



Town of Hilton Head Island
Board of Zoning Appeals Meeting
Monday, July 22, 2013 at 2:30p.m
Benjamin M. Racusin Council Chambers
REVISED AGENDA

1. **Call to Order**
2. **Roll Call**
3. **Freedom of Information Act Compliance**
Public notification of the Board of Zoning Appeals meeting has been published, posted and mailed in compliance with the Freedom of Information Act and the requirements of the Town of Hilton Head Island Land Management Ordinance.
4. **Wireless Telephone Usage**
Please turn off all wireless telephones so as not to interrupt the meeting.
5. **Swearing in of Returning and New Board Members – Mr. Peter Kristian, Mr. David Fingerhut and Mr. P. Jeffrey North by Mayor Drew Laughlin**
6. **Welcome and Introduction to Board Procedures**
7. **Approval of Agenda**
8. **Approval of Minutes – June 24, 2013 Meeting**
9. **Executive Session to discuss legal matters**
10. **Unfinished Business**
None
11. **New Business**
 - a) Motion to dismiss appeal of Sea Pines Resort, LLC
12. **Board Business**
13. **Staff Report**
 - a) Waiver Report *Presented by Nicole Dixon*
 - b) Board Training on Wetland Preservation *Presented by Rocky Browder*
14. **Adjournment**

Please note that a quorum of Town Council may result if four or more Town Council members attend this meeting.

TOWN OF HILTON HEAD ISLAND
Board of Zoning Appeals
Minutes of the Monday, June 24, 2013 Meeting
2:30p.m. - Benjamin M. Racusin Council Chambers

DRAFT

Board Members Present: Chairman Roger DeCaigny, Vice Chairman Peter Kristian,
Alan Brenner, Michael Lawrence and Glenn Stanford

Board Members Absent: Irv Campbell and Stephen Murphy

Council Members Present: Mayor Drew Laughlin

Town Staff Present: Nicole Dixon, Senior Planner & Board Coordinator
Heather Colin, Development Review Administrator
Kathleen Carlin, Secretary

1. Call to Order

Chairman DeCaigny called the meeting to order at 2:30p.m.

2. Roll Call

3. Freedom of Information Act Compliance

Public notification of this meeting has been published, posted, and mailed in compliance with the Freedom of Information Act and Town of Hilton Head Island requirements.

4. Introduction to Board Procedures

Chairman DeCaigny stated the Board's procedures for conducting the business meeting.

5. Approval of the Agenda

Vice Chairman Kristian made a **motion** to **approve** the agenda as presented. Mr. Stanford **seconded** the motion and the motion **passed** with a vote of 5-0-0.

6. Approval of the Minutes

Mr. Stanford made a **motion** to **approve** the minutes of the April 22, 2013 meeting as presented. Vice Chairman Kristian **seconded** the motion and the motion **passed** with a vote of 5-0-0.

7. Presentation of the Crystal Award to outgoing members, Mr. Roger DeCaigny and Mr. Alan Brenner

Mayor Drew Laughlin presented the Town's Crystal award to outgoing members, Mr. Roger DeCaigny and Mr. Alan Brenner. Mayor Laughlin stated his appreciation to Mr.

DeCaigny and to Mr. Brenner for providing six years of excellent service to the Board of Zoning Appeals and to the community. A Farewell Reception was held in Council Chambers for Mr. DeCaigny and Mr. Brenner following the meeting.

8. Unfinished Business

None

9. New Business

Public Hearing

SER130001: Request for Special Exception for an Eating Establishment with a Drive-thru in the Commercial Center (CC) Zoning District. Ernest Marchetti, on behalf of Karen Watson, is proposing to construct a Zaxby's restaurant. The property is located at 4 Marina Side Drive, and is further identified as Parcel 166 on Beaufort County Tax Map 11. Chairman DeCaigny introduced the application and opened the public hearing. Chairman DeCaigny then requested that the staff make their presentation.

Ms. Nicole Dixon made the presentation on behalf of staff. The staff recommended that the Board of Zoning Appeals *approve* the application based on the Findings of Fact and Conclusions of Law contained in the staff's report.

Ms. Dixon presented an in-depth overhead review of the application including a vicinity map and a conceptual site plan. The applicant is proposing to construct a Zaxby's drive-thru restaurant on the undeveloped property located at 4 Marina Side Drive.

On June 7, 2011, Town Council approved the rezoning of the property from OL (Office Institutional Low Density) to CC to allow for commercial uses on the property. The property is surrounded by the Verizon Wireless business to the south, a self-storage facility to the west, Christ Lutheran Church and a gas station/convenience store across William Hilton Parkway to the east and a restaurant to the north. Ms. Dixon presented a brief review of the Findings of Fact and Conclusions of Law.

At the completion of staff's presentation, Chairman DeCaigny requested that the applicant make his presentation.

Mr. Ernest Marchetti presented statements in support of the application. The Board and the applicant discussed the application including the criteria for granting a Special Exception. At completion of the applicant's presentation, Chairman DeCaigny requested public comments and none were received. Chairman DeCaigny then stated that the public hearing for the application is closed.

The Board discussed the application including the Findings of Fact and Conclusions of Law. Following this discussion, Chairman DeCaigny requested that a motion be made.

Mr. Stanford made a **motion** to **approve** SER130001 based on the Findings of Fact and Conclusions of Law contained in the staff's report. Vice Chairman Kristian **seconded** the motion and the motion **passed** with a vote of 5-0-0.

10. Board Business

Nomination and Election of Officers for July 1, 2013 – June 30, 2014

Mr. Lawrence made a **motion** to **elect** Mr. Peter Kristian to serve as Chairman for the July 1, 2013 – June 30, 2014 term. Mr. Brenner **seconded** the motion. Mr. Kristian **accepted** the nomination to serve as Chairman, and there were no additional nominations for the office. The vote to elect Mr. Kristian as Chairman **passed** 5-0-0.

Mr. Brenner then made a **motion** to **elect** Mr. Glenn Stanford to serve as Vice Chairman for the July 1, 2013 – June 30, 2014 term. Mr. Kristian **seconded** the motion. Mr. Stanford **accepted** the nomination to serve as Vice Chairman, and there were no additional nominations for the office. The vote to elect Mr. Stanford as Vice Chairman **passed** 5-0-0.

Mr. Kristian made a **motion** to **elect** Ms. Kathleen Carlin to serve as Secretary for the July 1, 2013 – June 30, 2014 term. Mr. Stanford **seconded** the motion and the motion **passed** with a vote of 5-0-0.

11. Staff Report

- A) Waiver Report - Ms. Nicole Dixon presented the Waiver Report on behalf of staff.
- B) Board Training – Floodplain Training was presented by Mr. Richard Spruce and an overview of the CRS Program was presented by Ms. Nicole Dixon. A Farewell Reception for the Mr. DeCaigny and Mr. Brenner was held in Council Chambers following the meeting.

12. Adjournment

The meeting was adjourned at 2:50p.m.

Submitted By:

Approved By:

Kathleen Carlin
Secretary

Peter Kristian, Chairman
(on behalf of previous Chairman, Roger DeCaigny)



TOWN OF HILTON HEAD ISLAND

Community Development Department

TO: Board of Zoning Appeals
FROM: Teri B. Lewis, *AICP, LMO Official*
VIA: Nicole Dixon, *Senior Planner and Board Coordinator*
DATE July 12, 2013
SUBJECT: Motion to dismiss appeal of Sea Pines Resort, LLC

Staff has received a motion to dismiss the appeal of Sea Pines Resort, LLC on the basis that Ms. Emhke (the appellant) lacks standing to proceed. The motion seeks that the Board of Zoning Appeals (BZA) hear the motion at its meeting on July 22, 2013. Staff finds no reason why this motion should not be heard on July 22nd and has added it to the agenda for that meeting.

A copy of the motion is attached.

PROFESSIONAL ASSOCIATION

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THOMAS H. HESSE (SC, GA)
IAN W. FREEMAN (SC, CA)
DANIEL S. McQUEENEY, JR.
KATHLEEN FOWLER MONCO
JOHN P. LINTON, JR.

OF COURSE:
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July 11, 2013

U.S. MAIL FACSIMILE FEDEX EMAIL

Teri B. Lewis, AICP
LMO Official
Town of Hilton Head Island
Community Development Department
One Town Center Court
Hilton Head Island SC 29928

RE: **Town of Hilton Head Island—Board of Zoning Appeals**
Application for Appeal of Determination Request by Sea Pines Resort, LLC
Sea Pines Beach Club
Our File No.: 859-004

Dear Ms. Lewis:

Our firm represents Sea Pines Resort, LLC, the owner of the Sea Pines Beach Club. As you are aware, Susan Emhke has filed an application for appeal of the determination dated June 14, 2013, with respect to the minimum parking at the proposed new Beach Club that was requested by my client.

I have enclosed the Motion to Dismiss Appeal of Sea Pines Resort, LLC on the basis that Ms. Emhke lacks standing to proceed. The motion further seeks that the Board hear the motion at its meeting on July 22, 2013. Standing is a threshold issue. If Ms. Emhke does not have standing, then there is no need for the full-blown hearing on the appeal on August 26, 2013.

I would very much appreciate your making the request to the Board as to determine whether we may proceed on July 22, 2013. Please also inform Ms. Emhke of this request.

Thank you for filing our motion and making the request. With kind regards, I am,

Teri B. Lewis, AICP
RE: Sea Pines Resort
July 11, 2013
Page 2

Sincerely,

PRATT-THOMAS WALKER, P.A.



G. Trenholm Walker

GTWyye

Enclosures (As noted)

cc: Chester B. Williams, Esq. (by email)
Gregg Alford, Esq. (by email)
Susan Emhke (by email and US Mail)
Malia O'Connell Flatt, Esq. (by email)
Cliff McMackin (by email)
Steven P. Birdwell (by email)

TOWN OF HILTON HEAD ISLAND
BOARD OF ZONING APPEALS

IN RE: Application of Appeal of Susan Emhke,)
 App. # APL130005.)
_____)

MOTION TO DISMISS APPEAL

Sea Pines Resort, LLC, through its undersigned attorneys, moves before the Board of Zoning Appeals for the Town of Hilton Head Island for the dismissal of the application for appeal filed by Susan Emhke on June 28, 2013, of the determination dated June 14, 2013, of the Town's LMO Official, ruling on the request by Sea Pines Resort, LLC, for a determination establishing the minimum number of parking spaces required for the planned new Beach Club in the Sea Pines Resort, located on North Sea Pines Drive (parcel #R550 017 00A 001A 0000, PD-I Zoning District, Corridor Overlay District).

Sea Pines Resort, LLC, is the owner of the Beach Club property, is the applicant that requested the determination that is under appeal, and is the party to whom the determination of the June 14, 2013 was addressed. As such, Sea Pines Resort, LLC is a necessary party to this appeal under Spanish Wells Property Owners Association, Inc. v. Board of Adjustment, 295 S.C. 67, 367 S.E.2d 160 (1988), copy attached hereto as Exhibit 1.

Susan Emhke lacks standing to challenge the determination dated June 14, 2013 for the following reasons:

- (1) Susan Emhke is not an aggrieved person as defined in Sec. 16-3-2001 of the Town's Land Management Ordinance since she neither owns real property nor resides on real property within 350 feet of the Beach Club site, and her application for appeal does not demonstrate that she will be adversely affected in any manner different from any other property owner within Sea Pines Plantation;

- (2) The application for appeal of Susan Emhke does not allege that she has a personal stake in or will suffer any actual, individualized, particular injury or harm as a result of the determination dated June 14, 2013, establishing the minimum number of parking spaces. For this reason she has no standing under the legal precedent of the Supreme Court of South Carolina in Sea Pines Ass'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources, 345 S.C. 594, 550 S.E.2d 287 (2001), copy attached hereto as Exhibit 2.
- (3) The other persons listed in the appeal application cannot be considered as appealing parties since they did not file an application for an appeal. Susan Emhke cannot represent them nor assert their individual status in furtherance of her application for appeal, and she cannot obtain standing by alleging she is acting in another's interest if she herself has suffered no individual injury under the legal precedent of the Court of Appeals of South Carolina in Lennon v. South Carolina Coastal Council, 330 S.C. 414, 498 S.E.2d 906 (Ct. App. 1998), copy attached hereto as Exhibit 2. 3
- (4) Susan Emhke cannot represent the other persons listed in the appeal application since she did not bring her appeal as attorney for the other listed persons. Permitting her to represent them before the Board of Zoning Appeals would constitute the unauthorized practice of law.

Sea Pines Resort, LLC requests that the Board of Zoning Appeals either consider this motion to dismiss at its regularly scheduled meeting to be held on July 22, 2013, or call a special meeting to consider this motion to dismiss in advance of the hearing of the application for appeal now scheduled for August 26, 2013. If Susan Emhke has no standing to pursue her application for appeal, then there is no need for the hearing on the merits of the purported appeal.

Respectfully submitted,

PRATT-THOMAS WALKER, P.A.

By:  _____

G. Trenholm Walker
W. Andrew Gowder
P.O. Drawer 22247
Charleston, S.C. 29403-2247
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ATTORNEYS FOR SEA PINES RESORT, LLC

July, // 2013

367 S.E.2d 160
 295 S.C. 67, 367 S.E.2d 160
 (Cite as: 295 S.C. 67, 367 S.E.2d 160)

H

Supreme Court of South Carolina.
 SPANISH WELLS PROPERTY OWNERS
 ASSOCIATION, INC., Respondent,

v.

BOARD OF ADJUSTMENT OF the
 TOWN OF HILTON HEAD ISLAND,
 South Carolina, Petitioner.
 In re CALIBOGUE SQUARE SUBDIVI-
 SION.

No. 22859.

Heard March 8, 1988.

Decided April 11, 1988.

After town planning commission granted preliminary development permit, property owners association appealed the commission's action to the Board of Adjustment. The Board of Adjustment denied the appeal, and association appealed to the Court of Common Pleas. The Court of Common Pleas, Beaufort County, John H. Waller, Jr., J., granted Board of Adjustment's motion to dismiss, and association appealed. The Court of Appeals, 292 S.C. 542, 357 S.E.2d 487, reversed, and board sought review. The Supreme Court granted certiorari to review, and held that party, who was granted development permit, was necessary party to appeal of its permit.

Reversed.

West Headnotes

Zoning and Planning 414 ↪ 1602

414 Zoning and Planning

414X Judicial Review or Relief

414X(B) Proceedings

414k1600 Parties

414k1602 k. Necessary and indispensable parties. Most Cited Cases

(Formerly 414k582.1, 414k582)

Party who was granted development permit was necessary party to appeal of its permit.

****161 *67** Curtis L. Coltrane and James M. Herring, of Herring, Meyer & Coltrane, P.A., Hilton Head Island, for petitioner.

Phillip C. Lyman, of Lyman & Howell, P.A., Hilton Head Island, for respondent.

***68 PER CURIAM:**

This case involves a development dispute on Hilton Head Island. This Court granted certiorari to review the decision of the Court of Appeals in *Spanish Wells Property Owners Ass'n v. Board of Adjustment*, 292 S.C. 542, 357 S.E.2d 487 (Ct.App.1987). We now reverse and remand.

The Hilton Head Island Planning Commission granted a preliminary development permit to Calibogue Yacht Properties, Inc. (Calibogue). Respondent Spanish Wells Property Owners Association, Inc. (Spanish Wells) objected to the issuance and appealed to petitioner Board of Adjustment (Board). The Board denied the appeal, and Spanish Wells appealed to the circuit court. The Board moved to dismiss under Rule 12(b)(7), SCRCF, arguing that Calibogue was a necessary party to the appeal under Rule 19, SCRCF. The circuit court granted the motion to dismiss, but allowed Spanish Wells fifteen days leave to join Calibogue. Spanish Wells instead appealed the order; the Court of Appeals reversed, holding that Calibogue was a proper, but not necessary, party to the appeal.

The sole question we address here is whether a permittee is a necessary party to

an action to revoke a development permit.

Other jurisdictions are divided on whether the permittee or successful applicant is a necessary party to an appeal instituted by an aggrieved party. The emerging majority view is that the permittee is a necessary party. See 3 Rathkopf, *The Law of Zoning and Planning* § 42.05[3] (4th Ed.1980 & Supp.1987) (citing numerous cases espousing "ascending" view); 101A C.J.S. *Zoning and Planning* § 301 (1979).

We find the reasoning behind the majority rule convincing. Designating the permittee a necessary party insures the most vitally interested party's participation in the appellate process. See *Cathcart-Maltby-Clearview Community Council v. Snohomish County*, 96 Wash.2d 201, 634 P.2d 853 (1981) (owner-applicant is party "most affected" and is necessary to any proceeding to invalidate his interest). Participation*69 by the most interested party serves judicial economy. Additionally, the majority rule insures that where a circuit court reverses a permit approval, the permittee will be bound because it is a party to the appeal. See *Hidden Lake Development Co. v. District Court*, 183 Colo. 168, 515 P.2d 632 (1973); accord *Board of Commissioners of Mesa County v. Carter*, 193 Colo. 225, 564 P.2d 421 (1977); *Lanaux v. City of New Orleans*, 489 So.2d 329 (La.Ct.App.1986); *Schroeder v. Burleigh County Board of Commissioners*, 252 N.W.2d 893 (N.D.1977).

For the foregoing reasons, we adopt the majority rule and hold that a development permittee is a necessary party to an appeal of its permit. The trial court therefore correctly ruled that Calibogue was a necessary party to Spanish Wells' appeal of the permit approval. Accordingly, the decision of the Court of Appeals to the contrary is

**162 reversed and the circuit court's order is affirmed.

REVERSED.

S.C.,1988.
Spanish Wells Property Owners Ass'n, Inc.
v. Board of Adjustment of Town of Hilton
Head Island
295 S.C. 67, 367 S.E.2d 160

END OF DOCUMENT

550 S.E.2d 287
 345 S.C. 594, 550 S.E.2d 287
 (Cite as: 345 S.C. 594, 550 S.E.2d 287)

▷

Supreme Court of South Carolina.
 SEA PINES ASSOCIATION FOR THE PROTECTION OF WILDLIFE, INC., Advocates Working for Animals and Respect for the Environment a/k/a AWARE, The Fund for Animals, Inc., Animal Protection Institute, and the Humane Society for the Prevention of Cruelty to Animals, Appellants,
 v.
 SOUTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY SERVICES ASSOCIATES, INC., Respondents.

No. 25326.
 Heard June 8, 2000.
 Decided July 23, 2001.
 Rehearing Denied Aug. 22, 2001.

Wildlife organizations challenged issuance by Department of Natural Resources of permits to lethally reduce deer population in wildlife sanctuary on island and sought temporary restraining order, which the Circuit Court, Richland County, James Carlyle Williams, Jr., J., denied. The Court of Appeals issued oral writ of supersedeas. On grant of organization's motion to certify case for review, the Supreme Court, Toal, C.J., held that: (1) organizations could not allege particularized harm as a result of termination and did not have standing to challenge issuance of permits, and (2) Department did not act ultra vires when it issued permits.

Affirmed.

West Headnotes

11 Action 13 ⚡ 13

13 Action

131 Grounds and Conditions Precedent

13k13 k. Persons entitled to sue. Most Cited

Cases

To have standing, one must have a personal stake in the subject matter of the lawsuit, that is, one must be a real party in interest.

21 Parties 287 ⚡ 6(2)

287 Parties

2871 Plaintiffs

2871(A) Persons Who May or Must Sue

287k6 Real Party in Interest

287k6(2) k. Who is real party in interest.

Most Cited Cases

A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.

31 Action 13 ⚡ 13

13 Action

131 Grounds and Conditions Precedent

13k13 k. Persons entitled to sue. Most Cited

Cases

A private person does not have **standing** unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action; such imminent prejudice must be of a personal nature to the party laying claim to **standing** and not merely of **general** interest common to all members of the **public**.

41 Associations 41 ⚡ 20(1)

41 Associations

41k20 Actions by or Against Associations

41k20(1) k. In general. Most Cited Cases

When an organization is involved, the organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act.

15 Action 13  13

13 Action

131 Grounds and Conditions Precedent

13k13 k. Persons entitled to sue. Most Cited Cases

Party seeking to establish standing carries burden of demonstrating each of three elements for standing: first, plaintiff must have suffered an injury in fact, second, there must be a causal connection between the injury and the conduct complained of, and third, it must be likely that the injury will be redressed by a favorable decision.

6 Action 13  13

13 Action

131 Grounds and Conditions Precedent

13k13 k. Persons entitled to sue. Most Cited Cases

An aesthetic interest in wildlife is a legally protected interest that can provide standing to challenge an injury to that interest.

7 Environmental Law 149E  652

149F Environmental Law

149EXIII Judicial Review or Intervention

149Ek649 Persons Entitled to Sue or Seek

Review; Standing

149Ek652 k. Organizations, associations, and other groups. Most Cited Cases

(Formerly 199k25.15(4.1) Health and Environment)

Wildlife organizations did not have standing to challenge issuance of permits by the Department of Natural Resources to lethally reduce deer population in wildlife sanctuary, as organizations could not allege particularized harm as a result of termination; there was no evidence that opportunity to view and enjoy deer would be diminished by permits because it was not certain that reducing size of herd would decrease number of deer actually viewed by residents, and alleged injury would not necessarily be redressed by favorable decision because Department also had plan to non-lethally reduce deer population on island.

18 Administrative Law and Procedure 15A  749

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(D) Scope of Review in General

15Ak749 k. Presumptions. Most Cited Cases

Administrative Law and Procedure 15A  791

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak791 k. Substantial evidence. Most Cited Cases

Findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence.

[9] **Administrative Law and Procedure** 15A
🔑791

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak791 k. Substantial evidence. Most Cited Cases

Under the substantial evidence rule, a reviewing court will not overturn a finding of fact by an administrative agency unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.

[10] **Administrative Law and Procedure** 15A
🔑785

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak785 k. Clear error. Most Cited Cases

Administrative Law and Procedure 15A 🔑791

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions

15AV(E) Particular Questions, Review of

15Ak784 Fact Questions

15Ak791 k. Substantial evidence. Most Cited Cases

A court may not substitute its judgment for that of an agency as to the weight of the evidence on ques-

tions of fact, unless the agency's finding are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

[11] **Game** 187 🔑5

187 Game

187k5 k. Licenses. Most Cited Cases

Department of Natural Resources did not act ultra vires when it issued permits to lethally reduce population of deer in wildlife sanctuary on island, even though deer population was healthy, as there was substantial evidence to support Department's determination that rapid increase in size of deer population, increase in deer/vehicle collisions, and potential spread of bacterial disease by deer constituted a threat to health, safety, and welfare of the public. Code 1976, § 50-11-880.

[12] **Game** 187 🔑5

187 Game

187k5 k. Licenses. Most Cited Cases

Department of Natural Resources could issue permits for the taking of deer in a wildlife sanctuary.

****289 *596** Harold W. Jacobs and J. Michelle Childs, both of Nexsen Pruet Jacobs & Pollard, LLP, of Columbia, for appellants.

Ester Haymond and James A. Quinn, of Columbia, for respondent South Carolina Department of Natural Resources; Stephen A. Spitz, of Columbia, and Roberts Vaux and Gray B. Taylor, of Vaux & Marscher, P.A., of Bluffton, all for respondent Community Services Associates, Inc.

TOAL, Chief Justice:

Sea Pines Association for the Protection of

Wildlife, Inc., Advocates Working for Animals and Respect for the Environment ("AWARE"), the Fund for Animals, Inc., Animal Protection Institute, and the Humane Society for the Prevention of *597 Cruelty to Animals ("Appellants") challenge the South Carolina Department of Natural Resources' ("Department") issuance of permits to lethally eliminate a substantial number of white-tailed deer in the Sea Pines Public Service District ("Sea Pines") on Hilton Head Island.

FACTS/PROCEDURAL BACKGROUND

Sea Pines is a 5,280 acre private, suburban community located on the southern portion of Hilton Head Island, South Carolina. The South Carolina General Assembly established Sea Pines as one of eleven wildlife sanctuaries designated under S.C.Code Ann. § 50-11-880(1) (Supp.2000). Sea Pines provides habitat for numerous species of wildlife, including the white-tailed deer.

Many Sea Pines residents enjoy observing, interacting, and photographing the deer and other wildlife in the sanctuary. However, over the past several years, many residents and homeowners have become concerned with the growing number of deer. Residents of Sea Pines have complained about landscape damage, increased number of automobile collisions ^{FN1}, and more frequent confrontations between deer and humans. In response, Community Service Associates, Inc. ("CSA") ^{FN2} embarked on a program designed to study the deer population. CSA hired both Todd Balentine, a local naturalist, and also Dr. Robert Warren, a professor of Wildlife Ecology and Management at the University of Georgia School of Forest Resources, to conduct a study of the deer population problem.

^{FN1} Mr. William Bloom, a statistician with the South Carolina Department of Public Safety, concluded that motorists within Sea Pines were 6.5 times more likely to have a deer/vehicle collision than motorists in South Carolina generally.

^{FN2} CSA is an association of property owners in Sea Pines formed to hold and manage the common property in Sea Pines and to provide security. All Sea Pines property owners are mandatory, dues-paying members of CSA.

Dr. Warren conducted an in-depth scientific analysis of the deer herd in Sea Pines. In conjunction with Dr. Warren's studies, six public meetings were held, the residents were surveyed, and two Master's theses were written. At the conclusion of his research, Dr. Warren issued a comprehensive *598 report and a Project Proposal on May 14, 1998, which served as a basis for the issuance of the permits in this case. Pursuant to the Project Proposal, a scientific study would commence in July 1998, and continue into the year 2000. At the conclusion of the study, lethal techniques would be used to remove 100 to 200 deer, or approximately fifty percent of the herd, in the southern portion of Sea Pines where the concentration of deer was the greatest.

Appellants oppose the lethal reduction of the population of white-tailed deer. The lead Appellant, Sea Pines Association for the Protection of Wildlife, Inc. ("SPAPW"), an organization of Sea Pines residents or property owners, was formed for the specific purpose of promoting the use of non-lethal means of resolving conflicts between humans and wildlife. On August 25, 1998, Appellants filed a Summons and Complaint seeking: (1) a temporary restraining order to restrain the Department from issuing any further permits for the taking or killing of deer within Sea Pines and to restrain CSA and the University of Georgia from acting on any existing **290 permits; (2) a temporary injunction and permanent injunction against the issuance of permits by the Department to CSA without meeting the requirements of section 50-11-880; and (3) a declaratory judgment determining whether the Department complied with the requisite statutes, rules, and regulations relative to the

issuance of permits in a wildlife sanctuary, and whether the Department violated the constitutional rights of the residents of Sea Pines by failing to afford them due process.

On September 10, 1998, the trial court denied Appellant's Motion for a Temporary Injunction. Appellants then filed a Petition for a Writ of Supersedeas with the South Carolina Court of Appeals. In a panel hearing on September 23, 1998, the Court of Appeals granted Appellant's petition, which reinstated the temporary restraining order until the trial of the case. On November 20, 1998, the Court of Appeals issued an order holding the appeal in abeyance pending the outcome of a trial on the merits of the case.

A non-jury trial was held from March 15, 1999 to March 17, 1999, where the trial judge vacated the temporary injunction and dismissed the action with prejudice, holding: (1) Appellants lacked standing to pursue the matters alleged in the *599 Complaint; (2) there are no statutory or constitutional due process requirements for notice or opportunity to be heard concerning the issuance of the permits; and (3) the actions of the Department in the issuance of these permits has been in total compliance with the statutory laws of this State.

On March 10, 1999, the Department issued a permit to CSA and the University of Georgia to collect up to ten male white-tailed deer for a herd health check. On July 13, 1999, the Department issued a permit to CSA and the University of Georgia for the removal of up to one hundred deer in Sea Pines during the period between September 15, 1999 and January 1, 1999. Appellants filed a Petition for a Writ of Supersedeas with the trial court to prevent CSA or any of its agents from acting on the latter permit, which was denied. Appellants filed another Writ of Supersedeas with the Court of Appeals challenging the latter permit, which was granted by order dated September 3, 1999.

On November 24, 1999, CSA file a Motion for Emergency Protection of the Public Health and Safety of Sea Pines Residents and Visitors. The Court of Appeals issued an order denying the Motion, but it noted the stayed permit expired on January 1, 2000, and there was nothing to prevent CSA from requesting another permit. The Department issued a permit to CSA to remove up to two hundred deer from Sea Pines on January 11, 2000. Appellants filed a separate suit on January 13, 2000, and requested a temporary restraining order that the trial court denied. The Court of Appeals issued an oral Writ of Supersedeas in this matter.

On March 13, 2000, this Court granted Appellant's Motion to Certify Case for Review. The following issues are before this Court on appeal:

I. Do Appellants have standing to challenge the Department's issuance of permits for the lethal elimination of deer in the Sea Pines' wildlife sanctuary?

II. Do Appellants, and other affected persons or organizations, have a right to notice and an opportunity to be heard prior to the Department's issuance of permits for the lethal elimination of deer in the Sea Pines' wildlife sanctuary?

*600 III. Did the Department properly issue permits for the lethal elimination of deer in the Sea Pines' wildlife sanctuary by making proper factual and legal determinations under section 50-11-880 that the deer, due to size, disease, or other extraordinary factors, posed a threat to the health, safety, and welfare of the public, or to itself, or other species in or around the sanctuary?

IV. Did the Department properly issue permits under section 50-11-1050 and section 50-11-1090 for the taking of deer in a wildlife sanctuary?

**291 LAW/ANALYSIS

I. Standing

Appellants argue the trial court erroneously determined they do not have standing. The trial court reasoned that because the deer are the property of the State of South Carolina and not its individual residents, Appellants do not have standing because they cannot allege a particularized harm as a result of the deer's termination. We agree with the trial court's ruling.

[1][2][3][4] To have standing, one must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest. *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999). "A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id.* at 181, 519 S.E.2d at 571 (quoting *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992)). A private person does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). Such imminent prejudice must be of a personal nature to the party laying claim to **standing** and not merely of **general** interest common to all members of the **public**. *Id.* (citing *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)). When an organization is involved, the organization has standing on behalf of its members if one *601 or more of its members will suffer an individual injury by virtue of the contested act. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

[5] In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), the United States Supreme Court enunciated a stringent standing test. *Lujan* set forth the "irreducible consti-

tutional minimum of standing," which consists of the following three elements:

First, the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical'. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

Id. at 559–61, 112 S.Ct. at 2136 (internal citations omitted); see also *Beaufort Realty Co. v. S.C. Coastal Conservation League*, 346 S.C. 298, 551 S.E.2d 588 (S.C. Ct.App. 2001). The party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.* at 561, 112 S.Ct. at 2136–37.

[6] The first element requires the plaintiff to suffer an injury in fact, or a particularized harm. The Department argues that an aesthetic interest in wildlife is not a legally protected interest because under South Carolina law there is no protected interest in an individual wild animal, until that animal is reduced to possession. S.C. Code Ann. § 50–11–10 (Supp. 2000) ("All wild birds, wild game, and fish, ... are the property of the State."). According to the United States Supreme Court, "The desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purpose of standing." *Id.* at 562, 112 S.Ct. at 2137.^{FN5} Furthermore, South Carolina case law has *602 specifically recognized an injury **292 to one's aesthetic and recreational interests in enjoying and observing wildlife is a judicially cognizable injury in fact. See *S.C. Wildlife Fed'n v. S.C. Coastal Council*, 296 S.C. 187, 371 S.E.2d 521 (1988) (holding environmental groups

and League of Women Voters had standing because they suffered injuries as a result of decisions by the Coastal Council which affected the members' use and enjoyment of the fish and wildlife of the wetlands); *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*, 332 S.C. 551, 505 S.E.2d 598 (Ct.App.1998) (holding property owners adjacent to wetlands had standing to challenge the issuance of a permit to fill the wetlands because the permit would adversely affect the property owners' use and enjoyment of the wetlands).

FN3. See also *Sierra Club, supra* ("Aesthetic and environmental well-being like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process."); *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (holding plaintiffs alleged a sufficient injury in fact because whale watching and studying of their members will be adversely affected by continued whale harvesting).

[7] Nonetheless, according to *Lujan*, the Appellant's injury has to be actual or imminent, not conjectural or hypothetical. In order for the injury to be "particularized," it must affect the plaintiff in a personal and individual way. *Lujan*, 504 U.S. at 561, 112 S.Ct. at 2136; see also *Beaufort Realty, supra* (finding one must suffer an actual injury in fact, not a prospective concern of future harm, in order to satisfy the *Lujan* test). Appellants presented no evidence their opportunity to view and enjoy the deer would be diminished by the permits. The Appellant's injury is conjectural because it is not certain that reducing the size of the herd would decrease the number of deer actually viewed by the residents each day. Because deer population growth has remained constant on Sea

Pines, the deer population decrease proposed by the Department may have little or no effect on the residents' ability to enjoy the deer.

Even if we assume Appellants have alleged a particularized harm, Appellants failed to present evidence the injury would be redressed by a favorable decision in this case. As the trial judge noted in his order, the goal of the Appellant's plan was *603 to reduce the size of the deer herd. According to Gordon Stamler, the lead Appellant, their plan was to first use all necessary non-lethal means to reduce the deer population, including educational pamphlets, education of wildlife officers, using roadside reflectors, enforcing the speed limits, and electric fencing. If, after using these non-lethal means, the Department determines pursuant to section 50-11-880 that the deer herd needs to be reduced due to health or safety concerns, the Department would use immunocontraception, a form of birth control. Therefore, it is unlikely that the alleged injury would be redressed by a favorable decision in this case because the Appellant's immunocontraception plan would cause the same injury—a reduction in the population of deer in Sea Pines.

In conclusion, although Appellants have an aesthetic interest in Sea Pines' deer and the environment, they are denied standing because they failed to satisfy the three-pronged *Lujan* test. Because we find Appellants lack standing, we decline to address the due process issue.

II. The Permits

Appellants argue the trial court erred in determining the Department complied with section 50-11-880 when it issued permits to kill deer in Sea Pines based on the presence of disease, overpopulation, and the number of deer/vehicle collisions. Appellants also argue the trial court erred in determining the Department may issue permits for the taking and killing of animals in a wildlife sanctuary under S.C.Code Ann. § 50-11-1050 and S.C.Code Ann. §

50-11-1090. We disagree.

[8][9][10] This Court reviews the Department's permitting decisions pursuant to the standard articulated in the Administrative Procedures Act ("APA"). The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Kearse v. State Health & Human Servs. Fin. Comm'n*, 318 S.C. 198, 456 S.E.2d 892 (1995). Under the substantial evidence rule, a reviewing court will not overturn a finding of fact by an administrative agency "unless there is no reasonable probability that the facts could be as related by a witness upon whose *604 testimony the finding was based." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981) (citations omitted). Thus, a court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact, unless the agency's finding are clearly erroneous**293 in view of the reliable, probative, and substantial evidence on the whole record. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 466 S.E.2d 357 (1996). Substantial evidence is evidence which would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. See *Miller by Miller v. State Roofing Co.*, 312 S.C. 452, 441 S.E.2d 323 (1994).

In section 50-11-880, the General Assembly designated eleven specific areas of the state as wildlife sanctuaries and provided that, within these areas, it is unlawful to "attempt to take or kill any wildlife." S.C.Code Ann. § 50-11-880 (Supp.2000). The statute further directs the Department to monitor these sanctuaries and assigns to the agency the following discretionary rights:

If the department determines that, due to size, disease, or other extraordinary factors, a particular population of a species located in, on, or around a sanctuary described above constitutes a threat to the health, safety, and welfare of the public or to itself, or other species in, on, or around the sanctuary, it

may authorize the taking of a sufficient number of species to reduce or eliminate the threat. The wildlife must be taken by department personnel or other persons acting under their supervision and the authorization for the taking limits the number of animals taken and the days, times, and methods to be used.

S.C.Code Ann. § 50-11-880 (emphasis added).

[11] We find the Department did not act *ultra vires* when it issued the permits in this case because there is substantial evidence in the record to support the Department's determination that the increase in the size of the deer population, the increase in deer/vehicle collisions, and the potential spread of *605 *Ehrlichiosis*^{FN4} by the deer^{FN5} constitutes a threat to the health, safety, and welfare of the public.

FN4. *Ehrlichiosis* is a bacterial disease spread by infected ticks. Most infections are mild and can be treated with antibiotics. Severely ill patients can develop abnormally low numbers of white blood cells, abnormally low numbers of platelets, or kidney failure. The risk of severe illness and complications is highest in the elderly.

FN5. Dr. Warren testified that the deer herd on Sea Pines may pose a threat to the public because the herd health surveys show that there is a very high incidence of *Ehrlichiosis*. He states that the fatality rates for both types of *Ehrlichiosis* infections in humans is relative high, especially in elderly people. Dr. Warren would not agree that there is no unique health risk associated with *Ehrlichiosis* because one hundred percent of the deer he examined had been exposed to *Ehrlichiosis*.

To refute the evidence presented by the Depart-

ment, the Appellants relied on the testimony of their expert, Dr. Allen Rutberg, a senior scientist with the Humane Society of the United States. Dr. Rutberg testified that the deer population of Sea Pines was healthy and there is "no evidence ... that the size of the deer population is in any way a threat to the deer." He also testified that he saw no justification for using lethal means to eliminate the deer at this time. However, he admitted he saw no evidence on the issue of deer population growth. He stated "I've seen no evidence at all that the population of deer at Sea Pines is growing or not growing." Dr. Rutberg's testimony does not discredit the findings of the Department because the health of the deer has nothing to do with the fact the deer population is growing at a rapid rate, dramatically increasing the number of deer/vehicle collisions in Sea Pines.

Between May 1998 and March 1999, the deer herd on Sea Pines increased by one hundred animals, from five hundred to six hundred. As set forth in the accident reports compiled by CSA security, there were 43 reported collisions in 1998, 29 in 1997, 39 in 1996, 33 in 1995, 40 in 1994, and 18 in 1993. Thus, the average of reported deer/vehicle collisions from 1993 to 1998 is 33.6 collisions per year. Charles Ray Ruth, the statewide deer project supervisor for the Department, stated that the deer/vehicle collision rate in Sea Pines is eight times the rate in the remainder of the State.^{FN6} According to Mr. **294 Ruth, the size of the deer population poses a health threat to *606 other deer and to the public through increased vehicle collisions. Mr. Ruth's testimony and the other evidence of deer/vehicle collisions on Sea Pines provides substantial evidence to support the Department's holding that the size of the deer population poses a definite threat to the health and safety of Sea Pines' residents.

^{FN6}. It is unclear whether this is the accurate rate of deer/vehicle collisions. In other sections of the record and in the briefs, the deer/vehicle collision rate is quoted as 6, 6.5, and 7 times greater on Sea Pines than in other

parts of South Carolina.

[12] Appellants also contend the Department has improperly issued permits for the taking of deer in Sea Pines under the auspices of statutes other than section 50-11-880. Specifically, the Appellants argue that sections 50-11-1050, 1090, and 1180 do not give the Department the authority to issue permits for the taking of deer in a wildlife sanctuary. However, wildlife sanctuaries are not specifically excluded from these statutes. Furthermore, section 50-11-880 is not a permitting statute. Once the Department makes a determination under section 50-11-880, another statute must be applied to issue the permits. Mr. Ruth, the Department's statewide deer project supervisor, was aware of the specific differences between the various sections, he explained during his testimony the basis and justification for each permit issued, and why he issued each permit pursuant to only certain code sections.

CONCLUSION

Based on the foregoing, we **AFFIRM** the trial court's order as modified, holding the Appellants do not have standing under Lujan, and the Department's issuance of permits for the lethal elimination of deer on Sea Pines was in compliance with the laws of this State.

MOORE, WALLER, BURNETT and
PLEICONES, JJ., concur.

S.C., 2001.

Sea Pines Ass'n for Protection of Wildlife, Inc. v.
South Carolina Dept. of Natural Resources
345 S.C. 594, 550 S.E.2d 287

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C

Court of Appeals of South Carolina.
Gered LENNON and Bonnie H. Zanetti,
Appellants,

v.

SOUTH CAROLINA COASTAL COUN-
CIL, A State Agency, and Peter B. Fellman
and Robert Braden, Respondents.

No. 2812.

Heard March 5, 1998.

Decided March 23, 1998.

Individual and adjacent property owner
appealed decision of the South Carolina
Coastal Council in the Circuit Court, Char-
leston County, John L. Breeden, Jr., J., to
issue special permits to property owners.
The Court of Appeals, Goolsby, J., held
that individual did not have standing to
bring suit.

Dismissed.

West Headnotes

[1] Action 13 ↪ 13

13 Action

13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue.

Most Cited Cases

No justiciable controversy is presented
unless party has standing to maintain ac-
tion.

[2] Action 13 ↪ 13

13 Action

13I Grounds and Conditions Precedent
13k13 k. Persons entitled to sue.

Most Cited Cases

Party must allege actual controversy in
which he has personal stake to show that

litigation is justiciable.

[3] Zoning and Planning 414 ↪ 1585

414 Zoning and Planning

414X Judicial Review or Relief

414X(A) In General

414k1584 Right of Review;

Standing

414k1585 k. In general. Most

Cited Cases

(Formerly 414k571)

Former geologist for Coastal Council
did not have standing to bring suit seeking
judicial review of Council's decision on be-
half of adjacent property owners affected
by decision, where geologist did allege any
individual injury.

****906 *414** Christopher McG. Holmes,
Charleston, for appellants.

***415** Mary D. Shahid, of the Office of
Ocean & Coastal Resource Management,
of Charleston, S.C. Department of Health
& Environmental Control; and Ellison D.
Smith, IV, Charleston, for respondents.

GOOLSBY, Judge:

Intervenors Gered Lennon and Bonnie
Zanetti appeal from the decision of the
South Carolina Coastal Council to issue
special permits to property owners Peter B.
Fellman and Robert Braden for construc-
tion on beachfront property. The circuit
court upheld the council's decision. We dis-
miss the appeal for lack of standing.

FACTS

Peter Fellman and Robert Braden, part-
ners in the real estate business, bought two
lots located on Folly Beach for \$50,000 in
April 1985. Several years later, in Decem-
ber 1993, Braden and Fellman applied to

the council pursuant to the South Carolina Beachfront Management Act for special permits to be able to build on their lots. The permitting committee recommended to the council that the permits be denied.

The recommendations to the council were appealed. The council consolidated the appeals and referred them to a hearing officer to conduct an evidentiary hearing and to make factual findings and a recommendation. Gered Lennon, formerly a geologist with the council, acting *pro se*, intervened. The hearing officer recommended that the permits be granted or that the lots' fair market value be paid.

The council, after a hearing, issued its Final Administrative Order granting the permits. Lennon, joined by Bonnie Zanetti, a Braden and Fellman neighbor, then filed a summons and complaint requesting judicial review of the council's decision. The circuit court affirmed. Lennon appeals.

DISCUSSION

[1][2] A threshold inquiry for any court is a determination of justiciability, *i.e.*, whether the litigation presents an active case or controversy. "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." *416 *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct.App.1994). "A plaintiff must allege an actual controversy in which he has a personal stake." **907 *Energy Research Found. v. Waddell*, 295 S.C. 100, 102, 367 S.E.2d 419, 420 (1988).

[3] Lennon argues he has standing by virtue of the regulations of the South Carolina Coastal Council and its practice and procedure for contested cases. We disagree. The regulation on contested case process for permitting requires that "[a]ll parties desiring to intervene in the con-

tested case hearing ... comply with" regulations 30-6(O), 30-6(P), 30-6(Q), and 30-6(R). 23A S.C.Code Ann.Reg. 30-6(D) (Supp.1997). Regulation 30-6(P), Grounds for Intervention, requires all who wish to intervene to show, among other things, that they "will be aggrieved or adversely affected by the final order." 23A S.C.Code Ann.Reg. 30-6(P) (Supp.1997).

Lennon's motion to intervene indicated that he was intervening "*on behalf of four affected parties*" and that he represented "Mr. and Mrs. Charles Newmwn [sic], Ms. Bonnie Zanetti,^{FN1} Mr. John Ungaro, and Dr. John Logothetis, each property owners adjacent to the two lots at issue."

FN1. Zanetti was listed as a plaintiff in the appeal to the circuit court. The circuit court, however, determined Zanetti was not a proper party because she was not granted intervenor status during the administrative hearing. See 23A S.C.Code Ann.Reg. 30-6(O) (Supp.1997) (requiring one who wishes to intervene to file a motion with the council for leave to intervene). Neither Lennon nor Zanetti appealed this finding. Any attempt now to do so comes too late. See *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct.App.1989) (holding an appellant may not use the reply brief to argue issues not argued in the initial brief).

Although an organization may represent the interests of its members if its members "have alleged an individual injury in the adverse effect of a specific decision of the Coastal Council," *South Carolina Wildlife Fed'n v. South Carolina Coastal Council*, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988); see also *Energy Research Founda-*

tion v. Waddell, 295 S.C. 100, 367 S.E.2d 419 (1988), Lennon is not an organization. In his brief, Lennon describes himself as a "pro se litigant," and he cannot obtain standing by alleging he is acting in another's interest if he himself has suffered no individual injury.

Lennon argues that the respondents have waived any standing issue because they have accepted him as a "proper party" *417 throughout the proceedings. He equates the standing issue with real party in interest, citing *Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 485 S.E.2d 371 (1997).

In *Bardoon Properties*, the supreme court determined that a party's status as a real party in interest does not involve subject matter jurisdiction so that it may be waived if not timely raised. *Id.* The supreme court noted, however, that "there is a difference between the concepts of 'standing,' 'capacity to sue,' and 'real party in interest.'" *Id.* at 169 n. 3, 485 S.E.2d at 373 n. 3 (citing 6A Charles A. Wright et al., *Federal Practice and Procedure* § 1542, at 328-29 (1990); *Firestone v. Galbreath*, 976 F.2d 279, 283 (6th Cir.1992)). The distinction is important here.

In the realm of public law, when governmental action is attacked on the ground that it violates private rights ... the courts have tended to rely on the judgemade [sic] doctrine of standing to sue. To the extent that standing in this context is understood to mean that the litigant actually must be injured by the governmental action that he is assailing, then it closely resembles the notion of real party in interest under Rule 17(a), inasmuch as both terms are used to designate a plaintiff who possesses a sufficient in-

terest in the action to entitle him to be heard on the merits....

However, several other elements of the standing doctrine are clearly unrelated to the rather simple proposition set out in Rule 17(a), and plaintiff must both be the real party in interest and have standing....

One significant context in which the two concepts diverge is when for standing purposes the plaintiff is required to show not only that he has been adversely affected by the governmental conduct that is under attack, but also that he has suffered an injury to a legally protected right....

Another point of departure is that standing acts as an element of the constitutional requirement that there be a "case or controversy"; when thus applied, *it acts as a **908 limitation on the subject matter jurisdiction of the federal courts. In this context, objections to standing, unlike Rule 17(a) objections, cannot be waived and may be raised by a federal court sua sponte.*

6A Charles A. Wright et al., *Federal Practice and Procedure* § 1542 (1990) (emphasis added) (footnotes omitted). South *418 Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached. *See Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *Crocker v. Barr*, 303 S.C. 1, 397 S.E.2d 665 (Ct.App.1990) (Goolsby, J., concurring), *rev'd on other grounds*, 305 S.C. 406, 409 S.E.2d 368 (1991).

We hold that Lennon does not have standing to challenge the decision of the South Carolina Coastal Council; therefore,

we dismiss the appeal.

DISMISSED.

HEARN and STILWELL, JJ., concur.

S.C.App., 1998.

Lennon v. South Carolina Coastal Council
330 S.C. 414, 498 S.E.2d 906

END OF DOCUMENT



TOWN OF HILTON HEAD ISLAND

Community Development Department

TO: Board of Zoning Appeals
FROM: Nicole Dixon, CFM, *Senior Planner*
DATE: July 12, 2013
SUBJECT: Administrative Waivers

The Board of Zoning Appeals (BZA) requested that staff keep them informed of administrative waivers that are granted by staff based on the provisions in Section 16-7-106 of the Land Management Ordinance (LMO). This memo will be distributed every month at the regular BZA meetings and will be discussed under staff reports on the agenda. Even if there have been no waivers for the month, a memo will be included in the packet to inform the BZA members of that.

The following language is contained in Section 16-7-106 Waiver by Administrator which gives the Administrator the power to grant waivers for existing nonconforming structures and site features.

“The Administrator may waive any provision of Article III or IV dealing with nonconforming structures and site features, respectively, upon a determination that:

- A. The proposed expansion, enlargement or extension does not encroach further into any required buffers or setbacks or increase the impervious area; and
- B. The proposed expansion, enlargement, or extension does not occupy a greater footprint than the existing nonconforming site feature or structure; and
- C. The proposed expansion, enlargement, or extension does not result in an increase in density greater than allowed per Sec. 16-4-1501, or the existing density, whichever is greater; and
- D. The applicant agrees to eliminate nonconformities or provide site enhancements that the Administrator determines are feasible in scope and brings the site into substantial conformance with the provisions of this Title (e.g. meeting buffer, impervious area and open space requirements); and
- E. The proposed expansion, enlargement or extension would not have a significant adverse impact on surrounding properties or the public health, safety and welfare; and
- F. If an applicant requests to relocate a nonconforming structure on the same site, they must bring the structure into conformance to the extent deemed practicable by the Administrator.”

The attached is a summary of the administrative waivers that have been granted by staff since the June Board of Zoning Appeals meeting.

Administrative Waivers

July - 2013

1. A project at 87 North Sea Pines Drive (Sea Pines Beach Club): the applicant requested to make improvements to an existing non-conforming parking lot (currently didn't meet parking design standards), in conjunction with the proposed redevelopment. A waiver was granted because the applicant is proposing to make improvements that will bring the site more into compliance with the LMO.