STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
SE CALHOUN, LLC, Appellant, vs. CITY OF CHARLESTON and CITY OF CHARLESTON BOARD OF ARCHITECTURAL REVIEW, Respondents.	)	Case No.: 2022-CP-10-05586 **ORDER GRANTING MOTION TO INTERVENE**

This matter comes before the Court upon Petitioners the Preservation Society of Charleston ("PSC") and Carter L. Hudgins' ("Hudgins") (collectively, the "Proposed Intervenors") Motion to Intervene in the above-captioned appeal. A hearing was held on Thursday, October 12, 2023. Ellis R. Lesemann appeared on behalf of the Proposed Intervenors. Alice Paylor appeared on behalf of Appellant SE Calhoun, LLC ("SE Calhoun" or "Appellant"). Tim Domin appeared on behalf of the City of Charleston[1] (the "City").

Having heard the arguments of counsel and considered the briefs, the Court hereby GRANTS the Motion to Intervene with the conditions that: (i) the Intervenors shall not have the right to block or "veto" any settlement of the action that might be reached; and (ii) any dismissal of this appeal will not require the consent or stipulation by the Intervenors.

[1] The City has indicated that it consents to the intervention of the Proposed Intervenors in both the mediation and appeal, provided that the Proposed Intervenors would not have a "veto power" or right to reject a settlement or object to the dismissal of the appeal. The Proposed Intervenors have confirmed that they are agreeable to these conditions upon the City's consent.

FACTUAL BACKGROUND

This appeal by SE Calhoun concerns the decision by the City of Charleston Board of Architectural Review ("BAR") denying the application for preliminary approval of a Certificate of Appropriateness relating to the proposed development located at 295 Calhoun Street, located in Charleston's Medical District and in the Old City District. Harleston Village is the City-recognized neighborhood in which the proposed development of 295 Calhoun Street is located. *Opp'n to Mot. to Intervene, Exh. A (BAR Meeting Results).*

Before its purchase by SE Calhoun, the property was rezoned MU-1/WH (Mixed Use 1, Workforce Housing) and Height District 7, which allows up to seven (7) stories. The MU-1/WH district is "incentive based and is intended to permit high density residential uses with a mixture of housing opportunities, along with limited neighborhood nonresidential uses and services in urban areas of the city." *See* City of Charleston Zoning Ordinance Sec. 54-201(u).

SE Calhoun purchased the property for $12 million for the purpose of development an apartment building with retail uses on the ground floor. In accordance with the City's Zoning Ordinance applicable to the Old City District, SE Calhoun was required to obtain permission from the BAR to demolish the one-story structure that was located on the property. SE Calhoun submitted an application for a demolition permit that included a rendering of the proposed building. The BAR approved the demolition of the existing structure.

PSC staff, with expertise in design that is sensitive to its context within the historic district, met with the SE Calhoun team, on December 17, 2020 and February 4, 2021, to provide feedback and comments on the building design of the proposed development. On April 21, 2021, SE Calhoun applied for a Certificate of Appropriateness from the BAR with regard to the design of the proposed structure, a mixed-use proposal consisting of 8 stories, 325 apartment units, retail

space, and a 429-space parking deck. PSC opposed the proposed plan due to its height, scale, mass, and architectural direction. Specifically, the PSC found that the building design was overwhelmingly massive for the site, out of scale as it relates to Harleston Village, and presented a design that was fundamentally at odds with the City's unique architectural character. The BAR subsequently denied the application.

The PSC and SE Calhoun met again on May 10, 2021 and June 10, 2021 following the BAR's denial of the initial design plan. SE Calhoun revised the design to incorporate the comments received from the BAR and City staff but without the substantive changes suggested by PSC. The PSC again provided a position statement to the BAR during the August 25, 2021 meeting, stating its opposition to the revised design due to its height, scale, mass, and architectural direction and strongly urged the BAR to deny SE Calhoun's application. The BAR again unanimously denied the resubmitted application. Following the denial of the resubmitted application, SE Calhoun prepared two redesigned plans. One version of the proposed design featured an 8-story building, which would necessitate a finding of architectural merit by the BAR. The other version of the building featured a 7-story building for which no architectural merit finding is needed. *See* City of Charleston Zoning Ordinance Sec. 54-306.H. SE Calhoun requested deferral of the plans for the 7-story building before the October 12, 2022 BAR meeting, and presented the plan for the 8-story building. The BAR ultimately denied both versions of the plans.

On December 5, 2022, SE Calhoun filed a Notice of Appeal and Petition to appeal from the decision of the BAR rendered on November 9, 2022, pursuant to S.C. Code §§ 6-29-900. In addition to the appeal from the decision of the BAR, SE Calhoun challenges the constitutionality of the City's Zoning Ordinance. Specifically, SE Calhoun seeks a declaration that the provisions of the Zoning Ordinance relating to the BAR's authority to make determinations on the

appropriateness of new or changed structures is unconstitutionally vague because it fails to provide objective criteria and standards, and does not adequately circumscribe the powers and jurisdiction of the BAR. SE Calhoun argues that the Zoning Ordinance is clear as to the meaning of "immediate surroundings," which is defined in the Zoning Ordinance as "abutting properties and those on both sides of the street of the block in which the building is located." *See* City of Charleston Zoning Ordinance Sec. 54-231(h). SE Calhoun argues that the meaning of "architectural merit" is not well defined in the Zoning Ordinance. Section 54-306 provides: "The Board of Architectural Review or Design Review Board may permit an additional story based on architectural merit and context." SE Calhoun argues that the definition of "architectural merit and context" set forth in the Zoning Ordinance is vague.

The Proposed Intervenors filed the Motion to Intervene pursuant to Rule 24(a) and Rule 24(b) on the grounds that the Proposed Intervenors have a substantial interest in the appeal brought under S.C. Code § 6-29-900, as well as an interest in the facial challenge to the City's Zoning Ordnance through SE Calhoun's declaratory judgment claim. Attached as exhibit to the Motion to Intervene is the Affidavit of Mr. Hudgins. Mr. Hudgins is a member of PSC and a resident of Harleston Village. (*Aff. of Hudgins*, ¶¶ 3, 5.) Mr. Hudgins has taught history and historic preservation at both the undergraduate and graduate level. (*Id.* ¶¶ 1, 4.) He served as director of the Clemson University and the College of Charleston graduate program in historic preservation. (*Id.* ¶ 4.) He has taught courses in architectural history, historic preservation and public policy, and historic preservation method and theory. (*Id.* ¶ 4.)

The PSC has been a membership-based charitable organization since its founding in 1920 and is the oldest community-based organization in the United States focusing on the protection of historic and cultural resources. For over a century, the PSC has consistently and successfully

advocated for the careful stewardship of Charleston's historic buildings and for the construction of new buildings that complement the City's irreplaceable historic buildings in scale, in mass, and in architectural character. (*Aff. of Hudgins,* ¶ 5.) The PSC staff has considerable experience in reviewing new construction proposals for their compatibility with the City's historic architecture. (*Id.*¶ 5.) The PSC's membership is core to its role as a grassroots organization as it engages the Charleston community in matters pertaining to its mission to preserve the City's distinctive character, quality of life, and diverse neighborhoods. The focus of the PSC is to provide clear, intelligent leadership as to the City's established patterns in architectural expression as it relates to both historic and new buildings. (*Aff. of Hudgins*, ¶ 5.)

Harleston Village has its own unique set of historic resources that contribute to Charleston's character and has a distinct character that is different from the City's other historic neighborhoods. (*Aff. of Hudgins,* ¶ 6.) Large residences occupy the corners of the neighborhood with newer residences from the late nineteenth and early twentieth century filling in the spaces that separated the neighborhood's earliest houses. (*Id.* ¶ 6.) The PSC currently has approximately 5,000 members, of which at least 130 reside in the historic Harleston Village neighborhood.

LEGAL STANDARD

The decision to grant or deny a motion to intervene in an action lies within the sound discretion of the trial court. *Ex parte Builders Mut. Ins. Co*., 431 S.C. 93, 98 – 99, 847 S.E.2d 87, 90 (2020).

ANALYSIS AND FINDINGS

The Court finds that the Proposed Intervenors have demonstrated that they are entitled to intervene as a matter of right pursuant to Rule 24(a). In its Petition, SE Calhoun both appeals the decision of the BAR pursuant to S.C. Code § 6-29-900 and seeks a declaration relating to the

constitutionality of the City's Zoning Ordinance. Accordingly, the Court finds that the Proposed Intervenors are entitled to intervene as a matter of right pursuant to Rule 24(a)(1) as to SE Calhoun's appeal from the decision of the BAR under S.C. Code § 6-29-900. The Court further finds that the Proposed Intervenors have demonstrated an unconditional right to intervene under Rule 24(a)(1) on the basis that the Declaratory Judgments Act confers standing on the Proposed Intervenors relating to SE Calhoun's claim for declaratory judgment as to the constitutionality of the Zoning Ordinance.

I. Intervention as of Right Under Rule 24(a)(1), SCRCP, Pursuant to Enabling Act Relating to Appeal from Decision of the BAR

SE Calhoun's appeal of the BAR decision is governed by the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code §§ 6-29-301 *et seq*. (the "Enabling Act"). Section 6-29-900 governs appeals from the decision of the board of architectural review to the circuit court. This statutory intervention implicates Rule 24(a)(1) providing for "intervention of right … when a statute confers an unconditional right to intervene." *See* Rule 24(a)(1), SCRCP.

Section 6-29-900(A) provides that "[a] person who may have a substantial interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law." *See* S.C. Code § 6-29-900(A). Section 6-29-915 ("Pre-litigation mediation; notice; settlement approval; effect on real property; unsuccessful mediation") provides in part, that "[a] person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the board of architectural review." *See* S.C. Code § 6-29-915(A).

The Court notes that SE Calhoun has not requested pre-litigation mediation in this appeal. The language of Section 6-29-900 is specific to the appealing party. Here, the Proposed Intervenors seek to intervene in an appeal initiated by SE Calhoun. Nevertheless, the Court must read the Enabling Act as a whole and consider its plain and ordinary meaning. *See CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[A] statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect."); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) ("The cardinal rule of statutory construction is that we are to ascertain and effectuate the actual intent of the legislature."). Accordingly, the Court finds that the "substantial interest" requirement is the relevant test for purposes of deciding the present Motion to Intervene.

The Enabling Act does not define the term "substantial interest" in the decision of the board of architectural review. *See* S.C. Code §§ 6-29-900 and 6-29-915. "In interpreting a statute, the court will give words their plain and ordinary meaning[ ] and will not resort to forced construction that would limit or expand the statute." *State v. Johnson*, 396 S.C. 182, 188, 720 S.E.2d 516, 520 (Ct. App. 2011). The term "substantial" is understood to mean "real and not imaginary; having actual, not fictitious, existence and "important, essential, and material; of real worth and importance." SUBSTANTIAL, Black's Law Dictionary (11th ed. 2019). The term "interest" is commonly understood to mean "a stake, share, or involvement in an undertaking," as well as a "legal concern." Oxford English Dictionary (2d ed. 1989).

The Proposed Intervenors have shown that they have a "substantial interest" in the BAR's decision relating to the proposed development of a 7-story or 8-story structure in the Old City District and located in Harleston Village. Harleston Village is the City-recognized neighborhood for the project. *Opp'n to Mot. to Intervene*, *Exh. A.* The Petition requests that the Court remand the

case to the BAR with an instruction to issue a Certificate of Appropriateness. If the relief is granted, SE Calhoun will proceed with the construction of a new building that does not express architectural harmony with the surrounding buildings. The Court finds that the Proposed Intervenors have demonstrated that the issuance of a Certificate of Appropriateness will adversely affect the members of the PSC.

SE Calhoun argues that the Proposed Intervenors do not have a substantial interest in this appeal because they do not own property in the "immediate surroundings." *Opp'n to Mot. to Intervene*, p. 7. The term "immediate surroundings" appears in the City's Zoning Ordinance and relates to the consideration of the exterior architectural appearance of a structure. *See* Sec. 54-231. A showing that the Proposed Intervenors own property in the "immediate surroundings" as that term is defined in the City's Zoning Ordinance, is not a requirement for establishing intervention as of right. The South Carolina Court of Appeals has recognized physical proximity as a way to establish "substantial interest" in the context of a board of zoning appeals decision. *See Spanish Wells Property Owners Ass'n v. Board of Adjustment*, 292 S.C. 542, 544-45, 357 S.E.2d 487, 488 (Ct. App. 1987), *reversed in part on other grounds*, 295 S.C. 67, 367 S.E.2d 160 (1988) (holding that owners of property adjacent to and in the near vicinity of a development were persons with "a substantial interest" in the board of adjustment's decision denying an appeal from planning commission). The Proposed Intervenors have demonstrated that the PSC has members who reside in Harleston Village and in the near vicinity of 295 Calhoun Street.

The Enabling Act confers upon the Proposed Intervenors an unconditional right to intervene in this appeal of the decision of the BAR pursuant to S.C. Code § 6-29-900. Accordingly, the Court finds that the Proposed Intervenors are entitled to intervene as a matter of right pursuant

to the Rule 24(a)(1) based on their "substantial interest" in the decision of the BAR from which this appeal arises.

II. Intervention as of Right Under Rule 24(a)(1), SCRCP, Pursuant to Declaratory Judgments Act Relating to Issue of Constitutionality of Zoning Ordinance

The Court also finds that the Proposed Intervenors are entitled to intervene as a matter of right under Rule 24(a)(1) pursuant to the Declaratory Judgments Act, S.C. Code §§ 15-53-10, *et seq*.

As alleged in the Petition, SE Calhoun seeks a declaration that the provisions of the City's Zoning Ordinance establishing the BAR are unconstitutionally vague. The Proposed Intervenors argue that they are entitled to intervene in this appeal involving a determination of their rights, status or other legal relations affected by the City's Zoning Ordinance. The purpose of the Declaratory Judgments Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. It is to be liberally construed and administered." *See* S.C. Code § 15-53-130. Under the Declaratory Judgments Act, "[a]ny person interested under a deed, will, written contract or other writings constituting a contract or 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." *See* S.C. Code § 15-53-30.

The Court finds that Section 15-53-30 confers standing on the Proposed Intervenors because Hudgins and the PSC each qualify as "[a]ny person … whose rights, status or other legal relations are affected by" the City's Zoning Ordinance. *See* S.C. Code §15-53-30. As stated in his affidavit, Hudgins is a resident of Harleston Village and therefore, subject to the City's Zoning Ordinance. The Proposed Intervenors have also demonstrated that PSC is a "person" entitled to

have determined any question arising under the City's Zoning Ordinance. The Proposed Intervenors have demonstrated that some of the members of the PSC own property and reside within Harleston Village in the vicinity of the Proposed Development.

The Court finds that the Declaratory Judgments Act confers standing on the PSC. An organization has associational standing to bring suit on behalf of its members when: (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Beaufort Realty Co. v. Beaufort Cty*., 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001); *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.,* 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001).

The PSC has associational standing to intervene in this appeal on behalf of its members. At least one member of PSC would otherwise have standing to sue under the Declaratory Judgments Act. There are approximately 130 members of the PSC who reside within the Harleston Village neighborhood, including Hudgins. These members would be affected by a declaration that the City's Zoning Ordinance is invalid. The Proposed Intervenors should not be denied the opportunity to participate in this appeal if they will be required to live with the result.

The Court finds that the PSC has established the second and third elements of associational standing. The interests that the PSC seeks to protect are germane to the purpose of the PSC. The focus of the PSC is to provide clear, intelligent leadership as to the City's established patterns in architectural expression as it relates to both historic and new buildings. (*Aff. of Hudgins*, ¶ 5.) For over a century the PSC has consistently and successfully advocated for the careful stewardship of Charleston's historic buildings and for the construction of new buildings that are complementary

to the City's irreplaceable historic buildings in scale, in mass, and in architectural character. The PSC's right to participate in the architectural review process as provided under the City's Zoning Ordinance would be affected by a declaration that those provisions are invalid. The third element requires the Proposed Intervenors to establish that neither the claim asserted nor the relief requested requires the participation of the PSC's individual members. The participation by the individual members of the PSC is not required in this appeal from the decision of the BAR.

Because the Declaratory Judgments Act confers standing on the Proposed Intervenors, the Motion to Intervene pursuant to Rule 24(a)(1) is granted.

III. Concepts of Standing Applicable to Intervention in this Appeal

SE Calhoun argues that the Proposed Intervenors lack standing to intervene because the Proposed Intervenors' alleged harms are neither individualized nor particular to PSC or Hudgins. As discussed above, the Court finds that the Proposed Intervenors have established intervention of right by statute.

"Generally, the rules of intervention should be liberally construed where judicial economy will be promoted by declaring the rights of all affected parties." *See Gov't Employee's Ins. Co., Ex parte*, 373 S.C. 132, 138, 644 S.E.2d 699, 702 (2007). "Accordingly, the [c]ourt should consider the practical implications of a decision denying or allowing intervention." *Id*. "However, a party must have standing to intervene in an action pursuant to Rule 24, SCRCP." *Id*. A party has standing if the party has a personal stake in the subject matter of a lawsuit and is a "real party in interest." *Id*. "A real party in interest ... is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the action." *Id*. In the most basic sense, "[s]tanding refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Pres. Soc'y of*

Charleston v. S.C. Dep't of Health & Env't Control, 430 S.C. 200, 209, 845 S.E.2d 481, 486 (2020).

The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute. *See Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012). When no statute confers standing, the elements of constitutional standing must be met. *Youngblood v. S.C. Dep't of Soc. Servs*., 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). A litigant must possess Article III standing in order to intervene as of right "if the intervenor wishes to pursue relief not requested by a plaintiff" or "to pursue relief that is different from that which is sought by a party with standing." *See Town of Chester, N.Y. v. Laroe Estates, Inc*., 137 S. Ct. 1645, 1651 (2017) (holding that an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing). The Proposed Intervenors are not pursuing relief new or different relief than that which is sought by the original parties.

SE Calhoun relies on *Carnival Corp. v. Historic Ansonborough Neighborhood Association* in which the South Carolina Supreme Court found that several citizens' groups lacked standing to bring nuisance and zoning claims in the circuit court. *See Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014). In *Carnival,* the Court held that the allegations of injury in fact were insufficient in the absence of allegations that any of the organizations' members had personally and individually suffered any of the asserted harms. The Court finds that the standing requirements discussed in *Carnival* are inapplicable here because in *Carnival*, the citizens' groups initiated the lawsuit in circuit court and asserted claims as plaintiffs. In contrast, the Proposed Intervenors are seeking to intervene in the appeal initiated by SE Calhoun against the City and the BAR.

The Proposed Intervenors need not demonstrate that they have standing in addition to meeting the requirements of Rule 24(a)(1).

IV. Intervention of Right Under Rule 24(a)(2), SCRCP

As an alternative basis for intervention governed by Rule 24(a)(1), the Proposed Intervenors argue that they would be entitled to intervene as of right pursuant to Rule 24(a)(2) because the members of the PSC, including, but not limited to Hudgins, "claim an interest relating to the property or transaction which is the subject of the action and are so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest." *See* Rule 24(a)(2), SCRCP ("Upon timely application[,] anyone shall be permitted to intervene in an action ... when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.").

A prospective intervenor seeking to intervene as a matter of right must satisfy the following factors: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. *See Berkeley Elec. Co-op., Inc. v. Town of Mt. Pleasant*, 302 S.C. 186, 189, 394 S.E.2d 712, 714 (1990).

Having found that the Proposed Intervenors are permitted to intervene in this appeal by right based on the applicable statutes of the Enabling Act and Declaratory Judgments Act, the Court will not address the four elements to intervene under Rule 24(a)(2).

V. Permissive Intervention Under Rule 24(b), SCRCP

In the alternative to granting intervention as of right, this Court has authority to allow intervention under Rule 24(b). *See* Rule 24(b), SCRCP. An intervenor seeking permissive intervention must: (1) establish timely application; (2) assert a claim or defense that has a question of law or fact in common with the underlying action; and (3) prove his participation in the underlying action will not delay or prejudice the adjudication of the rights of the original parties. *See Ex parte Builders Mut. Ins. Co*., 431 S.C. 93, 101, 847 S.E.2d 87, 91 (2020); Rule 24(b), SCRCP.

Because the Proposed Intervenors are entitled to intervene as of right, the Court need not address permissive intervention under Rule 24(b).

CONCLUSION

For these reasons, the Court finds that intervention by right is proper to grant the Proposed Intervenors limited intervention into the mediation and appeal as to the merits of the issues. The Court further finds that the Proposed Intervenors' status as intervenors does not provide a "veto power" or right to reject a settlement or object to a dismissal of this appeal.

Therefore, the Court GRANTS the Motion to Intervene in the mediation and the appeal.

AND IT IS SO ORDERED.

[*Electronic Signature Page to Follow*]

Charleston Common Pleas

Case Caption: Se Calhoun Llc VS Charleston City Of , defendant, et al

Case Number: 2022CP1005586

Type: Order/Intervene

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134