

NOTICE OF APPEAL FROM AN ADMINISTRATIVE TRIBUNAL

THE STATE OF SOUTH CAROLINA
In The Circuit Court

APPEAL FROM GREENVILLE COUNTY PLANNING COMMISSION

Steven Bichel, Chairman

Subdivision Application 2020-061

Northern Greenville County Rural Landowners,

Appellant,

v.

Greenville County Planning Commission and Vicars Construction, LLC

Respondents.

NOTICE OF APPEAL

Appellant appeals Greenville County Planning Commission approval of the Few's Crossing preliminary subdivision by vote on June 24, 2020.

July 24, 2020

s/ Michael Corley
SC Environmental Law Project
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Attorney for Appellant

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	
)	Case No. 2020-CP-23-_____
Northern Greenville County Rural)	
Landowners,)	
)	APPEAL FROM GREENVILLE COUNTY
Appellant,)	PLANNING COMMISSION
)	
vs.)	
)	
Vicars Construction, LLC and the)	
Greenville County Planning)	
Commission)	
)	
Respondents.)	
_____)	

Appellant Northern Greenville County Rural Landowners, complaining of Respondents, Greenville County Planning Commission and Vicars Constriction, LLC (“Vicars”), and appealing the Planning Commission’s decision to approve Vicars’ preliminary subdivision proposal entitled “Fews Crossing,” would respectfully show unto the Court as follows:

JURISDICTION AND PROCEDURAL HISTORY

1. Vicars proposes to subdivide and develop a property located along Fews Chapel Road in a rural section of northern Greenville County generally known as the Blue Ridge Community.

2. On June 24, 2020, Vicars’ proposed plan for Fews Crossing came before the Planning Commission. After discussion regarding density, flooding, vested rights, and the applicable legal standard, the Planning Commission voted 5-4 to approve the subdivision plat. (Approved plat attached as Exhibit A).

3. Undersigned, representing Northern Greenville County Rural Landowners,

submitted written comments prior to the June 24 meeting and offered oral comments at the meeting via zoom conference. Upstate Forever, a public interest environmental organization, also wrote and spoke in opposition to the subdivision.

4. South Carolina's Local Comprehensive Planning Enabling Act provides a right to appeal from Planning Commission decisions for any "party in interest," including the subdivision developer and opponents of the subdivision. See S.C. Code § 6-29-1150; Citizens for Quality Rural Living, Inc. v. Greenville Cty. Planning Comm'n, 426 S.C. 97 (Ct. App. 2019). Such appeal must be initiated "within thirty days after actual notice of the decision." S.C. Code § 6-29-1150.

5. This circuit court has jurisdiction over appeals from the Greenville County Planning Commission. See S.C. Code § 6-29-1150(D)(1).

6. Venue is proper in this Court, as the property at issue in this appeal is located within Greenville County.

PARTIES

7. Appellant Northern Greenville County Rural Landowners is a non-profit corporation organized in the state of South Carolina for the purpose of protecting and promoting rural land uses in the remaining lightly developed sections of northern Greenville County. Members of Appellant organization own property and reside in close proximity to the proposed Few's Crossing subdivision.

8. Appellant organization, through its members, has a significant interest in the outcome of the decision at issue here and has standing to bring this action on the basis of that interest.

9. Respondent Greenville County Planning Commission is an appointed local

planning commission as defined in the South Carolina Local Government Comprehensive Planning Enabling Act, S.C. Code § 6-29-310, *et seq.*, and was created pursuant to that legislation.

10. Respondent Vicars Construction, LLC is a business entity incorporated in South Carolina and doing business in Greenville County. Vicars is a necessary party to this appeal.

11. This Court has personal jurisdiction over the parties due to their location or activities in Greenville County.

STANDARD OF REVIEW

12. A Planning Commission decision “will not be upheld where it is based on errors of law, where there is no legal evidence to support it, where the board acts arbitrarily or unreasonably, or where, in general, the [commission] has abused its discretion.” Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997), cited in Kurschner v. City of Camden Planning Commission, 376 S.C. 165, 173-74, 656 S.E.2d 346, 351 (2008) (applying Zoning Board standard of review to a Planning Commission decision). Further, a decision of the planning commission will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).

GROUND FOR APPEAL

LDR Article 3.1

13. Pursuant to Greenville County’s Land Development Regulations (“LDR”), no plat of a subdivision shall be filed or recorded until it has been submitted to the Planning Commission and approved. LDR Article 1.1. Article 3.1 of the LDR provides the “Review Criteria” for proposed subdivisions and specifies that a subdivision may be approved only if it meets all criteria in the

Article.

14. As is particularly relevant here, Article 3.1 provides that a proposed subdivision must be consistent with surrounding land use density and with the surrounding environment:

Submitted developments may be approved if they meet all of the following criteria:

- Adequate existing infrastructure and transportation systems exist to support the project;
- The project is **compatible with the surrounding land use density**;
- The project is **compatible with the site's environmental conditions**, such as but not limited to, wetlands, **flooding**, endangered species and/or habitat, and historic sites and/or cemeteries.

Article 3.1 (emphasis added).

15. Article 3.1 has been the source of significant debate and attention over the last year, as a string of controversial subdivisions has been challenged on the basis of density and environmental compatibility, with some approved and others denied. At least two other subdivision appeals to this Court have been filed on the basis of the County's application of Article 3.1.

16. Article 3.1, with its density and environmental compatibility provisions, remains binding law in Greenville County, and subdivisions in unzoned areas of the County were previously denied based on Article 3.1.

17. Nevertheless, in the last several months, the County, through its staff, its counsel, and the Planning Commission, have repeatedly expressed and acted upon the position that Article 3.1 cannot be applied to subdivisions in unzoned areas. No legal basis exists for such position.

18. Likewise, in the last several months, the County, through its staff, its counsel, and the Planning Commission, have repeatedly expressed and acted upon the position that the Planning Commission has no discretion under the Land Development Regulations as it relates to

consideration of subdivisions in unzoned areas and that an unzoned subdivision must be approved if it meets the objective criteria of the LDR. No legal basis exists for such position.

19. Article 3.1's density and environmental compatibility provisions were not applied to Few's Crossing subdivision, based on the County's erroneous legal position.

20. The record reflects that the Planning Commission fundamentally misunderstood its charge under Article 3.1 to assess the subdivision's compatibility with surrounding land use density and environmental conditions. When the transcript of the Planning Commission's considerations of Few's Crossing is generated, it will reflect repeated misstatements of law on the part of the commissioners and staff regarding the Commission's ability to limit development of unzoned land, with the ultimate consensus being that the Commission was constrained to approve the project because the land was unzoned and met applicable numeric criteria.

21. Among the legal errors expressed and acted upon during the Planning Commission's consideration of Few's Crossing were the following:

- i. that a developer has a vested right under the South Carolina Vested Rights Act when that developer purchases a property for development, and this vested right prevents the Commission's discretionary denial of the subdivision;
- ii. that Article 3.1 does not apply to subdivisions in unzoned parts of the County;
- iii. that flooding concerns or problems created by Few's Crossing can only be evaluated after approval by the Planning Commission and are not the province of the Commission;
- iv. that density of the subdivision cannot be considered in any regard because the property is unzoned; and

- v. that the content of the Comprehensive Plan cannot be utilized to deny a subdivision in unzoned parts of the County.

22. Staff was present at the June 24 Planning Commission hearing, though not legal staff or attorneys, and staff repeatedly offered input and direction to the Commission as to the applicable law and the allowable scope of consideration. Generally, any time a commissioner spoke up in opposition to the subdivision's density, flooding, or compatibility, staff interjected to inform the Planning Commission that such considerations were not appropriate. Yet, when patently incorrect legal positions were offered by commissioners in favor of the subdivision, like as to the existence of a vested right, staff remained silent.

23. The Planning Commission committed a plain and reversible error of law in concluding that Vicars had a vested right in relation to this development and that the vested right limited the Commission's authority.

24. Multiple commissioners expressed serious concern over the potential of this subdivision to exacerbate flooding, and those commissioners inquired of staff as to what action the Commission could take in this regard. Staff repeatedly, and incorrectly, informed the Planning Commission that matters of flooding would only be considered after Commission approval. This legal position, upon which the Commission acted, is facially inconsistent with Article 3.1.

25. The Planning Commission committed a plain and reversible error of law in concluding that it did not have authority to consider flooding or to require Vicars to address flooding concerns, when the terms of Article 3.1 require the Commission to ensure the subdivision's site compatibility in relation to flooding.

26. The Planning Commission likewise committed a plain and reversible error of law

in declining to apply the terms of Article 3.1 to the Few's Crossing subdivision and in artificially reading a requirement into such law that it only applies in zoned portions of Greenville County.

27. Upon information and belief, the Planning Commission and Greenville County agreed to stop applying Article 3.1 to unzoned portions of the County as part of discussions in another subdivision appeal filed by a developer. See, highlighted excerpt from Homebuilders Association of Greenville's website attached as Exhibit B. The County's reversal of its previous application of the plain language in Article 3.1 has no legal basis.

28. Few's Crossing subdivision is, in fact, not compatible with the surrounding land use density under the standard of Article 3.1, and the Planning Commission was presented with ample evidence to demonstrate this fact in advance of its approval of the subdivision, including that:

- a. The community surrounding the proposed subdivision is striking in terms of the overwhelming prevalence of forest, farmland, and large residential lots, entirely dissimilar to what is proposed in Few's Crossing;
- b. The Comprehensive Plan designates the community surrounding Few's Crossing as "Rural" and specifies that residential lot sizes in this community should be at least two acres in size;
- c. The Comprehensive Plan specifies that the community surrounding Few's Crossing should consist of working farms with associated residences and otherwise should have minimal development. This is exactly the current land use density in the community, apart from Few's Crossing.

29. Few's Crossing subdivision is, in fact, not compatible with the site's environmental conditions under the standard of Article 3.1, and the Planning Commission was presented with ample evidence to demonstrate this fact in advance of its approval of the subdivision, including that:

- a. Few's Crossing is located in and adjacent to the floodplain of Foyster Creek and will increase stormwater runoff into Foyster Creek;
- b. Foyster Creek has experienced increased incidence of flooding, affecting roads and other infrastructure, immediately downstream of Few's Crossing;
- c. The Commission, only two months prior, approved a subdivision called Oakvale

- only a short distance downstream in the Foyster Creek floodplain and that the cumulative flooding from these adjacent subdivisions would be significant;
- d. The rural infrastructure in this community is not suited to handle the unavoidable flooding load from two subdivisions sitting back-to-back on Foyster Creek.

30. All evidence before the Planning Commission indicated that Few's Crossing subdivision was incompatible with the terms of Article 3.1, both in relation to density and the environment. Planning Commission's decision to the contrary is necessarily without evidentiary support, arbitrary, an abuse of discretion, and based on a misunderstanding of law.

Comprehensive Plan

31. While Greenville County's Comprehensive Plan is not a law, per se, the Planning Commission does have authority and discretion to consider the content of the Comprehensive Plan, especially as it informs application of the Greenville County Land Development Regulations.

32. The Comprehensive Plan was not considered in relation to Few's Crossing subdivision, based on the County's erroneous legal position that the Plan's content cannot be used as a basis to deny subdivision in the unzoned County.

33. Few's Crossing subdivision is fundamentally inconsistent with the Comprehensive Plan. Few's Crossing is proposed in an area having the most rural designation specified under the Plan. The "Rural" land classification that applies to Few's Crossing calls for the lightest impact from residential development in the County, outside of land that is part of a nature preserve or park. According to the Plan, the land in and around Few's Crossing should have the following characteristics:

Rural place types also support the primary residence of the property owner and any out-buildings associated with the activities of a working farm. Otherwise, these are places characterized by natural or cultivated landscapes with minimal development.

34. As specifically designated by the Plan, the density of residential development allowed in “Rural” areas like Fewes Crossing should be: “1 dwelling per 2 + acres.” Fewes Crossing would be at least four times denser than the maximum density allowed for this area under the Comprehensive Plan and would otherwise be completely outside the designated character of the area.

35. The Planning Commission did not consider the fundamental inconsistency of Fewes Crossing with the Comprehensive Plan, because the commissioners have been informed by County staff that the Plan does not apply in relation to unzoned land. This advice, adopted by the Planning Commission, represents a plain and reversible error of law.

36. To the extent, if any, that the Planning Commission did apply the Comprehensive Plan, it fundamentally failed to examine the character of Fewes Crossing in relation to the surrounding area and the requirements of the Plan.

37. Planning Commission’s decision not to consider or apply the Comprehensive Plan, along with its decision to approve a subdivision that is fundamentally inconsistent with the Comprehensive Plan, is necessarily without evidentiary support, arbitrary, an abuse of discretion, and based on a misunderstanding of law.

WHEREFORE, the Appellant requests that this Court:

- a. issue an order reversing the decision of the Greenville County Planning Commission to approve Fewes Crossing, and
- b. for costs of this action and such other and further relief as this Court finds just and appropriate.

Respectfully submitted,

s/ Michael G. Corley
Michael G. Corley
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Attorney for the Appellant

Greenville, South Carolina
July 24, 2020

[illegible]

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The image contains two circular professional engineer seals for the State of South Carolina. The left seal is for Rodney E. Gray, Registered Professional Engineer, No. 19812. The right seal is for Gray Engineering Consultants, Inc., No. C00060. Both seals include the text 'SOUTH CAROLINA', 'REGISTERED PROFESSIONAL ENGINEER', 'STATE OF SOUTH CAROLINA', and 'CERTIFICATE OF AUTHORITY'.

PRELIMINARY PLAN

**FEWS CROSSING
SUBDIVISION**

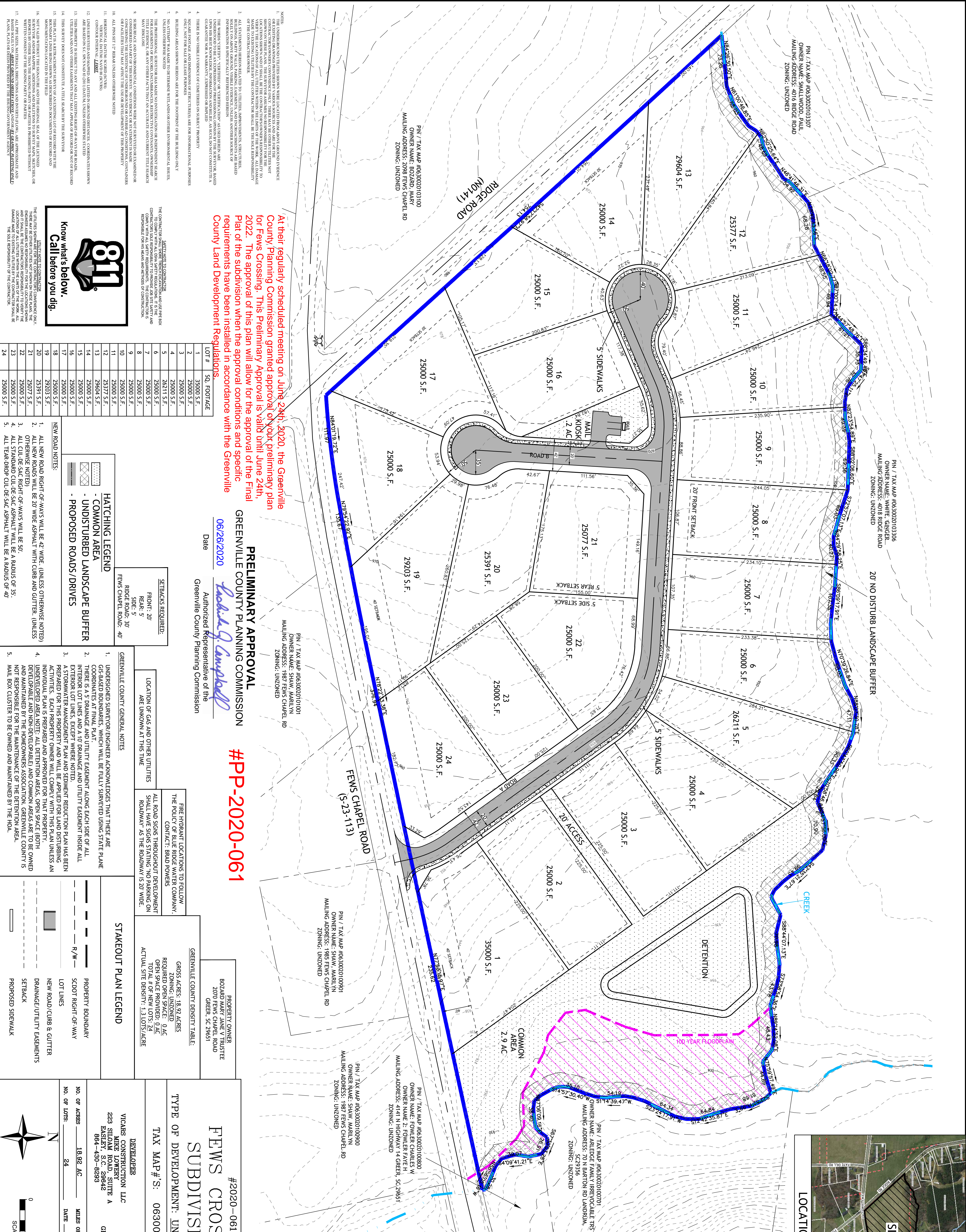
FEWS CHAPEL ROAD
GREENVILLE COUNTY, SC

PROJECT MANAGER:	REG
DRAWN BY:	CJR
PROJECT DATE:	3/18/20
SCALE:	1"=60'
JOB No.:	2020XXXX
PLOT DATE:	5/27/20

SHEET

CV-1

FEWS-Preliminary-D2.dwg





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Section 3.1 Challenged in Court by HBA Member Niemitalo, Inc.

by Michael Dey | Jun 30, 2020 | Blog, Government Affairs/Advocacy, National Association of Home Builders, Top Stories | 0 comments



In January 2018, Greenville County Council amended the Land Development Regulations over the objections of your Home Builders Association of Greenville. More than 30 members attended the meeting to tell County Council “no.” The ordinance was amended six months after six members of your HBA worked for more than three years on an overhaul to the LDR.

Two months later, after a quick review with the help of three members: Jamie McCutchen, Paul Harrison, and Jay Beeson, County Council removed most of the January changes, with the exception of Section 3.1.

In April, the Planning Commission began enforcing Section 3.1 and the flaws in the ordinance, which we pointed out to County Council, quickly became apparent.

In June, the Planning Commission approved a subdivision proposed by Niemitalo, Inc., an HBA member. After some behind the scenes intervention by a member of County Council, the Planning Commission reconsidered their decision in July 2018 and denied Niemitalo’s subdivision, a 30-lot single family development on 30 acres in the unzoned area of Northern Greenville County.

Brian and Bruce Niemitalo, partners in Niemitalo, Inc., appealed their decision in September after receiving written notice of the denial. They were not notified that the Planning Commission would reconsider their earlier decision.

NAHB's Legal Action Fund Steps in to Help

Your Home Builders Association immediately went to work to help Niemitalo, Inc. We had the county's Land Development Regulations reviewed by NAHB's Legal Department. They provided us with several recommendations. They also told us they consider Section 3.1 "unconstitutionally vague." They also told us they are concerned that allowing an ordinance like ours to go unchallenged could set a precedent for other unzoned areas around the country. Adding to the urgency, a neighboring property owner intervened as a party in the appeal, and she is represented by the Southern Environmental Law Center, an nonprofit law firm based in Raleigh that focuses on the environment.

Your HBA of Greenville applied for support from NAHB's Legal Action Fund and in January 2019 they approved a grant of \$10,000 to help Niemitalo, Inc., with their challenge.

The latest and more help from NAHB

After 18 months of legal wrangling, Greenville County and Niemitalo, Inc., came to an agreement to settle with the approval of the subdivision. At that time, the county ceased enforcing Section 3.1 in the unzoned areas. However, the neighbor refused to approve the settlement.

Without an approval for their project, in April Niemitalo, Inc., made their next move and filed a lawsuit challenging the legality of Section 3.1 and last month your HBA of Greenville applied for and received another grant of \$10,000 from NAHB in support of Niemitalo, Inc.'s,

latest cause of action.

“This situation is just one example of the importance of our Home Builders Association and the support it brings to our industry,” said Bill Kane, APB, President of your Home Builders Association of Greenville and Division Manager of Ryan Homes. “It is also just one of many reasons why every business in the Home Building Industry should support our Home Builders Association.”

Support for Vested Rights

This case also has one other benefit for Home Builders: potential case law in support of the Vested Rights Act. Your Home Builders Association actively lobbied for the Vested Rights Act in 2002. Our Vice President of Government Affairs, Michael Dey, was the lobbyist on that bill.

A decision in this case could benefit all Home Builders both in invalidating Section 3.1 and supporting the Vested Rights Act. All Home Builders owe Brian and Bruce Niemitalo their thanks for challenging Greenville County and their anti-housing and anti-development policies.

Recent Posts

BEA: SC Gross Domestic Product Falls 4.8% in 1Q2020

Primary Election Results: Changes Coming at Greenville County Council

New Greenville Water Meter Offset Policy is in Effect

“There’s an Extreme Lack of Inventory”

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Landowners,)	
)	SUMMONS
Appellant,)	
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Greenville County Planning)	
Commission)	
)	
Respondents.)	
_____)	

TO THE DEFENDANT GREENVILLE COUNTY PLANNING COMMISSION:

YOU ARE HEREBY summoned and required to answer the Notice of Appeal in this action, of which a copy is herewith served upon you, and to serve a copy of your response on the subscribers at their offices, P.O. Box 5761, Greenville, South Carolina, 29606, within thirty (30) days after the service hereof, exclusive of the day of such service.

Respectfully submitted,

s/ Michael G. Corley
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Attorney for the Appellant

Greenville, South Carolina
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TO THE DEFENDANT VICARS CONSTRUCTION, LLC:

YOU ARE HEREBY summoned and required to answer the Notice of Appeal in this action, of which a copy is herewith served upon you, and to serve a copy of your response on the subscribers at their offices, P.O. Box 5761, Greenville, South Carolina, 29606, within thirty (30) days after the service hereof, exclusive of the day of such service.

Respectfully submitted,

s/ Michael G. Corley
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