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## Who can Appeal?

**Planning Commission**

- 6-29-1150(C) "any party in interest"
  - Planning Commission - Staff decisions on subdivision/land development activity
  - Commission decision then goes to circuit court
    - *Citizens for Quality Rural Living v. Greenville County* (2019): Ct of App.
      - expanded appeal rights to any individual/group with an interest in the decision (not just property owner)

**Zoning Board of Appeals**

- 6-29-820(A) "A person who may have a substantial interest in any decision of the board..."
  - ZBA - Staff decisions on variances and special exceptions
  - ZBA decision then goes to circuit court


 A circular logo featuring a palm tree and a crescent moon, identical to the one on the first slide, located in the bottom left corner of the slide content area.

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## Application or Appeal to Planning Bodies

- Individual applicant appears before the body
  - Appeal of planning decisions of staff
  - Direct application for a land use activity
- Members sit in a judicial capacity
  - Subpoena & contempt powers
  - Limited in the information you may use to make decisions
- Burden of proof runs with the applicant
  - Applicant possesses rights under the US and state constitutions of due process of law and equal protection



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## Due Process

The SC Supreme Court defines Due Process as providing applicants\*:

- [Notice of hearings](#)
  - Local procedural rules should address how applicants will notified of hearing
- [A meaningful opportunity to be heard](#)
  - Present evidence, witnesses and rebut opposing evidence
  - Local rules should address the procedures to follow in all types of hearings
  - Does not mean a full trial type setting with cross-examination or adherence to Rules of Evidence
- [Judicial Review](#)
  - Planning Act requires that Board/Commission appeals go to circuit court

\* *Kurschner v. City of Camden Planning Commission*, 376 S.C. 165 (2008)



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## Equal Protection

SC Supreme Court defines equal protection in land use cases as:

Applying each law “equally to persons similarly situated, and that any differences of application must be justified by the law’s purpose.”\*

- Who is similarly situated?
  - Statutory classifications, type of project, unique individual factors
- Whatever process the body uses to determine who is similarly situated it must be reasonable and non-arbitrary

\**Harbit v. City of Charleston*, 382 S.C. 383 (2009)



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## Ethical Considerations for Planning Body Members

### **REQUIREMENTS FOR RECUSAL VS. VOLUNTARY ABSTENTION**



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## The South Carolina Ethics Act

- S.C. Ethics Act: 8-13-700:
  - (A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain **an economic interest** for himself, a family member, an individual with whom he is associated, or a business with which he is associated.
  - (B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a family member, an individual with whom he is associated, or a business with which he is associated has **an economic interest**.



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## What is an “Economic Interest”

Ethics Act Definition:

- 8-13-100(11)(a): an interest **distinct from that of the general public** in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.



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## Large Class Exception

- 8-13-100(11)(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.



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## Sample Recusal Notice

STATE OF SOUTH CAROLINA ) Disqualification Notice  
COUNTY OF \_\_\_\_\_ )

To the presiding officer:

I have received and reviewed the agenda, staff report(s), and meeting materials for the meeting scheduled to be held on \_\_\_\_\_, 20\_\_.

With respect to the following matter on the agenda: **(Item as listed on the agenda)**, I have or may have a potential conflict of interest of the following nature: **(Provide as much detail of your/related individual's financial interest)**, which S.C. Code § 8-13-700 requires that I disqualify myself from any discussions, comments, votes or other involvement in the matter.

Please record this statement in the minutes of all meetings in which the matter is considered.

**(Signature)**

Printed Name: \_\_\_\_\_ Date: \_\_\_\_\_, 20\_\_



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## Personal Bias & Abstention

- Right to vote is also the right not to vote: Roberts' Rule of Order Newly Revised (12<sup>th</sup> Ed)  
Rule 45:3 - Although it is the duty of every member who has an opinion on a question to express it by his vote, he can abstain, since he cannot be compelled to vote.
- **Impartiality is essential!**
  - Judge should disqualify himself in proceeding in which **his impartiality might reasonably be questioned**, including, but not limited to, instances where he has **personal bias or prejudice against party**; such bias must **stem from extra-judicial source** and result in decisions based on information other than what judge learned from his participation in case.\*

\* Mallett v. Mallett, 323 S.C. 141 (1996)



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## Actions that Can Imply Bias

- Public comments outside of a public forum
  - Cricket Cove v. Gilland, 390 S.C. 312 (2010)
- Social Media posts concerning the issue
  - City of Georgetown case
  - Bonner County Idaho
- Ex-Parte Communications: Communications with one party only



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## Potential Result of Biased Decisions

- Loss of impartiality can cloud the ultimate decision of the body and result in judicial appeals
  - Appellants will most likely have to show that a biased member affected the decision of the remaining members
  - “single tainted vote rule does not apply to allow a court to overturn an ordinance based on a tainted vote if, after excluding the improper vote, the requisite number of votes to pass the ordinance still exists”\*

\**Anderson v. Preston*, 427 S.C. 529 (2019)



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## Liability can Arise from Bias/Prejudice

- Liability issues may result to the Body or Individual member for violations of applicant rights
- Against the Body: SC Tort Claims Act : 15-78-60 Exceptions to Waiver of Immunity
  - (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude;
- Against the Individual: 28 U.S.C. 1983
  - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., subjects...any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured



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## Questions?

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