 145-02-21-025

50'

48th AVENUE NORTH

PURPOSE: REDUCE EROSION OF LOT
DATUM: MSL
ADJACENT PROPERTY OWNERS:
1. ANNETTE S. HOOD
P.O. BOX 1311
DILLON, S.C. 29536
2. JOHN J. HOGAN
APPLETREE LN.
LEXINGTON MA.

PLAN VIEW
SCALE: 1"=20'

DDC Engineers Incorporated

PROPOSED: BULKHEAD
AT: LOT 13 BLOCK
ON 48th AVENUE NORTH
AND CANAL "J"
NORTH MYRTLE BEACH
AGENT: DDC ENGINEERS INC
2206 HWY 17 SOUTH
N. MYRTLE BEACH, S.C.

- In 1993 McQueen applied for critical area permits to backfill his lots and build bulkheads.
- Coastal Council denied McQueen's permit applications and he filed a Takings lawsuit.

McQueen v. South Carolina Coastal Council, 354 S.C. 142, 580 S.E.2d 116, 118 (2003). (Emphasis added).

The Supreme Court said that "[a]ny taking McQueen suffered is not a taking effected by State regulation but *by the forces of nature and McQueen's own lack of vigilance in protecting his property*." (Emphasis added).

McQueen v. South Carolina Coastal Council, 354 S.C. 142, 580 S.E.2d 116, 120 (2003). (Emphasis added).

Penn Central says:

- No “set formula” for evaluating partial regulatory takings claims.
- However, the U.S. Supreme Court applies a three-prong test that they have described as
    - An "essentially *ad hoc*, factual inquir[y]”;
    - "depends largely upon the particular circumstances in that case." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 323, 326 (2002).

First Penn Central factor: **Economic impact of the regulation on the claimant**

Significantly, the U.S. Supreme Court has determined that property value diminution in excess of 75% was an *insufficient economic impact* to establish a partial regulatory taking. *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993).

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"The Court of Federal Claims has generally relied on diminutions ***well in excess of 85%*** before finding a regulatory taking." *Warren Trust Co. v. U.S.*, 107 Fed. Cl. 533, 568 (2012) (Emphasis added).

Examples:

- *Bowles v. United States*, 31 Fed.Cl. 37, 48–49 (1994) (***taking 92–100%***);
- *Formanek v. United States*, 26 Cl.Ct. 332, 340 (1992) (***taking 88%***);
- *Loveladies Harbor, Inc. v. United States*, 21 Cl.Ct. 153, 160 (1990) (***taking 99%***), aff'd, 28 F.3d 1171 (Fed.Cir.1994).

Second Penn Central factor: **Interference with distinct investment-backed expectations**

Criteria for establishing the *objective reasonableness* of property owner's expectations:

- Substantial and dispositive weight given to property owner's *knowledge of pre-acquisition regulatory schemes*. *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004); *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001).

Second Penn Central factor continued: **Interference with distinct investment-backed expectations**

Criteria for establishing the objective reasonableness of property owner's expectations:

❖ Voluntarily enter a "heavily regulated field?"

- ❑ If yes, then regulatory takings claims particularly difficult to maintain.
- ❑ Lack a reasonable expectation that the legislature will not enact new requirements from time to time that buttress the regulatory scheme. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004).

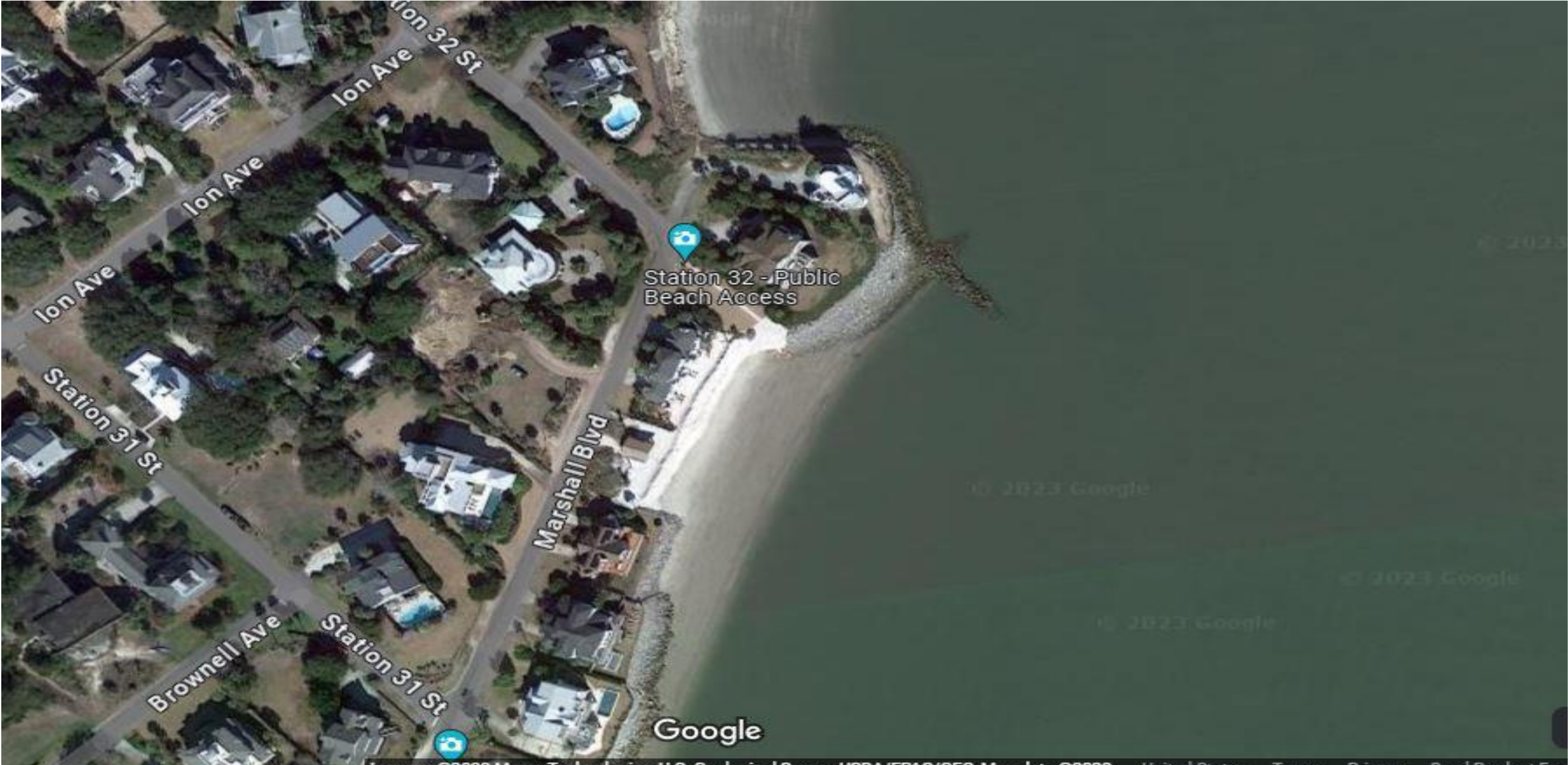
Second Penn Central factor continued: **Interference with distinct investment-backed expectations**

Criteria for establishing the objective reasonableness of property owner's expectations:

- Deeply discounted purchase price?

  If yes, this shows an awareness that obtaining the necessary permit might be difficult or impossible. *Gazza v. New York Department of Environmental Conservation*, 679 N.E.2d 1035 (N.Y. 1997) (owner paid $100,000 for wetland worth $396,000 if unregulated).

Example of a property owner who voluntarily entered a "heavily regulated field“ by purchasing oceanfront property at a deep discount in 2012 on Sullivan’s Island for $900,000.



Limits on the Second Penn Central factor

Subjective* expectations of property owner are *irrelevant.

"The subjective expectations of the claimant are irrelevant. The critical question is what a reasonable owner in the claimant's position should have anticipated." *Columbia Venture, L.L.C. v. Richland Cnty.*, 413 S.C. 423, 449, 776 S.E.2d 900, 914 (2015).

Limits on the Second Penn Central factor

***At some point, investment-backed* expectations must be acted on.**

"[T]he government cannot be held hostage by a property owner's [investment-backed] expectations indefinitely when an owner refuses to implement those expectations. Rather, at some point, the government must have a right to regulate local properties in a measured fashion without running afoul of the takings doctrine, even if its regulation runs contrary to an owner's unspoken and unimplemented investment-backed expectations." Braden's Folly, LLC v. City of Folly Beach, 886 S.E.2d 674, 694 (S.C. 2023)

Third *Penn Central* factor: **Character of the governmental action**.

This factor is the most flexible component of a regulatory takings analysis.

A "public program adjusting the benefits and burdens of economic life to promote the common good" will likely *not* be determined to be a partial regulatory taking. *Penn Central, 438 U.S. at 124.*

- ❖S.C. Code Ann. § 48-39-30(A) establishes the States "promoting-the-common-good" policy in implementing the Coastal Tidelands and Wetlands Act (i.e., "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State").

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Third *Penn Central* factor: **Character of the governmental action**.

Some lower courts have held that the "character factor" requires that the government conduct be directed at *specific* property to be deemed a regulatory taking.

- *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001);
- *Swisher International, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir. 2008);
- *Empress Casino Joliet Corp. v. Giannoulias*, 896 N.E.2d 277 (Ill. 2008).

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Friday, January 19

How the ALC is Involved in Regulation of Activity Along SC's Coast

The Honorable Ralph K. "Tripp" Anderson, III

PRACTICING ENVIRONMENTAL LAW AT THE ALC
Ralph K. Anderson, III
Chief Administrative Law Judge
South Carolina Administrative Law Court

Road Map

- Types of Environmental Cases Heard Before the ALC
- Common Statutory Origins of Cases – Emphasis on Coastal Cases
- Procedural Posture Before the ALC
- Stays
- De Novo Trial
- Evidence
  - Importance of Expert Testimony
  - Importance of Quantitative Evidence and Specificity with Cause and Effect
- Appeals
- How Our Cases Have Impacted the State
- New Case Law (State and Federal)

TYPES OF CASES

- Dock Permits
- New Coastal Development (e.g., critical area permits)
- Beach Renourishment
- Erosion Control
- Pollution Control Tax Exemptions
- Sewage Disposal
- Pipelines
- Landfills
- Setback Lines and Baselines
- Air Quality Violations
- Water Quality Violations
- Redevelopment
- Stormwater

STATUTORY ORIGINS

Common Sources of Cases

- Pollution Control Act
  - S.C. Code 48-1-10 *et. seq.*
  - Sets state standards for air and water pollution
  - Water quality, air quality, discharges (sewage, industrial, etc.)
- Coastal Zone Management Act (CZMA)
  - S.C. Code Ann. 48-39-10 *et seq*.
  - Governs permits related to the coastal zone, including permits for disturbance, dredging, and filling of critical areas, coastal waters, tidelands, beaches, and dunes
- South Carolina Solid Waste Policy and Management Act
  - S.C. Code Ann. 44-96-10 *et seq.*
  - Regulates solid waste disposal in landfills, etc.
- Federal Law (Clean Water Act, Clear Air Act)
- Common Law (public trust doctrine, takings)

Coastal Zone Management Act

- The Coastal Zone Management Act (CZMA) was enacted in 1977.
- DHEC was charged with developing and administering a Coastal Zone Management Program (CZMP). S.C. Code Ann. § 49-8-39-80.
- DHEC was also required to "[d]evelop a system whereby the [D]epartment shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." S.C. Code Ann. § 48-39-80(B)(11).
- A Coastal Zone Management Program Document was thereafter developed and approved by the General Assembly. The CZMP Document is available on DHEC's website.
- DHEC certifies whether a project is consistent with the CZMP by issuing a Coastal Zone Consistency Certification (CZCC). Our Court reviews those certifications.

CZMA policies, certifications, and permits

- Coastal Zone Management Program and CZCC
- Beach Erosion Control Policy
- Critical Areas Permits
- Beach Preservation Policy
- Baseline and Setback Line Policies
- Comprehensive Beach Management Plan

Federal Permits

- The U.S. Army Corps of Engineers' (USACE) regulates discharges of dredged or fill material into waters of the United States and structures or work in navigable waters of the United States, under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899.
- An **individual permit** is issued when projects have more than minimal individual or cumulative impacts (which would be usually covered under a general permit), are evaluated using additional environmental criteria, and involve a more comprehensive public interest review.
- A **general permit** is issued for structures, work, or discharges that will result in only minimal adverse effects. General permits are issued on a nationwide, regional, or state basis for particular categories of activities. There are three types of general permits – **Nationwide Permits**, **Regional General Permits**, and **Programmatic General Permits**. General permits are usually valid for five years and may be re-authorized by USACE.

DHEC and Federal Permits

- South Carolina, through DHEC, assists with the administration of Federal permitting under the Clean Water Act (CWA) in coastal areas.
- Section 404 of the CWA is administered by the U.S. Army Corps of Engineers (USACE) to issue permits for dredging and filling.
- The requirement for a 404 permit from the Corps triggers a requirement under section 401 of the CWA for water quality certification that any discharge into navigable waters is consistent with federal and state water quality standards (401 Water Quality Certification) that must be obtained from DHEC, which this Court reviews.

PROCEDURAL POSTURES

Types of Cases

Contested Case	Injunctive Relief	Enforcement	Emergency Action
• S.C. Code Ann. § 1-23-505 (defining "contested case") • S.C. Code Ann. § 1-23-600(A) (outlining this Court's contested case jurisdiction) • *See also* SCALC Rules 9-32 (governing contested cases)	• S.C. Code Ann. § 1-23-600(F)	• S.C. Code Ann. § 1-23-600(G)	• S.C. Code Ann. § 1-23-370(c)

Example of Contested Case Procedure

DHEC STAFF GRANTS A PERMIT TO A BEACHFRONT RESIDENTIAL COMMUNITY TO CONSTRUCT NEW EROSION CONTROL STRUCTURES AND RENOURISH A BEACH TO PROTECT IT FROM ENCROACHING

EROSION

ENVIRONMENTAL GROUP AND/OR RESIDENTIAL OWNERS IN THE COMMUNITY APPEAL THE STAFF DECISION TO THE DHEC BOARD

THE DHEC BOARD WILL EITHER

1) REVIEW THE MATTER AND ISSUES THE FINAL DECISION ON BEHALF OF THE AGENCY OR

2) REFUSE TO TAKE THE MATTER UP, RENDERING THE STAFF DECISION THE FINAL AGENCY DECISION

ENVIRONMENTAL GROUP AND/OR HOMEOWNERS APPEAL DHEC'S FINAL AGENCY DECISION TO THE ALC

- MOTION TO LIFT THE AUTOMATIC STAY IS FILED;

- ALC HOLD A HEARING ON THE MOTION;

- ALC ISSUES AN ORDER RESOLVING THE MOTION.

ALC HOLDS A DE NOVO HEARING ON MERITS OF THE CASE

ALC ISSUES A FINAL ORDER

EITHER PARTY MAY FILE A MOTION FOR RECONSIDERATION (AND MUST FILE ONE IF THEY WISH TO APPEAL TO THE SOUTH CAROLINA COURT OF APPEALS)

Example Injunctive Relief/Enforcement Cases

DHEC asks this Court to issue a Cease and Desist order to an individual with a "Pumper License," which allows him to clean onsite sewage treatment and disposal systems. The licensee had been improperly disposing of sewage in violation of the Pollution Control Act.

DHEC asks this Court to issue a Contempt Order to a South Carolina Town that has not complied with a Consent Order of Dismissal issued by this Court in a previous year.

Note: Pursuant to SCALC Rule 29(B), "In matter involving the assessment of civil penalties, the imposition of sanctions, or the enforcement of administrative orders, the agency shall have the burden of proof."

Example of an Emergency Case

- DHEC requests the Court immediately suspend the permit of a factory that was expelling air pollutants at a level that was in violation of the permit limits.
- Specifically, factory's ceramic filter air pollution control system was lacking two of its four filter boxes, which left it operationally deficient.
- Issue was resolved before an emergency suspension order had to be issued.

STAYS

S.C. Code Ann. 1-23-600(H)

- A request for a contested case automatically stays the action required under the agency decision

    (except emergency actions, which are not stayed)

- Ninety days after the contested case is initiated, a party may move to lift the automatic stay
- Hearing on lifting the stay **MUST** be held within thirty days of its request/service on the parties
- The Court **SHALL** lift the stay unless the party requesting the contested case shows:
    - The likelihood of irreparable harm
    - A substantial likelihood of success on the merits
    - Balance of equities favors the stay AND
    - Continuing the stay serves the public interest

(Contested Cases)

DE NOVO TRIAL

De Novo Trial

"The ALC's de novo review hearing is best explained as 'one in which the decisionmaker does not review the decision of someone else, but ***makes the determination himself*.** Thus, the [ALC], while he may use the record compiled earlier as part of the evidence in the case, may receive additional evidence and decides the issue without regard to the decisions made by the agency.'"

Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 766 S.E.2d 707 (2014) (C.J. Toal, Dissenting)(quoting *Judicial Review of Agency Decisions*, *in* SOUTH CAROLINA ADMINISTRATIVE PRACTICE AND PROCEDURE 459 (Randolph R. Lowell ed. 2008) (emphasis added).

Standard of Review

S.C. Code Ann. § 1-23-600(A)(5): "Unless otherwise provided by statute, the standard of proof in a contested case is by a preponderance of the evidence."

Burden of Proof

"In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof."

Sierra Club v. S.C. Dep't of Health & Env't Control, 426 S.C. 236, 257, 826 S.E.2d 595, 67 (2019)

EVIDENCE

Expert Testimony

"To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony."

Risher v. S.C. Dep't of Health & Env't Control, 393 S.C. 198, 205, 712 S.E.2d 428, 432 (2011).

Expert testimony tends to be especially important in environmental law cases because the harms generally asserted by petitioners are usually harms that cannot be articulated, understood, or quantified by lay individuals.

- Erosion rates, species loss, geomorphology, habitat requirements, tidelands delineation, toxicity levels, water quality measurement, turbidity, engineering of structures

Quantitative Evidence and Specificity with Cause and Effect

- Environmental law cases can be challenging for petitioners to prevail on if they do not present quantitative evidence showing with specificity that the action complained of will cause the harm alleged.

- For example, it's hard for a Court to draw conclusions that turtles will be harmed when the following evidence is the only type presented:
  - This type of beach is consistent with this species of turtle's habitat
  - Someone has seen this species of turtle on this beach
  - Several years ago, someone estimated 100 turtles were present
  - Development on this beach will likely impact this turtle habitat

Problems with this Evidence

- "Consistent with" does not mean turtles are present.
- Is this sufficiently specific or current?:
  - Who saw the turtle? When did they see the turtle? How many of this species of turtle are present now?
- Is this ultimately probative?:
  - What percentage of the current turtle population will die or be placed under stress if the development is allowed to go forward?
- It is certainly probative, but does it establish the development is not consistent with the turtle's habitat? Even if there is a percentage decline in population, is that percentage significant in terms of the overall population's ability to be successful?

Challenges to Developing Evidence

- Environmental harms can be challenging to quantify and explain in a way that the law can recognize.
- For example, a groin is a permanent erosion control structure; however, technically a groin can be removed after installation.
  - Does removal of a groin return the beach to its original condition before the groin was placed on it so that no irreparable harm occurred if the groin was installed but the permit is later denied during litigation?
    - This is a challenging question because:
      - The beach is dynamic, so is there ever a "status quo"? What is the status quo?
      - The heavy machinery needed to construct the groins and the groins themselves likely destroy, displace, and crush the ecosystem below and around them, but this is an assumption unless an expert testifies to it. Does the compaction of this ecosystem have long lasting effects even after the groin is removed? How long do the effects last?
      - If the groin is ordered to be removed, is it truly possible to remove all the sand, rocks, and other materials associated with its installation to return the beach to the status quo?
      - Can the movement of sand along the coast resume at the "status quo" or will it be permanently altered even with the removal of the groins because the groins effected a permanent alteration to the movement of sand during the time period they were installed. What amount of time must pass for an effect to become permanent?

APPEALS

Appeals

Appeals are to the South Carolina Court of Appeals

For judicial review of a final decision of an administrative law judge, a notice of appeal by an aggrieved party must be served and filed with the court of appeals as provided in the South Carolina Appellate Court Rules in civil cases and served on the opposing party and the Administrative Law Court not more than thirty days after the party receives the final decision and order of the administrative law judge.

S.C. Code Ann. § 1-23-610(A)(1).

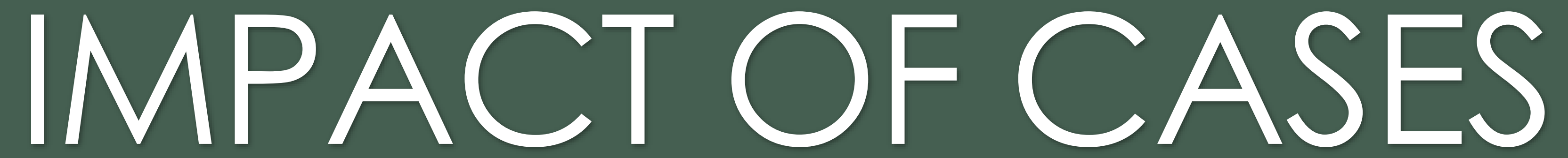
Upon motion, the administrative law judge may grant, or the court of appeals may order, a stay upon appropriate terms.

S.C. Code Ann. § 1-23-610(A(2)).

Standard of Review: Substantial Evidence

In determining whether the ALJ's decision was supported by substantial evidence, this Court need only find, looking at the entire record on appeal, evidence from which reasonable minds could reach the same conclusion that the ALJ reached.

Hill v. S.C. Dep't of Health & Env't Control, 389 S.C. 1, 9–10, 698 S.E.2d 612, 617 (2010).


IMPACT OF CASES

DeBordieu

South Carolina Coastal Conservation League v. South Carolina Department of Health and Environmental Control and DeBordieu Colony Community Association, Docket Nos. 19-ALJ-07-0089-CC, 20-ALJ-07-0161-CC, 2021 WL 227378, at *1 (Jan. 15, 2021).

- Petitioner South Carolina Coastal Conservation League (League) challenged DHEC's decision to issue a permit to Respondent DeBordieu Colony Community Association (DCCA) for beach renourishment and the construction of three groins along a 1.5-mile section of Debidue Island in Georgetown County, South Carolina.
- Section 48-39-290 of the South Carolina Code only allows groins "on beaches that have high erosion rates with erosion threatening existing development or public parks." § 48-39-290(A)(8).
- The Court had to discern what a "high erosion rate" was and whether the groins would cause a "detrimental effect on adjacent or downdrift areas." S.C. Code Ann. 48-39-290.

High Erosion Rate—Deference

There is no statutory or regulatory guidance for what is a high erosion rate.

- The evidence showed it is clearly a long-standing agency interpretation.
- DHEC's interpretation was reasonable.
- DHEC's definition of a high erosion rate was consistent with the credible expert testimony in the case.

Detrimental Effect

Subsection 48-39-290(A)(8)(b) provides "[g]roins may be permitted only after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas." *See also* S.C. Code Ann. Regs. 30-15(G)(2) ("Groins may only be permitted after thorough analysis demonstrates that the groin will not cause a detrimental effect on adjacent or downdrift areas.").

The Court concluded all groins create a downdrift impact as evidenced by the expert testimony and their very function, but whether it constitutes a "detrimental" impact is the question.

The Court further concluded there is nothing in the statute that states mitigation cannot be considered when evaluating whether the effect of a groin will be "detrimental."

The credible expert testimony showed that the accompanying renourishment was enough to mitigate this detrimental downdrift effect for several years and even increase the flow of sand to the downdrift beach. Additionally, the evidence showed the mitigation trigger rate in the permit would trigger mitigation before the detrimental effects of the groins were felt.

Result

The Court found that DHEC’s interpretation was appropriate and affirmed DHEC’s issuance of the permit.

Coastal Conservation League Appealed.

The ALC and the Court of Appeals declined to stay the decision during the appeal.

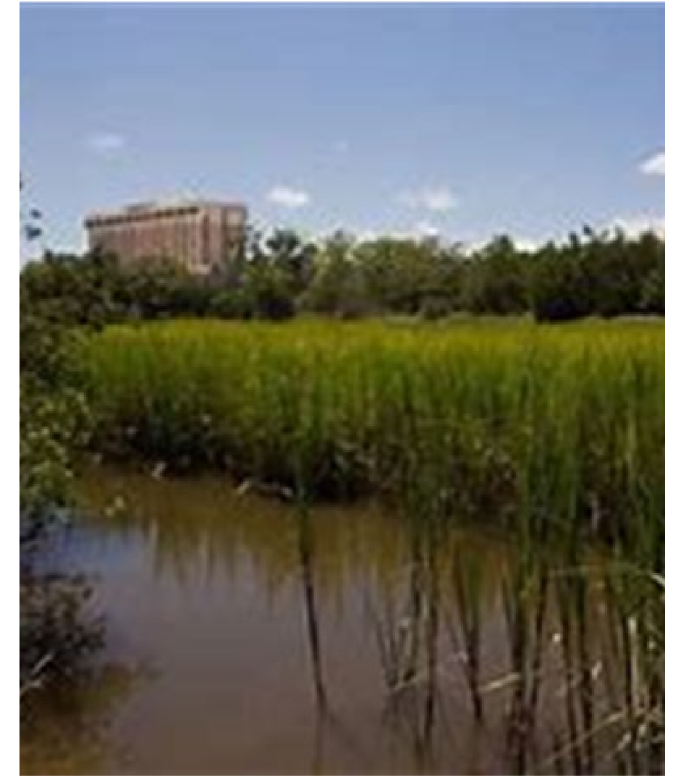
Renourishment is supposed to start November 2023.

Friends of Gadsden Creek

Friends of Gadsden Creek v. South Carolina Department of Health and Environmental Control and WestEdge Foundation, Inc., Docket No. 21-ALJ-07-0433-CC, 2022 WL 17549122, at *1 (Dec. 5, 2022).

- Petitioner challenged DHEC's decision to issue WestEdge Foundation, Inc. (WestEdge) a critical area permit, a Coastal Zone Consistency Certification (CZCC), and a Section 401 Water Quality Certification (collectively, the "Permit"), which authorized WestEdge to fill in 3.9 acres of critical area on the west side of the Charleston peninsula.
- WestEdge is currently redeveloping this area of the peninsula, which includes an area that used to contain the water feature known as Gadsden's Creek and its attendant salt marsh. This is a historically African-American area.
- From the 1950s to the 1970s, the City of Charleston began to use Gadsden Creek and its surrounding salt marsh as a landfill. As the landfill expanded, the creek became more and more altered by the landfill. The creek ultimately ceased to exist in its natural state and was replaced by a channelized drainage ditch that was established along the periphery of the landfill to provide stormwater drainage to the area when the landfill was closed in the 1970s.

- Petitioners wanted to retain the creek in some capacity. Originally, WestEdge had also wanted to retain the creek in some fashion and possibly restore it.
- However, testimony revealed the channelized ditch around the landfill, which had naturalized back to a creek to some extent, was contaminated by the landfill.
- Lead and other toxic chemicals were present in high concentrations. The most feasible, safe, and economical fix was to fill in the "creek" to cap the landfill and prevent further leaching.
- Flooding and its affect on public health was also a concern in the project area, especially with a leaching landfill.
- While the filing of wetlands and tidelands, like the "creek" at issue in this case, is generally discouraged under our state's statutory laws, exceptions exist to meet legitimate public needs. *See* S.C. Code Ann. Reg. 30-12(G)(1).



Result

- The Court upheld DHEC's decision to grant the permit.
- Overall, the Court found the evidence showed the contamination from the landfill in the creek was a threat to the health, safety and welfare of the public and the environment.
- There was also an overriding public need that could not be met without dredging and filling the wetlands. Here, the creek and its attendant tidelands flowed next to and over a landfill that had been exposed and was leaking leachate into the tidelands. Although the tide may have diluted the leachate, it also spread it throughout the reach of the creek and its flood waters. Therefore, anything that came into contact with the creek waters or its flood waters—including plants, animals, storm water, or members of the public—was exposed to the toxic leachate to some extent. Protecting the public and the environment from the leachate was certainly a legitimate public need. DHEC's decision to grant the Permit was affirmed.

CASE LAW UPDATE
State

Preservation Society

- *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 205, 845 S.E.2d 481, 483 (2020)
- **Background**: Petitioners, citizen groups and neighborhood associations, challenged a DHEC decision to issue a permit for relocating and expanding passenger cruise facility at the Union Pier Terminal in Charleston.
- **Issue**: Did Petitioners have statutory standing as "affected persons" to challenge DHEC's permit?
- **Law**:
  - S.C. Code Ann. § 44-1-60(G): "An applicant, permittee, licensee, or **affected person** may file a request with the Administrative Law Court for a contested case hearing within thirty calendar days…." (emphasis added).

Preservation Society Analysis

- "Affected person" was not defined under the statute.
- ALC determined that because "affected person" was not defined and Petitioners could not simply adopt the self-imposed moniker that they were "affected persons," utilizing the principles of constitutional standing was a reasonable framework to determine if Petitioners were "affected persons."
- The ALC noted the Court of Appeals had previously taken this approach. *Smiley v. S.C. Dep't of Health & Env't Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32 (2007) (using constitutional standing to evaluate whether a petitioner had standing under a statute that granted the right to a contested case to "[a]ny person adversely affected").
- The SC Supreme Court rejected this analysis and *Smiley*, holding that "affected person" was the statutory standard to establish standing and it was inappropriate to apply constitutional standing.
- "The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute." *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012).

Preservation Society
Who Qualifies as an "Affected Person"?

- When a term is undefined in a statute, court's use the usual and customary meaning of the word 'affected.' Black's Law Dictionary 70 (11th ed. 2019) defines 'affect' as '[m]ost generally, to produce an effect on; to influence in some way.' Black's Law Dictionary 53 (5th ed. 1979) similarly defines 'affect' as '[t]o act upon; influence; change; enlarge or abridge; often used in the sense of acting injuriously upon persons and things.'
- "The General Assembly surely intended DHEC to receive input from all persons affected by a project with potentially harmful environmental impacts."
- "Those living near the project are most likely to be impacted in ways that are distinguishable from the impacts generally falling upon the public at large, and some jurisdictions have emphasized the significance of this **geographic proximity** in cases involving the assessment of a project's environmental consequences." (emphasis added).
- "Here, members would suffer the environmental consequences Petitioners allege the project will create, such as breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution."
- "[T]he members fall within the scope of any **reasonable, ordinary definition** of 'affected persons.'" (emphasis added).

Preservation Society
Take Away

- Statutory standing that is undefined (and arguably somewhat vague) should not be interpreted through the lens of constitutional standing.
- “Affected” is given its reasonable and ordinary meaning—to influence, change, and often act injuriously upon.
- Geographic proximity to the alleged harm is an important consideration, but not determinative of, affected person standing.

Hook v. S.C. Dep't of Health & Env't Control, 439 S.C. 52, 885 S.E.2d 442 (Ct. App. 2023), *reh'g denied* (Apr. 20, 2023)

- **Background**: Petitioner requested the court hold DHEC in contempt for failing to adhere to a Consent Order issued by this Court because DHEC granted a permit to construct a dock in a position that violated the Consent Order.
- **Held**:
  - Although DHEC violated the Consent Order, the record contained no evidence that the permit was issued with any intent to violate the law.
  - "**To uphold a finding of contempt, the record must contain evidence that some DHEC employee acted purposefully in disregarding the Consent Order**." 439 S.C. at 77, 885 S.E.2d at 455 (emphasis added).
  - "[Petitioner] does not provide us, **nor could we find, any South Carolina case providing that an entire agency is charged with knowledge of an employee's actions for purposes of willfulness** in a contempt finding as he asserts. Therefore, the ALC erred in finding DHEC's behavior was willful and thus holding it in contempt." 439 S.C. at 78, 885 S.E.2d at 456 (emphasis added).

Hook v DHEC
Take Away

- Can an agency ever be held in contempt?
- Difficulty in pin-pointing a specific employee within the agency whose motivations were documented and subject to Discovery.
- What recourse does the homeowner have for DHEC's failure to abide by the Consent Order?

CASE LAW UPDATE

West Virginia v. Environmental Protection Agency 142 S. Ct. 2587, 2592 (2022)

Background: The Clean Air Act (CAA) authorizes the EPA to regulate power plants by setting a "standard of performance" for the emission of certain pollutants, and the standard must reflect the "best system of emission reduction" (BSER) determined by the agency to be "adequately demonstrated."

In 2015, the EPA interpreted its regulatory authority to allow it to issue a new rule (The Clean Power Plan) concluding that the BSER for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity or subsidize increased generation by natural gas, wind, or solar sources.

Issue: Whether the EPA's Clean Power Plan exceeded the authority granted to it under the Clean Air Act.

West Virginia v. Environmental Protection Agency
142 S. Ct. 2587, 2592 (2022)

Major Questions Doctrine Applies

- "[O]ur precedent teaches that there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."
- "Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. *Utility Air*, 573 U.S. at 324, 134 S.Ct. 2427. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."

Commentary (Excerpt)

Kevin R. Eberle, *A Review of Significant Supreme Court Decisions of the 2021-2022 Term*, S.C. LAW., September 2022, at 30, 35.

Under the newly christened--if not newly created--"major question doctrine," to effect a sweeping overhaul of the nation's economic activity, Congress has to be quite explicit and act with "clear congressional authorization." Agencies may not use enabling statutes in new ways, even if the language makes the agency's interpretation colorable. The Court was not clear on when a regulation was sufficiently sweeping that it would trigger the doctrine and was not clear on what would suffice to show Congressional intent. A cynic might expect the Court to find disfavored regulations to be "sweeping" and to never find Congressional delegation for them quite clear enough. Regardless, the case substantially shifted the analysis for challenges to regulations.

Commentary (Excerpt)

Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 177–78 (2022).

This shift from major questions doctrine to canon is subtle but powerful. More than a further pullback from *Chevron* deference, it is a *reversal* of it. *Chevron* gives agencies some range of interpretive authority when statutes are ambiguous. The major questions doctrine discards that deference, allowing courts to engage directly with statutes (and, therefore, with Congress). But the major questions canon is actively hostile to agency assertions of authority, allowing courts to reject agency interpretations in "major" cases of statutes that are insufficiently unambiguous. The major questions canon is thus a super-*Marbury* for the administrative state. Where the earlier major questions doctrine shifted a reviewing court from a deference regime to one of rough neutrality, the new canon further shifts from neutrality to *antideference*.

… the major questions canon is in fact simply the nondelegation doctrine masquerading as a principle of statutory interpretation. The traditional major questions doctrine was a nondelegation avoidance doctrine; now elevated to substantive canon, that separation has collapsed.

West Virginia v. Environmental Protection Agency 142 S. Ct. 2587, 2592 (2022)

Takeaway

- The US Supreme Court held the EPA's interpretation exceeded the scope of its delegated authority under the CAA.
- Administrative Agencies cannot broadly read a statute to give them regulatory authority over an area of significant political and economic impact that Congress would likely directly regulate itself without a clearly expressed delegation of authority.

Sackett v. Environmental Protection Agency 598 U.S. 651, 657, 143 S. Ct. 1322, 1329, 215 L. Ed. 2d 579 (2023)

- **Background**: In 2004, Michael and Chantell Sackett purchased a small lot near Priest Lake, Idaho. In preparation for building a modest home, they began backfilling their property with dirt and rocks. A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the Clean Water Act (CWA) because their property contained protected wetlands. The EPA demanded that the Sacketts immediately "undertake activities to restore the Site" pursuant to a "Restoration Work Plan" that it provided. The order threatened the Sacketts with penalties of over $40,000 per day if they did not comply.

- **Issue**: Whether the water on the Sacketts' property constitutes wetlands that are subject to the Clean Water Act as "waters of the United States."

Sackett v. Environmental Protection Agency
598 U.S. 651, 657, 143 S. Ct. 1322, 1329, 215 L. Ed. 2d 579 (2023)

Holding

- The CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." *Rapanos*, 547 U.S., at 755, 126 S.Ct. 2208 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish "first, **that the adjacent [body of water constitutes] ... 'water[s] of the United States,**' (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, **that the wetland has a continuous surface connection with that water**, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*, at 742, 126 S.Ct. 2208. (emphasis added).

Sackett v. Environmental Protection Agency
598 U.S. 651, 657, 143 S. Ct. 1322, 1329, 215 L. Ed. 2d 579 (2023)

Effect of the Opinion

The Supreme Court significantly narrowed what kind of wetlands are covered under the Act compared to long-standing interpretations and application of the Act.

Justice Kavanaugh, concurring in result only, summarizes it well:

- In my view, the Court's "**continuous surface connection**" test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents. **The Court's test narrows the Clean Water Act's coverage of "adjacent" wetlands to mean only "adjoining" wetlands**. But "adjacent" and "adjoining" have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, and (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. By narrowing the Act's coverage of wetlands to only adjoining wetlands, **the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States.**(citation omitted) (emphasis added).

Sackett v. Environmental Protection Agency Takeaway

- Wetlands must now have a continuous surface connection with waters of the United States to be subject to regulation under the CWA.
- It will be interesting to see what percentage of wetlands in the coastal counties are now unregulated under this new interpretation and how "deregulation" of these wetlands impact development in coastal areas.
- S.C. Code Ann. Regs. 61-104(III)(A) (relating the management of hazardous waste):
  - "Adjacent" to a wetland means bordering, contiguous, neighboring, or hydrologically interconnected via surface water or groundwater. Adjacent wetlands include, but are not limited to, those areas that are separated from other waters of the State by man-made dikes, berms, or barriers, natural river berms, and beach dunes. Areas hydrologically interconnected are considered to be those where a realistic potential exists for migration of a release or spill to an adjacent wetlands via surface water or groundwater.

Legislative Power

Appalachian Voices v. United States Dep't of the Interior, 78 F.4th 71, 74 (4th Cir. 2023)

Background: Petitioners were environmental groups challenging federal agency actions that would enable the final construction and initial operation of the Mountain Valley Pipeline, a 300-plus-mile underground pipeline that would transport natural gas from West Virginia to Virginia.

The Fourt Circuit wrote: "[D]uring the pendency of this matter before this Court, Congress proactively intervened by legislation and enacted the Fiscal Responsibility Act of 2023 [temporarily suspending the federal debt limit]. **Section 324** of that Act purports to ratify the agencies' actions regarding the Mountain Valley Pipeline and remove our jurisdiction over the underlying petitions".

Excerpts From the Fourth Circuit's Holding

- In Section 324(e)(1), Congress provided that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any action taken by" certain listed agencies "that grant" any authorization or approval "necessary for the construction and initial operation at full capacity of the Mountain Valley Pipeline…whether issued prior to, on, or subsequent to the date of enactment of this section, and including any lawsuit pending in a court as of the date of enactment of this section."
- Relevant to this matter, under Section 324(e)(2), Congress carved out a specific jurisdictional exception to give the U.S. Court of Appeals for the District of Columbia Circuit "original and exclusive jurisdiction over any claim alleging the invalidity of this section or that an action is beyond the scope of authority conferred by this section."
- "To be sure, courts considering similar challenges to statutes with similar language have generally upheld the statutes, reasoning that Congress approving agency action 'notwithstanding' other law does not violate the separation of powers because Congress has changed the law, not directed courts to apply existing law."
- "Congress is widely seen to enjoy broad control over the jurisdiction of the federal courts.…The exact confines of Congress's power over jurisdiction are still being debated, especially when it comes to **jurisdiction-stripping efforts that appear to dictate the outcome of pending litigation**." (emphasis added)

QUESTIONS?

South Carolina Bar

Continuing Legal Education Division

2024 SC BAR CONVENTION

Environment & Natural Resources Section/Administrative & Regulatory Committee

Friday, January 19

Protecting South Carolina's Coast - One Case at a Time

Leslie Lenhardt

ELECTRONICALLY FILED - 2023 Aug 03 3:23 PM - BEAUFORT - COMMON PLEAS - CASE#2023CP0701324

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

BEFORE THE BEAUFORT COUNTY PLANNING COMMISSION

PINE ISLAND GC, LLC,

Appellant/Petitioner,

-vs-

BEAUFORT COUNTY,

Respondent.

NOTICE OF *and* **DECISION AND ORDER** *of the* **BEAUFORT COUNTY PLANNING COMMISSION** *on an* **ADMINISTRATIVE APPEAL**

Date of Decision(s) Being Appealed:	April 14, 2023
Date of Filing of Appeal(s):	May 12, 2023
Property Location(s):	288 Dulamo Road; St. Helena Island, SC 29920
Property Tax Map No(s).	R300-012-000-0001-0000; R300-012-000-0254-0000; and, R300-012-000-0255-0000.
Date of Hearing on Appeal(s):	June 5, 2023

STATEMENT OF THE CASE:

On May 12, 2023, Pine Island GC, LLC (the "*Appellant*") filed three (3) appeals with Beaufort County (collectively, the "*Appeals*") challenging three identical decisions of Robert Merchant, the Director of Beaufort County's Planning Zoning Department (the "*Director*"), all dated April 14, 2023 (collectively, the "*Interpretations*"). In the Interpretations, the Director determined that the Appellant's three (3) Conceptual Land Development Applications (collective, the "*Applications*") failed to "comply with the applicable standards of the Community Development Code and the amendments given first reading by County Council on April 10, 2023." In particular, the Director found that the Applications sought "to construct a golf course" on the Appellant's properties and were "a prohibited use under Subsection 3.4.50.D" of the Beaufort County Community Development Code (the "*CDC*").

The Beaufort County Planning Commission (the "*Planning Commission*") published notice of the hearings on the Appeals as required by law. The Appeals were heard by the Planning Commission on June 5, 2023 (the "*Hearing*"). Present at the Hearing were the Appellant and its attorneys, Ellis Lesemann & Lauren Niemiec, as well as the Director, County staff, and County staff counsel, Brian Hulbert. At the Hearing, all three Appeals were consolidated into a single hearing with the consent of the Appellant and Beaufort County. This Order will address all three Appeals collectively.

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Having fully considered the record on appeal, the applicable law, and the arguments of the attorneys for the Parties, the Planning Commission *affirms* the Interpretations of the Director and *denies* the relief requested by the Appellant in the Appeals for the reasons set forth herein.

INTRODUCTION AND BACKGROUND:

The Appeals arise from the proposed development of a portion of Pine Island, an approximately 500-acre tract of land located on St. Helena Island in unincorporated Beaufort County, South Carolina. The Appellant proposed "six holes of golf" on each of three (3) adjacent parcels located on Pine Island and as more fully identified in the Applications (the "*Properties*").

Pine Island and the Properties at issue have a base zoning under the CDC of T2 Rural ("*T2R*"). This T2R base zoning district is a transect zone "intended to preserve the rural character of Beaufort County." *See* CDC § 3.2.40. The Properties also fall within the Cultural Protection Overlay ("*CPO*") zoning district, the purpose of which is "to provide for the long term protection of the culturally significant resources found on St. Helena Island. The CPO zone acknowledges St. Helena's historic cultural landscape and its importance as a center of Beaufort County's most notable concentration of Gullah culture." *See* CDC § 3.4.50.A.

Beginning in 2021, the Appellant began meeting with County officials and County staff to discuss potential development plans for Pine Island. One of the potential development plans for Pine Island included an 18-hole golf course. On November 16, 2022, County staff held a pre-application conference with the Appellant to discuss the proposed development of Pine Island and permitted uses under the CPO district.

At the time of this pre-application conference, CDC § 3.4.50.D identified the following uses located within the CPO district as incompatible with the CPO's stated purpose and were therefore prohibited:

> **Resort** This use includes lodging that serves as a destination point for visitors and designed with some combination of recreation uses or natural areas. Typical types of activities and facilities include marinas, beaches, pools, tennis, golf, equestrian, restaurants, shops, and the like. This restriction does not apply to ecotourism or its associated lodging.
>
> **Golf Course** This use includes regulation and par three golf courses having nine or more holes.

(the "*Original CPO Section*"). On November 29, 2022, the Appellant applied for a zoning map amendment with Beaufort County to have Pine Island removed from the CPO. *See* PINE ISLAND TIMELINE. Within one day of the submission of the zoning map amendment application, County officials notified the Appellant that County staff was submitting a proposed CDC text amendment

designed to "allow greater land use flexibility by [conditionally] permitting previously prohibited uses in the CPO Zone, but only if certain conditions are met which further protect and otherwise enhance the purpose of the CPO Zone." *See* Director Memo (Jan. 5, 2023). The Appellant deferred action on its proposed zoning map amendment until a decision was made on Staff's proposed text amendment.

On December 18, 2022, the County advertised a public hearing scheduled for January 5, 2023, before the Planning Commission on the proposed text amendment. *See* PINE ISLAND TIMELINE. At the January 5, 2023, public hearing, Planning Commission considered County staff's proposed text amendment and recommended that County Council deny the same. *Id.*

On January 9, 2023, the Community Services and Land Use Committee of County Council (the "*Land Use Committee*") reviewed County staff's proposed text amendment. At the meeting, the Land Use Committee took the following action:

> Postpone this matter until [the April 10th County Council meeting] and refer the matter to the Cultural Protection Overlay District Committee to study the existing ordinance with [the County's] legal department and with other outside entities of the Committee's choosing to suggest revisions that can be added to reinforce the [CPO's] purpose and to improve the protection it provides to St. Helena and the surrounding islands.

Id. Eight (8) members of County Council attended the Land Use Committee meeting, participated in the same, and voted in favor of the proposed action.

On January 17, 2023, the Cultural Protection Overlay District Committee (the "*CPO Committee*") met to discuss the proposed text amendment and other potential amendments to the CDC. The CPO Committee had a second meeting on January 31, 2023, and another on February 21, 2023.

On February 28, 2023, the Appellant delivered an exempt plat to County staff that subdivided Pine Island's existing three parcels into five (5) separate parcels, three of which constitute the Properties.

On March 7, 2023, the Appellant submitted the Applications for "six holes of golf" on each of the three Properties. On March 8, 2023, the Beaufort County Staff Review Team had a pre-application conference with the Appellant. On March 9, 2023, County staff notified the Appellant that the Applications were incomplete and additional information was required to process the Applications.

On March 21, 2023, the CPO Committee held a meeting at which it finalized a proposed text amendment to the CDC and voted unanimously to forward the proposed text amendment to the Land Use Committee and County Council. The proposed text amendment substantially revised CDC § 3.4.50 and, in particular, revised the prohibition on golf courses within the CPO district as follows:

> **Golf Course** An area of land with improvements to the grounds on which the sport of golf is played. It typically consists of a series of holes, each consisting of a tee box, the fairway, the rough and other hazards, and/or a green with a cylindrical hole

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in the ground, known as a cup. Golf course accessory uses may include a clubhouse, restrooms, driving range, and shelters.

(collectively, the "*2023 CPO Amendments*"). That same day, County staff publicly advertised that County Council would hold first reading of a proposed ordinance adopting the 2023 CPO Amendments, as recommended by the CPO Committee, on April 10, 2023.

On March 24, 2023, the Appellant provided the County with the final item identified as missing from the Applications. Later that same day, the County notified the Appellant that the Applications were deemed complete.

On April 10, 2023, the Land Use Committee recommended that County Council adopt the 2023 CPO Amendments. Later that day, County Council voted in favor of first reading of the 2023 CPO Amendments.

On April 14, 2023, the Director issued the Interpretations and delivered the same to the Appellant. On April 24, 2023, County Council voted in favor of second reading of the 2023 CPO Amendments. Thereafter, on May 8, 2023, County Council voted in favor of third and final reading of the 2023 CPO Amendments.

On May 12, 2023, the Appellant requested that its original zoning map amendment application be reactivated and filed the three subject Appeals.

STATEMENT OF THE ISSUES:

In its Appeals, the Appellant posits that the Director's Interpretations were in error for a number of reasons.

First, the Appellant argues that the CDC in effect prior to the adoption of the 2023 CPO Amendments permitted six holes of golf on a single parcel. *Appeal*, p. 2. In support thereof, the Appellant emphasizes that Section 3.4.50.D's prohibition on golf courses "includes regulation and par three golf courses having nine or more holes." *Id.*; CDC § 3.4.50.D. As the Applications proposed only six holes of golf per Property, the Appellant contends that such a use is not strictly prohibited and should therefore be allowed. In response, the County contends that all golf was prohibited within the CPO district by the plain language of the CDC. Both parties also presented case law on the construction of ordinances and statutes in the event of an ambiguity.

Second, the Appellant argues that the Director's reliance on the "amendments given first reading on April 10, 2023" was improper. *Appeal*, pp. 7-9. The Appellant contends that the Applications were completed and submitted to the County on March 7, 2023; thus, ordinances adopted after March 7, 2023, could not be used as a basis for denying the Applications. *Id.* More particularly, the Appellant alleges that the County's use of the "pending ordinance doctrine" was in

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error for three reasons: (a) the pending ordinance doctrine only applies to newly annexed areas; (b) as of March 7, 2023, the County had not resolved to consider the 2023 CPO Amendments since they were not finalized until March 21, 2023; and, (c) advertisement noticing the public of the County's intent to consider the 2023 CPO Amendments was not provided until March 21, 2023. In response, the County counters that the pending ordinance doctrine was appropriately applied as an alternative basis for the denial of the Applications since notice of the particular scheme of rezoning was provided prior to March 24, 2023.

Third, the Appellant argues that it has vested rights to develop the Properties in accordance with the Applications due to its alleged expenditure of substantial funds in good faith reliance on the CDC prior to the adoption of the 2023 CPO Amendments. *Appeal*, pp. 9-10; *citing Pure Oil Division v. City of Columbia*, 254 S.C. 28, 173 S.E.2d 140 (1970)(good faith reliance upon ordinances existing at the time of application creates a vested right to the permit as of the time of application). The County counters that there was no good faith reliance by the Appellant, the proposed use was not expressly permitted under the original iteration of the CDC, the proposed use was incompatible with the express purpose of the CPO district, and the common law vested rights argument presented by the Appellant has been abrogated by the adoption of the South Carolina Vested Rights Act and the County's incorporation of the same into the CDC.

FINDINGS OF FACT:

1. This written *Decision and Order of the Beaufort County Planning Commission on an Administrative Appeal* (the "*Order*") is entered, filed, and provided to all parties as required by S.C. Code Ann. § 6-29-1150.

2. Pursuant to the CDC, notice of the public hearing on the appeal was duly published in the *Island Packet/Beaufort Gazette*, a newspaper of general circulation in Beaufort County.

3. The Properties are located within the unincorporated boundaries of Beaufort County, South Carolina, and as such, the Properties and the Applications are subject to the CDC.

4. Jurisdiction in the Planning Commission for the Appeals is proper.

5. Although the Applications were originally submitted on March 7, 2023, the Applications were incomplete at the time of submission due to the Appellant's failure to include mandatory supplemental reports and exhibits.

6. The Applications were completed on March 24, 2023, once the Appellant's consultants provided County staff with the required additional materials, and the Applications were received and accepted by County staff.

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7. The Applications were for the approval of "Conceptual Land Development Applications," the approval of which would not result in the issuance of a permit.

8. Each of the Applications proposed six holes of golf per Property.

9. The Properties, as conceptually designed, were intended to function in connection with one another and were not presented as truly separate facilities.

10. The Properties are within the T2R base zoning district and within the CPO district.

11. The 2023 CPO Amendments prohibit the development of golf courses as proposed in the Applications.

12. Notice to the public of the County Council's intent to consider the 2023 CPO Amendments, which constituted a particular scheme of rezoning, was provided not later than March 21, 2023.

13. The Appellant presented little to no evidence to support its contention that it had incurred "substantial expenditures" in preparation of the Applications for conceptual land development.

14. The Appellant failed to establish "good faith reliance" on the Original CPO Section as the Original CPO Section did not expressly permit the developments proposed by the Applications and the Appellant was given fair notice that the Original CPO Section did not expressly permit the development proposed by the Applications as evidenced by the Appellant's zoning map amendment application.

15. At the conclusion of the hearing and having considered the record provided and the testimony of the parties, the Commission unanimously found and concluded that the Interpretations of the Director denying the Applications were correct and proper and, therefore, should be upheld.

CONCLUSIONS OF LAW:

1. The Original CPO Section does not establish a six-hole golf course as a permitted "by right" use for the Properties; rather, the Original CPO Section prohibited the development of golf courses on the Properties in a manner consistent with the intent and purpose of the Cultural Protection Overlay District.

2. The Original CPO Section's inclusion of "[T]his use includes regulation and par three golf courses having nine or more holes" does not nor was it intended to permit golf courses of fewer than nine holes.

3. The Applications for three six-hole golf courses were an attempt to circumvent the purpose and intent of the CPO district as the Applications and the Appellant failed to show how the three Properties can function independently of each other.

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4. At the time the completed Applications were received by County staff, notice to the public of the County's intent to consider revisions to the Original CPO Section and the CDC had already been provided; therefore, the pending ordinance doctrine was appropriately applied by County staff in the Interpretations.

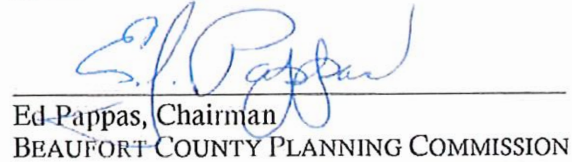
5. The Appellant failed to establish a claim for vested rights existed at the time of the Applications' submission as (i) the developments proposed by the Applications were not expressly permitted under the Original CPO Section and the CDC, (ii) there was not good faith reliance by the Appellant, (iii) little to no evidence of substantial expenditures was presented, and (iv) the Applications were for conceptual land development and the approval of the Applications would not have resulted in the issuance of a permit to develop the Properties.

6. The developments proposed by the Applications are golf courses and golf courses are prohibited within the CPO district under the 2023 CPO Amendments, the Original CPO Section, and all prior iterations of the ordinances regulating the CPO district.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Appeals be DENIED, and that the Interpretations of the Director be AFFIRMED.

IT IS SO ORDERED.



Ed Pappas, Chairman
BEAUFORT COUNTY PLANNING COMMISSION

This 27th day of June, 2023.
Beaufort, South Carolina.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
South Carolina Coastal Conservation League and Charleston Waterkeeper,	)	
Plaintiffs,	)	Case No. 2022-CP-10-_____
vs.	)	**SUMMONS**
South Carolina Department of Health and Environmental Control,	)	
Defendant.	)	

TO: THE ABOVE-NAMED DEFENDANT

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in the above-entitled action, a copy of which is herewith served upon you (and which has been filed with the Office of the Clerk of Court), and to serve a copy of your Answer upon the above-named parties within thirty (30) days after the date of such service, exclusive of the day of service; and if you fail to answer the said Complaint within such time, the relief demanded in the Complaint will be rendered against you by default.

S.C. ENVIRONMENTAL LAW PROJECT

s/ Emily M. Nellermoe
Emily M. Nellermoe (SC Bar No. 102330)
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Counsel for Plaintiffs

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
South Carolina Coastal Conservation League and Charleston Waterkeeper,	))	
	)	Case No. 2022-CP-10-_____
Plaintiffs,	)	
	)	**COMPLAINT FOR DECLARATORY JUDGMENT** (Non-Jury)
vs.	)	
	)	
South Carolina Department of Health and Environmental Control,	))	
	)	
Defendant.	)	
	)	

Plaintiffs South Carolina Coastal Conservation League and Charleston Waterkeeper, by and through undersigned counsel, respectfully move this Court pursuant to S.C. Code Section 15-53-10, *et seq.* for a declaratory judgment in this matter. In support of this Complaint, Plaintiffs submit the following:

NATURE OF THE CASE

1. This is a civil suit brought against Defendant Department of Health and Environmental Control ("DHEC" or "the Department") pursuant to the Uniform Declaratory Judgments Act, S.C. Code Section 15-53-10, *et seq.* Plaintiffs seek declaratory and injunctive relief and other relief the Court deems appropriate to remedy Defendant's failure to properly review individual on-site wastewater systems (also known as septic tanks or septic systems) for consistency with the state's Coastal Management Program, and Defendant's additional failure to publicly notice septic applications and permits.

2. Defendant's failures place the public's health at risk and expose our state's waterways, marshes, beaches, and fisheries to significant, documented harms that can be traced to untreated sewage from malfunctioning, ill-maintained, and/or ill-placed septic systems.

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JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action and may issue declaratory and/or injunctive relief pursuant to the Uniform Declaratory Judgments Act, S.C. Code Section 15-53-10, *et seq.*

4. This Court has personal jurisdiction over the parties because Plaintiffs are organizations based in Charleston, South Carolina. Defendant is a state agency with regulatory authority over activities occurring in the eight coastal counties, including Charleston County.

5. Venue is proper in this Court because Defendant has regulatory authority over the coastal zone, including Charleston County, and its Office of Ocean and Coastal Management ("OCRM"), which conducts reviews for Coastal Zone Consistency Certification in accordance with the State's Coastal Management Program, is located in Charleston County.

PARTIES

6. Plaintiff South Carolina Coastal Conservation League ("the League") is a non-profit 501(c)(3) membership corporation organized and existing under the laws of the State of South Carolina, and headquartered in Charleston, South Carolina. The League has over 4,000 members residing in South Carolina, and works to protect coastal landscapes, abundant wildlife, clean water, and quality of life for South Carolina's citizens and its members through various forms of advocacy and education. The League and its members have a strong interest in advocating for protection of the environment and preserving the state's coastal resources for their use and enjoyment.

7. Plaintiff Charleston Waterkeeper ("Waterkeeper") is a non-profit 501(c)(3) organization headquartered in Charleston, South Carolina, founded to protect and restore Charleston's waterways. Waterkeeper has a strong interest in advocating for environmental protections that promote clean rivers, creeks, and beaches within the County. Waterkeeper

encourages community members, its volunteers, and its donors to participate in public advocacy on issues that affect water quality, wildlife, and the health of public trust waterways. Waterkeeper also regularly conducts water quality testing of the County's waterways and reports its findings to the public.

8. Plaintiff organizations and their members have significant, particularized, and concrete interests in the application of the South Carolina Coastal Tidelands and Wetlands Act, which is designed to protect sensitive coastal resources. The League routinely seeks to prevent or reduce endangerment to human health and the natural environment resulting from activities within the eight coastal counties. *See, e.g., S.C. Coastal Conserv. League v. S.C. Dep't Health & Envtl. Control*, 434 S.C. 1 (2021); *Kiawah Dev. Partners v. S.C. Dep't Health & Envtl. Control*, 411 S.C. 16 (2014); *Spectre v. S.C. Dep't Health & Envtl. Control*, 386 S.C. 357 (2010). Waterkeeper similarly seeks to prevent and reduce such harms, specifically in Charleston County. *See, e.g., Charleston Waterkeeper v. Frontier Logistics*, 488 F.Supp.3d 240 (D.S.C. 2020).

9. Plaintiffs' members live near, recreate on, fish from, and regularly use the coastal waters in South Carolina, and specifically the waters and wetlands in and around Bulls Bay in Awendaw, Cape Romain National Wildlife Refuge, James Island Creek, Shem Creek and numerous other waterbodies that have been or will be impacted by the use of septic systems. These members intend to live on, recreate on, fish from, and use these water resources in the future. These individuals use and enjoy our state's coastal waters for purposes of commerce, recreation, conservation, education, and aesthetic enjoyment, including but not limited to shellfish harvesting, fishing, boating, birdwatching, and sightseeing. Further, these individuals have been and will continue to be harmed by pollution into waterways caused by septic systems, adversely impacting their ability to make such uses.

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10. Malfunctioning septic systems harm Plaintiffs' members in part because septic discharges contain untreated human waste, pathogens, and other pollutants that are known to present public health risks and endanger both human and environmental health. If Defendant continues to permit septic systems without regard to the water table, soil characteristics, geography, or water quality classifications and designations, especially in high densities, Plaintiffs' members are persons for whom aesthetic and recreational values of the area have been and will continue to be lessened.

11. Defendant is failing to carry out its legally-mandated duties in failing to apply the plain language requirements of the Coastal Tidelands and Wetlands Act, S.C. Code Section 48-39-10, *et seq.*, by failing to assess whether installations of septic tanks in the coastal zone comply with the state's Coastal Management Program. Therefore, Plaintiff organizations and their members seek to remedy these agency omissions with this action.

12. Defendant is a state agency created by statute and administered under the supervision and control of the South Carolina Board of Health and Environmental Control. *See* S.C. Code Ann. § 44-1-20. DHEC's Office of Ocean and Coastal Resource Management administers the state's Coastal Management Program and has broad management authority over activities within the eight-county coastal zone.[1] DHEC also administers the state's septic tank permitting program. S.C. Reg. 61-56.

LEGAL BACKGROUND

Coastal Tidelands and Wetlands Act & the Coastal Management Program

13. In 1972, finding an "urgent need to protect and to give high priority to natural systems in the coastal zone," the United States Congress promulgated the Coastal Zone

[1] The "coastal zone" is comprised of Charleston, Beaufort, Berkeley, Colleton, Dorchester, Georgetown, Horry, and Jasper counties.

Management Act, 16 U.S.C. Section 1451, *et seq*., declaring a national policy "to preserve, protect, develop, and where possible, to restore and enhance, the resources of the Nation's coastal zone for this and succeeding generations." Thereafter, South Carolina promulgated the Coastal Tidelands and Wetlands Act ("the Act"), in 1977. S.C. Code Ann. § 48-39-10, *et seq.*

14. In promulgating the Act, the General Assembly found that "increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development . . . have resulted in the decline or loss of living marine resources, wildlife, nutrient-rich areas, [and] permanent and adverse changes to ecological systems[.]" S.C. Code Ann. § 48-39-20. The General Assembly also found that the coastal zone is "ecologically fragile and consequently extremely vulnerable to destruction by man's alterations" and that "[i]mportant ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values." *Id.* Therefore, the General Assembly declared that "the basic state policy in the implementation of [the Act] is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." S.C. Code Ann. § 48-39-30(A).

15. Defendant, by and through OCRM, is charged with the Act's administration, including the implementation and enforcement of a comprehensive coastal management program. *See* S.C. Code Ann. § 48-39-80. To that end, the Department promulgated the Coastal Management Program ("CMP"), which was approved by the General Assembly in 1979 and amended once in 1993. The CMP contains binding norms applicable to activities in the coastal zone and has been upheld by the South Carolina Supreme Court as valid and enforceable. *See, e.g.*, *Spectre v. S.C. Dep't Health & Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010). In developing the CMP, DHEC was directed to take into account "all lands and waters in the coastal zone," which

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encompasses the eight coastal counties, including Charleston County. S.C. Code Ann. § 48-39-10.

16. The Act directed DHEC to create two distinct regulatory programs: (1) a permitting program applicable to all uses and alterations of the coastal zone's "critical areas"[2] where OCRM has direct permitting authority (S.C. Code Ann. § 48-39-130); and (2) a review and certification program, applicable throughout all of the coastal zone, through which the Department is directed to "[d]evelop a system whereby [OCRM] shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan." S.C. Code Ann. § 48-39-80(B)(11).

17. The CMP provides the following guidelines for evaluation of ***all*** projects in the coastal zone:

> (1) The extent to which the project will further the policies of the South Carolina General Assembly which are mandated for [OCRM] in implementation of its management program, these being: (a) "to promote the economic and social improvement of the citizens of this State . . . **with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development** . . . ; (b) to protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations."
>
> (2) The extent to which the project will have adverse impacts on the "critical areas" (beaches, primary ocean-front sand dunes, **coastal waters, tidelands**).
>
> (3) The extent to which the project will protect, maintain or improve water quality, particularly in coastal aquatic areas of special resource value, for example, spawning areas or productive oyster beds.
>
> . . .
>
> (7) The possible long-range, cumulative effects of the project, when reviewed in the context of other possible development and the general character of the area.
>
> (8) The extent and significance of negative impacts on Geographic

[2] "Critical area" includes coastal waters, tidelands, beaches, and the beach/dune system. S.C. Code Ann. § 48-39-10(J).

Areas of Particular Concern (GAPCs).

(9) The extent and significance of impact on the following aspects of quality and quantity of these valuable coastal resources: (i) unique natural areas – **destruction of endangered wildlife or vegetation or of significant marine species** . . . , **degradation of existing water quality standards** . . . . [and] (ii) public recreational lands – . . . degradation of environmental quality in these areas[.]

CMP III-14 (internal citations omitted, emphases added).

18. The CMP contemplates added layers of protection and review for projects located in proximity to Geographic Areas of Particular Concern[3] ("GAPCs") for two reasons: (1) barrier islands are designated Areas of Special Resource Significance[4] (CMP III-7); and (2) wildlife preserves, as "irreplaceable resources," are considered to be GAPCs. *See* CMP IV-5.

19. Further, when "a project overlaps with, is adjacent to, or significantly affects a GAPC, [OCRM] will carefully evaluate the project based on the criteria listed as the priority of uses which specifically address each type of GAPC. A project would be prohibited if it would permanently disrupt the uses of priority for the designated area. A project would be strongly discouraged or the permit conditioned if the project would interrupt, disturb, or otherwise significantly impact the priority uses of the designated area." CMP IV-2. Further still, the CMP provides that the "goals of the South Carolina coastal zone management program for preservation and development of GAPCs are: To give the highest priority to the identified primary value of a GAPC when considering the preservation or development to that area." CMP IV-3.

20. The CMP document makes specific findings regarding septic systems: "[i]ndividual systems such as wells and septic tanks are adequate where development is limited,

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[3] GAPCs are lands that provide unique importance as natural, aesthetic, recreational, scientific, or economic resources in the coastal zone. *See* CMP IV-3.

[4] Areas of Special Resource Significance are those areas that have been identified through resource and inventory efforts as being unique and either environmentally fragile or economically significant to the coastal area and the State. *See* CMP III-69.

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but can have major environmental impacts in densely populated areas. For example, a proliferation of wells in some areas can seriously draw-down or drain the aquifer, reducing the groundwater resources, and possibly resulting in saltwater intrusion." CMP III-60. The document further finds: "the major negative impact associated with sewage treatment systems is potential water quality degradation from effluent discharge . . . . Septic tanks are only effective in treating sewage in areas where soils are suitable for proper drainage, where they are spaced adequately and where groundwater and surface water are sufficient distance away." *Id.*

21. DHEC is charged with regulating septic tank permits throughout the state, and thus septic tank permits are state permits.

22. Despite the findings discussed in the preceding paragraphs, and despite the General Assembly's clear mandate that DHEC "review ***all*** state and federal permit applications in the coastal zone, and to certify that these do not contravene the [CMP]" (S.C. Code Ann. § 48-39-80(B)(11) (emphasis added)), DHEC has entirely failed to undertake this review for typical residential septic permits in low-lying and dynamic coastal areas. Consistency review is mandated by statute and is intended to give weight to the unique value of natural resources on the coast, as well as the unique natural forces at play on the coast. *See* S.C. Code Ann. § 48-39-80. This failure violates the plain language of the statute.

23. The CMP contains a provision that "DHEC retains regulatory authority over septic tanks with flow rate of 1500 gallons per day or greater (Section 44-1-40, S.C. Code of Laws)." CMP III-62; *see also* CMP V-5. However, nothing in the statute authorizes such a limitation on DHEC's certification review. Nor can the CMP override the plain language of the statute. *See, e.g.*, *Milliken v. S.C. Dep't of Labor*, 275 S.C. 264, 269 S.E.2d 765 (1980). "Although a regulation has the force of law, it must fall when it alters or adds to a statute." *S.C. Coastal Conserv. League v. S.C. Dep't Health & Envtl. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010).

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FACTUAL BACKGROUND

Septic System Risks and Harms

24. It is well-documented that septic systems can and do impact local drinking water wells, groundwater, surface water bodies, and coastal waters, especially when installed in sensitive environmental areas, at sites with inappropriate soils or high groundwater tables, when sited in high densities, and when sited on small lots with small drainfields.

25. Septic systems can be a significant source of environmental pollution, particularly in rural areas. According to Defendant's own Nonpoint Source Management Plan, nonpoint sources of pollution, such as septic systems, are "continuously recognized as the nation's largest cause of surface water quality impairments."[5]

26. The risks inherent to malfunctioning septic systems abound. According to the Environmental Protection Agency ("EPA"), the "most serious documented problems [with septic systems] involve contamination of surface waters and ground water with disease-causing pathogens [bacteria and viruses] and nitrates."[6] Even if a septic system is functioning properly, soil filtration alone cannot remove all contaminants (e.g., medicines, cleaning products, and other harmful chemicals) and can discharge wastewater with pollutant concentrations exceeding established water quality standards. In coastal regions, contamination of shellfish beds and beaches by pathogens is a concern, as coastal waters are more sensitive to nitrogen contamination from failing septic systems. "Other problems [with septic systems] include excessive nitrogen discharges to sensitive coastal waters and phosphorous pollution of inland surface waters, which

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[5] S.C. Dep't Health & Envtl. Control, SOUTH CAROLINA NONPOINT SOURCE MANAGEMENT PLAN 2020-2024, (2019), *available at* https://dc.statelibrary.sc.gov/bitstream/handle/10827/32190/DHEC_Nonpoint_Source_Management_Plan_2020-2024_2019.pdf (last visited Oct. 28, 2022).

[6] U.S. Envtl. Protection Agency, Septic System Impacts on Water Sources, *available at* https://www.epa.gov/septic/septic-system-impacts-water-sources (last visited Oct. 28, 2022).

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increases algal growth and lowers dissolved oxygen levels" causing large-scale kills of fish and other aquatic organisms and creating regional "dead zones."[7]

27. These risks are compounded for ill-placed septic installations within the coastal zone. Sandy soils commonly found in coastal areas drain rapidly, meaning that pollutants are able to reach groundwater before they are absorbed;[8] likewise, waterlogged soils allow untreated waste to flow laterally to ground and surface waters.[9] Because effective wastewater treatment from septic is dependent upon adequate depths of unsaturated soil beneath the drainfield, groundwater tables characteristic of low-lying coastal areas are often too shallow to support proper waste treatment.[10] Precipitation from seasonal variances, annual rainfall, storm events, and sea level rise raise water tables even higher, increasing the risk that poorly treated sewage will pollute nearby waterbodies.

28. Plaintiff Waterkeeper's testing data shows that high levels of bacteria often make Charleston County waterways like Shem Creek, James Island Creek, and Filbin Creek unsafe for recreational activity and/or shellfish harvesting for human consumption due to high levels of fecal bacteria that indicate the presence of pathogens like tuberculosis, staph, cholera, and e. coli.

29. Septic systems placed in proximity to coastal waters have been identified as a source of the above-referenced bacteria and pathogens in coastal waterways in numerous scientific

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[7] *Id.*

[8] For example, within the James Island Creek Watershed, approximately 72.2% of the soil is considered to have moderate to severe limitations for septic system drainfields due to high water tables and percolation rates. Terracon, *et al.*, WATERSHED MGMT. PLAN – JAMES ISLAND CREEK (May 25, 2021), *available at* https://www.jamesislandsc.us/Data/Sites/1/media/pdf-files/james-island-creek---watershed-management-plan-final.pdf (last visited Nov. 1, 2022) (citing USDA, Soil Survey- Charleston County, South Carolina (1971)).

[9] *See, e.g.*, Michael A. Mallin, *Septic Systems in the Coastal Environment: Multiple Water Quality Problems in Many Areas*, MONITORING WATER QUALITY (2013), *available at* https://uncw.edu/cms/aelab/reports%20and%20publications/2013/mallin%20chapter%204%20septic%20system%20problems.pdf (last visited Oct. 28, 2022).

[10] *Id. see also* Miami-Dade Cnty. Dep't of Regulatory & Econ. Res., *et al.*, *Septic Systems Vulnerable to Sea Level Rise* (2018), *available at https://www.miamidade.gov/green/library/vulnerability-septic-systems-sea-level-rise.pdf* (last visited Oct. 28, 2022).

studies. For example, a study of Cape Hatteras National Seashore, a large public nature park in North Carolina, found fecal concentrations in water samples were "significantly correlated" to nearby community water usage, "indicating that increased septic tank usage led to increased pollutant concentrations in area waterways."[11] In Charleston, a recent study of the routinely-impaired waters of the James Island Creek Watershed examined the correlation between two clusters of septic systems—an estimated 181 densely-placed septic tanks near the Simpson Creek tributary, and another cluster of approximately 27 septic tanks adjacent to James Island Creek—and water quality data from two sampling locations, collected by Plaintiff Waterkeeper over the course of eight years (2013-2020).[12] That study and associated Watershed Management Plan concluded that septic systems had a high likelihood of being a major source of *Enterococci*[13] in the waters of James Island Creek.

30. The exact number of failing septic systems in South Carolina is unknown because, after installation, South Carolina law does not require property owners to have existing systems inspected or maintained. However, the EPA estimates that as many as twenty percent of septic tanks are likely malfunctioning to some degree;[14] according to DHEC, ten to thirty percent of septic systems fail to work properly in an average year.[15]

31. Currently, OCRM's coastal expertise and knowledge is completely excluded from

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[11] Michael A. Mallin & Matthew R. McIver, *Pollutant impacts to Cape Hatteras National Seashore from urban runoff and septic leachate*, Marine Pollution Bulletin 64, 1356-1366 (2012).

[12] Terracon, *et al.*, WATERSHED MGMT. PLAN – JAMES ISLAND CREEK at 25-26 (May 25, 2021), *available at* https://www.jamesislandsc.us/Data/Sites/1/media/pdf-files/james-island-creek---watershed-management-plan-final.pdf (last visited Nov. 1, 2022).

[13] *Enterococci* are bacteria that indicate the presence of fecal matter in water.

[14] U.S. Envtl. Protection Agency, *Stormwater Best Management Practice: Preventing Stormwater Contamination from Septic Failure* (2021), *available at* https://www.epa.gov/system/files/documents/2021-11/bmp-preventing-stormwater-contamination-from-septic-system-failure.pdf (last visited Oct. 28, 2022).

[15] S.C. Dep't Health & Envtl. Control, SOUTH CAROLINA NONPOINT SOURCE MANAGEMENT PLAN 2020-2024, (2019), *available at* https://dc.statelibrary.sc.gov/bitstream/handle/10827/32190/DHEC_Nonpoint_Source_Management_Plan_2020-2024_2019.pdf (last visited Oct. 28, 2022).

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septic tank application review and permit issuance, as permitting is delegated to a completely separate agency division (On-Site Waste Water, or "OSWW," a program under the umbrella of the Bureau of Environmental Health Services, or "BEHM"). This, compounded by the Department's failure to undertake Coastal Zone Consistency review and its related failure to consider the appropriateness and the impacts of coastal forces and geologic conditions on individual septic systems in the coastal zone, is arbitrary, capricious, and in error.

Bulls Bay Watershed &
Cape Romain National Wildlife Refuge

32. Cape Romain National Wildlife Refuge ("Cape Romain" or "the Refuge") is a large wildlife preserve located in Charleston County and managed by the U.S. Fish and Wildlife Service ("FWS"). The Refuge extends for twenty-two miles along the coast and encompasses 66,306 acres of barrier islands and salt marsh, with elevations ranging from zero to four feet above sea level. Of the Refuge's 63,300 acres, 29,000 acres have been designated as a Class 1 Wilderness Area[16] since 1975.

33. The Refuge is designated critical habitat for the federally listed Piping plover and its beaches are the site of the largest nesting population of the threatened Loggerhead sea turtle outside the state of Florida.[17]

34. Cape Romain is almost entirely surrounded by water: its borders are formed by the Intracoastal Waterway ("ICW") to the west/north, Price Inlet and tributary to the south, Cape Romain Harbor and its tributaries to the north, and the Atlantic Ocean to the east. According to FWS, the Refuge is "seventy-five percent estuary with the seemingly endless emergent salt marshes that are dominated by smooth cordgrass and interwoven with winding tidal creeks,

[16] Class 1 Wilderness Areas are designated pursuant to the Clean Air Act, 42 U.S.C. 7401, *et seq.,* and impose heightened air quality and visibility protections for national wilderness areas larger than 5,000 acres.
[17] U.S. Fish & Wildlife Serv., *Cape Romain National Wildlife Refuge*, https://www.fws.gov/refuge/cape-romain (last visited Oct. 28, 2022).

shallow bays, shell rake islands and salt flats. These estuarine wetlands are significant nursery habitats. The incoming tide carries juvenile fish, crabs, shrimp and other invertebrates. Combining the ocean's nourishment with the nutrient-laden fresh waters of small rivers makes the estuary one of the most productive environments on earth."

35. Cape Romain lies within the Bulls Bay Watershed of the Santee River Basin. This watershed, specifically Bulls Bay, has a documented history of fecal coliform bacteria impairment due in part to malfunctioning septic systems. In 2002, DHEC added Shellfish Harvesting Area 7 to the Clean Water Act - Section 303(d) list of impaired waters for fecal coliform bacteria. To restore the water quality of this area, local and state governments began to implement best management practices and septic repairs. As part of the seven-year, nearly one-million-dollar project, sixty-two septic systems were completely replaced. By 2014, Shellfish Harvesting Area 7 was delisted and reopened for shellfish harvesting.

36. Today, the waters in and around the Refuge have been designated as Outstanding Resource Waters ("ORW")—the highest water quality designation in the state—defined as waters which constitute an outstanding recreational or ecological resource. S.C. Reg. 61-68. Specifically, Bulls Bay, Cape Romain Harbor, Price Inlet, and their tributaries are all designated ORW. S.C. Reg. 61-69. The entirety of Sewee Bay is designated Shellfish Harvesting Waters ("SFH"), defined as tidal waters protected for shellfish harvesting and suitable for recreation, crabbing, fishing, and for the survival and propagation of a balanced indigenous aquatic community of marine fauna and flora. S.C. Reg. 61-68 and 69.

37. Additionally, the Refuge qualifies as both a GAPC and an Area of Special Resource Significance; therefore, under the CMP, permit applications for projects adjacent to or that will significantly affect the Refuge are subject to the additional requirements discussed *infra* (¶¶ 17-19).

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Proposed Developments in Awendaw

38. South Carolina's coastal areas are experiencing increased development pressures, particularly outside of areas with established utility services. In these areas, conventional septic tank systems are often chosen for household wastewater treatment because of the lack of sewer service, in addition to the low initial development costs and the ease of obtaining septic installation permits.

39. Plaintiffs are informed and aware of at least two pending projects in Charleston County that would utilize a significant number of individual septic tanks as part of high-density residential development proposals within and adjacent to sensitive coastal areas. Both projects are residential subdivisions within the Town of Awendaw, and both are situated in close proximity to the Congressionally-authorized boundaries of the Cape Romain National Wildlife Refuge. Further, both project sites and Cape Romain lie within the Bulls Bay Watershed of the Santee River Basin, indicating that waters, rainfall, snowmelt, sediments, and pollutants from inland locations are eventually channeled to geographically grouped outflow points such as reservoirs, bays, and the ocean, namely the waters in and around the Refuge.

40. Upon information and belief, White Family Partnership, LP, ("WFP") is a limited partnership organization doing business in Charleston County. WFP is the owner of four parcels of land located in Awendaw, corresponding with TMS Numbers 644-00-00-023, 644-00-00-025, 644-00-00-026, and 644-00-00-030. Together, these parcels comprise 233.45 acres, and are referred to collectively as "White Tract."

41. The White Tract property is situated east of Highway 17 near the intersection of Seewee Road and Bulls Island Road in Awendaw, South Carolina. *See* Exhibit A. Upon information and belief, this property primarily consists of forested uplands and freshwater wetlands, and is surrounded by public roadways and forested land, including forested land owned

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by the federal government (Francis Marion National Forest). The easternmost boundary of the property consists almost entirely of wetlands, and a portion of the easternmost tract extends to the waters of the ICW and Sewee Bay, which are currently classified as SFH. The property lies within one mile of Cape Romain National Wildlife Refuge and is part of the Bulls Bay Watershed.

42. Upon information and belief, on April 18, 2022, following a public hearing, the Town's Planning Commission voted to approve the White Tract subdivision preliminary plat, green-lighting the development of 204 single-family homes at an overall gross density of one unit per acre. The individual proposed lots range in size from 14,167 square feet (approximately 0.325 acres) to 40,705 square feet (approximately 0.934 acres). *See* Exhibits B and C.

43. Upon information and belief, all of the proposed lots within White Tract are to be served by individual septic systems. *See* Exhibits B and C.

44. The Plaintiffs submitted a Freedom of Information Act ("FOIA") request to DHEC to determine whether any septic tank permit applications had been submitted for the White Tract development. On October 11, 2022, DHEC notified Plaintiffs that no such applications have been submitted to or received by the Department.

45. Upon information and belief, DHEC does not intend to issue public notices for any septic tank permit applications for the White Tract.

46. Upon information and belief, DHEC does not intend to conduct a review of any septic tank permits on the White Tract, or anywhere else in the coastal zone, for consistency with the CMP.

47. Upon information and belief, Wapataw, LLC ("Wapataw") is a limited liability company and the owner of one parcel of land located on Doar Road in Awendaw, corresponding with TMS Number 681-00-00-028. This parcel comprises 184 acres, and is commonly referred to as the "Doar Tract."

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48. The Doar Tract is situated east of Highway 17 near the intersection of Seewee Road and Doar Road in Awendaw, South Carolina. *See* Exhibit D. Upon information and belief, Doar Tract is 46% wetland (approximately eighty-five acres of wetlands and ninety-nine acres of highland). *See* Exhibit D at 2. Upon information and belief, this property lies within 1.5 miles of the ICW and Cape Romain, and is part of the Bulls Bay Watershed.

49. On December 17, 2018, the Town's Planning Commission approved a major residential subdivision, also known as "Romain Bay Preserve," on the Doar Tract. Wapataw's Planned Development ("PD") document proposed two different design possibilities: (1) "Scenario One" which called for 249 residential units (gross density of approximately 1.5 units per acre); and (2) "Scenario Two" which called for 188 residential units (gross density of approximately 2.0 units per acre). Under either scenario, Wapataw's PD contemplated "individual or central septic systems for sanitary sewer, subject to DHEC approval for septic systems." Exhibit D.

50. Upon information and belief, Wapataw submitted a subdivision application to the Town, specifically regarding the first of several phases of the Romain Bay Preserve project ("Phase One"). Phase One encompassed eighty-five new parcels, three roads, and associated water infrastructure and service. *Id.*

51. On May 16, 2022, following a public hearing, the Town's Planning Commission approved the Romain Bay Preserve preliminary plat as to Phase One only. In its Memorandum on Conditions for Approval, the Town provided that "all proposed lots will be served with onsite septic systems." *See* Exhibit E at 2, n.7.

52. Upon information and belief, Defendant issued eighty-five individual permits for on-site wastewater systems to Romain Bay Preserve on or about August 4, 2022. DHEC did not issue public notices for any of these septic tank applications, nor did they publicly notice the permit decisions themselves. The Plaintiffs learned of these permits through a FOIA request, which was

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submitted on September 12, 2022, and fulfilled on October 11, 2022, well past the fifteen-day window for challenging such decisions.[18]

53. Upon information and belief, DHEC failed to review the septic tank permit applications for consistency with the CMP.

PUBLIC NOTICE AND DUE PROCESS

54. Currently, the Department does not place applications for individual septic tanks on public notice, nor does it publicly notice issued permits for the same.

55. The failure to provide public notice for applications or permits creates a system whereby affected persons and the public at large are unable to engage in decision-making processes that implicate their rights. In particular, those rights include recreational uses in and on public trust resources, such as boating, swimming, fishing, and harvesting shellfish, in addition to impacts on their health and well-being and their property values. In short, affected persons are kept completely in the dark about the state's permitting of septic systems in ecologically sensitive coastal areas that have the potential to harm the quality of their communities and surrounding environment.

56. Administrative agencies such as DHEC are required to meet minimum standards of due process. *Stono River Env't Prot. Ass'n v. S.C. Dep't Health & Envtl. Control*, 305 S.C. 90, 93-94 (1991) (citing S.C. Const. Art. 1, § 3; *Smith & Smith, Inc. v. S.C. Public Service Comm'n,* 271 S.C. 405 (1978)). The South Carolina Constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on **due notice** and an opportunity be heard . . . and he shall have in all such instances the right to judicial review." S.C. Const., Art. 1, § 22 (emphasis added); *see also Kurschner v. City of*

[18] *See* S.C. Code Ann. § 44-1-60(E)(2) ("The staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review . . . is filed with the department by the applicant, permittee, licensee, or affected person.).

Camden Plan. Comm'n, 376 S.C. 165, 171 (2008) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution."). "Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. Rather, due process is flexible and calls for such procedural protections as the particular situation demands." *Kurschner*, 376 S.C. at 171-72 (internal citations omitted); *see also Stono River*, *supra* (citing *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)).

57. The General Assembly codified the same when it enacted S.C. Code Section 44-1-60(B), which provides: "To the maximum extent possible, the department shall use a uniform system of public notice of permit applications, opportunity for public comment and public hearings." The purpose of this act "is intended to provide a uniform procedure for contested cases and appeals from administrative agencies." *S.C. Coastal Conserv. League v. S.C. Dep't Health & Envtl. Control*, 390 S.C. 418, 429 (2010) (quoting Act No. 387 § 53).

58. To prevail on a claim of denial of due process in an administrative proceeding, there must be a showing of substantial prejudice. *See, e.g., Palmetto Alliance, Inc. v. S.C. Public Serv. Comm'n,* 282 S.C. 430, 435 (1984). Here, lack of public notice substantially prejudices Plaintiffs in that they receive no notice of an agency decision, and thereby lack the means to timely challenge that decision.

59. With a fifteen-day clock to challenge the issuance of the permit, affected persons must be aware that an application has been submitted and that DHEC has made a permitting decision. Currently, the only option the public has to obtain such information and challenge it is to request septic information under FOIA, placing an impossible burden on affected persons to time a FOIA request concurrently with a septic permit application and/or permit issuance. If a

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FOIA request is made too soon, no information will be available for the Department to disclose. If a FOIA request is made too late, the fifteen-day clock will likely have run by the time the request is fulfilled, precluding an affected person from challenging DHEC staff's decision to issue said permits. Even assuming a FOIA request is perfectly timed, the Department has forty days to respond to a FOIA request, again presenting a substantial likelihood that a permit will have been issued and the fifteen-day clock expired.

60. Because DHEC does not provide any public notice of septic tank permit applications or its decisions to grant such permits, the public and any affected persons are foreclosed from a meaningful opportunity to be heard and subsequent judicial review.

61. Plaintiffs are aware of a recent instance in which the failure to publicly notice permit applications and agency decisions has caused prejudicial effects. In particular, the Gullah/Geechee Fishing Association ("the Association") has been objecting to a luxury resort proposed for Bay Point Island in Port Royal Sound in Beaufort County. In 2020, Governor Henry McMaster, Senator George E. "Chip" Campsen, and Representative Shannon Erickson joined in support of the Association and submitted letters to the Beaufort County Zoning Board of Appeals advocating for the protection of this cultural and natural resource and against the proposed development. Yet, despite monitoring DHEC activities and submitting a FOIA request regarding any septic tank permit applications, the Association did not learn of DHEC's decision to issue a septic tank until after the fifteen-day appeal window had passed. Even though the Association appealed within fifteen days of learning of the permit issuance, which occurred without a coastal zone consistency certification, the Administrative Law Court dismissed their appeal as untimely. *Gullah/Geechee Fishing Assoc. v. S.C. Dep't Health & Envtl. Control*, 22-ALJ-07-0008-CC, Order Granting Resp't Bay Point's Mot. to Dismiss (July 15, 2022). *See* Exhibit F.

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62. The South Carolina Constitution, as well as multiple statutes promulgated by the General Assembly, envision a system of government whereby administrative agencies provide public notice of decisions and allow public input to promote transparency and public participation in the decision-making process. When legislative intent is subverted by an agency's failure to follow plainly stated processes and procedures, citizens are denied the rights conferred on them by the legislature and the Constitution. Such a result should not be permitted to stand, and the affected members of the public (i.e., Plaintiffs) should not be further prejudiced as a result.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment – Coastal Zone Consistency Review)

63. Plaintiffs re-allege and incorporate the allegations of the preceding paragraphs as if fully contained herein.

64. Section 48-39-80(B)(11) of the S.C. Code requires the Defendant to "review **all** state and federal permit applications in the coastal zone, and to certify that these do not contravene the [CMP]" (emphasis added).

65. DHEC is the state agency charged with reviewing septic tank permit applications, and septic tank permits are state permits.

66. DHEC does not and has never reviewed septic tank permit applications for consistency with the Coastal Management Program.

67. DHEC has violated S.C. Code Section 48-39-80(B)(11) by failing to review septic tank permit applications for consistency with the Coastal Management Program.

68. DHEC's failure to comply with the Coastal Tidelands and Wetlands Act also indicates a failure to comply with the federal Coastal Zone Management Act.

69. Plaintiffs seek a declaration from this Court that DHEC-OCRM is required to review all septic system applications in the coastal zone for consistency with the Coastal Management Program pursuant to S.C. Code Section 48-39-80(B)(11).

70. A concrete issue exists in this case, Plaintiffs have asserted legal rights, and DHEC is denying an affirmative legal duty; as such, a justiciable controversy exists in this matter, and Plaintiffs are entitled to a declaratory judgment as a matter of law.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment – Public Notice)

71. Plaintiffs re-allege and incorporate the allegations of the preceding paragraphs as if fully contained herein.

72. The Due Process Clause of the S.C. Constitution provides that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity be heard."

73. DHEC does not provide notice of any kind regarding septic tank permit applications, and as a result DHEC deprives the public of an opportunity to be heard and for judicial review.

74. The Plaintiffs are substantially prejudiced because they receive no notice, have no opportunity to be heard and have no ability to obtain judicial review.

75. Plaintiffs seek a declaration from this Court that DHEC must provide for public notice of all onsite wastewater system applications, regardless of volume, so that members of the public and affected parties have notice and an opportunity to be heard.

76. Plaintiffs re-assert that a concrete issue exists in this case, Plaintiffs have asserted legal rights, and DHEC is denying an affirmative legal duty; as such, a justiciable controversy exists in this matter, and Plaintiffs are entitled to a declaratory judgment as a matter of law.

FOR A THIRD CAUSE OF ACTION
(Temporary and Permanent Injunction)

77. Plaintiffs re-allege and incorporate the allegations of the preceding paragraphs as if fully contained herein.

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78. Plaintiffs ask the Court to enjoin the Defendant from issuing any septic tank permits in the coastal zone unless and until the agency has certified that such permit is consistent with the Coastal Management Program.

79. A temporary injunction is an appropriate remedy at law if the plaintiff shows the following: (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *See, e.g., Scratch Golf Co. v. Dunes West Residential Golf Props. Inc.*, 361 S.C. 117, 122 (2004).

80. Similarly, a permanent injunction is an appropriate remedy at law if the plaintiff will suffer irreparable harm without such relief, the plaintiff lacks an adequate remedy at law for the defendant's wrongdoing, and equity favors the granting of such relief.

81. Here, Plaintiffs will suffer irreparable harm if an injunction is not granted. Continued permitting of septic systems in the coastal zone without regard for the special considerations outlined in the CMP and without review by the special expertise of OCRM staff will likely allow hundreds, if not thousands, of septic units to be installed in sensitive or inappropriate coastal areas, exposing Plaintiffs, the public at large, and the natural environment to unnecessary and heightened risks of water quality degradation and hazards to human health.

82. Plaintiffs are likely to succeed on the merits of this action based on the plain language of the Coastal Tidelands and Wetlands Act, which requires that **all** state and federal permits to be reviewed for consistency with the CMP.

83. In the absence of an injunction, there is no adequate remedy at law available to Plaintiffs. Challenging onsite wastewater permits individually is effectively impossible given that Defendant refuses to provide notice to the public of septic system applications or permits.

84. Until such time as the Court permanently decides the issues set forth herein, no material harm will result to Defendant if it is temporarily enjoined from approving septic tank

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permits without conducting coastal zone consistency certification review.

85. Enjoining the Defendant from approving septic tank permits in sensitive coastal areas without regard to the special requirements mandated by the General Assemby would best serve the public interest.

86. As a result of the foregoing, Plaintiffs are entitled to the award of a temporary and permanent injunction for the relief sought herein.

WHEREFORE, having fully set forth the allegations against Defendant, Plaintiffs seek an Order of this Court granting the following relief:

(1) Declaring that the Department of Health and Environmental Control must review all onsite wastewater system applications in the coastal zone for consistency with the Coastal Management Program;

(2) Declaring that the Department of Health and Environmental Control must provide for public notice of septic tank permit applications and agency decisions on those permit applications;

(3) Enjoining the Department of Health and Environmental Control from issuing any septic tank permits within the eight coastal counties without undertaking the requisite review for consistency with the Coastal Management Program; and

(4) Granting Plaintiffs such other and further relief as this Court deems just and proper.

Signature page to follow.

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Respectfully submitted,

s/ Emily M. Nellermoe

Emily M. Nellermoe (SC Bar No. 102330)
Leslie Lenhardt (SC Bar No. 15858)
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Counsel for Plaintiffs

November 10, 2022
Charleston, South Carolina

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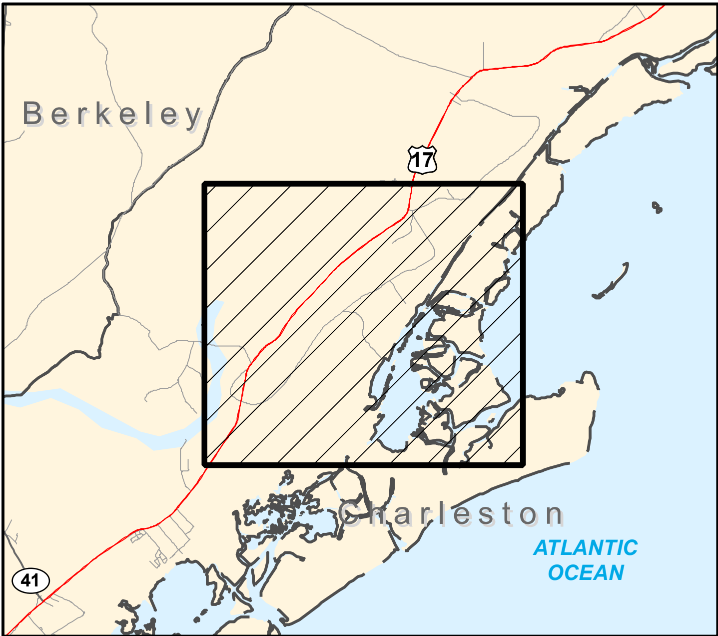
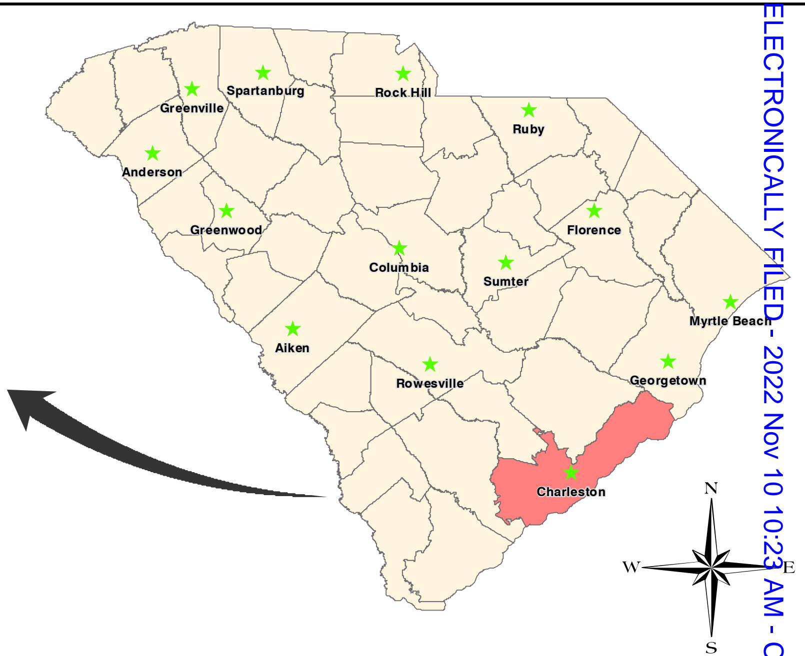
EXHIBIT A





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WHITE RD
DOAR RD
LIGHTKEEPER LN
IRON SWAMP RD
MAXVILLE RD
CLAYFIELD RD
FOREST SERVICE RD 232
COME ABOUT WAY
17
JIBE CT
WEE RD
GUERINS BRIDGE RD
FLATFIELD FARM RD
GOODWINE CIR
AWD RD
OLD FORT RD

PROJECT LOCATION
32.955094° -79.670240°

J:\SOUTH CAROLINA\2021\SC-21PGI3649\GIS\2022\TNE\EXHIBITS\EXHIBIT_1_PROJECT_LOCATION_MAP.MXD

EXHIBIT 1. PROJECT LOCATION MAP
WHITE TRACT

DRAWN BY	DATE
R.F.	02/11/22
REVIEWED BY	DATE
T.B.	02/11/22
REVISED	DATE

EXHIBIT B

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Town of Awendaw

Planning Commission Staff Report

Monday, April 18th, 2022

6:00 PM

Town of Awendaw

691 Doar Road, Awendaw, SC

Subdivision of Land – White Tract

The proposal before the Planning Commission is the subdivision of land on TMS numbers #6440000023 & #6440000025 & 6440000026 & 6440000030. The submittal to the Town includes an application, preliminary plat and utility plan, threatened and endangered species report and historical/archaeological/cultural resources letter.

Zoning - The Parcels are zoned Planned Development (PD). The PD zoning was adopted by the Town in 2006. The PD called out the development of 400 parcels between ¼ and ½ acre in size on 324 acres, with a density of 1.23 parcels per acre. The subdivision proposal is to subdivide the 4 parcels of approximately 230 acres in to 204 parcels, a density of less than 0.9 parcels per acre. The smallest proposed lot is close to 1/3 of an acre. The average lot size is ½ of an acre.

Lot Sizes – The Parcels are zoned Planned Development. The PD states that the lot sizes will vary and be between ¼ acre and a ½ acre. The parcels on the Plat conform to this requirement. A detailed analysis of all 204 parcels shows that there are no lots as small as 1/4 of an acre and only 14 parcels in the 1/3-acre category. There are 34 lots in the 15,000+ square foot range making only 23% of the total parcels. The smallest lot is 14,167 square feet and the largest lot is 40,705 square feet.

Setbacks – The minimum allowable setbacks are 25-foot front setback, 10 foot each side setback and a 10-foot rear setback.

Open Space - There is an existing parcel contained in the PD that is now owned by the US Government. This parcel, along with the proposed Preliminary Plat,

preserves over 43% of the original PD in undisturbed open space. This does not include additional open spaces such as ponds, amenity areas etc.

Access on Bull Island Road – Bull Island is a SCDOT facility. Consequently, SCDOT standards in its "Access and Roadside Management Standards (ARMS)" manual apply to minimum separation and issuance of encroachment permits for local private roads and driveways. SCDOT is currently considering improvements to the HWY 17/Seewee Road intersection. The ARMS manual requires a separation of driveways no less than 75' from inside edge to inside edge for the lower volume 30 mph description. However, a low volume residential driveway may be an exception as determined by the resident maintenance engineer. The four private driveways along Bull Island Road are separated by more than 75 feet.

Traffic – The main access will be on Seewee Rd and Bull Island Rd. The current Average Annual Daily Trips on Bull Island Rd is low and is estimated to be approximately 300 vehicles per day. The Project will generate approximately 2,000 trips per day at full buildout. The project will be completed in two phases. A project with under 2,400 trips daily will likely not be required to provide any off-site improvements to Bull Island Road or Seewee Rd. That decision will be made by SCDOT.

204 New Homes on Parcels – Attached to this Staff Report is an Excel Worksheet that articulates the size of every single proposed parcel. The average lot size is a half of an acre.

Utilities – Water will be provided via the Town of Awendaw. There is an existing watermain on Seewee Rd. and it will be the developer's responsibility to extend the waterline to the project. Wastewater disposal will be provided through individual septic systems. As a former sand mine site, the soils are conducive to septic systems.

If, for any reason, the property does not meet conventional or alternative standards for a septic system as outlined within Regulation 61-56, there are options to pursue. One of these options is to work with a professional engineer and soil scientist to evaluate the property to determine if the property can support a specialized/engineered system (referred to as the 610 standard). No lot will be given approval without DHEC septic approval.

Trees - The Town approved the applicants Tree Survey and has recommended that any B and C graded hardwood trees lost would need to be replaced on a

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one-inch to one-inch basis, which the applicant has agreed to.

Environment - The Project site was surveyed for threatened and endangered plant and wildlife species on February 8 and 9, 2022. The result of the report is that no threatened or endangered species were documented on the Project site. The Charleston District Corps of Engineers has received an application to receive a jurisdictional delineation letter of existing wetlands on site. The design of the subdivision is sensitive to the environment that is found on the site and is consistent with the PD zoning.

Recommendation - Staff finds that the proposed subdivision is in substantial compliance with the Planned Development approved by the Town in 2006. Staff has prepared a list of Conditionals of Approval and requests that the Planning Commission ***APPROVE the Preliminary plat with these conditions.***

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EXHIBIT C

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Memorandum

To: Members of the Awendaw Planning Commission

From: Mark Brodeur, Interim Planning Director

Date: April 18, 2022

RE: Conditions of Approval for White Tract Subdivision

Please consider adding these Conditions for Approval to your motion regarding the White Tract Subdivision. This Preliminary Plat is based upon and limited to compliance with the project description, the hearing exhibits, and all conditions of approval outlined in the PD approval listed below, including mitigation measures and specified plans and agreements included by reference, as well as all applicable Town rules and regulations. The project description is as follows:

The Project for consideration is a 204-lot residential subdivision referred to as the White Tract. The parcels being subdivided are TMS# 6440000023 & 6440000025 & 6440000026 & 6440000030 and are currently Zoned Planned Development. This subdivision is being developed under the 2006 Planned Development zoning. The Planned Development in 2006 was approved for a total acreage is approximately 324 acres. The project will be completed in two phases. The current owner is White Family Partnership/ Applicant is Pulte Homes. It is near the intersection of Seewee Rd and Bull Island Road.

A summary of the Approved Planned Development zoning applicable to the property is:

Total Gross Acreage: 324.04 Acres

Net Acreage: 304.22 Acres (19.8 acres critical area)

Wetland Acres: 101.74 Acres

Total Upland Acreage: 202.48 Acres

Net Density: 1.97 per Acre.

Gross Density: 1.23 per Acre

Proposed Total Units: 400

The PD illustrates four parcels, lettered as A through D. The Preliminary Plat before the Commission illustrates development on Parcels A, C, and a portion of D. Parcel B was sold off to the United States of America and is managed by the US Fish and Wildlife Service and will remain forested land. The TMS numbers and acreages for each of the four parcels are identified here:

Parcel A according to Charleston County GIS is identified as parcel number 6440000023. Acreage is 64.2 acres. This is the parcel closest to Seewee Road.

Parcel B according to Charleston County GIS is identified as parcel number 6440000024 and is 64.3 acres and is not being developed as the parcel was sold to the United States of America.

Parcel C according to Charleston County GIS is identified as parcel number 6440000025. Acreage is 69.3.

Parcel D according to Charleston County GIS is identified as parcel numbers 6440000026 and 6440000030. Acreage is 99.95 acres. This parcel is the most seaward of the four parcels.

The Planned Development concept plan identifies 1/2-acre, 1/3-acre, and 1/4 -acre lots.

The total acres identified in parcels A, C, and D total approximately 233.45 acres.

The total number of dwelling units proposed is 204 divided into two phases.

- Phase 1 will contain 81 lots.
- Phase 2 will contain 123 lots.
- Approximately 103 acres of open space (45% of the project area) between both phases.

Staff can conclude from the analysis of the acreages, that the overall gross density of the proposed Phase 1 and Phase 2 is approximately ONE UNIT PER ACRE.

The following Conditions of Approval are recommended by Town Staff.

1. Before the approval of the Final Plat, the Owner/Applicant shall receive approvals from all Federal, State, and local agencies that the development is acceptable to each agency responsible for approving land development activities in South Carolina.
2. Before recordation of the Final Plat and subject to Planning Director approval, Owner/Applicant shall have satisfied all requirements consistent with approvals from all Government agencies with Authority and with the Subdivision Ordinance of the Zoning Code.
3. The Owner/Applicant shall be required to obtain review and approval by SCDOT concerning any possible transportation impacts and encroachment permits and provide to the Town approved plans for any potential off-site improvements that might be required by SCDOT. The applicant is responsible for contacting the SCDOT for all driveway encroachment permits.
4. The developer shall contact OCRM regarding the applicability of both its stormwater and Coastal Zone Area Consistency review in that this property is within one-half mile of coastal waters and the state's NPDES stormwater program requires that anyone engaged in clearing, grading, and/or excavating activities to obtain coverage under the state's Construction General Permit (CGP) from DHEC's Stormwater Permitting division before beginning any land-disturbing activities. While smaller projects or developments located in the Coastal Zone within one-half mile of a coastal receiving water **may** be automatically granted coverage under a general NPDES permit, the applicant is required to provide the Town with evidence that a technical stormwater review has been processed before approval of any Final plats. A general coastal zone consistency determination, which is issued by DHEC's Office of Ocean and Coastal Resource Management, is also required.
5. The Town requires the mitigation of all "significant" hardwood trees over a certain size and quality. The Town has verified that there are 17 regulated significant trees proposed for removal. Ten of the

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seventeen are “C” rated trees and represent 228 inches of tree that would need to be mitigated. Seven of the seventeen trees are “B” rated trees and represent 162 inches of tree that would need to be mitigated. A total of 390 inches of significant hardwood trees needs to be mitigated on-site. In approving this Tree Removal Plan, the Town Planner required an inch-for-inch replanting of removed hardwood (A, B & C rated) trees in the proposed ROWs within the development. Trees should be a minimum of 2.5” in caliper but strongly suggest that some of the replacements would be larger to establish a program of tree growth that would help produce a better tree canopy habitat. The new replacement trees shall be used in the ROWs and not on private property because individual owners may choose to remove them.

6. The Applicant shall record Covenants, Conditions, and Restrictions (CC&Rs) which establish a Property Owners Association (POA). This POA provides for the permanent maintenance responsibilities of; a) Any ponds and/or stormwater system and appurtenant landscaping, fencing, and access; b) Common area landscaping; c) Plantings required for oak/hardwood tree removal mitigation.
7. Title to the common [OPEN SPACE, WETLANDS) areas shall be held by a non-profit association or public entity. If the wetlands are conveyed to a non-profit, the entity will maintain the wetlands in their natural state and not allow any type of structure that might otherwise degrade the quality of the wetland.
8. To reduce stormwater runoff, allow for infiltration, reduce pollutants and minimize degradation of stormwater quality from the development, parking lots, buildings, structures, streets, and other paved surfaces, the Owner/Applicant has agreed to limit the maximum impervious area on any lot to 35%. This is consistent with the Zoning Code
9. To reduce the impact on Bull Island Rd, all construction-related vehicles, equipment staging, and storage areas shall be located onsite and away from the Bull or Seewee Road right of way. The Owner/Applicant shall provide all construction personnel & the Town with written notice of this requirement and a description of approved parking, staging, and storage areas.
10. Without a public wastewater system in the Town, all proposed lots will be served with onsite septic systems. The applicant shall provide copies of SCDHEC approvals for individual sewage disposal systems before approval of a Final Plat by the Director. DHEC approval WITH the septic site locations will be attached to any zoning permit packages for construction on any of the individual lots.
11. To increase maintenance and decrease the chances of failure of the septic systems, the Applicant has also agreed to require within the recorded CC&Rs that all property owners be required to have an annual inspection of the individual septic systems.
12. Prescribed burning is vital to the health and protection of federally protected lands and forests. As to not interfere with this important activity, the Applicant has agreed to include in the recorded CC&Rs prescribed fire smoke easements with the US Forest Service and US Fish & Wildlife Service.

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13. To reduce light pollution, the Applicant has agreed to coordinate with Berkeley Electric Co-op on the location and number of overall fixtures to lessen the impact on the surrounding natural areas. These fixtures shall by "full cutoff" type and shall not impacr Birds of Prey and Cape Romain Wildlife Refuge.
14. To decrease the impact on the local solid waste system, the Applicant has agreed that the POA will establish regular solid waste pick up for all residents.
15. To decrease the impact on the Garris Boat Landing, the Applicant will allow residents to be able to store their boats in their backyards as long as they have a fence, and the boats are not visible from the street.
16. The Applicant has further agreed to limit the hours of construction to Charleston County standards.
17. The applicant shall implement a 50 foot buffer on all four sides of the property and shall be shown/depicted on the Final Plat before the Town can approve it.

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EXHIBIT D

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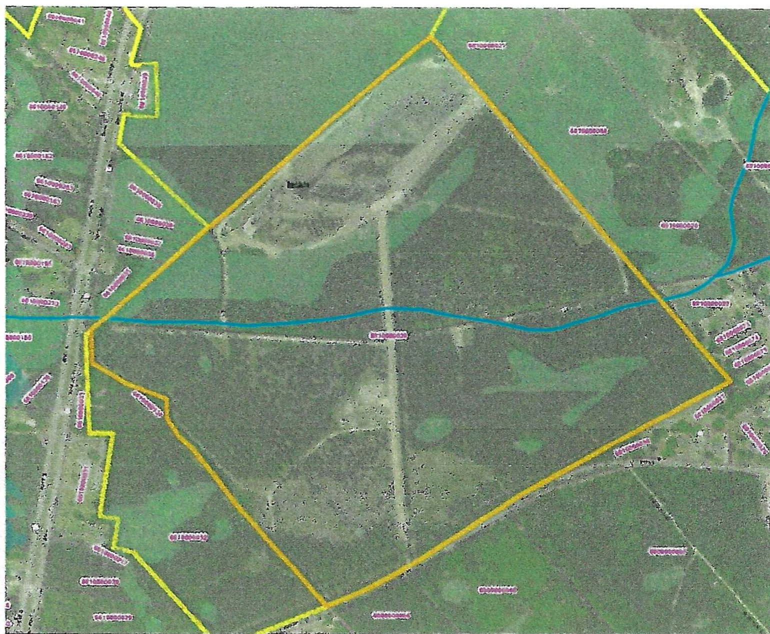
PLANNED DEVELOPMENT

WAPATAW COMMUNITY | AWENDAW, SC

TMS 6810000028

Approved by the Planning Commission on 12/17/18

Adopted 2/7/19



Prepared by:

SeamonWhiteside

501 Wando Park Blvd, Suite 200

Mount Pleasant, SC 29464

843.884.1667

Contact:

William T. Eubanks, FASLA, LEED AP

Creative Director

beubanks@seamonwhiteside.com

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Planned Development
Wapataw Community | Awendaw, SC

Applicant:
Wapataw Group, LLC
PMB 187
295 Seven Farms Drive, Suite C
Charleston, SC 29492

Prepared by:
SeamonWhiteside
501 Wando Park Blvd, Suite 200
Mount Pleasant, SC 29464
843.884.1667

Contact:
William T. Eubanks, FASLA, LEED AP
Creative Director
beubanks@seamonwhiteside.com

Executive Summary and Development Objectives

The purpose of this Planned Development is to create a rural mixed-use neighborhood with diverse housing options to serve the future needs of the Awendaw community, while providing flexibility to also allow the addition of new private or public schools to serve Awendaw and surrounding communities. There is also the goal of providing connectivity through the site for a proposed section of the Awendaw East Coast Greenway/East Cooper Trail, a multi-use path system for bicyclists and pedestrians. Trail should be built by developer and should enter on the northern tip and run behind homes along the pond and then run along north side of spine road all the way to Doar Roar.

The site is currently predominately wooded with some existing wetlands and it fronts on Doar Road. The site totals approximately 184 acres. This includes approximately 99 acres of highland and approximately 85 acres of wetlands. The site is currently parcel 6810000028 in Charleston County.

For the purpose of this PD, the development objectives will be shown for both possible scenarios.

Scenario One will include a maximum of 276 residential units, or a gross density of approximately 1.5 units per acre and a minimum of one acre of Civic/Commercial area, with uses as outlined in this document. The area will include approximately 92 acres of required open space, or a minimum of 50%. See Figure 1.

Scenario Two will include approximately 90 acres to be used for schools and include a maximum of 188 residential units on approximately 94 acres or a maximum gross density of 2.0 units per area. See Figure 2.

Density:
Scenario One: Maximum residential density of 1.5 units per acre.
Scenario Two: Maximum residential density of 2.0 units per acre of non-school acreage.

Minimum Open Space:
Open Space is defined as community amenity areas, preserved wetlands, stormwater ponds, buffers, and undeveloped highland areas. Open Space shall include an easement for the Awendaw East Coast Greenway / East Cooper Trail to pass through the site. The minimum easement width shall be 50' with very limited sections (a maximum of 5% of the overall length) reduced to a minimum of 20' where 50' can't otherwise be achieved. Easements of less than 20' may be approved by the Town of Awendaw.

Scenario One: Minimum Open Space of 92 acres (50% of total)
Scenario Two: Minimum Open Space of 50 acres (53% of non-school area)

Over the life of the Community, the shape and configuration of different land use zones may undergo modifications. These modifications include changes to the configuration of various zones and variations in the acreage of each zone by as much as 10%, by right, subject to notification being made to Planning Staff (not subject to formal Staff or other approval). This does not change the approved maximum densities or minimum lot requirements. Specific development plans for each development tract will be submitted to the Town of Awendaw in accordance with their submittal requirements.

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The on-going development of the Community needs to maintain flexibility in order to accommodate specific soil conditions, wetlands, physical constraints, market conditions, final engineering requirements, and various design parameters. Due to this need for flexibility, the exact locations of boundary lines between various land use zones, the locations and sizes of land uses in the development zones, and the preliminary planning concepts for the tracts and uses are not indicated on the Conceptual Land Use Diagram.

Land Use:

NV (Neighborhood Village): Allowed Uses include Residential including Single Family Detached and Single Family Attached structures, (including Multi-Family) and secondary structures to include: Detached Garages or Carports, Shop Buildings, Barns, Storage Buildings, and Accessory Dwelling Units, including units above garages or carports. See Figures 1 and 2.

CC (Civic/Commercial): Allowed Uses include primarily non-residential uses including but not limited to: Office and Professional Uses, Retail and Commercial Uses, Restaurant or Diner, Professional Service Uses, Municipal and Government Facilities, Places of Worship or Community Gathering, Indoor or Outdoor Recreation, and Live-Work Units (either attached or detached). See Figure 1.

Prohibited Uses:

Nightclub or Bar (as primary use)

Outdoor amusement (such as Amplified Music, Sports Arenas, Amusement Parks)

Outside storage as a primary use

Storage businesses

Business Hours of Operation:

The hours of operation for commercial uses will not exceed 6:00 A.M. to 9:00 P.M. except a restaurant which may be open until 11:00 P.M. Monday through Sunday.

ED (Educational): Allowed Uses include public and/or private schools including elementary, middle, and high schools, Trade Schools, Technical Colleges, or Universities. This includes ancillary uses such as parks, plazas, open space, stormwater management, parking, sports fields, practice fields, and playgrounds. See Figure 2. Direct access to Highway 17 is required for this use.

Design Standards:

Lot criteria, allowed land uses, buffer requirements and other development standards are provided herein. A mix of lot sizes is most desirable to provide diversity within the Community and to provide a wider range of choices for housing. It is also desirable to break the rhythm along each street in order to avoid monotony.

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Towards that end, there should be variation in lots sizes along a street. Identical lot widths shall not be repeated for more than 8 lots without a break in rhythm. This break shall consist of a lot of at least 5% narrower or wider than the adjacent lots, a park or Common Open Space, or some other variation to break the rhythm. Where block lengths are 400' or less in length no such variation in lot sizes is required, other than the extra setbacks needed for corner lots.

Residential Lot Requirements:

Minimum Lot Size:

Single Family Detached A: 10,000 square feet (Scenario One) and 7,500 square feet (Scenario Two)

Single Family Detached B: 8,000 square feet (Scenario One) and 5,000 square feet (Scenario Two)

Single Family Attached: 1500 square feet

Multi-Family: .5 acres

Maximum Lot Coverage by Primary Structure:

25% for single family detached; 50% for single family attached; and 33% for multi-family structures

Minimum Lot Width at Front Setback Line: 30'

Maximum Lot Width to Depth Ratio: 1:4 (measured as an average)

Maximum Building Height (measured from finished grade to eave): 40 feet

Primary Structure:

Minimum Front Setback: 15'

Minimum Rear Setback: 25'

Minimum Side Setback: 5'

Secondary Structure:

Minimum Front Setback: 50'

Minimum Rear Setback: 10'

Minimum Side Setback: 5'

Landscape Buffers:

All buffers are to remain natural and undisturbed as much as possible except for sweet gum trees which may be removed. Utilities, easements, drainage or detention areas, parking and storage may not be in buffers. No grading is allowed in buffers. Buffers must meet minimum requirements as outlined in this document.

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Doar Road:
25' minimum for residential or school uses with either existing plant material (if approved by the Town) or planted with the following:
5 understory trees (6-8 feet height) per 100 LF
4 canopy trees (2 ½" caliper) per 100 LF

Peripheral Buffers | Residential: No buffer required

Peripheral Buffers | School: 25' buffer

Internal Buffers: No buffers are required for commercial uses, except between commercial parking areas and residential uses. Then, a 5' buffer is required with canopy trees at 27' O.C. and 20 shrubs (3 gal. minimum) per 100 LF. All loading areas and waste containers shall be adequately screened with opaque fencing and/or landscaping.

Scenario Two Landscaping Requirements for Schools:

1. The following landscape requirements shall be met along Doar Road and the internal spine road, as far as the proposed roundabout.
2. 4" caliper Street Trees at 55' O.C. on both sides of internal spine road
3. Irrigation in ROW of internal spine road, as far as the proposed roundabout
4. Sod shall be installed and irrigated to a depth of 20 feet from the back of the curb for the road. Seed to be installed in open areas from edge of sod to edge of forests
5. Evergreen hedge, maintained at minimum 5' height, of minimum 7-gallon nursery container stock, to screen parking areas along internal spine road.

Other Landscape Buffers Requirements:
No land clearing or selective tree thinning is permitted until the Planning Commission approves a development plan and all state permits are issued and then only the area to be developed may be cleared. Clearing shall be limited to the area of proposed development at the time of development or during Town approved timbering operations.

A minimum of 30 trees per acre are required to be retained or planted, with the minimum tree size being 2 ½ caliper inches. The owner or developer is encouraged to retain existing trees on the site in lieu of replanting.

All buffers are to remain natural and undisturbed. Where possible, native plant material is encouraged to be conserved as specified on a plan prepared by a licensed Landscape Architect and approved by the Town.

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A survey of all trees, with the exception of sweet gums sixteen (16) inches or greater DBH is required for the entire parcel.

The land owner, or successors in interest, shall be responsible for the following:

1. Regular maintenance of all landscaping in good condition and in a way that presents a healthy, neat, and orderly appearance. All landscaping shall be maintained free from disease, pests, weeds and litter. This maintenance shall include weeding, watering, fertilizing, pruning, mowing, edging, mulching or other maintenance, as needed and in accordance with acceptable horticultural practices.

2. The repair or replacement of required landscape structures (e.g., fences, irrigation system) to a structurally sound and functioning condition;

3. The regular maintenance, repair, or replacement, where necessary, of any landscaping required by Planned Development documents or the Zoning Ordinance; and

4. Continuous maintenance of the overall site: When replacement of trees, plant material or other landscape features are required, such replacement shall be accomplished within one growing season, one year, or such time-frame as required by the Planning Director, whichever is shorter.

Infrastructure:

The Awendaw East Coast Greenway/East Cooper Trail, a multi-use path system for bicyclist and pedestrians will be accommodated in this development. The Trail should be built by the developer and should enter on the northern tip and run behind homes along the pond and then run along the north side of the spine road all the way to Doar Road, unless the Town builds it first in which case it will run along the perimeter of the property.

Direct access to Highway 17 is required for education uses and is preferred for the residential scenario.

All uses shall be served by Town Awendaw for water service and by individual or central septic systems for sanitary sewer, subject to DHEC approval for septic systems. Schools and residential areas may have sanitary sewer package plants as approved by the Town and DHEC. The project shall meet all applicable local, state, and federal requirements for stormwater management. All internal streets, whether public or private, shall be constructed to Charleston County standards.

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Storm drainage will be accommodated according to all local requirements and the existing drainage patterns will be maintained to the pre-development conditions for the site. The stormwater management and conveyance systems will be designed to meet or exceed local, state, and federal regulations involving storm flow, siltation, and erosion control.

The development and all outfall structures will be designed to consider all storm frequencies up to and including the 100-year storm. The maintenance of any detention facilities will be the responsibility of one or more Property Owners Associations (POA) that will be established in recorded Covenants and Restrictions.

The planned Roadways (public and/or private) and Open Space areas will allow for accommodation of stormwater detention utilizing low-impact discharge techniques and traditional stormwater ponds. Any detention facilities may be constructed to also provide an aesthetic amenity including ponds incorporated into the Community's Common Areas.

Architecture and Site Design:

All buildings must conform to the current building code as adopted by the State of South Carolina. Drawings submitted for Town review must be prepared by a SC licensed design professional qualified in the discipline of the area submitted. For example, site plans shall be prepared by a registered civil engineer, planting plans shall be prepared a licensed landscape architect and buildings shall be designed by a registered architect. All structures shall be reviewed for approval by the Planning Commission for exterior construction materials and aesthetics before requesting a building permit and must follow the Awendaw Architecture Guidelines.

The Town of Awendaw requires that Low Impact Development techniques be used as much as possible. This includes the use of pervious paving materials, bio-swales, etc. Low impact measures shall be encouraged where feasible depending on land use and site conditions.

In addition to buffers, landscaping is required throughout the site to include foundation plantings, parking lot plantings, etc. All landscape details and plans must be approved by the Town prior to the issuance of any zoning permits.

Site Lighting

Exterior site lighting should be used in minimal amounts to provide for efficient and safe flow of vehicular and pedestrian traffic. These lights are to be shielded to prevent spillover and glare onto adjacent properties and roadways. To ensure this:

1. All site lighting must be IES cut-off fixtures. They shall be shielded to reflect down onto the

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ground and not out onto the streets or neighboring property.

2. All lamps shall have a color range from 2700 K – 3500 K and shall be consistent throughout the site. Low pressure sodium lighting is not permitted.
3. Luminaire heights shall not exceed 18 feet from the average surrounding grade.
4. Foot-candle levels from all fixtures shall not exceed 10 foot-candles at any point and shall provide uniform light levels.
5. Building Flood lights are not permitted.

Requirements for Review:

At the time of final plan submittal, a site lighting plan shall be submitted providing:

1. Location and mounting information for each light shown on the landscape plan.
2. A fixture schedule listing fixture design, type of lamp, etc.
3. Manufacture's photometric data for each type of light fixture.

Signage:

Along the property entrance there will be one monument sign (no larger than 32 sq. ft. for Scenario 1 and no larger than 50 sq. ft. for Scenario 2) that will represent the entire property. The monument sign is to be integrated with landscaping and will have down lighting (internal lit signs prohibited). Building materials and design should coordinate with the architecture.

All other signage will follow the Town of Awendaw ordinances for size and location and will be reviewed for approval by Town Staff. (Any additional signage requires approval by Planning Commission.) Signage should be integrated in architectural features such as parapets or on store front windows. The architect should specify building sign locations and parameters. Each business shall apply for sign approval through the Town of Awendaw by submitting elevation drawings. Internal lit signs are prohibited.

Garbage Disposal:

Dumpsters will be provided for each business or grouping of businesses. A concrete pad and screening fence will be used to limit visibility. Dumpster locations and screening details shall be approved by the Planning Commission.

Parking:

Parking to be per Town Zoning requirements, Sec 9.2. Shared parking to be encouraged where possible, and where approved by Town of Awendaw.

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Development Schedule:

The Community will most likely be developed in multiple phases over a 2 to 10-year period. Engineering drawings and appropriate permits for each phase are subject to future approvals. It is anticipated that the road and drainage network, and water supply system will be dedicated for ownership and maintenance with each phase.

Property Owner's Association (POA):

A Property Owner's Association Board of Directors will be created for this property which could own and maintain the access drive, road drainage system, and all other common/amenity areas. The POA will be managed by the Developer (or his designated representative) collecting all fees and handling POA responsibilities until such time that over one half of the total number of units within the development are sold, at which time duties will be turned over to the POA.

The POA will be responsible for maintaining and funding driveway and improvements and repairs to open space, amenity areas, landscaping, all walking areas, buffers, ponds and the overall drainage system which will serve the entire development. All these items will be maintained by the Developer until the ongoing maintenance is assumed by the Property Owners Association.

Exemptions: Commercial properties, school properties, and the East Coast Greenway Easement are not included within the POA.

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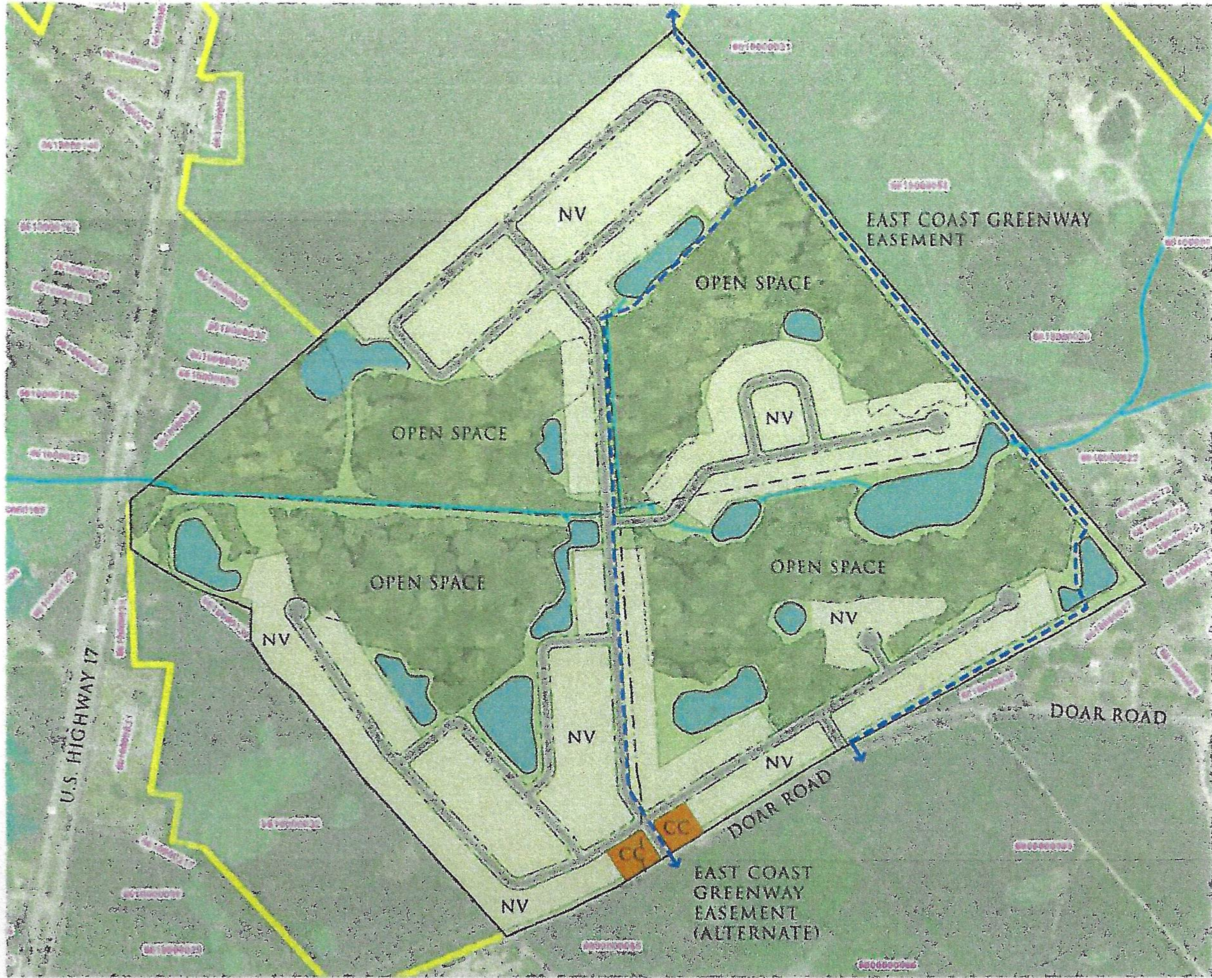

FIGURE 1 | SCENARIO ONE

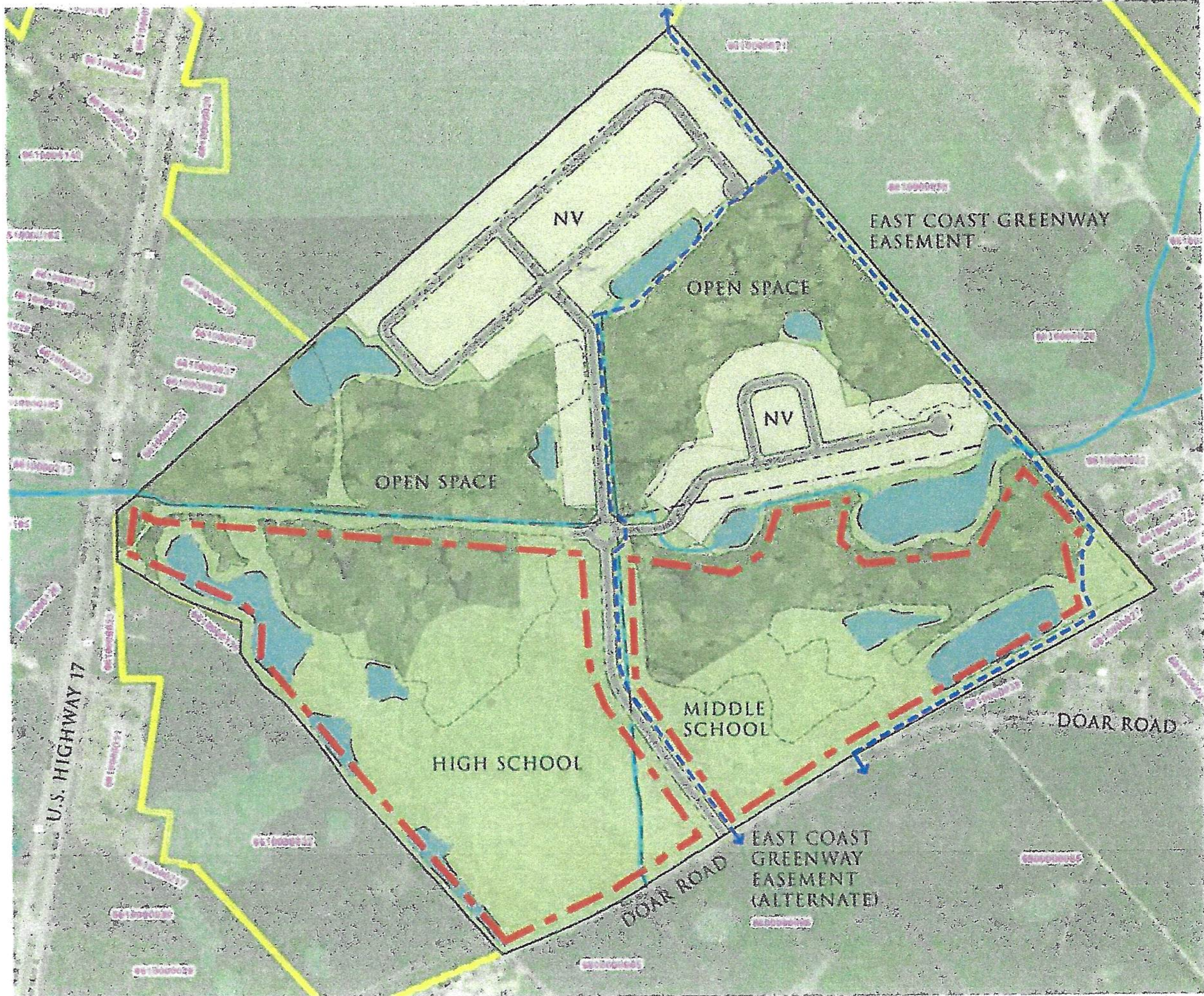

FIGURE 2 | SCENARIO TWO

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EXHIBIT E

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Memorandum

To: Members of the Awendaw Planning Commission

From: Mark Brodeur, Interim Planning Director

Date: May 16, 2022

RE: Conditions of Approval for White Doar (Romain) Tract Subdivision

---

Please consider adding these Conditions for Approval to your motion regarding the White Doar Tract Subdivision. This Preliminary Plat is based upon and limited to compliance with the project description, the hearing exhibits, and all conditions of approval outlined in the PD approval listed below, including mitigation measures and specified plans and agreements included by reference, as well as all applicable Town rules and regulations. The project description is as follows:

The Project for consideration is for an 85-lot subdivision. The Romain Bay Preserve project is located at the former "White Doar Mine" near the intersection of Seewee Road and Doar Road in close proximity to the Town of Awendaw Town Hall. The project will be developed in several Phases and this application represents the first Phase with 85 new parcels. This Phase of the project will include the construction of 3 new roads and water infrastructure with water service to be provided by the Town of Awendaw. The main entrance will be located in the same vicinity as the existing entrance to the former mine. The parcel is zoned Planned Development and is within the Town limits of the Town of Awendaw. Construction is anticipated to begin in mid to late 2022.

The following Conditions of Approval are recommended by Town Staff.

1. Before the approval of the Final Plat, the Owner/Applicant shall receive approvals from all Federal, State, and local agencies that the development is acceptable to each agency responsible for approving land development activities in South Carolina.
2. Before recordation of the Final Plat and subject to Planning Director approval, Owner/Applicant shall have satisfied all requirements consistent with approvals from all Government agencies with Authority and with the Subdivision Ordinance of the Zoning Code.
3. The Owner/Applicant shall be required to obtain review and approval by SCDOT concerning any possible transportation impacts and encroachment permits and provide to the Town approved plans for any potential off-site improvements that might be required by SCDOT.
4. The Applicant shall record Covenants, Conditions, and Restrictions (CC&Rs) which establish a Property Owners Association (POA). This POA provides for the permanent maintenance responsibilities of; a) Any ponds and/or stormwater system and appurtenant landscaping, fencing, and access; b) Common area landscaping; c) Plantings required for oak/hardwood tree removal mitigation.
5. To reduce stormwater runoff, allow for infiltration, reduce pollutants and minimize degradation of stormwater quality from the development, parking lots, buildings, structures, streets, and other

paved surfaces, the Owner/Applicant has agreed to limit the maximum impervious area on any lot to 35%. This is consistent with the Zoning Code

6. To reduce the impact on Doar Rd, all construction-related vehicles, equipment staging, and storage areas shall be located onsite and away from the Doar Road right of way. The Owner/Applicant shall provide all construction personnel & the Town with written notice of this requirement and a description of approved parking, staging, and storage areas.

7. Without a public wastewater system in the Town, all proposed lots will be served with onsite septic systems. The applicant shall provide copies of SCDHEC approvals for individual sewage disposal systems before approval of a Final Plat by the Director. DHEC approval WITH the septic site locations will be attached to any zoning permit packages for construction on any of the individual lots.

8. Prescribed burning is vital to the health and protection of federally protected lands and forests. As to not interfere with this important activity, the Applicant has agreed to include in the recorded CC&Rs prescribed fire smoke easements with the US Forest Service and US Fish & Wildlife Service.

9. To reduce light pollution, the Applicant has agreed to coordinate with Berkeley Electric Co-op on the location and number of overall fixtures to lessen the impact on the surrounding natural areas. These fixtures shall by "full cutoff" type and shall not impacr Birds of Prey and Cape Romain Wildlife Refuge.

10. To decrease the impact on the local solid waste system, the Applicant has agreed that the POA will establish regular solid waste pick up for all residents.

11. The Applicant has further agreed to limit the hours of construction to Charleston County standards.

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EXHIBIT F

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Gullah/Geechee Fishing Association, Inc., Petitioner, vs. South Carolina Department of Health and Environmental Control, and Bay Point Island, LLC, Respondents.	Docket No. 22-ALJ-07-0008-CC **ORDER GRANTING RESPONDENT BAY POINT'S MOTION TO DISMISS**

APPEARANCES: Leslie S. Lenhardt, Esq.
Emily Nellermoe, Esq.
For Petitioner Gullah/Geechee Fishing Association, Inc.

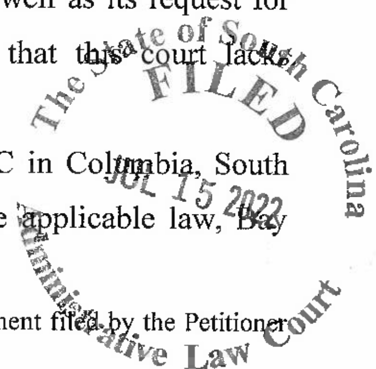
Sara V. Martinez, Esq.
Christopher Whitehead, Esq.
For Respondent South Carolina Department of Health and Environmental Control

Mary D. Shahid, Esq.
Lica Colwell, Esq.
For Respondent Bay Point Island, LLC

STATEMENT OF THE CASE

This matter is before the South Carolina Administrative Law Court (ALC or court) pursuant to a Motion to Dismiss and Memorandum in Support thereof (collectively, Motion) filed by Bay Point Island, LLC (Bay Point) on May 9, 2022. In its motion, Bay Point argues that the Gullah/Geechee Fishing Association, Inc. (Petitioner) failed to timely file its Request for Review (RFR) with the South Carolina Department of Health and Environmental Control's (DHEC or Department) Board of Health and Environmental Control, as well as its request for contested case hearing with this court. As such, Bay Point argues that this court lacks jurisdiction to hear the Petitioner's underlying permit challenge.

A hearing on the Motion was held on June 20, 2022, at the ALC in Columbia, South Carolina.[1] After careful consideration of the parties' arguments and the applicable law, Bay



[1] During the hearing, the court also heard argument on cross motions for summary judgment filed by the Petitioner

Point's Motion is granted.

BACKGROUND

Bay Point is the owner of Bay Point Island, a 493-acre island located in Beaufort County, South Carolina. The island is entitled by a subdivision plan that was platted over twenty (20) years ago and approved by Beaufort County. In the past, Bay Point has proposed development of the island to support an environmentally sensitive resort and residential subdivision. However, at present, there is no proposal for large-scale development submitted by Bay Point to the Department. Instead, this matter concerns an application submitted by Bay Point on August 31, 2021, to the Bureau of Environmental Health Services (BEHS) within the Department for authorization to construct a single septic tank and drainfield to serve a single residential dwelling located on a single lot on Bay Point. More specifically, the specialized onsite wastewater system would serve a four-bedroom residence to be located at 98 Bay Point Island Drive (Lot 13), St. Helena, South Carolina in Beaufort County (proposed location). Per the application, the system as designed would handle less than 1,500 gallons per day (GPD) of domestic waste only.

Prior to the application, on July 19, 2021, the Petitioner submitted a Freedom of Information Act (FOIA) request to the "Bureau of Water, OCRM" within the Department requesting "[a]ny and all applications and file documents for NPDES or land disturbance permits for Bay Point Island, likely submitted by Bay Point Island, LLC, or for any requests or file documents relating to a Coastal Zone Consistency Certification for Bay Point Island, LLC."

The Department responded on August 3, 2021, asserting that that it had responsive documents, but none related to septic tank applications or permits; only documents and correspondence for an unrelated issue on Bay Point.

On August 31, 2021, the Department responded that it had no such materials to disclose, which prompted a second FOIA request on the same date seeking "[a]ny applications for permits or permits issued by DHEC for septic tanks or land disturbance permits or coastal zone consistency certifications . . . . We are also seeking specifically septic tank applications in addition to any other NPDES permits."[2] The Department again responded that it had no such

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and the Department on May 27, 2022. Because the court's ruling on Bay Point's Motion is dispositive of this matter, the court does not reach the merits of the summary judgment motions. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (citation omitted) (holding that a court need not address remaining issues when disposition of a prior issue is dispositive).

[2] The Petitioner's second FOIA request was also directed to "Bureau of Water, OCRM."

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materials to disclose on October 20, 2021.

On September 23, 2021, BEHS issued Septic Tank Permit No. 2106120 (Septic Permit) authorizing the construction of a septic tank and drainfield at the proposed location. By its specific terms, the Septic Permit authorizes construction of a specialized onsite wastewater system on a single lot on Bay Point Island for peak flows of less than 1,500 GPD.[3]

The Petitioner became aware of Bay Point's Septic Permit on October 27, 2021, through information provided by a third party.

Fourteen (14) days later, on November 9, 2021, the Petitioner submitted an RFR to the Department, some forty-eight (48) days after the Department issued its decision approving the Septic Permit.

On December 17, 2021, the Department issued a determination declining to conduct a Final Review.

Thereafter, on January 17, 2022, the Petitioner filed a request for a contested case hearing before this court arguing, among other things, that the Septic Permit should be rescinded because the Department failed to conduct a coastal zone consistency review.

STANDARD OF REVIEW

"[T]he question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction . . . ." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (citation omitted); *see also Windham v. Sanders*, 287 S.C. 170, 171, 337 S.E.2d 205, 206 (1985) ("The appellate record must affirmatively show the proper taking of all necessary steps and the existence of all the facts necessary to confer jurisdiction on the appellate court." (citation omitted)).

Due to the *de novo* nature of a contested case hearing, however, the failure to abide by the rules, regulations, and statutes governing a challenge to a Department determination at the ALC does not implicate "appellate jurisdiction"; instead, it implicates "procedural jurisdiction." *FA Logic SC, LLC, d/b/a FA Logic, v. S.C. Dep't of Revenue*, Docket No. 19-ALJ-17-0002-CC, 2020 WL 1166875, at *2 (S.C. Admin Law Ct. March 3, 2020); *see also Michael J. Finley v. Charleston Cnty. Assessor*, Docket No. 19-ALJ-17-0066-CC, 2019 WL 5866668, at *3 n.7 (S.C.

[3] In accordance with Section 201.1(3) of S.C. Code Reg. 61-56 (Supp. 2021), the minimum required size for any septic tank is a net liquid capacity of one thousand (1000) gallons, which is sufficient to serve dwellings of four bedrooms or less. Additional capacity of 250 gallons is required for each bedroom over four. As such, the Septic Permit authorizes a septic system sufficient for a single six-bedroom home.

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Admin. Law Ct. Oct. 30, 2019) ("[P]revious ALC decisions have determined that a litigant's failure to properly follow intermediate administrative steps at the agency level prior to requesting a contested case hearing deprives the ALC of procedural jurisdiction." (citations omitted)); *S.C. Dep't of Health & Env't Control v. Kirby Blocker*, Docket No. 15-ALJ-07-0554-CC, 2016 WL 5867852, at *5 n.4 (S.C. Admin. Law Ct. Oct. 3, 2016) ("Other ALC case orders have employed the term 'procedural jurisdiction' to bridge the conceptual gap between the quasi-appellate posture of a contested case and the de novo trial-level nature of a contested case, as well as to distinguish the issues of timeliness from those of subject-matter jurisdiction, when determining whether the ALC had the authority to hear the matter." (citations omitted)).

"'[P]rocedural jurisdiction' may, therefore, be defined as the compliance or noncompliance with the 'rules, regulations, and statutes governing' the request for a contested case hearing at the ALC to challenge the determination of an administrative agency." *FA Logic SC, LLC*, Docket No. 19-ALJ-17-0002-CC at *2 (citation omitted).

DISCUSSION

In its Motion, Bay Point contends that the Department's September 23, 2021, staff decision to issue the Septic Permit became final on October 8, 2021, because the Petitioner failed to submit an RFR within the fifteen (15) day statutory window. It further asserts that the manner by which an affected person may request notice of such decisions is to submit a written request to the Department. Because the Petitioner did not request in writing to be notified of relevant septic tank permitting decisions, and did not lodge an RFR within fifteen (15) days of the staff decision's date of mailing, Bay Point contends that this court lacks procedural jurisdiction to hear the untimely challenge. As explained below, the court agrees.

The evidence indicates that the Department's staff decision in this matter was issued on September 23, 2021. A "staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review . . . is filed with the [D]epartment by the applicant, permittee, licensee, or affected person." S.C. Code Ann. § 44-1-60(E)(2) (2018). The Petitioner's RFR was not filed until November 9, 2021, forty-eight (48) days after the staff decision regarding the Septic Permit was issued. Thus, pursuant to Section 44-1-60, the staff decision became final on October 8, 2021. *See id.* This would mean that the Petitioner's RFR—filed thirty-three (33) days after the staff

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decision had already become final—was untimely.

Nevertheless, the Petitioner argues that its RFR was timely filed because there is no uniform procedure for notifying DHEC of "affected persons" status that would entitle it to notice, and it made attempts to get the information through FOIA, the responses to which the Petitioner maintains were incomplete and untimely. If the FOIA requests had been answered accurately and in a timely manner, the Petitioner argues, it would have revealed the Septic Permit so that the Petitioner could have filed its RFR in a timely manner. The Petitioner further asserts that, pursuant to *S.C. Coastal Conservation League v. S.C. Department of Health and Environmental Control*,[4] "the fifteen-day clock to file an RFR technically never started running because [the] Petitioner was never mailed notice of the permit decision . . . ." The Petitioner argues that if the court "substitute[s] the date of actual notice for the date of mailing (October 27, 2021), [the] Petitioner timely filed its RFR within fifteen (15) calendar days (on November 9, 2021)." The Petitioner, therefore, asserts that its November 9, 2021, RFR was timely filed. The court finds this argument unavailing in view of the statutory language and established precedent.

Though the court appreciates that the Petitioner made efforts to obtain information related to the Septic Permit, allowing the Petitioner's FOIA request to supplant or augment the statutory provision that persons obtain "affected person" status by sending written notification to the Department would be problematic for a number of reasons.

First, a formal statutory procedure for an affected person to request notice of Department permitting decisions is delineated in Section 44-1-60(E)(1). That section unambiguously states that "[a]ffected persons may request in writing to be notified by regular mail or electronic mail in lieu of certified mail." S.C. Code Ann. § 44-1-60(E)(1) (2018). The court is aware of nothing, that precludes the application of that procedure to septic tank permitting decisions. In fact, by its express terms, "[a]ll department decisions involving the issuance . . . of permits . . . must be made using the procedures set forth in this section," including that for affected persons to request notice. *See* S.C. Code Ann. § 44-1-60(A) (Supp. 2021). Yet, the Petitioner maintains that this "task is effectively impossible" because of uncertainty over what qualifies for "affected person" status, essentially arguing that it did not request notice using this procedure because it was not sure it could.

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[4] *S.C. Coastal Conservation League v. S.C. Dep't of Health and Env't Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010).

However, the Supreme Court has held that the question of who qualifies as an "affected person" under Section 44-1-60 is determined using a reasonable, ordinary definition of the term. *See Pres. Soc'y of Charleston v. S.C. Dep't of Health and Env't Control*, 430 S.C. 200, 216-17, 845 S.E.2d 481, 490 (2020); *see also S.C. Coastal Conservation League*, 390 S.C. at 428, 702 S.E.2d at 252 (noting that DHEC takes an informal approach to determining which parties qualify as affected persons for notice purposes). Here, the Petitioner alleges, among other things, that it would suffer certain environmental consequences if the Septic Permit was issued. That alone creates an inference that the Petitioner was, or reasonably could be, an affected person. *See Pres. Soc'y of Charleston*, 430 S.C. at 216-17, 845 S.E.2d at 490 (noting that the petitioners' "members would suffer the environmental consequences [the] [p]etitioners allege the project will create" in finding that they qualified as "affected persons"); *see also Affect*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "affect" as "[m]ost generally, to produce an effect on; to influence in some way"). Thus, while the statutory procedure requires an inferential step, the court does not find it to be "effectively impossible" to navigate. To the contrary, the court finds the procedure to be both logical and straightforward, and the term "affected person" is interpreted rather broadly. Thus, the court does not find support for the Petitioner's argument in this regard.[5]

Second, even if the Petitioner was genuinely unsure if it qualified as an affected person for notice purposes under Section 44-1-60, its sole reliance on the FOIA requests was unreasonable under the circumstances. As explained above, a cursory analysis reveals that the Petitioner likely meets the definition of "affected person" and Section 44-1-60 delineates the proper procedure for affected persons to request notice of Department decisions. Here, however, the Petitioner never requested notice through the statutory procedure, under Section 44-1-60, when it filed its FOIA requests. Instead, it chose to rely exclusively on its requests

[5] As Bay Point notes, the Petitioner must consider itself an affected party to have acted in this matter. Otherwise, the Petitioner's argument that its FOIA requests entitled it to the same notice as an affected person under Section 44-1-60 would be nonsensical. Moreover, even if the Petitioner was unsure if it qualified, because the Petitioner was not the applicant or permittee, "affected person" status was the only avenue under Section 44-1-60 that would entitle it to file its RFR in the first place. *See* S.C. Code Ann. § 44-1-60(E)(2) (stating that an RFR may be filed with the Department by "the applicant, permittee, licensee, or affected person"). Stated another way, the Petitioner had to be an affected person to file its RFR of the decision it claims it did not receive, in part, because of uncertainty over whether it qualified as an affected person. Had the Petitioner requested notice using the express statutory procedure for affected persons, it would have been notified of the Department's permitting decision in time to file its RFR. Then, the only issue before this court, if any, would be whether the Petitioner qualified as an affected person.

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through FOIA, an entirely separate statutory process used for obtaining information from a multitude of state and federal sources, which has different rules and requirements.

The Petitioner does not cite any authority suggesting that a FOIA request can serve as a substitute for the procedure set forth in Section 44-1-60, but argues, generally, that the purpose and spirit of the legislation is similar. However, this ignores the fact that the General Assembly has provided a specific statutory procedure in Section 44-1-60(E)(1) to address the issue of how persons affected by Department permitting actions can request notice of those decisions. *See Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) ("A specific statutory provision prevails over a more general one." (citation omitted)). To that end, the court finds it incongruous that the Petitioner would seek notice of a Department permitting decision to enable it to file an RFR under Section 44-1-60(E)(2) using FOIA instead of the process set forth in the immediately preceding section of the same statute. S.C. Code Ann. § 44-1-60(E)(1). *See Jowers v. S.C. Dep't of Health and Env't Control*, 423 S.C. 343, 359, 815 S.E.2d 446, 455 n.14 (2018) ("[S]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." (citation omitted)).

This court further finds that allowing FOIA to be used by anyone, regardless of whether they qualify as an "affected person," as a supplement for the procedure set forth in Section 44-1-60 is not in keeping with the legislative intent of that section. *See* S.C. Code Ann. § 44-1-60(E)(1) (providing that only "affected persons" may request notice of Department permitting decisions). Such a result would significantly expand the procedural influence of a FOIA request, and the Department's obligations related thereto. Consequently, the court finds that the Petitioner's decision to forgo use of the statutory procedure in Section 44-1-60 and instead rely only on its FOIA requests was misguided.

Third, even if the Petitioner's sole reliance on FOIA was not unreasonable under the circumstances, the FOIA requests themselves were inadequate. The Petitioner's first FOIA request was submitted on July 19, 2021, forty-three (43) days before the Septic Permit application was even filed, to the wrong Department division. The Petitioner's second FOIA request, filed on August 31, 2021, the same day the Septic Permit application was filed by Bay Point, was also sent to the wrong Department division. The court acknowledges that the Department's response to the second FOIA request appears timely and ultimately inaccurate.

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However, the incorrect addressee and concurrent timing of the request with the application may have contributed to its apparent delay.[6] Regardless, it is not within this court's jurisdiction to remedy purported FOIA violations. *See* S.C. Code Ann. § 30-4-100(A) (Supp. 2021) ("A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of [FOIA] . . . ."). The court, therefore, cannot confer Section 44-1-60 notice rights with a faulty FOIA request and cannot otherwise remedy the purported FOIA deficiencies.

In any event, without a request for notice pursuant to Section 44-1-60, this court is without authority to extend the deadline to file an RFR based on a party's actual notice of the Department determination. In *S.C. Coastal Conservation League v. S.C. Department of Health and Environmental Control*, the Supreme Court explicitly rejected the idea that actual notice triggers the fifteen (15) day period to begin running, holding that:

> The clear and unambiguous language in the statute provides that the staff decision becomes final "fifteen days after notice of the department decision *has been mailed* . . . ." Had the legislature intended for the time period to begin running from the date a party receives notice of the decision, the statute would have been drafted accordingly.[7]

S.C. Coastal Conservation League, 390 S.C. at 426, 702 S.E.2d at 251-52. Moreover, that case is distinguishable because, unlike here, the petitioner had, by the Department's own admission, requested to be notified of a permitting decision, but was not notified simultaneously with the other parties. *Id.* at 427-28, 702 S.E.2d at 251. Consequently, since the Petitioner did not submit a written request to notified, and did not file its RFR within the fifteen (15) day statutory window, this court is without authority to extend the deadline to file an RFR based the Petitioner's actual notice of the Department's determination.

ORDER

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[6] The court is troubled by the Department's late and inaccurate response to the Petitioner's second FOIA request.

[7] This holding was recently reaffirmed by the Supreme Court:

> As we noted in SCCCL, the General Assembly chose not to include an actual notice trigger when it enacted the statutory provisions governing the procedure for bringing a contested case before the ALC. We have no authority to inject into the statute an actual notice trigger of the fifteen-day limitations period, as that would disturb the legislatively prescribed procedure for appealing permitting decisions.

Pickens Cnty. v. S.C. Dep't of Health and Env't Control, 435 S.C. 99, 105-06, 866 S.E.2d 537, 540 (2021) (citations omitted).

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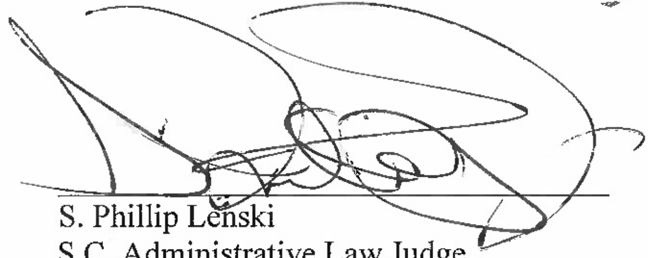
THEREFORE, IT IS HEREBY ORDERED that Bay Point's Motion to Dismiss is **GRANTED.**

AND IT IS SO ORDERED.



July 15, 2022
Columbia, South Carolina

S. Phillip Lenski
S.C. Administrative Law Judge

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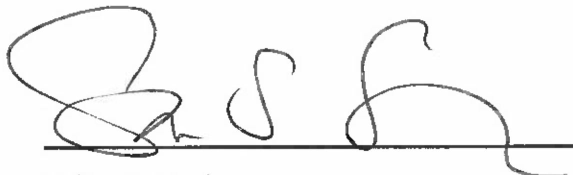
CERTIFICATE OF SERVICE

I, Erika S. Easler, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Erika S. Easler
Judicial Law Clerk

July 15, 2022
Columbia, South Carolina

ELECTRONICALLY FILED - 2023 Mar 10 11:15 AM - GEORGETOWN - COMMON PLEAS - CASE#2023CP2200210

STATE OF SOUTH CAROLINA	:	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN	:	**FIFTEENTH JUDICIAL CIRCUIT**
	:	
Kendrick A. Bryant and Keisha Bryant Sherman on behalf of the heirs of Ernest Bryant; Benjamin Dennison and Willie Dereef, Jr. on behalf of the heirs of Limerick Dennison; Lucille Grate; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlet, Inc.	:	**CASE NO.**
	:	**SUMMONS**
	:	**Declaratory Judgment**
	:	**Appeal from Georgetown County Council**
	:	**Jury Trial Demanded**
Plaintiffs	:	
v.	:	
	:	
Georgetown County; Covington Homes, LLC	:	
Defendants	:	
	:	
	:	

SUMMONS

TO: THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your pleading to said Complaint upon the subscribers at their offices at P.O. Box 1922, Pawleys Island, SC 29585, within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiffs will apply to the Court for judgment by default for the relief demanded in the Complaint.

Respectfully submitted,

/s/ Cynthia Ranck Person
Cynthia Ranck Person, Esquire (SC Bar #105126)

KEEP IT GREEN ADVOCACY, INC.
P.O. Box 1922
Pawleys Island, SC 29585
(843) 325-7795
(570) 971-8636
kig.advocacy@gmail.com

ATTORNEY FOR PLAINTIFFS

March 10, 2023
Pawleys Island, South Carolina

ELECTRONICALLY FILED - 2023 Mar 10 11:15 AM - GEORGETOWN - COMMON PLEAS - CASE#2023CP2200210

STATE OF SOUTH CAROLINA **COUNTY OF GEORGETOWN**	:	**IN THE COURT OF COMMON PLEAS** **FIFTEENTH JUDICIAL CIRCUIT**
Kendrick A. Bryant and Keisha Bryant Sherman on behalf of the heirs of Ernest Bryant; Benjamin Dennison and Willie Dereef, Jr. on behalf of the heirs of Limerick Dennison; Lucille Grate; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlet, Inc. **Plaintiffs** **v.**	:	**CASE NO.** **COMPLAINT** **(Civil Action)** **Declaratory Judgment** **Appeal from Georgetown County Council** **Jury Trial Demanded**
Georgetown County; Covington Homes, LLC **Defendants**	:	

COMPLAINT

Plaintiffs, by and through their attorneys, bring this Complaint seeking Declaratory Judgment against Defendants named herein, and an Appeal from a decision by Georgetown County Council on February 14, 2023, approving a land development subdivision application as follows:

I.

INTRODUCTION & OVERVIEW

1. This Complaint involves two existing Georgetown County ordinances that Plaintiffs contend are void as conflicting with South Carolina state law, and a land development decision that was based on the two invalid ordinances.

2. This case arises in the context of a land development application requesting approval of a high density multi-family subdivision on a parcel of vacant land in the heart of a

minority community in Pawleys Island, Georgetown County, South Carolina, zoned as General Residential ("GR") and designated by the Georgetown County Comprehensive Plan and Maps, (hereinafter "Comprehensive Plan"), as "Medium Density."

3. The high density subdivision application was denied by Georgetown County Planning Commission after public hearing on January 19, 2023, on the basis that it conflicted with the Comprehensive Plan residential density requirements, *inter alia.* No appeal of this decision was filed by the applicant.

4. Thereafter, on February 14, 2023, Georgetown County Council reversed the decision of Planning Commission and approved the high density subdivision application without further input, review, consideration, or decision by Planning Commission.

First Ordinance that Conflicts with State Law
(County Council Site Plan Review)

5. Georgetown County GR Zoning Ordinance 607 contains provisions that require County Council to approve land development plans in certain cases of two-family, multi-family and townhouse developments.

6. Under the South Carolina Comprehensive Planning Enabling Act, (hereinafter "Planning Act"), Section 6-29-1150, the South Carolina legislature explicitly set forth detailed procedures for the submission of development plans and conferred specific authority for making the decision to approve or disapprove development plans on the Planning Commission or designated staff. Staff decisions are appealable to the Planning Commission and Planning Commission decisions are appealable to the Circuit Court.

7. The plain language of the state Planning Act provides that the final county decision-maker on land development plans is the Planning Commission with appeal to the Circuit Court.

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8. There is no provision in the Planning Act giving County Council, a legislative body, authority to make decisions on or to hear appeals of land development plans.

9. The GR Zoning Ordinance provisions requiring County Council to make the final decision on land development plans conflicts with and is pre-empted by the explicit provisions of state law which confer this decision on Planning Commission with appeal to Circuit Court.

10. Under fundamental principles of South Carolina law, county ordinances that conflict with state law are void.

11. The Georgetown County GR ordinance provisions that require site plan reviews by County Council are void as a matter of law.

12. County Council had no authority to hear or approve the subdivision application on February 14, 2023, and its decision is void as a matter of law.

Second Ordinance that Conflicts with State Law
(GR Density Provisions)

13. At all times pertinent hereto, the parcel in question was zoned General Residential (GR) and was designated by the Comprehensive Plan as "Medium Density."

14. "Medium Density" is defined by the Comprehensive Plan to allow a maximum of five (5) residential units per acre.

15. GR Zoning Ordinance 607 allows a maximum residential density of sixteen (16) units per acre.

16. The South Carolina Planning Act specifically requires that zoning regulations "must be made in accordance with the comprehensive plan for the jurisdiction," and provides that the purpose of a zoning ordinance is to "implement the comprehensive plan." S.C. Code, Section 6-29-720(A) & (B).

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17. The plain language of the state law requirement that zoning ordinances be in accordance with the Comprehensive Plan is mandatory and unconditional.

18. The GR zoning ordinance, which allows high density, i.e., a maximum residential density of sixteen (16) units per acre, is not in accordance with the Comprehensive Plan designation of this parcel as "Medium Density" which allows a maximum of five (5) units per acre.

19. To the extent that the GR zoning ordinance permits residential density of more than five (5) units per acre on land parcels designated as "Medium Density" by the Comprehensive Plan, it conflicts with the state law requirement that zoning "must be in accordance with the comprehensive plan."

20. Under fundamental principles of South Carolina law, county ordinances that conflict with state law are void.

21. The residential density provisions of the GR zoning ordinance that allow more than five (5) units per acre on land designated "Medium Density" by the Comprehensive Plan are void as a matter of law.

22. The County Council decision of February 14, 2023, was based on invalid provisions of the GR ordinance and is void as a matter of law.

23. For the reasons set forth herein, Plaintiffs submit as follows:

a. The February 14, 2023, decision by County Council to approve the subdivision site plan application is void and of no force or effect.

b. The February 14, 2023, decision by County Council to approve the subdivision site plan application was arbitrary, capricious, and otherwise improper as set forth more particularly hereinafter.

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c. The January 19, 2023, decision of Planning Commission to deny the subdivision application is the final decision from which no appeal to the Circuit Court was filed, and therefore, is the valid and binding decision.

d. GR zoning ordinance provisions that allow high residential density on land designated by the Comprehensive Plan as Medium Density are void as a matter of law, and land development decisions based thereon are null, void and of no force or effect.

II.

LAND PARCEL AT ISSUE

24. The parcel of land upon which the subdivision was proposed is owned by Covington Homes, LLC, (hereinafter "Covington Homes"), and was acquired by Deed dated April 7, 2022, Tax Map No. 04-0204-025-03-00, recorded in Georgetown County Deed Book 4332, Page 243, having the address of 319 Petigru Drive, and consisting of 2.01 acres of vacant forested land, including wetlands, hereinafter "Covington Homes parcel."

25. The Covington Homes parcel is located in the heart of one of the oldest and most historically significant African American neighborhoods of Pawleys Island, Georgetown County, South Carolina, known as Fraserville.

26. The Covington Homes parcel was designated as "Medium Density" by the Georgetown County Comprehensive Plan at the time Covington Homes acquired it on April 7, 2022.

27. On or about December 20, 2022, Covington Homes and its agent Bryan Lenertz, submitted a Major Subdivision Application requesting approval to construct twelve (12) multi-family high density duplex units with infrastructure including driveways, sidewalks, and parking

areas, on approximately 1.5 net buildable acres for a net residential density of 7.74 units per acre, which significantly exceeds the medium density limitation of 5 units per acre.

28. Public hearing on this Major Subdivision Application was scheduled before Planning Commission on January 19, 2023.

III.

PARTIES

Plaintiffs

29. Plaintiffs, Kendrick A. Bryant and Keisha Bryant Sherman, on behalf of the heirs of Lazarus and/or Ernest Bryant, are adult individuals having an address of 300 Petigru Drive, Pawleys Island, Georgetown County, South Carolina, and own and reside on three parcels of land consisting of approximately 5 acres that directly adjoin the Covington Homes parcel, identified as Georgetown County Tax Map Nos. 04-0416-020-00-00, 04-0416-020-01-00, 04-0416-020-02-00, by deeds recorded in the Office of Recorder of Deeds for Georgetown County. Kendrick A. Bryant and Keisha Bryant Sherman have signed an Affidavit attached hereto as Exhibit "1," and incorporated herein by reference.

30. Plaintiffs, Benjamin Dennison and Willie Dereef, Jr., on behalf of the heirs of Limerick Dennison, are adult individuals having addresses of 92 Ferguson Drive, Pawleys Island, Georgetown County, South Carolina, and 132 Ferguson Drive, Pawleys Island, Georgetown County, South Carolina, respectively, and own and reside on three parcels of land consisting of approximately 9.2 acres that directly adjoin the Covington Homes parcel, identified as Georgetown County Tax Map Nos. 04-0416-018-00-00, 04-0416-018-01-00, 04-0416-018-02-00, by Deed dated February 21, 1882, recorded in Deed Book H, Page 97, in the Office of Recorder of Deeds for Georgetown County. Benjamin Dennison and Willie Dereef, Jr., have

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signed Affidavits attached hereto as Exhibits “2,” and "3," respectively which are incorporated herein by reference.

31. Plaintiff, Lucille Grate, is an adult individual who resides at 328 Petigru Drive, Pawleys Island, Georgetown County, South Carolina, and owns and lives on land directly across Petigru Drive from the Covington Homes parcel, identified as Tax Map No. 04-0157-005-00-00, by Deed recorded in Deed Book 1305, Page 196, in the Office of Recorder of Deeds for Georgetown County. Lucille Grate has signed an Affidavit attached hereto as Exhibit “4,” and incorporated herein by reference.

32. Plaintiff, Parkersville Planning & Development Alliance, (hereinafter “Parkersville PDA”), is a nonprofit corporation organized and existing under the laws of the State of South Carolina, having an address c/o Rev. Johnny A. Ford, President, 511 Petigru Drive, Pawleys Island, Georgetown County, South Carolina. Affidavit signed by Johnny A. Ford, President of Parkersville PDA, who personally resides approximately 750 feet from the Covington Homes parcel, is attached hereto as Exhibit “5,” and incorporated herein by reference.

33. The mission of Parkersville PDA is to protect and preserve the history, culture, and character of the traditional African American communities of Parkersville and Fraserville, which are the oldest minority settlements in the Waccamaw Neck area of Georgetown County.

34. The Parkersville PDA represents residents of Parkersville and Fraserville in the promotion of housing, land use, and economic development that fits within the character, infrastructure, and needs of the community.

35. The Parkersville PDA was formed to represent and speak for the minority community which has been substantially and negatively impacted by county land use decisions and zoning ordinances that conflict with the Comprehensive Plan or otherwise have allowed

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undesirable and harmful commercial or other encroachment into the residential Parkersville/Fraserville community such as garbage dumps, recycling centers, storage facilities, electric substations, transformers and the like. This pattern of decision-making has had permanent detrimental and discriminatory impact on this traditional historical minority neighborhood.

36. The Parkersville PDA represents the interests of the named Plaintiffs herein as well as many other residents and landowners in the vicinity of the proposed high density subdivision at issue in this case that threatens to continue a pattern of permanent and detrimental impact to this historical minority community.

37. Plaintiff, Keep It Green, (hereinafter "KIG"), is a nonprofit corporation organized and existing under the laws of the State of South Carolina, having an address of P.O. Box 3312, Pawleys Island, Georgetown County, South Carolina. Affidavit signed by Duane Draper, Chairman of KIG and resident of Pawleys Island, is attached hereto as Exhibit "6," and incorporated herein by reference.

38. Plaintiff, Preserve Murrells Inlet, Inc., (hereinafter "PMI"), is a nonprofit corporation organized and existing under the laws of the State of South Carolina, having an address of 4510 Richmond Hill Drive, Murrells Inlet, Georgetown County, South Carolina. Affidavit signed by Leon L. Rice, III, President of PMI and resident of Murrells Inlet, is attached hereto as Exhibit "7," and incorporated herein by reference.

39. KIG and PMI are citizens' organizations comprised of thousands of residents of the Waccamaw Neck, Georgetown County, South Carolina, who are concerned about the impact of land use decisions, zoning changes, increased residential density, and inappropriate

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development on traffic, flooding, environment, overburdened infrastructure, natural character, quality of life, and other matters of safety and general welfare in the Waccamaw Neck.

40. The Waccamaw Neck is a part of northeast Georgetown County defined by its unique geographic configuration as a long narrow peninsula between the Atlantic Ocean and the Waccamaw River that includes the areas of Parkersville/Fraserville, Pawleys Island, Litchfield, North Litchfield, Murrells Inlet and Garden City.

41. KIG primarily focuses on the southern Waccamaw Neck (Parkersville/Fraserville, Pawleys Island, Litchfield, North Litchfield) and PMI primarily focuses on the northern Waccamaw Neck (Murrells Inlet & Garden City).

42. Part of the missions of KIG and PMI involves monitoring county land use decisions, zoning change requests, and proposed development in the Waccamaw Neck for compliance with proper law, procedure, and the Georgetown County Comprehensive Plan for the purpose of protecting and preserving the land, quality of life, and natural character of the Waccamaw Neck for the benefit of present and future generations.

43. KIG and PMI began as grassroots responses by citizens of the Waccamaw Neck to a number of zoning changes, approved and/or recommended for approval by Georgetown County, that increased residential density in conflict with the Georgetown County Comprehensive Plan and had a negative impact on the safety and general welfare of citizens and surrounding landowners.

44. Parkersville PDA, KIG and PMI are nonprofit corporations that are independent of one another and managed by separate volunteer Boards of Directors.

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45. Parkersville PDA, KIG, and PMI represent the interests of thousands of citizens of the Waccamaw Neck, hundreds of whom reside in the vicinity of the Covington Homes parcel.

46. Parkersville PDA, KIG, and PMI represent the interests of the named Plaintiffs herein as well as other adjoining landowners or landowners who reside in the immediate vicinity of the Covington Homes parcel or other areas of the Waccamaw Neck where zoning is not in compliance with the Comprehensive Plan as required by state law and as set forth hereinafter, and who would have standing to challenge these and other decisions.

Defendants

47. The South Carolina Uniform Declaratory Judgments Act, S.C. Code, Section 15-53-80 requires that

> "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise the municipality shall be made a party and shall be entitled to be heard."

Accordingly, the following parties are required to be named as Defendants in this action for declaratory relief.

48. Defendant Georgetown County (hereinafter "County"), 129 Screven Street, Georgetown, South Carolina, is one of the forty-six counties of the State of South Carolina and is a body politic incorporated pursuant to the South Carolina Constitution, Article VII, Sec. 9, South Carolina Code Ann. § 4-1-10 (Supp. 2015).

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49. Defendant Georgetown County is comprised of and/or controls the Georgetown County Council, the Georgetown County Planning Commission and the Georgetown County Planning Department, its agents, representatives and employees.

50. Defendant, Covington Homes, LLC, owner of the Covington Homes parcel, is a limited liability company organized and existing under the laws of the State of South Carolina, having a business address of 4210 River Oaks Drive, Suite 5, Myrtle Beach, Horry County, South Carolina, 29579, and a registered agent name and address of Gregory B. Harrelson, at 4210 River Oaks Drive, Suite 5, Myrtle Beach, Horry County, South Carolina 29579.

IV.

APPLICABLE LAW

A. SOUTH CAROLINA STATE LAW

51. The following are the relevant provisions of the South Carolina Planning Act that require zoning and land development to be in accordance with the Comprehensive Plan.

a. Planning Act, Section 6-29-720(B), governs planning and zoning and specifically requires that zoning regulations "must be made in accordance with the comprehensive plan for the jurisdiction."

b. Planning Act, Section 6-29-720(A), provides that the purpose of a zoning ordinance is to "implement the comprehensive plan."

c. Planning Act, Section 6-29-540, requires that the "location, character, and extent" of new development must be compatible "with the comprehensive plan of the community."

d. Planning Act, Section 6-29-1110, *et seq.*, governs land development regulations and sets forth definitions as well as procedures for local governments to follow in

regulating land development within their jurisdictions. One of the specifically articulated legislative intents of Article 7 is to "assure" that proposed development is "in harmony with the comprehensive plan" of the municipality or county. (Planning Act, Section 6-29-1120(5)).

52. As set forth above, the South Carolina legislature has made it abundantly clear throughout the South Carolina Planning Act that zoning and land development are required to be consistent with the Comprehensive Plan.

B. GEORGETOWN COUNTY COMPREHENSIVE PLAN

i. General

53. The "Introduction" to the original Georgetown County Comprehensive Land Use Plan enacted in August of 1997, which is currently in effect, specifically recognizes and reinforces the requirements of the South Carolina Planning Act and states as follows:

> "In order for local ordinances regulating land use to be valid, they must be adopted in accordance with a locally adopted [comprehensive] plan ... [and] once the Plan is adopted, no [development] ... may be constructed or authorized ... until the location, character and extent of it have been submitted to the planning commission for review and comment as to the compatibility of the proposal with the comprehensive plan for the community." (page 1-4)

ii. Covington Homes Parcel & Adjoining Land

54. The current Comprehensive Land Use Plan, including maps, was enacted by County Council on March 10, 2015, by Ordinance number 2015-05, and specifically designates the Covington Homes parcel as "Medium Density," which limits net residential density to a maximum of 5 units per acre.

55. All parcels of land that adjoin the Covington Homes parcel are designated by the Comprehensive Plan as "Medium Density" residential.

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56. All residential areas of the traditional Parkersville/Fraserville minority community are designated by the Comprehensive Plan as "Medium Density," or "Low Density," (maximum of two (2) units per acre).

iii. Density Increases Restricted in South Waccamaw Neck

57. The Comprehensive Land Use Plan specifically states as follows with respect to residential density in the South Waccamaw Neck:

> "The overriding issue in the Pawleys-Litchfield area is population density. The general concept of allowing higher density to prevent sprawl is no longer applicable in this area. The key now is to limit the number of new residential units that are added so that the impacts of additional development (i.e. increased traffic congestion, increased storm water runoff, greater pressures on our overall infrastructure) are minimized as much as possible."

(Comprehensive Land Use Plan, Page 23). A copy of this portion of the Comprehensive Plan is attached hereto as Exhibit "8," and incorporated herein by reference.

58. The Comprehensive Plan further states as follows with respect to the South Waccamaw Neck:

> "Density increases in new development should *only* be allowed if open space is provided by use of planning tools: as part of a Planned Development District, Transfer Development Rights, Cluster Development, or land placed in a Conservation Easement, etc."

(Comprehensive Land Use Plan, Page 25). A copy of this portion of the Comprehensive Plan is attached hereto as Exhibit "9," and incorporated herein by reference.

59. The clear intention of this provision is to restrict density increases in new development and allow them *only* when there is a corresponding density decrease or elimination (*i.e.,* by creating "open space") through use of one of the enumerated planning tools which are specifically designed to offset a density increase.

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60. None of these exceptions or planning tools apply to the Covington Homes subdivision application, and, therefore, density is limited to a maximum of 5 units per acre as designated by the Comprehensive Plan.

61. Density restrictions were deliberately included in the Comprehensive Plan because the South Waccamaw Neck was then and is now facing unprecedented population growth resulting in critically overburdened infrastructure, increasing volumes of traffic that exceed road design capacity, increasing numbers of serious and life-threatening motor vehicle accidents, increasing flooding and stormwater problems as a consequence of clear cutting and filling in wetlands, as well as other environmental and safety challenges resulting from overdevelopment of the limited geographic space of the South Waccamaw Neck.

C. GEORGETOWN COUNTY ORDINANCES

i. General Residential Ordinance

62. GR Zoning Ordinance 607 permits a range of residential uses and a range of residential densities, including both medium and high density, up to a maximum of sixteen (16) units per acre.

63. Determination of the maximum permissible residential density on a particular parcel within a GR Zoning District, should consider the provisions of all applicable land use regulations, including but not limited to:

a. The residential density permitted by the Comprehensive Plan as set forth above (in this case 5 units per acre);

b. The conditions and limitations set forth within the GR zoning ordinance itself, including proposed use, design, and setback requirements; and

c. The requirements of all other applicable laws, ordinances, and/or development regulations, including those set forth below that dictate mandatory application of the most restrictive regulation in the case of conflict.

ii. <u>Ordinances Require Application of Most Restrictive Regulation</u>

64. According to the following Georgetown County ordinances, when there is a conflict between or among zoning or land development regulations, the most restrictive applies.

a. Section 1800 of the Georgetown County Zoning Ordinance provides:

> "in case of conflict between this Ordinance or any part thereof, and the whole or part of any existing or future ordinance of the County of Georgetown, <u>the most restrictive shall in *all* cases apply</u>."

b. Article I, Section 10, of the Georgetown County Development Regulations states:

> "Whenever this Ordinance imposes a higher standard than that required by other resolutions, ordinances, rules or regulations, easements, covenants or agreements, the provisions of this Ordinance shall govern. When the provisions of any other statute impose higher standards, the provisions of such statute shall govern.

65. In the present case, as the most restrictive regulation, the Comprehensive Plan "Medium Density" designation limits density to a maximum of 5 units per acre on the Covington Homes Parcel.

V.

<u>COUNTY DECISION PROCESS</u>

A. <u>PLANNING COMMISSION PROPERLY DENIED</u>

66. The Georgetown County Planning Commission held a public hearing on the Covington Homes major subdivision application on January 19, 2023, and after considering the evidence, including considerable testimony from interested parties, voted to deny the application

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on the basis of its inconsistency with the Comprehensive Plan density restrictions, as well as flooding, stormwater and traffic, and general detriment to the neighbors and community.

67. The Planning Commission decision was proper in all respects and no appeal of the decision to deny was filed by Covington Homes.

68. The Planning Commission decision to deny should be the final and binding decision.

B. COUNTY COUNCIL IMPROPERLY REVIEWED & APPROVED

i. No Authority

69. The Covington Homes subdivision application was placed on the County Council agenda for February 14, 2023, under the heading "Reports to Council" as agenda item 14(a), "Site Plan Review," pursuant to the ordinance provisions cited hereinabove. A copy of the February 14, 2023, County Council agenda is attached hereto as Exhibit "10," and incorporated herein by reference.

70. Georgetown County ordinances requiring site plans to be approved by County Council are void and unenforceable for the following reasons:

a. They are inconsistent with explicit provisions of state law as set forth hereinabove.

b. They violate the doctrine of separation of powers.

c. They reserve to County Council arbitrary power without the guidance of uniform rules and regulations.

d. They do not articulate any standards by which the County Council should decide to approve or disapprove the decision by Planning Commission.

e. They violate the South Carolina Planning Act and other law.

71. Accordingly, County Council did not have authority to hear, review or approve this land development application, or to review, modify, or reverse the decision of Planning Commission, and its decision to approve is void as a matter of law.

ii. Improper, Arbitrary & Capricious

72. Even if Council had possessed the authority to hear and make a decision on this subdivision application, which is specifically denied, the details, substance, and merits of the plan and its compliance or noncompliance with *all* applicable laws and regulations including South Carolina state law, the Georgetown County Comprehensive Plan, the GR ordinance and other land development regulations was not addressed or considered by Council in any way.

73. In fact, the information packet submitted to council by the Planning Department for its consideration did not include all pertinent facts and neglected to include any information about the Comprehensive Plan designation of the Covington Homes parcel. Please see Agenda Request Form and packet attached hereto as Exhibit "11," and incorporated herein by reference.

(a) Erroneous Instructions

74. County Council was specifically instructed in the Agenda Request Form as well as during the February 14, 2022, meeting, that its review was "limited to compliance with the land use regulations of the County, as the use has already been properly designated by establishment of the zoning district."

75. This instruction improperly made the predetermined conclusion that the use was "properly" designated by the establishment of the zoning district, and prevented Council from reviewing state law to determine whether the use was, in fact, "properly" designated, which is Council's very duty and responsibility.

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76. Where, as in the present situation, the established zoning district is not in accordance with the Comprehensive Plan as required by state law, the use is not "properly" designated.

77. Council was instructed not to and/or otherwise did not consider the following critical matters:

a. Whether the county ordinance requiring Council to review this land development application was void as conflicting with explicit provisions of state law.

b. Whether the county GR zoning ordinance density provisions, which Council was instructed to follow as its sole consideration, were void as conflicting with the mandatory state law requirement that zoning ordinances must be in accordance with the Comprehensive Plan.

c. County Zoning Ordinance 1800, and Land Use Regulation Article I, Section 10, requiring application of the most restrictive regulation.

c. Whether the proposed land development was in accordance with the Comprehensive Plan as required by state and local law.

d. Inconsistency of the proposed high density development with the Comprehensive Plan designation of this parcel as "Medium Density."

e. That all adjoining parcels are designated by the Comprehensive Plan as "Medium Density."

f. The findings of Planning Commission after consideration of evidence presented at a public hearing and the specifically articulated reasons set forth by Planning Commission as the basis for its decision to deny the subdivision application.

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d. Land development regulations that specifically allow consideration of flooding, stormwater, traffic, infrastructure, character of the neighborhood, and detriment to the community.

78. Council was advised by the Planning Director at the meeting on February 14, 2023, and in written materials submitted to Council, that the proposed subdivision complied with all county ordinances and regulations and that the Planning Department recommended approval.

79. Essentially Council was asked to rubber stamp the Planning Department recommendation and bypass the Planning Commission decision, the Public Hearing, the Comprehensive Plan inconsistencies, and the requirements of the South Carolina Planning Act.

80. County Council has been repeatedly advised that Georgetown County would be vulnerable to lawsuits by Developers if it does not approve land development applications based on the zoning ordinance alone, without regard to state law requirements, without regard to whether the zoning ordinance is in accordance with the Comprehensive Plan, without regard to whether the proposed land development conforms to the Comprehensive Plan, and without regard to many other legitimate considerations such as flooding, stormwater, traffic, infrastructure, character of the surrounding neighborhood and detriment to adjoining landowners and the community.

81. Georgetown County land use decisions have been consistently driven by a "fear of lawsuits by Developers" and not by proper and legitimate considerations such as consistency with state law and the Comprehensive Plan. As a result, citizens of the county, particularly those in minority communities, have suffered serious harm.

82. The Georgetown County land development decision-making process, as exemplified by this situation, obviates the need for a Planning Commission or a South Carolina legislature.

(b) Arbitrary & Capricious

83. Based on the above instructions, County Council voted to approve the Covington Homes high density subdivision on a parcel of land designated as Medium Density by its own Comprehensive Plan maps.

84. The following Council members voted to approve the development: Clint Elliott (District 1); Stella Mercado (District 6); Raymond Newton (District 5); Louis Morant (District 7); Lillie Jean Johnson (District 4). The following council members opposed the development: Bob Anderson (District 2); Everett Carolina (District 3).

85. The decision by Council and the underlying instructions which formed the basis of the decision are erroneous as follows:

a. State law was deliberately not taken into consideration.

b. The Comprehensive Plan was deliberately not taken into consideration notwithstanding the state law mandate that zoning ordinances and land development must be in accordance with the Comprehensive Plan.

c. Conflict with the Comprehensive Plan density restrictions was disregarded.

d. Other applicable laws were not considered including Georgetown County Zoning Ordinance, Section 1800, and Land Development Regulation, Article I, Section 10, requiring application of the most restrictive land development regulations.

e. New development was approved without considering its compatibility with the comprehensive plan in violation of Planning Act, Section 6-29-540, which

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provides that no new development should be permitted "until the location, character, and extent of it have been submitted to the planning commission for review and comment as to the compatibility of the proposal with the comprehensive plan of the community."

f. New development was approved as complying with the GR zoning ordinance when details of the plans were not considered or discussed by Council and do not, in fact, comply with all applicable ordinances, including the GR ordinance.

g. Development was approved without applying uniform standards or considering other applicable law.

h. The decision by Council conflicts with its own ordinance 2015-05, *i.e.,* the Comprehensive Plan and maps.

86. The decision to allow a high density subdivision in contravention of the Comprehensive Plan residential density restriction sets a precedent for (a) ignoring the Comprehensive Plan in making future land use decisions, and (b) allowing high density land development on many acres of other land in Georgetown County that is designated as medium or low density by the Comprehensive Plan.

87. The cumulative incremental impact of density increases in the South Waccamaw Neck has had, would have, and is having devastating and far-reaching negative consequences to all citizens, and a disparate discriminatory impact on minority communities.

(c) No Public Hearing

88. Numerous adjoining landowners and neighboring residents attended the Council meeting on February 14, 2023, to express their opposition. No public hearing was provided and interested parties had no opportunity to present evidence. The only opportunity for input of any

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kind was the very limited time afforded during the General Public Comment period at the beginning of the meeting.

89. Legal counsel for interested parties directed a letter to Council dated February 13, 2023, raising the matters that form the basis of this complaint, none of which were considered at the meeting. A copy of said letter is attached hereto as Exhibit "12," and incorporated herein by reference. There were numerous letters of opposition and no letters in support.

VI.

DUTIES OF GEORGETOWN COUNTY WITH RESPECT TO ZONING AND LAND DEVELOPMENT

90. Defendant Georgetown County through its agents, representatives, employees, elected officials, boards and appointed officials has the following duties and responsibilities pursuant to the South Carolina Planning Act and local law:

a. Duty to bring residential zoning ordinances and land development regulations into conformity with the current Georgetown County Comprehensive Plan as specifically required by Planning Act Sections 6-29-720 and 6-29-1120.

b. Duty to bring the decision-making processes in land development and zoning change requests into compliance with state law which requires review for compatibility with the Comprehensive Plan as a condition of approval pursuant to Planning Act Sections 6-29-540, 6-29-720, and 6-29-1120, and Georgetown County Planning Commission Bylaws, Article V, Section 2, which states that "[a]ll zoning and development regulation amendments *shall* be reviewed first for conformity with the comprehensive plan."

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91. South Carolina Planning Act, Section 6-29-340, mandates that it is the "duty" of the local planning commission to put these processes into place for the benefit and welfare of the public which it serves.

92. The duties identified in paragraphs 90 and 91 above, shall collectively be referred to as "required duties."

93. The "Introduction" to the first Georgetown County Comprehensive Land Use Plan, adopted in August of 1997, states:

> "One of the most important implementation measures is the immediate preparation of revisions to the Georgetown County Zoning Ordinance. The adoption of the Comprehensive Plan represents the direction or "blueprint," but the actual governing laws and ordinances must change to reflect the goals and action items within the Plan. Once the Plan is adopted, the planning staff will immediately commence work on changes to the Zoning Ordinances." (page 1-5 and 1-6)

94. More than twenty-five years after this language was adopted by Georgetown County ordinance, zoning ordinances have still not been revised or changed to be in accordance with the Comprehensive Plan as required by the South Carolina Planning Act and the Georgetown County Comprehensive Plan itself.

A. Existing Zoning Ordinances Conflict with Comprehensive Plan

95. To the extent that the GR zoning ordinance permits high density land development on land designated by the Comprehensive Plan and Maps as medium or low density, the zoning ordinance is in direct conflict with the Comprehensive Plan.

96. There are many existing zoning districts on parcels of land in the Waccamaw Neck that are in direct conflict with the Comprehensive Plan as they relate to residential density.

97. Under both state and local law, these conflicting zoning ordinances should have been brought into compliance with the Comprehensive Plan immediately upon its enactment.

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Instead, conflicting zoning ordinances have been permitted to exist, in some cases for many decades, despite their inconsistency with the Comprehensive Plan and Maps.

98. The County's failure to perform its duty to bring residential zoning ordinances into compliance with the Comprehensive Plan has caused injury to the Plaintiffs herein, and put Plaintiffs and every other land owner in the Waccamaw Neck at risk of imminent harm and serious injury.

99. The County has repeatedly approved development pursuant to these conflicting zoning ordinances notwithstanding their inconsistency with the Comprehensive Plan density limitations.

100. These approvals have negatively affected the property rights of many land owners in the Waccamaw Neck.

101. Conflicting zoning ordinances and land use decisions are more prevalent in minority communities and have had a discriminatory impact on the minority population living in these communities.

B. Land Use Approval Process

102. In making zoning and land development decisions, Georgetown County does not consider compatibility with the Comprehensive Plan as a necessary part of the process.

103. There are many instances of approval of land development and zoning changes on the Waccamaw Neck that were inconsistent with density and other provisions of the Comprehensive Plan and Maps. These approvals have negatively affected the property rights and caused injury to many land owners in the Waccamaw Neck.

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104. Approval of zoning changes and land development that conflict with the Comprehensive Plan are more prevalent in minority communities and have had a discriminatory impact on the minority residents of these communities.

C. Georgetown County Refuses to Comply

105. Georgetown County has repeatedly been requested by Plaintiff organizations and citizens to bring its zoning ordinances and land use approval processes into compliance with the Comprehensive Plan as required by the South Carolina Planning Act.

106. A letter dated September 2, 2022, attached hereto as Exhibit "13," and incorporated herein by reference, was directed to Georgetown County by legal counsel for Plaintiff organizations and citizens specifically requesting compliance. Georgetown County has neither acknowledged nor responded to the letter.

107. At all times pertinent hereto, Georgetown County has failed and/or refused to perform the required duties as set forth herein.

108. Georgetown County's continued failure and refusal to perform its required duties has caused harm and created a risk of imminent and future injury to Plaintiffs and other land owners in the Waccamaw Neck.

109. Georgetown County's continued failure and refusal to perform its required duties has had a substantially greater negative impact on minority neighborhoods and minority land owners.

110. Georgetown County's continued failure and refusal to perform its required duties sets a precedent for allowing development that does not conform to the Comprehensive Plan and maps.

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111. Plaintiffs request that Georgetown County immediately bring the zoning of the Covington Homes parcel as well as all other non-compliant zoning and decision-making processes into compliance with the Comprehensive Plan and the South Carolina Planning Act.

JURISDICTION, STANDING AND VENUE

112. Paragraphs 1 through 111, above, are incorporated by reference as though fully set forth herein.

113. This court has jurisdiction to hear these claims arising under the South Carolina Uniform Declaratory Judgments Act, South Carolina Comprehensive Planning Enabling Act, the common law of South Carolina and other law.

114. Venue is proper in Georgetown County as the property in question is situated in Georgetown County and all pertinent actions took place in Georgetown County.

115. Plaintiffs have statutory standing to challenge these ordinances as follows:

a. South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann., Section 15-53-30, states

> "[a]ny person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

Plaintiffs' rights and legal relations have been and are substantially affected by the County Council decision of February 14, 2023, the Planning Commission decisions of January 19, 2023, Georgetown County's Zoning Ordinances, Land Development Regulations and Comprehensive Plan, and the South Carolina

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Planning Act. Plaintiffs have standing to ask the court to determine rights, status, validity and other legal relations with regard to these statutes, ordinances and decisions.

b. South Carolina Comprehensive Planning Enabling Act, S.C. Code Ann., Section 6-29-1150 and 6-29-1155, states that any party in interest may appeal land development decisions. Rule 74, SCRCP ("Procedure on Appeal to the Circuit Court") governs appeals from "an inferior court or decision of an administrative agency or tribunal" to circuit court. Plaintiffs are parties in interest under the Planning Act.

116. Alternatively and in addition, Plaintiffs have constitutional standing pursuant to Article III of the United States Constitution inasmuch as (a) they have suffered an injury by virtue of land use decisions with respect to property that directly adjoins land owned by them or by someone they represent; (b) the injury was caused by the improper approval of subdivision applications and Georgetown County's failure and refusal to perform required duties; and (c) the injury is redressable by a favorable decision of this court declaring that the approval of the subdivision applications by County Council is improper, null and void, and requiring Georgetown County to perform its required duties.

117. Alternatively and in addition, Plaintiffs have standing to challenge these ordinances pursuant to the public importance doctrine inasmuch as the decision in this case has potentially far-reaching, widespread, devastating and irreversible negative impact on the public welfare by serving as a precedent for similar land development decisions that would impact many acres in the Waccamaw Neck, and future guidance by this court is necessary to determine

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the validity of Georgetown County's repeated disregard of the requirements of the South Carolina Planning Act and the Comprehensive Plan in the Waccamaw Neck.

118. Plaintiffs Parkersville PDA, KIG, and PMI have associational standing as follows: (a) at least one of the parties represented is an affected person who has standing in his or her own right; (b) the interests at stake are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual landowners and monetary damages are not being requested. Plaintiffs Parkersville PDA, KIG, and PMI represent the interests of the named Plaintiffs as well as other affected persons who own adjoining land or reside in the vicinity of the Petigru and Parkersville parcels and other land where zoning is not in compliance with the comprehensive plan or where land use decisions have been made that are not in compliance with the comprehensive plan. The issues in this case fall squarely within the mission and purpose of these citizens organizations as set forth above.

COUNT I

DECLARATORY JUDGMENT

Georgetown County Ordinances Requiring Site Plan Review by County Council are Void and Unenforceable

119. Paragraphs 1 through 118, above, are incorporated by reference as though fully set forth herein.

120. Pursuant to the provisions of the Uniform Declaratory Judgments Act, S.C. Code Ann., Section 15-53-10, *et seq*., Plaintiffs seek declaratory judgment from this Court that the Georgetown County ordinances requiring land development plans to be approved by County Council are inconsistent with the explicit provisions of state law and are void, and of no force or effect.

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COUNT II

DECLARATORY JUDGMENT

County Council Had No Authority to Render the February 14, 2023, Decision Approving Subdivision Application

121. Paragraphs 1 through 120, above, are incorporated by reference as though fully set forth herein.

122. Plaintiffs seek declaratory judgment from this Court that the February 14, 2023, County Council decision to reverse the Planning Commission decision and approve the Covington Homes subdivision application is null, void, and of no force or effect.

COUNT III

DECLARATORY JUDGMENT

Planning Commission Decision to Deny Subdivision Application on January 19, 2023, was Final, Valid and Binding

123. Paragraphs 1 through 122, above, are incorporated by reference as though fully set forth herein.

124. Plaintiffs seek declaratory judgment from this Court that the January 19, 2023, Planning Commission decision to deny this subdivision application is the valid, proper, and final decision as follows:

a. The South Carolina Planning Act 6-29-1150 confers final decision-making authority on subdivision applications to Planning Commission whose decisions are appealable to the circuit court.

b. Planning Commission properly voted to deny the subdivision applications after public hearing on January 19, 2023.

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c. The sole process for review, modification, or reversal of a Planning Commission approval or disapproval of a land development application is by appeal to the circuit court within thirty (30) days after mailing of the Notice of Decision.

d. No appeal was taken by the applicant from this decision as provided in the Planning Act, and this decision stands as the final, valid and binding decision.

COUNT IV

DECLARATORY JUDGMENT

Georgetown County Zoning Ordinances Allowing High Density on Land Parcels Designated by the Comprehensive Plan as Medium Density are Void and Unenforceable

125. Paragraphs 1 through 124, above, are incorporated by reference as though fully set forth herein.

126. Plaintiffs seek declaratory judgment from this Court that the provisions of the Georgetown County zoning ordinances that allow high residential density on land designated by the Comprehensive Plan as Medium Residential Density are inconsistent with the explicit state law requirement that zoning ordinances must be in accordance with the Comprehensive Plan and are void, and of no force or effect.

COUNT V

DECLARATORY JUDGMENT

The Approval of the Subdivision Application was a Violation of State and County Law

127. Paragraphs 1 through 126, above, are incorporated by reference as though fully set forth herein.

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128. Plaintiffs seek declaratory judgment from this Court that even if Council had authority to make decisions on the subdivision application, the February 14, 2023, decision to approve is null, void, and of no force or effect as follows:

a. The approval of development that conflicts with the Comprehensive Plan and Maps violates the South Carolina Planning Act which requires development and zoning to be consistent with the Comprehensive Plan.

b. The approval of development that violates county ordinance 2015-05 (Comprehensive Plan and Maps) is improper, null, void and of no force or effect.

c. A development decision that fails to take compatibility of the Comprehensive Plan into consideration violates the Planning Act which requires consideration of compatibility with the comprehensive plan.

d. The decision failed to consider Zoning Ordinance 1800 and Land Development Regulations, Article I, Section 10, which requires application of the most restrictive regulation.

e. The decision failed to consider whether the details of the subdivision plans actually complied with the GR ordinance and other local land development ordinances.

f. The decisions failed to consider other applicable law.

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COUNT VI

DECLARATORY JUDGMENT

Georgetown County Has a Statutory Mandate to Bring Zoning Ordinances and Land Use Regulations Into Compliance with Comprehensive Plan

129. Paragraphs 1 through 128, above, are incorporated by reference as though fully set forth herein.

130. Plaintiffs seek declaratory judgment from this Court that Georgetown County has a statutory mandate to bring residential zoning ordinances and land development regulations, including the Covington Homes parcel, into conformity with the current Georgetown County Comprehensive Plan as specifically required by Planning Act, Sections 6-29-720 and 6-29-1120.

COUNT VII

DECLARATORY JUDGMENT

Georgetown County Has a Statutory Mandate to Consider Compliance with Comprehensive Plan in Decision Making Processes

131. Paragraphs 1 through 130, above, are incorporated by reference as though fully set forth herein.

132. Plaintiffs seek declaratory judgment from this Court that Georgetown County has a statutory mandate to bring its zoning and land development decision-making processes into compliance with state law which requires review for compatibility with the Comprehensive Plan as a condition of approval pursuant to Planning Act Sections 6-29-540, 6-29-720, and 6-29-1120, and Georgetown County Planning Commission Bylaws, Article V, Section 2, and the language of the Georgetown County Comprehensive Plan Introduction, and other applicable law.

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COUNT VIII

APPEAL OF COUNTY COUNCIL DECISION

133. Paragraphs 1 through 132, above, are incorporated by reference as though fully set forth herein.

134. In the event this court finds that County Council had authority to render the February 14, 2023, decision on the subdivision applications, Plaintiffs appeal this decision for the reasons set forth hereinabove.

COUNT IX

ATTORNEYS FEES FROM GEORGETOWN COUNTY

135. Paragraphs 1 through 134, above, are incorporated by reference as though fully set forth herein.

136. Defendant Georgetown County acted without substantial justification with respect to the claims set forth herein and there is no special circumstance that would make the award of attorneys fees unjust. Citizens should not be forced to spend time and money or engage the services of attorneys in order to obtain the county's compliance with law.

137. S.C. Code 15-77-300 permits the award of attorneys fees in this circumstance.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Honorable Court to enter judgment in their favor as set forth herein, declare as follows that:

a. the February 14, 2023, County Council decision approving the subdivision application is null, void and of no force or effect;

b. the Planning Commission decision of January 19, 2023, denying the subdivision application is the final, valid and binding decision;

c. Georgetown County ordinances requiring approval by County Council of land development applications conflict with state law and are void, unenforceable, and of no force or effect;

d. Georgetown County ordinances allowing high residential density on land designated by the Comprehensive Plan as Medium Density conflict with state law and are void, unenforceable, and of no force or effect;

e. Georgetown County has a statutory mandate to bring zoning ordinances into compliance with the Comprehensive Plan and to consider compliance with the comprehensive plan in its land use decision making processes;

f. Plaintiffs are entitled to costs and attorneys fees from Defendant Georgetown County pursuant to S.C. Code 15-77-300 ; and

g. Such other relief as the court deems just and appropriate.

Respectfully submitted,

/s/ Cynthia Ranck Person
Cynthia Ranck Person, Esquire (SC Bar #105126)

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ATTORNEY FOR PLAINTIFFS

March 10, 2023
Pawleys Island, South Carolina

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STATE OF SOUTH CAROLINA **COUNTY OF GEORGETOWN**	:	**IN THE COURT OF COMMON PLEAS** **FIFTEEN JUDICIAL CIRCUIT**
Michael T. Green and Carrie J. Green, Julian P. Rutledge and Melvin L. Rutledge; Carlethia B. Jenkins; Frances Jo Baker; Parkersville Planning & Development Alliance, Inc.; Keep It Green, Inc.; and Preserve Murrells Inlet, Inc. **Plaintiffs**	:	**CASE NO.** **SUMMONS** **Declaratory Judgment** **Appeal from Georgetown County Council** **Jury Trial Demanded**
v.	:	
Georgetown County, Laine CRE, LLC; TriStar Land, LLC; and Samuel J. Nesbit on behalf of the heirs of Will Nesbit **Defendants**	:	

SUMMONS

TO: THE ABOVE NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your pleading to said Complaint upon the subscribers at their offices at P.O. Box 1922, Pawleys Island, SC 29585, within 30 days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiffs will apply to the Court for judgment by default for the relief demanded in the Complaint.

Respectfully submitted,

/s/ Cynthia Ranck Person
Cynthia Ranck Person, Esquire (SC Bar #105126)

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ATTORNEY FOR PLAINTIFFS

October 24, 2022
Pawleys Island, South Carolina

STATE OF SOUTH CAROLINA	:	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GEORGETOWN	:	**FIFTEEN JUDICIAL CIRCUIT**
	:	
Michael T. Green and Carrie J. Green, Julian P. Rutledge and Melvin L. Rutledge; Carlethia B. Jenkins; Frances Jo Baker; Parkersville Planning & Development Alliance, Inc.; Keep It Green, Inc.; and Preserve Murrells Inlet, Inc.	:	**CASE NO.** **COMPLAINT** **(Civil Action)** **Declaratory Judgment** **Appeal from Georgetown County Council**
Plaintiffs	:	
v.	:	**Jury Trial Demanded**
	:	
Georgetown County, Laine CRE, LLC; TriStar Land, LLC; and Samuel J. Nesbit on behalf of the heirs of Will Nesbit	:	
Defendants	:	
	:	

COMPLAINT

Plaintiffs, by and through their attorneys, bring this Complaint seeking Declaratory Judgment against Defendants named herein, and an Appeal from decisions by Georgetown County Council on September 27, 2022, approving two land development subdivision applications as follows:

INTRODUCTION

1. This Complaint involves two land development subdivision applications proposing "high density" multi-family housing on two vacant parcels of heirs' property land designated as "medium density" by the Georgetown County Comprehensive Land Use Plan and Maps, (hereinafter collectively "comprehensive plan"), and located in the heart of a traditional African American community known as "Parkersville," one of the oldest and most historically significant neighborhoods of Pawleys Island, Georgetown County, South Carolina.

2. Both subdivision applications were denied by Georgetown County Planning Commission, (hereinafter "Planning Commission"), after public hearing on August 18, 2022, for a variety of reasons including that they conflicted with the comprehensive plan.

3. No appeal was filed from the Planning Commission's decisions to deny.

4. After denial by Planning Commission, the land development applications were placed on the September 27, 2022, agenda of Georgetown County Council, (hereinafter "Council"), pursuant to Georgetown County ordinance provisions requiring site plan decisions of the Planning Commission to be approved by County Council for proposed developments involving more than 10 multi-family dwelling units with a proposed density of 5 units per acre or greater (high density).

5. At the council meeting on September 27, 2022, County Council reversed the Planning Commission decisions and approved both subdivision applications without further input, review, consideration, or decision by Planning Commission, notwithstanding that the high density development plans violate the medium density comprehensive plan map designation, and no amendment was made to the comprehensive plan or map.

6. Georgetown County has failed and continues to fail to perform statutory duties required by the South Carolina Comprehensive Planning Enabling Act, (hereinafter "Planning Act"), S.C. Code, Section 6-29-310, *et seq.* causing injury and detriment to Plaintiffs and other Georgetown County landowners.

7. For the reasons set forth herein, Plaintiffs submit as follows:

a. County Council was without authority to render decisions on the subdivision site plan applications or to review, hear, or change the August 18, 2022, denial of the applications by Planning Commission.

b. The September 27, 2022, decisions by County Council to approve the subdivision site plan applications were improper for lack of authority and for other reasons as particularly set forth hereinafter, and are null, void and of no force or effect.

c. The August 18, 2022, decisions of Planning Commission to deny the subdivision applications are the final decisions from which no appeals to the circuit court were filed, and therefore, are valid and binding decisions.

d. Georgetown County is required to comply with the South Carolina Planning Act as set forth more particularly hereinafter.

LAND PARCELS AT ISSUE

8. Upon information and belief, both parcels of land upon which the subdivisions were proposed are heirs' property owned by the heirs of Will Nesbit, (hereinafter "Nesbit heirs").

9. The first parcel, identified as Tax Map No. 04-0203-155-00-00, hereinafter "Petigru Parcel," is a long narrow lot that lies along a secondary road known as Petigru Drive, consisting of 6.87 acres of vacant forested land, including wetlands, with 207.6 feet of frontage on the existing Petigru Drive and extending a depth of 1,663 feet, having a width to depth ratio of 8.01.

10. The second parcel, identified as Tax Map No. 04-0416-004-00-00, hereinafter "Parkersville Parcel," lies along a secondary road known as Parkersville Road, consisting of 13.69 acres of vacant forested land which includes 5.79 acres of wetlands to the rear of the parcel. 7.9 acres are proposed for development, which includes 1.56 acres of wetlands. The lot has 427.2 feet of frontage on the existing Parkersville Road and extends a depth of 1,664.3 feet with a width to depth ratio of 3.90.

PARTIES

Plaintiffs

11. Plaintiffs, Michael T. Green and Carrie J. Green, husband and wife, (hereinafter "Greens"), are adult individuals who reside at 533 Parkersville Road, Pawleys Island, Georgetown County, South Carolina, and own and live on land that directly adjoins the Petigru Parcel, identified as Tax Map No. 04-0203-155-01-0, recorded in Deed Book 614, Page 92, in the Office of Recorder of Deeds for Georgetown County on February 13, 1995. The Greens have signed an Affidavit attached hereto as Exhibit "1," and incorporated herein by reference.

12. Plaintiffs, Julian P. Rutledge and Melvin L. Rutledge, heirs of Annette Rutledge, are adult individuals who reside at 1018 Martin Luther King Road and 1654 Petigru Drive, respectively, and own 8 acres of land that directly adjoins the Petigru Parcel, identified as Tax Map No. 04-0203-156-00-00, recorded in Deed Book E, Page 384, in the Office of Recorder of Deeds for Georgetown County on May 3, 1875. Julian P. Rutledge and Melvin L. Rutledge have signed an Affidavit attached hereto as Exhibit "2," and incorporated herein by reference.

13. Plaintiff, Patricia S. Grate, is an adult individual who resides at 1724 Petigru Drive, Pawleys Island, Georgetown County, South Carolina, and owns and lives on two parcels of land that directly adjoin the Petigru Parcel, identified as Tax Map No. 04-0203-154-03-00, and 04-0203-154-06-02, recorded in Deed Book 3404, Page 192, in the Office of Recorder of Deeds for Georgetown County on December 18, 2018.

14. Plaintiff, Carlethia B. Jenkins, heir of Frank Jenkins and Vernon Jenkins, is an adult individual who resides at 51 Jenks Court, Pawleys Island, Georgetown County, South Carolina, and owns approximately 13 acres of land that directly adjoins the Parkersville Parcel, identified as Tax Map No. 04-0413-051-01-00, recorded in Deed Book 1181, Page 257, in the

Office of Recorder of Deeds for Georgetown County on May 11, 2001. Carlethia Jenkins has signed an Affidavit attached hereto as Exhibit "3," and incorporated herein by reference.

15. Plaintiff, Frances Jo Baker, is an adult individual who resides at 729 Parkersville Road, Pawleys Island, Georgetown County, South Carolina, and owns and lives on land that directly adjoins the Parkersville Parcel, identified as Tax Map No. 04-0147-060-01-00, recorded in Deed Book 1339, Page 237, in the Office of Recorder of Deeds for Georgetown County on December 23, 2002. Frances Jo Baker has signed an Affidavit attached hereto as Exhibit "4," and incorporated herein by reference.

16. Plaintiff, Parkersville Planning & Development Alliance, Inc., (hereinafter "Parkersville PDA"), is a nonprofit corporation organized and existing under the laws of the State of South Carolina, having an address c/o Rev. Johnny A. Ford, President, 511 Petigru Drive, Pawleys Island, Georgetown County, South Carolina. Affidavit signed by Johnny A. Ford, President of Parkersville PDA, and resident of Parkersville, is attached hereto as Exhibit "5," and incorporated herein by reference.

17. The mission of Parkersville PDA is to protect and preserve the history, culture, and character of the traditional African American community known as Parkersville which is one of the oldest settlements in the Waccamaw Neck area of Georgetown County.

18. The Parkersville PDA represents residents of Parkersville in the promotion of housing, land use, and economic development that fits within the character, infrastructure, and needs of the community.

19. The Parkersville PDA was formed to represent and speak for the Parkersville minority community which has been substantially and negatively impacted by county land use decisions and zoning ordinances that conflict with the comprehensive plan or otherwise have

allowed undesirable and harmful commercial or other encroachment into the Parkersville Community such as garbage dumps, recycling centers, storage facilities, electric substations, transformers and the like. This pattern of decision-making has had permanent detrimental and discriminatory impact on this traditional historical minority neighborhood.

20. The Parkersville PDA represents the interests of the named Plaintiffs herein as well as many other residents and landowners in the vicinity of the two proposed high density subdivisions at issue in this case that threaten to continue a pattern of permanent and detrimental impact to this historical minority community.

21. Plaintiff, Keep It Green, Inc., (hereinafter "KIG"), is a nonprofit corporation organized and existing under the laws of the State of South Carolina, having an address of P.O. Box 3312, Pawleys Island, Georgetown County, South Carolina. Affidavit signed by Duane Draper, Chairman of KIG and resident of Pawleys Island, is attached hereto as Exhibit "6," and incorporated herein by reference.

22. Plaintiff, Preserve Murrells Inlet, Inc., (hereinafter "PMI"), is a nonprofit corporation organized and existing under the laws of the State of South Carolina, having an address of 4510 Richmond Hill Drive, Murrells Inlet, Georgetown County, South Carolina. Affidavit signed by Leon L. Rice, III, President of PMI and resident of Murrells Inlet, is attached hereto as Exhibit "7," and incorporated herein by reference.

23. KIG and PMI are citizens' organizations comprised of thousands of residents of the Waccamaw Neck, Georgetown County, South Carolina, who are concerned about the impact of land use decisions, zoning changes, increased residential density, and inappropriate development on traffic, flooding, environment, overburdened infrastructure, natural character, quality of life, and other matters of safety and general welfare in the Waccamaw Neck.

24. The Waccamaw Neck is a part of northeast Georgetown County defined by its unique geographic configuration as a long narrow peninsula between the Atlantic Ocean and the Waccamaw River that includes the areas of Parkersville, Pawleys Island, Litchfield, North Litchfield, Murrells Inlet and Garden City.

25. KIG primarily focuses on the southern Waccamaw Neck (Parkersville, Pawleys Island, Litchfield, North Litchfield) and PMI primarily focuses on the northern Waccamaw Neck (Murrells Inlet & Garden City).

26. Part of the missions of KIG and PMI involves monitoring county land use decisions, zoning change requests, and proposed development in the Waccamaw Neck for compliance with proper law, procedure, and the Georgetown County Comprehensive Plan for the purpose of protecting and preserving the land, quality of life, and natural character of the Waccamaw Neck for the benefit of present and future generations.

27. KIG and PMI began as grassroots responses by citizens of the Waccamaw Neck to a number of zoning changes, approved and/or recommended for approval by Georgetown County, that increased residential density in conflict with the Georgetown County Comprehensive Plan and had a negative impact on the safety and general welfare of citizens and surrounding landowners.

28. Parkersville PDA, KIG and PMI are nonprofit corporations that are independent of one another and managed by separate volunteer Boards of Directors.

29. Parkersville PDA, KIG, and PMI represent the interests of thousands of citizens of the Waccamaw Neck, hundreds of whom reside in the vicinity of the Petigru and Parkersville Parcels.

30. Parkersville PDA, KIG, and PMI represent the interests of the named Plaintiffs herein as well as other adjoining landowners or landowners who reside in the immediate vicinity of the Petigru and Parkersville Parcels or other areas of the Waccamaw Neck where zoning is not in compliance with the comprehensive plan as set forth hereinafter, and who would have standing to challenge these and other decisions.

Defendants

31. Defendant Georgetown County (hereinafter "County"), 129 Screven Street, Georgetown, South Carolina, is one of the forty-six counties of the State of South Carolina and is a body politic incorporated pursuant to the South Carolina Constitution, Article VII, Sec. 9, South Carolina Code Ann. § 4-1-10 (Supp. 2015).

32. Defendant Georgetown County is comprised of and/or controls the Georgetown County Council, the Georgetown County Planning Commission and the Georgetown County Planning Department, its agents, representatives and employees.

33. Defendant, Laine CRE, LLC, a/k/a, Laine Commercial Real Estate, is a limited liability company organized and existing under the laws of the State of South Carolina, having a business address of 835 Lowcountry Boulevard, Mount Pleasant, SC 29464, and a registered agent address of 1676 Jorrington Street, Mount Pleasant, SC 29464.

34. Defendant, TriStar Land, LLC, is a limited liability company organized and existing under the laws of the State of South Carolina, having a registered agent address of 665 Cornerstone Court, Charleston, SC 29464.

35. Defendant, Samuel J. Nesbit, on behalf of the heirs' of Will Nesbit, owners of the Petigru and Parkersville parcels, is an adult individual residing at 6201 Rosebud Street, Columbia, South Carolina.

36. At all times pertinent hereto, Defendants Laine CRE, LLC and/or Defendant TriStar, LLC, were the authorized agents and representatives of Samuel J. Nesbit and the heirs of Will Nesbit.

BACKGROUND

Major Subdivision Applications

37. Upon information and belief, in or around early 2022, Defendant Laine CRE, LLC, and/or TriStar Land, LLC, hereinafter "Developers" entered into a contract with the Nesbit heirs to purchase both the Petigru and Parkersville Parcels, contingent upon approval of applications for land development projects.

38. Upon information and belief, Developers hired Development Resource Group, LLC, (hereinafter "DRG"), an engineering and development consulting firm, to draw plans on their behalf for projects on the Petigru and Parkersville parcels.

39. A letter of agency dated June 13, 2022, was signed by Samuel J. Nesbit on behalf of the Nesbit heirs authorizing DRG to submit land development applications for each of the two parcels on behalf of Developers.

40. On July 19, 2022, DRG submitted two subdivision applications on behalf of Developers requesting approval for a total of 109 high density multi-family townhouse units on the two parcels.

41. The Petigru application requested 53 two-story, three-bedroom, multi-family townhouse units with streets, driveways, sidewalks, and parking areas on 6.2 acres with a net residential density of 8.55 units per acre, and a proposed name of "Regatta Townhomes." Said application is attached hereto as Exhibit "8," and incorporated herein by reference.

42. The Parkersville application requested 56 two-story, three-bedroom, multi-family townhouse units with streets, driveways, sidewalks and parking areas on 7.9 acres with a net residential density of 9.84 units per acre, and a proposed name of "Osprey Townhomes." Said application is attached hereto as Exhibit "9," and incorporated herein by reference.

Comprehensive Plan and Maps
Designate Parcels as Medium Density

43. The current version of the Georgetown County Comprehensive Land Use Plan and Future Land Use Maps was enacted by County Council on March 10, 2015, by Georgetown County Ordinance number 2015-05, and the maps specifically designate both the Petigru and the Parkersville parcels as "Medium Density."

44. The Petigru parcel has eight adjoining parcels of land on three sides, all of which are owned or represented by Plaintiffs herein, designated by the comprehensive plan and maps as "medium density" residential, and consist of single family homes or vacant land.

45. The Parkersville parcel has eleven adjoining parcels of land on two sides, all of which are owned or represented by Plaintiffs herein, designated by the comprehensive plan and maps as "medium density" residential, and consist of single family homes or vacant land. The land directly across Parkersville Road from this parcel is designated as "low density" residential. The far end of this parcel abuts four small lots that lie along the west side of the U.S. Route 17 corridor and are designated by the comprehensive plan as commercial which allows for no residential density.

46. The historical Parkersville residential community is and always has been characterized by single family homes along narrow, often unpaved, tree-lined streets in low to medium density neighborhoods. The residential areas of the traditional Parkersville community are designated by the comprehensive plan and maps as "low density" or "medium density."

47. The comprehensive plan defines “Medium Density” as a maximum of 5 units per acre, “Low Density” as a maximum of 2 units per acre, and “High Density” as anything above 5 units per acre.

Zoning & Land Development Regulations
Most Restrictive Applies

48. At all times pertinent hereto, both the Petigru and Parkersville parcels were zoned as General Residential (hereinafter “GR”).

49. The GR District (Georgetown County Zoning Ordinance, 607) permits a range of residential uses and a range of residential densities.

50. The GR ordinance specifically states that it is appropriate for both medium or high density projects and that those projects

> “should be designed to insure preservation of the critical areas, to be compatible with the existing development and to discourage any encroachment of commercial, industrial or other uses capable of adversely affecting the charm and residential character of this district.”

51. In determining the maximum permissible residential density on a particular parcel within a GR Zoning District, the provisions of all applicable land use regulations should be considered, including but not limited to:

a. The residential density permitted by the comprehensive plan and land use maps which have been enacted by Georgetown County Ordinance 2015-05;

b. The conditions and limitations set forth within the GR zoning ordinance itself, including proposed use, design, and setback requirements; and

c. The requirements of other applicable laws, ordinances, and/or development regulations.

52. According to Georgetown County zoning and land development ordinances, when there is a conflict between or among zoning or land development ordinances, the most restrictive applies.

53. Section 1800 of the Georgetown County Zoning Ordinance provides:

> "in case of conflict between this Ordinance or any part thereof, and the whole or part of any existing or future ordinance of the County of Georgetown, the most restrictive shall in *all* cases apply."

54. Article I, Section 10, of the Georgetown County Development Regulations states:

> "Whenever this Ordinance imposes a higher standard than that required by other resolutions, ordinances, rules or regulations, easements, covenants or agreements, the provisions of this Ordinance shall govern. When the provisions of any other statute impose higher standards, the provisions of such statute shall govern.

55. In the present case, the Comprehensive Land Use Plan and maps designate residential density on the Petigru and Parkersville parcels, all adjoining residential land, and all other residential land in this neighborhood as either "low density" or "medium density" which limits density to a maximum of two units per acre or five units per acre, respectively. As the most restrictive regulation, the medium density limitation on the Petigru and Parkersville parcels restricts density on these two parcels to a maximum of 5 units per acre.

56. The current version of the Land Use Element of the Comprehensive Plan was adopted in 2015, and states as follows at Page 23 with respect to residential density and Land Use Goals for the South Waccamaw Neck.

> "The overriding issue in the Pawleys-Litchfield area is population density. The general concept of allowing higher density to prevent sprawl is no longer applicable in this area. The key now is to limit the number of new residential units that are added so that the impacts of additional development (i.e. increased traffic congestion, increased storm water runoff, greater pressures on our overall infrastructure) are minimized as much as possible."

South Carolina State Law Requires Zoning & Land Use Regulations to be Consistent with the Comprehensive Plan

57. The South Carolina Planning Act, Section 6-29-720(A), provides that the purpose of a zoning ordinance is to "implement the comprehensive plan."

58. Planning Act, Section 6-29-720(B), specifically requires that zoning regulations

> "must be made in accordance with the comprehensive plan for the jurisdiction ... ."

59. Planning Act, Section 6-29-540, requires that no new development should be permitted "until the location, character, and extent of it have been submitted to the planning commission for review and comment as to the compatibility of the proposal with the comprehensive plan of the community."

South Carolina State Law Requirements for Land Development Decisions

60. Article 7 of the South Carolina Planning Act, Section 6-29-1110, *et seq.*, governs land development regulations and sets forth definitions as well as procedures for local governments to follow in regulating land development within their jurisdictions.

61. One of the specifically articulated legislative intents of Article 7 is to "assure" that proposed development is "in harmony with the comprehensive plan" of the municipality or county. (Planning Act, Section 6-29-1120(5)).

62. Planning Act, Section 6-29-1150, sets forth detailed procedures and requirements for the submission of development plans for approval or disapproval and specifically confers authority for making decisions to approve or disapprove on the Planning Commission or designated staff. Staff decisions are appealable to the Planning Commission and Planning Commission decisions are appealable to the circuit court.

63. The Planning Act grants no authority to County Council to approve or disapprove a land development application, or to review, modify, or reverse a decision of the Planning Commission relative to a land development application.

64. The sole process for review, modification, or reversal of a Planning Commission approval or disapproval of a land development application is by appeal to the circuit court within thirty (30) days after mailing of the Notice of Decision.

Planning Commission
Denied Subdivision Applications

65. The Georgetown County Planning Commission held a public hearing on the Petigru and Parkersville subdivision applications on August 18, 2022.

66. Prior to the public hearing, the public record included numerous letters of opposition from residents, including a detailed letter dated August 18, 2022, from legal counsel on behalf of Plaintiffs and other citizens, outlining the objections that form the basis of this complaint. A copy of this letter is attached hereto as Exhibit "10," and incorporated herein by reference. There were no letters supporting approval of the applications.

67. Numerous residents and adjoining landowners, including Plaintiffs, attended the Planning Commission public hearing to express their opposition. Legal counsel for adjoining landowners and 19 other citizens spoke on the record. No one spoke in favor of the subdivision applications other than the Developers' agent.

68. After public hearing, the Planning Commission voted to deny both applications, citing a variety of reasons including inconsistency with the comprehensive plan.

69. No appeal of the August 18, 2022, Planning Commission decisions to deny was filed by the applicant Developers.

County Council Improperly
Reviewed and Approved Applications

70. Following denial by Planning Commission, the subdivision applications were placed on the county council agenda for September 27, 2022, under the heading "Reports to Council" as agenda items 14(a) and 14(b), "site plan reviews," pursuant to Georgetown County ordinances requiring site plan decisions of the Planning Commission to be approved by County Council. A copy of the September 27, 2022, County Council agenda is attached hereto as Exhibit "11," and incorporated herein by reference.

71. As set forth hereinabove, County Council did not have authority under the Planning Act to approve or disapprove these land development applications, or to review, modify, or reverse the August 18, 2022, decision of the Planning Commission.

72. The Georgetown County ordinances requiring site plan decisions of the Planning Commission to be approved by County Council do not articulate any standards by which the County Council should decide to approve or disapprove the decision by Planning Commission.

73. These ordinances are invalid and unreasonable because they reserve to County Council arbitrary power without the guidance of uniform rules and regulations.

74. The ordinances are invalid and unenforceable as violating the Planning Act and other law.

75. The ordinances are invalid and unenforceable because they violate the doctrine of separation of powers.

76. Placing the Petigru and Parkersville subdivision applications on the council agenda pursuant to these ordinances was improper and any decision rendered by Council thereunder is void and of no effect.

77. Prior to the September 27, 2022, council meeting, numerous letters of opposition were received , including a letter dated September 26, 2022, by legal counsel for Plaintiffs and other residents outlining the objections that form the basis of this complaint. A copy of said letter is attached hereto as Exhibit "12," and incorporated herein by reference. There were no letters in support.

78. Numerous residents attended the meeting to express their opposition, and legal counsel for adjoining landowners along with members of the community spoke in opposition.

79. The Georgetown County Planning Department submitted an "Agenda Request Form" to Council which contained, *inter alia*, "Points to Consider" for each of the two subdivision applications. Said Agenda Request Forms are attached hereto as Exhibits "13," and "14," respectively, and incorporated herein by reference.

80. The Planning Department offered oral presentations at the council meeting based on the Agenda Request Forms.

81. Minor modifications had been made to the site plans between the time they were denied by Planning Commission and the September 27, 2022, council meeting; however, both subdivision applications remained "high density" developments proposed on parcels designated as "medium density" by the comprehensive plan.

82. The Planning Department in both the Agenda Request Forms and the oral presentations at the County Council meeting omitted and/or failed to objectively set forth important and relevant facts including, but not limited to, the following:

a. Failed to note inconsistencies of the proposed developments with the Comprehensive Plan including that these applications requested "High Density" on parcels designated by the comprehensive plan and maps as "Medium Density."

b. Failed to note that all 19 adjoining residential parcels are designated by the comprehensive plan and maps as “Medium Density,” and the land across the street from the Parkersville parcel is designated as “Low Density.”

c. Failed to note that the entire Parkersville residential community is designated by the comprehensive plan and maps as “Medium Density” or “Low Density.”

d. In calculating permissible density, considered only the requirements of the GR zoning ordinance and failed to consider the requirements of the comprehensive plan and land use maps and other land development regulations, or Zoning Ordinance 1800, or Land Use Regulation Article I, Section 10, which requires application of the most restrictive regulation.

e. Failed to note that existing infrastructure in the Parkersville community is currently overburdened, beyond design capacity, and grossly inadequate to accommodate additional high density development.

f. Failed to consider reliable, accurate, up-to-date, traffic data or require impartial independent traffic studies, and instead relied on traffic data that was substantially outdated in an area that has experienced significant increase in population and traffic.

g. Failed to note serious flooding and stormwater issues that currently exist on neighboring properties and in the Parkersville community in general.

h. Failed to provide any information on the amount of fill to be brought in and the impacts of that fill on adjacent properties already subject to frequent flooding.

i. Failed to consider the cumulative negative impact of incremental development approvals on the neighborhood and community.

j. Failed to provide accurate, reliable, objective and impartial information for consideration by the governing authority and instead provided information based on outdated data and slanted to favor the Developers.

83. After the Planning Department made its presentation to council, one of the six council members noted that the two subdivision applications did not comply with the Comprehensive Plan and map designation as "Medium Density" and suggested that zoning and land development should "mirror the comprehensive plan." Other council members disagreed and sought advice and direction of the County Attorney and the Planning Director in resolving the issue.

84. Council was advised that the sole consideration was compliance of the applications with the GR zoning ordinance and that the comprehensive plan and maps were not to be considered.

85. The Planning Director specifically represented in response to questions by council that "the site plan, in terms of density ... as it's laid out, meets the requirements of our ordinances."

86. Neither the Planning Director nor the County Attorney addressed other applicable law, including Georgetown County Zoning Ordinance, Section 1800, or Land Use Regulation, Article I, Section 10, which requires application of the most restrictive land development regulations.

87. Council members clearly did not understand the parameters of the decision they were charged with making. In the course of Council's discussion based on the advice and representations of the Planning Director and the County Attorney, the Chairman of County Council stated that if a plan has complied with all the regulations that have been set forth by the

County, "why does it come in front of Council?" Another council member remarked on two occasions that, "I don't think we have a choice, but to approve this plan." Two council members stated that they believed the developer had "vested rights" that needed to be protected.

88. County Council voted 5 to 1 to approve the Petigru and Parkersville subdivision applications based on the guidance of the County Attorney and Planning Director which Plaintiffs believe to be erroneous as follows:

a. The comprehensive plan and comprehensive plan map designation of the parcels, which had been put into place by Georgetown County Ordinance 2015-05, were deliberately <u>not</u> taken into consideration.

b. The sole consideration was compliance of the applications with the GR zoning ordinance, notwithstanding their conflict with the comprehensive plan and maps, and regardless of other applicable law including Georgetown County Zoning Ordinance, Section 1800, and Land Development Regulation, Article I, Section 10, requiring application of the most restrictive land development regulations.

c. "Vested rights" of the Developers in the GR zoning ordinance was considered as a legitimate factor in this decision notwithstanding that the applicant Developers had not yet purchased the land in question and that neither the owners (Nesbit heirs) nor the Developers had any <u>approved</u> development plan or pre-existing nonconforming use that would trigger a vested right.

89. Even if council had possessed the authority to hear and make decisions on these Subdivision Applications, which is specifically denied, the details, substance, and merits of the plans and their compliance or noncompliance with the GR ordinance and other land development regulations were not addressed or considered by Council in any way.

90. In addition to the failure of the applications to comply with the comprehensive plan, there were numerous substantive areas of noncompliance with the GR ordinance and other ordinances, including but not limited to:

a. GR Zoning Ordinance, 607.3:

"The minimum lot area for a multi-family project shall be at least one acre. The minimum lot frontage shall be at least 150 feet of frontage on an approved street. The lot depth shall be no greater than three (3) times the lot width."

b. GR Zoning Ordinance, 607.4021:

"The front of the buildings shall not form long, unbroken lines of row housing, but shall be staggered at the front building lines;"

c. GR Zoning Ordinance, 607.4022:

"No more than six (6) contiguous townhouses nor fewer than three (3) shall be built on a row;"

d. GR Zoning Ordinance, 607.40255:

"[Multi-family] projects shall also comply with all other applicable ordinances ... ."

e. Land Development Regulations, Article II, Section 2-2(A):

"All required federal, and state permit applications shall be pending prior to submission of the Development Plat to the Planning Commission."

Upon information and belief, there is a federally protected bald eagle's nest on this property that requires no disturbance within a certain radius and requires federal permits that were not requested or received or pending as of the date of this application.

f. Other state and local laws require wise distribution of development to avoid congestion and overcrowding and to protect the public health, safety, and general welfare of the community. This includes stormwater, flooding, traffic, tree protection, safety and other considerations, and assuring compatibility of the proposed development with the character of the neighborhood.

91. The decisions by Council and the underlying instructions which formed the basis of the decisions, are in direct conflict with the plain language of the South Carolina Planning Act, the South Carolina Vested Rights Act, 6-29-1510, *et seq.*, and Georgetown County Land Development Regulations as follows:

a. New high density development was approved without considering its compatibility with the comprehensive plan in violation of Planning Act, Section 6-29-540, which provides that no new development should be permitted "until the location, character, and extent of it have been submitted to the planning commission for review and comment as to the compatibility of the proposal with the comprehensive plan of the community," and Section 6-29-720 which provides that zoning regulations are intended to "implement the comprehensive plan" and that they "must be made in accordance with the comprehensive plan for the jurisdiction."

b. South Carolina Vested Rights Act and local law require an approved plan or a pre-existing nonconforming use in order to trigger a vested right, neither of which existed in the present case.

c. Development was approved as complying with the GR zoning ordinance when details of the plans were not even considered by Council and do not, in fact, comply with the GR zoning ordinance.

d. Development was approved without applying uniform standards or considering other applicable law.

92. The decisions by Council to approve the subdivision applications were unauthorized, without any basis or justification in law or fact, and in violation of state and local law and procedure.

93. The decisions by council to allow high density development on land designated as medium density by the comprehensive plan and maps that are put in place by Georgetown County Ordinance would set a precedent for allowing high density development on many acres of undeveloped land in Parkersville and other areas of the Waccamaw Neck that is designated medium or low density.

DUTIES OF GEORGETOWN COUNTY WITH RESPECT TO ZONING AND LAND DEVELOPMENT

94. Defendant Georgetown County through its agents, representatives, employees, elected officials, boards and appointed officials has the following duties and responsibilities pursuant to the South Carolina Planning Act and local law:

a. Duty to bring residential zoning ordinances and land development regulations into conformity with the current Georgetown County Comprehensive Plan as specifically required by Planning Act Sections 6-29-720 and 6-29-1120.

b. Duty to bring the decision-making processes in land development and zoning change requests into compliance with state law which requires review for compatibility with the comprehensive plan as a condition of approval pursuant to Planning Act Sections 6-29-540, 6-29-720, and 6-29-1120, and Georgetown County Planning Commission Bylaws, Article V, Section 2, which states that "[a]ll zoning and development regulation amendments *shall* be reviewed first for conformity with the comprehensive plan."

95. South Carolina Planning Act, Section 6-29-340, mandates that it is the "duty" of the local planning commission to put these processes into place for the benefit and welfare of the public which it serves.

96. The duties identified in paragraphs 94 and 95 above, shall collectively be referred to as "required duties."

97. The "Introduction" to the first Georgetown County Comprehensive Land Use Plan, adopted in August of 1997, by Georgetown County ordinance, which is still apparently in effect, specifically recognized that the Comprehensive Plan forms

> "the legal basis for existing and future land use ordinances. In order for local ordinances regulating land use to be valid, they must be adopted in accordance with a locally adopted plan ... [and] once the Plan is adopted, no [development] ... may be constructed or authorized ... until the location, character and extent of it have been submitted to the planning commission for review and comment as to the compatibility of the proposal with the comprehensive plan for the community." (page 1-4)
>
> "One of the most important implementation measures is the immediate preparation of revisions to the Georgetown County Zoning Ordinance. The adoption of the Comprehensive Plan represents the direction or "blueprint," but the actual governing laws and ordinances must change to reflect the goals and action items within the Plan. Once the Plan is adopted, the planning staff will immediately commence work on changes to the Zoning Ordinances." (page 1-5 and 1-6)

98. More than twenty-five years after this language was adopted by Georgetown County ordinance, zoning ordinances have still not been revised or changed to be in accordance with the comprehensive plan as required by the South Carolina Planning Act and the Georgetown County Comprehensive Plan itself.

Existing Zoning Ordinances
Conflict with Comprehensive Plan

99. To the extent that the GR zoning ordinances on the Petigru and Parkersville parcels permit high density land development on land designated by the comprehensive plan and

maps as "Medium Density," the zoning ordinances are in direct conflict with the comprehensive plan.

100. There are many existing zoning ordinances on parcels of land in the Waccamaw Neck that are in direct conflict with the comprehensive plan as they relate to residential density.

101. Under both state and local law, these conflicting zoning ordinances should have been brought into compliance with the comprehensive plan immediately upon its enactment. Instead, conflicting zoning ordinances have been permitted to exist, in some cases for many decades, despite their inconsistency with the comprehensive plan and maps.

102. The county's failure to perform its duty to bring residential zoning ordinances into compliance with the comprehensive plan has caused injury to the Plaintiffs herein, and put Plaintiffs and every other land owner in the Waccamaw Neck at risk of imminent harm and serious injury.

103. The county has repeatedly approved development pursuant to these conflicting zoning ordinances notwithstanding their inconsistency with the comprehensive plan density limitations.

104. These approvals have negatively affected the property rights of many land owners in the Waccamaw Neck.

105. Conflicting zoning ordinances and land use decisions are more prevalent in minority communities and have had a discriminatory impact on the minority population living in these communities.

Land Use Approval Process

106. In making zoning and land development decisions, Georgetown County does not consider compatibility with the comprehensive plan as a necessary part of the process.

107. There are many instances of approval of land development and zoning changes on the Waccamaw Neck that were inconsistent with density and other provisions of the comprehensive plan and maps. These approvals have negatively affected the property rights and caused injury to many land owners in the Waccamaw Neck.

108. Approval of zoning changes and land development that conflicts with the comprehensive plan are more prevalent in minority communities and have had a discriminatory impact on the minority residents of these communities.

<u>Georgetown County Refuses to Comply</u>

109. Georgetown County has repeatedly been requested by Plaintiff organizations and citizens to bring its zoning ordinances and land use approval processes into compliance with the comprehensive plan as required by the South Carolina Planning Act.

110. A letter dated September 2, 2022, attached hereto as Exhibit "15," and incorporated herein by reference, was directed to Georgetown County by legal counsel for Plaintiff organizations and citizens specifically requesting compliance. Georgetown County has neither acknowledged nor responded to the letter.

111. At all times pertinent hereto, Georgetown County has failed and/or refused to perform the required duties as set forth herein.

112. Georgetown County's continued failure and refusal to perform its required duties has caused harm and created a risk of imminent and future injury to Plaintiffs and other land owners in the Waccamaw Neck.

113. Georgetown County's continued failure and refusal to perform its required duties has had a substantially greater negative impact on minority neighborhoods and minority land owners.

114. Georgetown County's continued failure and refusal to perform its required duties sets a precedent for allowing development that does not conform to the comprehensive plan and maps.

115. Plaintiffs request that Georgetown County immediately bring the zoning of the Petigru and Parkersville parcels as well as all other non-compliant zoning and decision-making processes into compliance with the comprehensive plan and the South Carolina Planning Act.

JURISDICTION, STANDING AND VENUE

116. Paragraphs 1 through 115, above, are incorporated by reference as though fully set forth herein.

117. This court has jurisdiction to hear these claims arising under the South Carolina Uniform Declaratory Judgments Act, South Carolina Comprehensive Planning Enabling Act, the common law of South Carolina and other law.

118. Venue is proper in Georgetown County as the property in question is situated in Georgetown County and all pertinent actions took place in Georgetown County.

119. Plaintiffs have statutory standing to challenge these ordinances as follows:

a. South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann., Section 15-53-30, states

> "[a]ny person ... whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

Plaintiffs' rights and legal relations have been and are substantially affected by the County Council decisions of September 27, 2022, the Planning Commission decisions of August 18, 2022, Georgetown County's Zoning Ordinances, Land

Development Regulations and Comprehensive Plan, and the South Carolina Planning Act. Plaintiffs have standing to ask the court to determine rights, status, validity and other legal relations with regard to these statutes, ordinances and decisions.

b. South Carolina Comprehensive Planning Enabling Act, S.C. Code Ann., Section 6-29-1150 and 6-29-1155, states that any party in interest may appeal land development decisions. Rule 74, SCRCP ("Procedure on Appeal to the Circuit Court") governs appeals from "an inferior court or decision of an administrative agency or tribunal" to circuit court. Plaintiffs are parties in interest under the Planning Act.

120. Alternatively and in addition, Plaintiffs have constitutional standing pursuant to Article III of the United States Constitution inasmuch as (a) they have suffered an injury by virtue of land use decisions with respect to property that directly adjoins land owned by them or by someone they represent; (b) the injury was caused by the improper approval of subdivision applications and Georgetown County's failure and refusal to perform required duties; and (c) the injury is redressable by a favorable decision of this court declaring that the approval of the subdivision applications by County Council is improper, null and void, and requiring Georgetown County to perform its required duties.

121. Alternatively and in addition, Plaintiffs have standing to challenge these ordinances pursuant to the public importance doctrine inasmuch as the decision in this case has potentially far-reaching, widespread, devastating and irreversible negative impact on the public welfare by serving as a precedent for similar land development decisions that would impact many acres in the Waccamaw Neck, and future guidance by this court is necessary to determine

the validity of Georgetown County's repeated disregard of the requirements of the South Carolina Planning Act and the Comprehensive Plan in the Waccamaw Neck.

122. Plaintiffs Parkersville PDA, KIG, and PMI have associational standing as follows: (a) at least one of the parties represented is an affected person who has standing in his or her own right; (b) the interests at stake are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual landowners and monetary damages are not being requested. Plaintiffs Parkersville PDA, KIG, and PMI represent the interests of the named Plaintiffs as well as other affected persons who own adjoining land or reside in the vicinity of the Petigru and Parkersville parcels and other land where zoning is not in compliance with the comprehensive plan or where land use decisions have been made that are not in compliance with the comprehensive plan. The issues in this case fall squarely within the mission and purpose of these citizens organizations as set forth above.

COUNT I

DECLARATORY JUDGMENT

Planning Commission Decisions to Deny Subdivision Applications on August 18, 2022, were Valid and Final

123. Paragraphs 1 through 122, above, are incorporated by reference as though fully set forth herein.

124. Pursuant to the provisions of the Uniform Declaratory Judgments Act, S.C. Code Ann., Section 15-53-10, *et seq*., Plaintiffs seek declaratory judgment from this Court that the August 18, 2022, Planning Commission decisions to deny these subdivision applications are the valid, proper, and final decisions as follows:

a. The South Carolina Planning Act 6-29-1150 confers final decision-making authority on subdivision applications to Planning Commission whose decisions are appealable to the circuit court.

b. Planning Commission properly voted to deny the subdivision applications after public hearing on August 18, 2022.

c. The sole process for review, modification, or reversal of a Planning Commission approval or disapproval of a land development application is by appeal to the circuit court within thirty (30) days after mailing of the Notice of Decision.

d. No appeal was taken by the applicant Developers from this decision as provided in the Planning Act, and this decision stands as the final, valid and binding decision.

COUNT II

DECLARATORY JUDGMENT

County Council Had No Authority to Render the September 27, 2022, Decisions Approving Subdivision Applications

125. Paragraphs 1 through 124, above, are incorporated by reference as though fully set forth herein.

126. Plaintiffs seek declaratory judgment from this Court that the September 27, 2022, County Council decisions to approve the Petigru and Parkerville subdivision applications are null, void, and of no force or effect as follows:

a. The Planning Act grants no authority to County Council to approve or disapprove land development applications or to review, modify, or reverse decisions of the Planning Commission relative to land development applications.

b. The sole process for review, modification, or reversal of a Planning Commission approval or disapproval of a land development application is by appeal to the circuit court within thirty (30) days after mailing of the Notice of Decision.

c. County Council's approval of a site specific development plan violates the separation of powers doctrine.

COUNT III

DECLARATORY JUDGMENT

Georgetown County Ordinances Requiring Site Plan Review by
County Council are Void and Unenforceable

127. Paragraphs 1 through 126, above, are incorporated by reference as though fully set forth herein.

128. Plaintiffs seek declaratory judgment from this Court that the Georgetown County ordinances requiring site plan decisions of the Planning Commission to be approved by County Council for proposed developments are null, void, and of no force or effect.

COUNT IV

DECLARATORY JUDGMENT

The Approval of the Subdivision Applications
was a Violation of State and County Law

129. Paragraphs 1 through 128, above, are incorporated by reference as though fully set forth herein.

130. Plaintiffs seek declaratory judgment from this Court that even if Council had authority to make decisions on the subdivision applications, the September 27, 2022, decisions to approve are null, void, and of no force or effect as follows:

a. The approval of development that conflicts with the comprehensive plan and maps violates the South Carolina Planning Act which requires development and zoning to be consistent with the comprehensive plan.

b. The approval of developments that violate county ordinance 2015-05 (comprehensive land use plan and maps) is improper, null, void and of no force or effect.

c. Development decisions that fail to take compatibility of the comprehensive plan into consideration violate the Planning Act which requires consideration of compatibility with the comprehensive plan.

d. The decisions failed to consider Zoning Ordinance 1800 and Land Development Regulations, Article I, Section 10, which requires application of the most restrictive regulation.

e. The decisions failed to consider whether the details of the subdivision plans actually complied with the GR ordinance.

f. The decisions failed to consider other applicable law.

COUNT V

DECLARATORY JUDGMENT

Georgetown County Has a Statutory Mandate to Bring Zoning Ordinances and Land Use Regulations Into Compliance with Comprehensive Plan

131. Paragraphs 1 through 130, above, are incorporated by reference as though fully set forth herein.

132. Plaintiffs seek declaratory judgment from this Court that Georgetown County has a statutory mandate to bring residential zoning ordinances and land development regulations, including the Petigru and Parkersville parcels, into conformity with the current Georgetown

County Comprehensive Plan as specifically required by Planning Act, Sections 6-29-720 and 6-29-1120.

COUNT VI

DECLARATORY JUDGMENT

Georgetown County Has a Statutory Mandate to Consider Compliance with Comprehensive Plan in Decision Making Processes

133. Paragraphs 1 through 132, above, are incorporated by reference as though fully set forth herein.

134. Plaintiffs seek declaratory judgment from this Court that Georgetown County has a statutory mandate to bring its zoning and land development decision-making processes into compliance with state law which requires review for compatibility with the comprehensive plan as a condition of approval pursuant to Planning Act Sections 6-29-540, 6-29-720, and 6-29-1120, and Georgetown County Planning Commission Bylaws, Article V, Section 2, and the language of the Georgetown County Comprehensive Plan Introduction, and other applicable law.

COUNT VII

APPEAL OF COUNTY COUNCIL DECISION

135. Paragraphs 1 through 134, above, are incorporated by reference as though fully set forth herein.

136. In the event this court finds that County Council had authority to render the September 27, 2022, decisions on the subdivision applications, Plaintiffs appeal these decisions for the reasons set forth hereinabove.

COUNT VII

ATTORNEYS FEES FROM GEORGETOWN COUNTY

137. Paragraphs 1 through 136, above, are incorporated by reference as though fully set forth herein.

138. Defendant Georgetown County acted without substantial justification with respect to the claims set forth herein and there is no special circumstance that would make the award of attorneys fees unjust. Citizens should not be forced to spend time and money or engage the services of attorneys in order to obtain the county's compliance with law.

139. S.C. Code 15-77-300 permits the award of attorneys fees in this circumstance.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request this Honorable Court to enter judgment in their favor as set forth herein, declare as follows that:

a. the September 27, 2022, County Council decision approving the subdivision applications is null, void and of no force or effect;

b. the Planning Commission decisions of August 18, 2022, denying the subdivision applications are the final, valid and binding decisions;

c. Georgetown County ordinances requiring approval by County Council of Planning Commission's decisions on land development applications are invalid, unenforceable, and of no force or effect;

d. Georgetown County has a statutory mandate to bring zoning ordinances into compliance with the comprehensive plan and to consider compliance with the comprehensive plan in its land use decision making processes;

e. Plaintiffs are entitled to costs and attorneys fees from Defendant Georgetown County; and

f. such other relief as the court deems just and appropriate.

Respectfully submitted,

/s/ Cynthia Ranck Person
Cynthia Ranck Person, Esquire (SC Bar #105126)

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ATTORNEY FOR PLAINTIFFS

October 24, 2022
Pawleys Island, South Carolina

South Carolina Bar

Continuing Legal Education Division

2024 SC BAR CONVENTION

Environment & Natural Resources Section/Administrative & Regulatory Committee

Friday, January 19

New Frontiers: Public Trust Doctrine, Beach Renourishment, and the Takings Clause

Mary Shahid
Amy Armstrong
Kelly D.H. Lowry

New Frontiers: Public Trust Doctrine, Beach Renourishment and the Takings Clause

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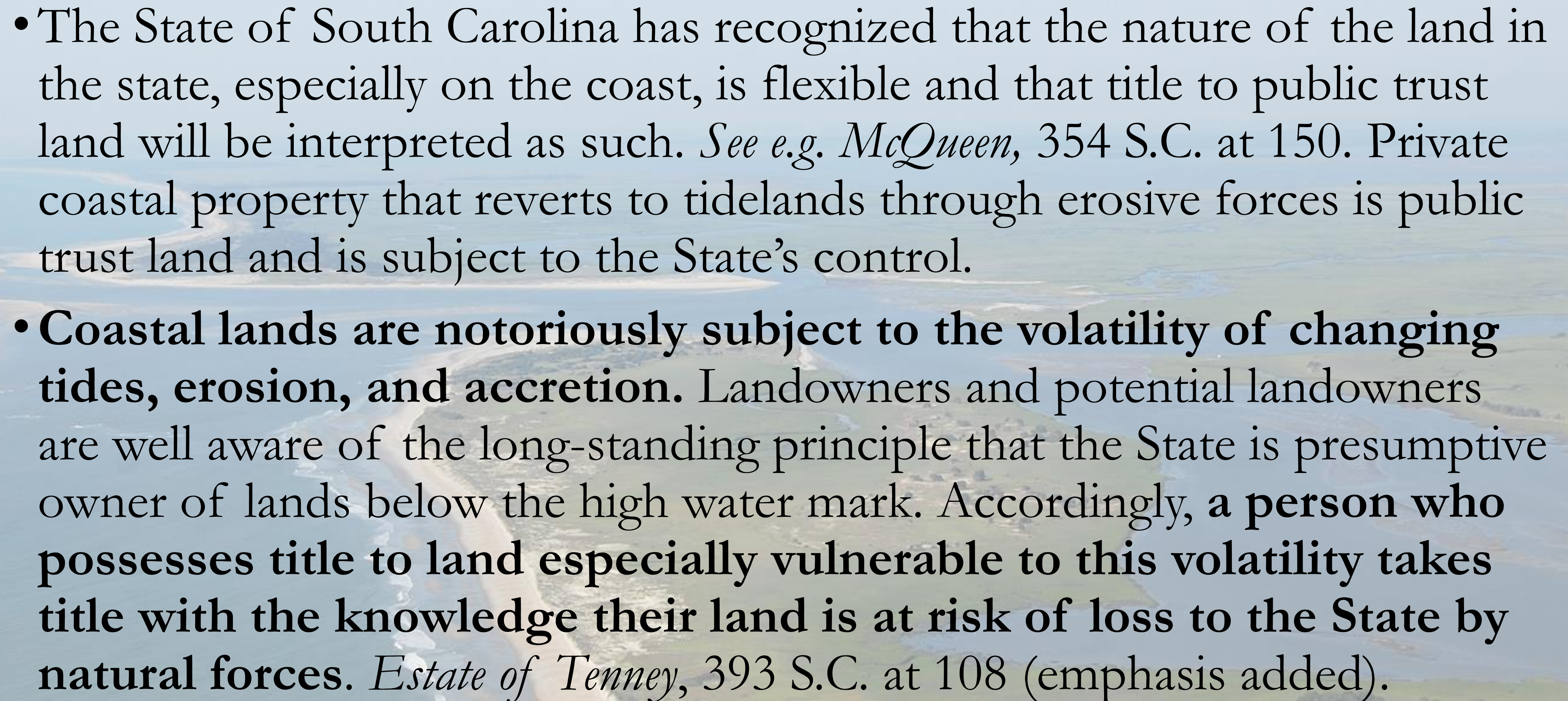
Public Trust Doctrine

- "All navigable waters shall forever remain public highways free to the citizens of the State and the United States." S.C. Const. Art. XIV § 4.
- South Carolina courts have long recognized the public trust doctrine and the responsibilities it places upon the State. *See e.g. Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 128 (1995); *McQueen v. S.C. Coastal Council*, 354 S.C. 142, 150 (2003); *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343 (2018).

- The S.C. Supreme Court has adopted *Illinois Central Railroad Company v. State of Illinois*, 146 U.S. 387 (1892), one of the earliest public trust doctrine cases of the Supreme Court of the United States, as authoritative. *See Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 128 (1995).
- In *Illinois* Central, the Court held that the **state holds title to land under navigable waters and soils under tide water.**
- The State has the exclusive right to control land below the high water mark for the public benefit, Port Royal Mining Co. v. Hagood, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." McQueen v. S. Carolina Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119-20 (2003) (citing Sierra Club v. Kiawah Resort Assocs., 318 S.C. 119, 456 S.E.2d 397 (1995)).

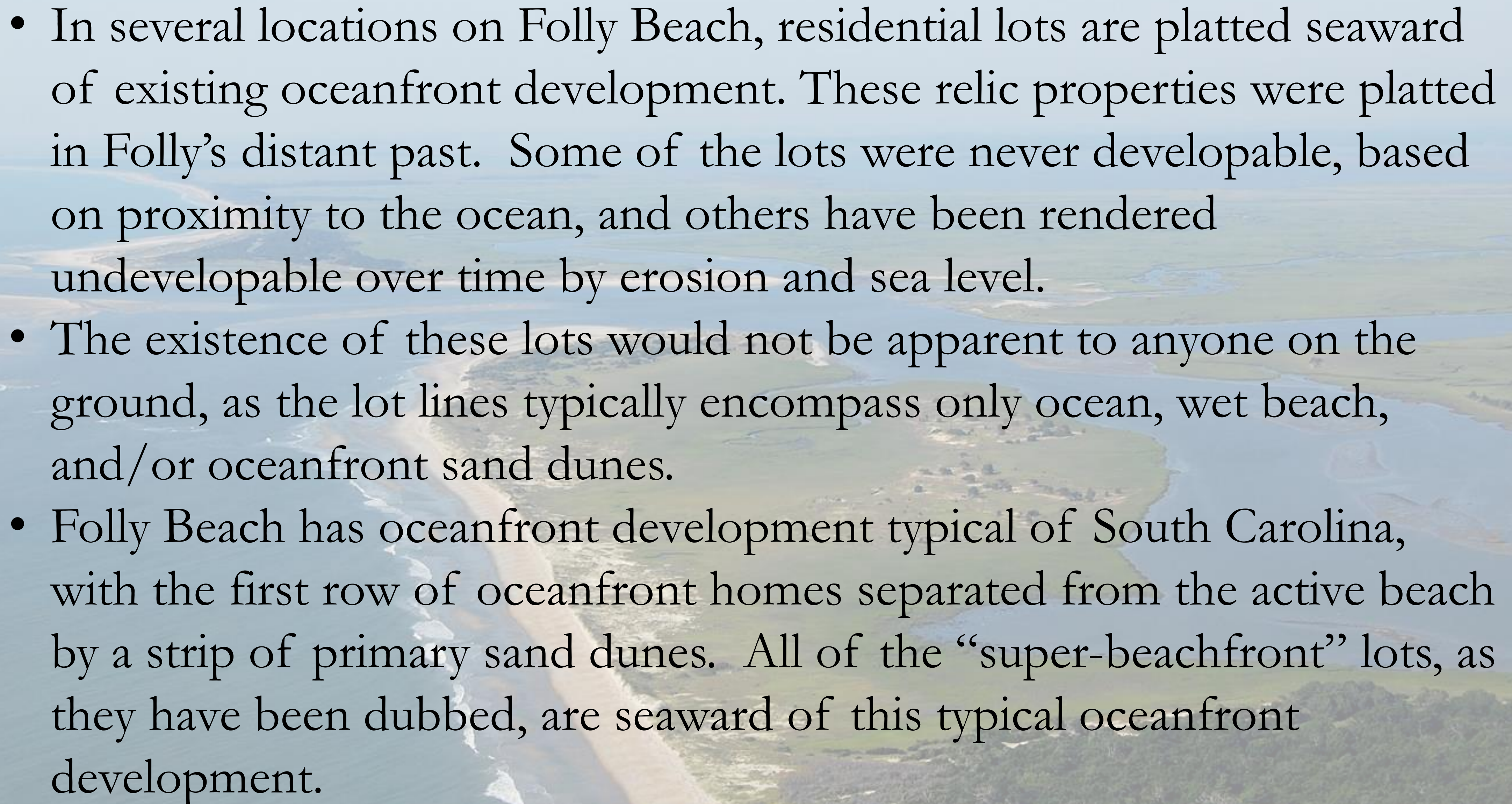
- Along the shoreline, the boundary between public trust property (land below the high water mark) and private property is not fixed. Rather, beachfront (littoral) property owners possess title to land especially vulnerable to erosion and take title "at risk of loss to the State by natural forces." <u>Estate of Tenney v. S.C. Dep't of Health & Envtl. Control</u>, 393 S.C. 100, 108, 712 S.E.2d 395, 399 (2011).
- Along a shoreline, the boundary between public waters/beach and private uplands is a dynamic boundary, which, by its very nature, frequently changes. Private parcels contiguous with the beach and ocean may contract and expand as the high water mark shifts. <u>See</u>, <u>McQueen v. S.C. Coastal Council</u>, 354 S.C. 142, 580 S.E.2d 116 (2003); <u>Hilton Head Plantation Prop. Owners' Ass'n, Inc. v. Donald</u>, 375 S.C. 220, 651 S.E.2d 614 (Ct. App. 2007).



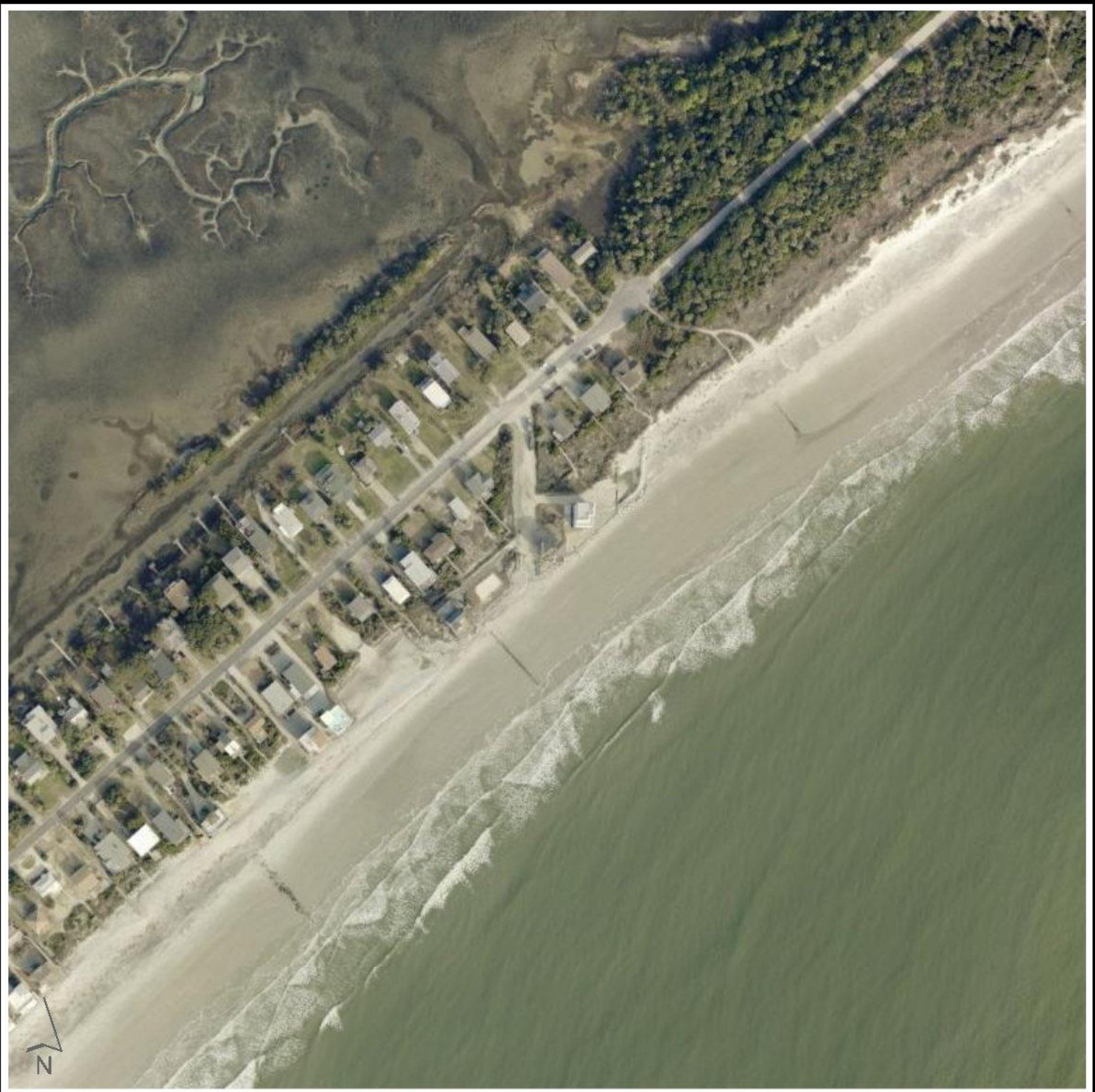
- The State of South Carolina has recognized that the nature of the land in the state, especially on the coast, is flexible and that title to public trust land will be interpreted as such. *See e.g. McQueen,* 354 S.C. at 150. Private coastal property that reverts to tidelands through erosive forces is public trust land and is subject to the State's control.
- **Coastal lands are notoriously subject to the volatility of changing tides, erosion, and accretion.** Landowners and potential landowners are well aware of the long-standing principle that the State is presumptive owner of lands below the high water mark. Accordingly, **a person who possesses title to land especially vulnerable to this volatility takes title with the knowledge their land is at risk of loss to the State by natural forces**. *Estate of Tenney*, 393 S.C. at 108 (emphasis added).

Law of Accretion and Erosion in South Carolina

- A riparian / littoral property owner who loses land to **erosion** loses ownership of what is submerged. Horry Cty. v. Woodward, 282 S.C. 366, 370 (Ct. App. 1984) ("[L]ands gradually encroached upon by water cease to belong to the former riparian or littoral owner. ... The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence.")
- A riparian property owner whose land grows on account of **accretion** gains ownership of the dry ground created. See Woodward, 282 S.C. 366 at 369 ("South Carolina recognizes the general common law rule that accretions by natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to.")



- In several locations on Folly Beach, residential lots are platted seaward of existing oceanfront development. These relic properties were platted in Folly's distant past. Some of the lots were never developable, based on proximity to the ocean, and others have been rendered undevelopable over time by erosion and sea level.
- The existence of these lots would not be apparent to anyone on the ground, as the lot lines typically encompass only ocean, wet beach, and/or oceanfront sand dunes.
- Folly Beach has oceanfront development typical of South Carolina, with the first row of oceanfront homes separated from the active beach by a strip of primary sand dunes. All of the "super-beachfront" lots, as they have been dubbed, are seaward of this typical oceanfront development.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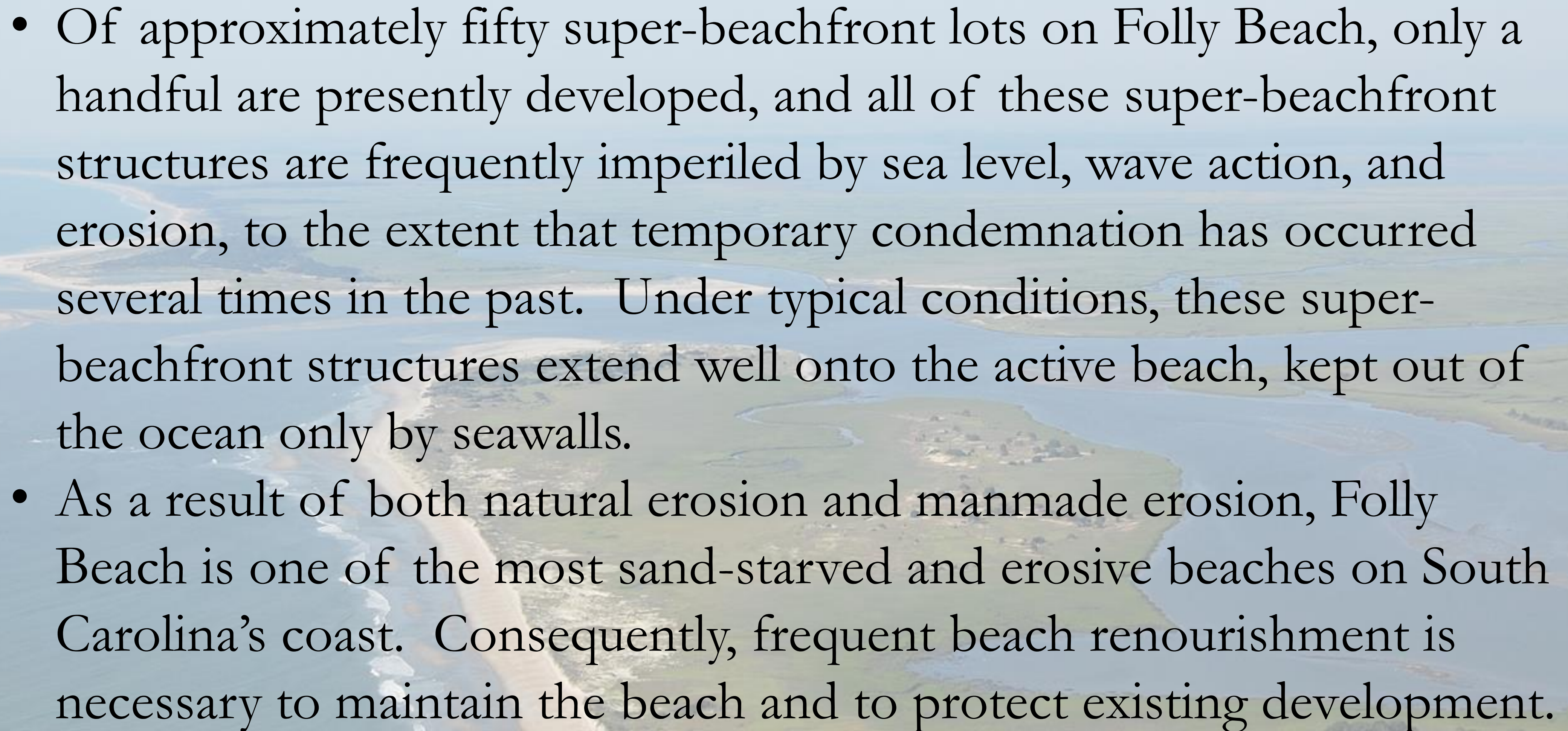
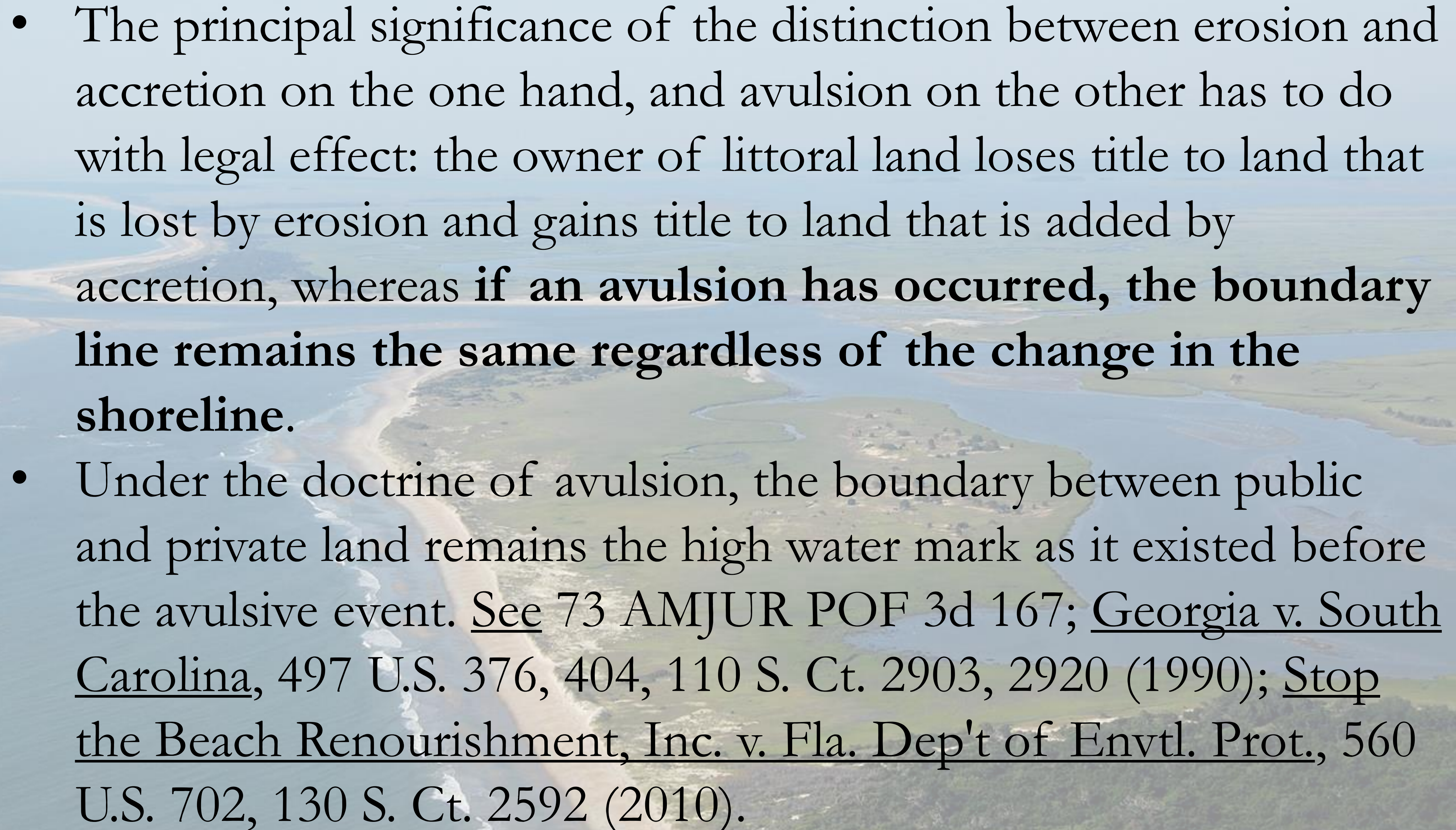


- Of approximately fifty super-beachfront lots on Folly Beach, only a handful are presently developed, and all of these super-beachfront structures are frequently imperiled by sea level, wave action, and erosion, to the extent that temporary condemnation has occurred several times in the past. Under typical conditions, these super-beachfront structures extend well onto the active beach, kept out of the ocean only by seawalls.
- As a result of both natural erosion and manmade erosion, Folly Beach is one of the most sand-starved and erosive beaches on South Carolina's coast. Consequently, frequent beach renourishment is necessary to maintain the beach and to protect existing development.

Avulsion

- Contrary to the gradual processes of accretion and erosion, avulsion is a "sudden and perceptible" loss of, or addition to, littoral land. 73 AMJUR POF 3d 167. Rather than occurring imperceptibly over time, avulsion happens as part of an observable one-off event, like a major storm or a sudden shift in stream bed. Georgia v. South Carolina, 497 U.S. 376, 404, 110 S. Ct. 2903, 2919 (1990); New Jersey v. New York, 523 U.S. 767, 118 S. Ct. 1726 (1998).



- The principal significance of the distinction between erosion and accretion on the one hand, and avulsion on the other has to do with legal effect: the owner of littoral land loses title to land that is lost by erosion and gains title to land that is added by accretion, whereas **if an avulsion has occurred, the boundary line remains the same regardless of the change in the shoreline**.
- Under the doctrine of avulsion, the boundary between public and private land remains the high water mark as it existed before the avulsive event. See 73 AMJUR POF 3d 167; Georgia v. South Carolina, 497 U.S. 376, 404, 110 S. Ct. 2903, 2920 (1990); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 130 S. Ct. 2592 (2010).

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