

STATE OF NORTH CAROLINA  
COUNTY OF PITT

FILED

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

2024 NOV 20 A 10:38 FILE NO. 24 CVS 2755

PITT CO. C.S.C.

BROOKHAVEN ESTATE ASSOCIATION,  
INC. d/b/a BROOKHAVEN COMMUNITY  
ASSOCIATION, GARRIE MOORE,  
VIVIAN KENNION, and WALTER  
FIELDS.

Petitioner,

v.

CITY OF GREENVILLE, and RACE  
TRAC, INC.,

Respondents.

**PETITION FOR WRIT OF  
CERTIORARI**

NOW COME Petitioners Brookhaven Estate Association (“Brookhaven Community Association” or “BCA”), Dr. Garrie Moore (“Dr. Moore”), in his personal capacity and as CEO of the Center for Science Technology and Leadership Development, Vivian Kennion (“Mrs. Kennion”), and Walter Fields (“Mr. Fields”) (together, “Petitioners”) by and through counsel, and respectfully petition this Court to issue a Writ of Certiorari<sup>1</sup> for judicial review of the September 26, 2024 decision and Accompanying Written Decision on October 25, 2024 of the City of Greenville Board of Adjustment (“Board of Adjustment” or “BOA”) to grant a Special Use Permit (the “Decision”) to RaceTrac, Inc. (the “Applicant” or “RaceTrac”) for operation of a Convenience Store with Gasoline Sales (“the RaceWay”). In support of their Petition, Petitioners respectfully show the Court the following:

<sup>1</sup> A copy of the proposed Writ of Certiorari that Petitioners have submitted to the Clerk of the Pitt County Superior Court is attached to this Petition as **Exhibit A**. An executed copy will be served on opposing parties upon receipt from the Clerk.

## PARTIES AND STANDING

1. As the Board of Adjustment correctly determined, unanimously and without opposition, Petitioners Dr. Garrie Moore, Walter Fields, and Vivian Kennion all have standing to challenge the Board of Adjustment's determination and decision, pursuant to N.C. Gen. Stat. § 160D-1402(c)(2), as Petitioners will all suffer special damages from the Decision.

2. As the Board of Adjustment correctly determined, unanimously and without opposition, Brookhaven Community Association has standing, pursuant to N.C. Gen. Stat. § 160D-1402(c)(3), as it is an association with at least one member who has standing individually, was formed decades ago to advocate for the Brookhaven community's interests, and is comprised of residents in the Brookhaven area who have standing in their individual capacities.

3. To establish standing for a quasi-judicial proceeding, individual Petitioners only need to allege "special damages" not common to the surrounding community at large. *Cherry v. Wiesner*, 245 N.C. App. 339, 351-52 (2016); *Fort v. County of Cumberland*, 218 N.C. App. 401, 405 (2012) (recognizing that allegations of injury are sufficient because "competent" evidence requirement doesn't apply to standing). Petitioners' allegations as to property value diminution or potential harms from a nearby proposed development, such as increased traffic, runoff, and safety concerns, are sufficient to establish these "special damages" for quasi-judicial standing. *Id.*; *Sanchez v. Town of Beaufort*, 211 N.C. App. 574, 578-79 (2011). Proximity to the proposed development also bears weight on the determination of special damages. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644 (2008); as displayed in **Exhibit B**, Dr. Moore and Mrs. Kennion live directly adjacent to the proposed development, and Mr. Fields lives within 250 feet of the proposed development. Petitioners will suffer special damages from the construction and operation of the RaceWay, as elaborated upon below, and so have standing to

bring this Petition.

4. Dr. Garrie Moore (“Dr. Moore”) is a longstanding resident of Greenville who owns and resides at property located at 1701 Brookhaven Avenue, Greenville, NC (PIN: 4780633268), immediately adjacent to the proposed development on one side of his property and adjacent to a highway, N. Memorial Drive, on another adjacent side. Dr. Moore is the current President of Brookhaven Community Association. Dr. Moore is also an expert in education, having earned his EdD in education from North Carolina State University in 1995 and subsequently working in the field for approximately thirty years; Dr. Moore currently works with troubled Wellcome Middle School students through the Center for Science Technology and Leadership Development, a non-profit he founded where he serves as CEO.

5. Dr. Moore will suffer special damages as a result of the Decision, and from the proposed RaceWay, due to the unique positioning of his property, as he is the only property owner immediately adjacent to both the RaceWay and to North Memorial Drive—a highway that is frequented by passenger car and heavy truck traffic but contains no highway noise barrier. As a property owner adjacent to a highway, he is already faced with the greatest degree of noise of any Brookhaven resident, which disrupts his sleep, and a greater degree of cumulative vehicle air pollution exposure than any other property owner adjacent to the RaceWay. He is certain the emissions and noise from the RaceWay’s construction and operation will uniquely harm his health as a property owner faced with the greatest degree of noise and vehicle emissions, due to his property’s unique positioning near the highway and the RaceWay site. The increased noise from individuals frequenting the RaceWay, along with the increased noise and air pollution from cars entering, idling at, and exiting the RaceWay, will certainly decrease the value of his property. Moreover, more vehicle traffic may be expected along N. Memorial Drive as drivers

may go somewhat out of their way to fill their gas tanks at the RaceWay. Finally, Dr. Moore's extensive background in education and community engagement with Wellcome Middle School makes him worried that the RaceWay will harm the health of many students he personally works with and whose well-being he is deeply invested in; Dr. Moore was not able to consult the City of Greenville *Board of Adjustment Rules of Procedure* via the City of Greenville website because they were not posted or accessible to the public except by special request, which harmed Dr. Moore's ability to present evidence. Dr. Moore nevertheless presented competent, substantial, and material expert testimony about his concerns to the BOA. Dr. Moore's personal and property impacts are examples of special damages he will suffer from the RaceWay.

6. Walter Fields ("Mr. Fields") is a member of the Brookhaven Community Association who has owned and resided at 1713 Brookhaven Drive, Greenville, NC (PIN: 4780620859), for over forty years. Mr. Fields moved to the Brookhaven community with his wife, now passed, because it is a safe neighborhood where residents take pride in their homes. Having retired from his industry job, Mr. Fields currently works as a substitute teacher at Wellcome Middle School multiple times per week. His property is uniquely positioned, as it is within 250 feet of the RaceWay site and sits on the corner of Briley Road and Brookhaven Drive. As such, Mr. Fields faces unique traffic effects in the area during school hours and Wellcome Middle School events, as well as effects from passerby traffic on Briley Road and Brookhaven Drive. The RaceWay would increase both the intensity and duration of these peak hours of traffic and decrease the value of his property. Despite not having access to the BOA's rules of procedure through the City of Greenville's website, Mr. Fields expressed his concerns at the BOA Hearing through sworn testimony. However, because the BOA's rules of procedure were not posted online as they are required to be, Mr. Fields did not know what to expect or

how to prepare for the BOA hearing and was disadvantaged in the proceeding.

7. Mr. Fields was unfortunately diagnosed with prostate cancer in 2019. Although his cancer is now in remission, he suffers from a persistent cough and breathing difficulties. Despite the obstacles he has faced, Mr. Fields maintains a zest for life. Mr. Fields keeps a well-manicured lawn and shrubbery surrounding his home, and he cherishes the days when his grandchildren, residents of Raleigh, come to Greenville to grill with him outdoors. Siting a gas station next to Mr. Fields' property will worsen nearby traffic during peak school hours, exacerbate Mr. Field's coughing and breathing issues through increased pollution, and increase his likelihood of prostate cancer recurrence. The close proximity of the gas station will also make it less enjoyable to sit outdoors or to grill, particularly when the fumes of car exhaust overpower the smell of food cooking on the grill. Mr. Fields believes the RaceWay will, for these reasons, ruin his grandchildren's visits and therefore decrease his and his grandchildren's use and enjoyment of his property. Finally, he is worried about the RaceWay bringing crime to his neighborhood; he has never had to worry about crime before and is now concerned about vandalism and safety as a senior Brookhaven resident living alone. These increases in traffic, air pollution, and worries about crime show Mr. Fields will suffer special damages from the Decision, and from the RaceWay's operation and construction, especially due to the unique positioning of his property, his health history, his family's visits, and his status as a single-occupant owner of property in Brookhaven.

8. Vivian Kennion ("Mrs. Kennion) is a Brookhaven community resident, and member of Brookhaven Community Association, who has owned and resided at 1711 Brookhaven Drive, Greenville, NC (PIN: 4780621988), with her husband for over forty-five years. A lover of nature, Mrs. Kennion spends the majority of her time on her back porch, where

she admires her view and enjoys the quietude and birdsong surrounding her. Mrs. Kennion takes great pride in her backyard, where she periodically and diligently cares for her flowers, entertains neighbors, and plays football with her grandchildren who visit weekly. Mrs. Kennion goes on walks weekly, where she walks past the proposed RaceWay site—a field of undisturbed trees and grass prior to RaceTrac’s involvement—before turning south towards Wellcome Middle School. She walks this route four times per outing, but fears the potential for crime at the RaceWay and proximity to heavy development and increased traffic will nullify the benefits of this routine. Mrs. Kennion is certain this development will ruin the appeal of her backyard, and therefore reduce her property value, because her view will be obstructed, quietude and birdsong will be drowned out, and air pollution will drastically affect her as an adjacent property owner. Despite not having access to the BOA’s rules of procedure through the City of Greenville’s website, Mrs. Kennion expressed her concerns at the BOA Hearing through sworn testimony. However, because the BOA’s rules of procedure were not posted online as they are required to be, Mr. Fields did not know what to expect or how to prepare for the BOA hearing and was disadvantaged in the proceeding.

9. Mrs. Kennion was diagnosed with two distinct types of breast cancer in 2014, which is in remission after a long fight. However, she must frequently return to the doctor for health assessments. Living immediately adjacent to a gas station, where cars and trucks will enter, idle, and exit, puts Mrs. Kennion’s life at risk, as frequent exposure to the air pollutants associated with gas stations increases her likelihood of breast cancer recurrence. With her bedroom window set to be in close proximity to the proposed RaceWay site, she is concerned that the lights from RaceWay will flood into her room, potentially worsening her existing sleep related issues. Mrs. Kennion may be forced to alter her entire lifestyle, end her frequent walks,

and forego football with her grandchildren to avoid the air pollutants associated with RaceWay for her personal safety. Mrs. Kennion will suffer special damages from the Decision, as she will uniquely suffer from RaceWay's construction and operation.

10. Petitioner Brookhaven Estate Association, Inc., d/b/a Brookhaven Community Association, is a North Carolina association formed in 1972. BCA is comprised of property owners who live and reside on Brookhaven Drive in Greenville, NC, which is adjacent to the proposed development and thrives as a historically Black community in Greenville. BCA was created to improve the quality of life of Brookhaven residents and represent the interests of Brookhaven residents to the outside community. Residents are eligible to join upon moving to Brookhaven Drive, and membership is terminated upon moving away from Brookhaven Drive.<sup>2</sup> Accordingly, BCA has standing as an association representing individuals with standing to challenge the Decision, pursuant to N.C. Gen. Stat. § 160D-1402(c)(3).

11. Respondent City of Greenville (the "City") is a city duly established and organized under the laws of the State of North Carolina. The City of Greenville Board of Adjustment (the "BOA"), pursuant to its authority under state laws N.C. Gen. Stat. §§ 160D-302, 160D-406, and 160D-705, and local ordinances Greenville Code §§ 9-4-186 and 9-4-320, amongst others, granted the Special Use Permit application of RaceTrac, Inc.

12. Respondent RaceTrac, Inc., is a private corporation that owns and operates gas stations across the southeastern United States. Justin Giambalvo submitted an application on behalf of RaceTrac, with the consent of property owner Julian Rawl, on August 26, 2024, for RaceTrac to obtain a Special Use Permit to operate a RaceWay gas station immediately adjacent

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<sup>2</sup> See **Exhibit C**, Brookhaven Community Association Bylaws, at 1.

to the Brookhaven community and Wellcome Middle School.

13. The City of Greenville and RaceTrac, Inc. (together, “Respondents”), are properly included as Respondents, pursuant to N.C. Gen. Stat. § 160D-1402(d).

### **JURISDICTION AND VENUE**

14. This is an appeal in the nature of certiorari, and this Court has jurisdiction, pursuant to N.C. Gen. Stat. §§ 160D-406, 160D-1402, 160D-1405, and Greenville Code 9-4-186(H).

15. Upon information and belief, the Board’s Decision was signed by the Secretary of the Board of Adjustment on October 25, 2024, and served on affected persons on that same day.<sup>3</sup> This Petition is timely filed within (30) days thereof. N.C. Gen. Stat. §§ 160D-406(j), 160D-1402, 160D-1405(d).

16. Pitt County is the proper venue for this proceeding. N.C. Gen. Stat. § 160D-1402(e).

### **FACTUAL BACKGROUND**

17. This case arises from an application submitted by Justin Giambalvo on behalf of Respondent RaceTrac, Inc., on August 26, 2024, for a Special Use Permit to operate a convenience store with gasoline sales (gas station) on property located at 3201 N. Memorial Drive, Greenville, NC (PIN: 4780624727).<sup>4</sup> This application was authorized by the owner of the subject property Julian Rawl.

18. The property at 3201 N. Memorial Drive, Greenville, NC, is zoned as General

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<sup>3</sup> See **Exhibit D**, BOA 24-17, Decision and Order Granting Special Use Permit (Quasi-Judicial Decision) (“Order”), at 31-33.

<sup>4</sup> See **Exhibit E**, September 26, 2024, City of Greenville Board of Adjustment Agenda Packet, at 60-64.



Commercial, which may accommodate a “Convenience Store with Gasoline Sales” only if a Special Use Permit is granted by the City of Greenville Board of Adjustment. Greenville Code § 9-4-68; Appendix A(10)(b).

19. An evidentiary hearing was scheduled for September 26, 2024 for the Board of Adjustment to consider RaceTrac’s Special Use Permit application (“BOA Hearing”).

20. The City notified property owners within 250 feet of the proposed development, informing them of the upcoming Special Use Permit hearing. This notice was sent to Dr. Moore, Mrs. Kennion, Mr. Fields, and other members of the Brookhaven community.

21. Upon information and belief, the City of Greenville *Board of Adjustment Rules of Procedure*,<sup>5</sup> which would have helped nearby property owners better understand how to properly provide competent evidence in the quasi-judicial evidentiary hearing, were not publicly available on the City’s website before and during the evidentiary hearing, in violation of N.C. Gen. Stat. § 160D-308. For instance, the *Board of Adjustment Rules of Procedure* state that the BOA will not rely on hearsay,<sup>6</sup> even though it is well-established in North Carolina law that Boards of Adjustment are free to rely on hearsay when making quasi-judicial decisions. N.C. Gen. Stat. § 160D-1402(j)(3); *Harding v. Bd. of Adjustment*, 170 N.C. App. 392, 397-98 (2005). The unavailability of procedural rules seriously injured the ability of Brookhaven residents’ ability to understand how to prepare for and properly present competent evidence to be considered at the BOA hearing.

22. On September 26, 2024, the BOA held an evidentiary hearing to review the Applicant’s Special Use Permit application, in order to determine whether to approve, approve

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<sup>5</sup> See **Exhibit F**, City of Greenville *Board of Adjustment Rules of Procedure*.

<sup>6</sup> See **Exhibit F**, City of Greenville *Board of Adjustment Rules of Procedure*, at 5.

with conditions, table, or deny the Special Use Permit application.

23. To be granted a Special Use Permit, an applicant must meet their burden of establishing that they meet local Special Use Permit requirements. *PHG Asheville, LLC v. City of Asheville*, 374 N.C. 133, 149 (N.C. 2020).

24. To be granted a Special Use Permit in the City of Greenville, an applicant must produce sufficient evidence to meet all requirements in Greenville Code § 9-4-81:

- a. The proposed use meets conditions, specifications, and policies of the City of Greenville for submission of a Special Use Permit;
- b. The proposed use is in general conformity with the Comprehensive Land Use Plan;
- c. The proposed use will not adversely affect the health and safety of the persons residing or working in the neighborhood of the site. This includes traffic considerations and pedestrian movements on-site and off-site;
- d. The proposed use will not be detrimental to the public welfare or to the use of adjacent properties or other neighborhood uses;
- e. The proposed use would not be adversely affected by existing uses in the surrounding area;
- f. The proposed use will not injure adjoining or abutting property;
- g. The proposed use will not constitute a nuisance or hazard. These considerations include intensity of uses in the surrounding area, visual impact, method of operation, and externalities including noise, odor, dust, and emissions.

25. Additionally, the Greenville Board of Adjustment “shall make appropriate

findings to insure that the [requirements in Greenville Code § 9-4-186(E)] are met.” The requirements in Greenville Code § 9-4-186(E) mirror those in Greenville Code § 9-4-81, except that Greenville Code § 9-4-186(E) also requires that the location and character of the use must be “in harmony with the area in which it is to be located.”

26. Anyone who has standing to appeal the decision may also participate as a party at an evidentiary hearing. N.C. Gen. Stat. § 160D-406(d). This right to participate as a party includes the due process right to offer evidence. *Young v. City of Durham*, 287 N.C. App. 521, 2023-NCCOA-19, ¶ 13.

27. Several witnesses for RaceTrac were admitted as experts and given the opportunity to provide their expert opinions at the hearing. Each proffered expert witness appearing on behalf of the Applicant was prompted by the BOA to state their qualifications to be certified as an expert in their field. Additionally, other parties at the hearing were given the opportunity to object to any witness’s certification as an expert. The BOA concluded these processes by moving to certify each witness as an official expert. Each vote passed unanimously. However, none of these experts mentioned or discussed whether the RaceWay would be in conformity with the City of Greenville Comprehensive Land Use Plan, or Horizons 2026.

28. After RaceTrac presented its evidence, Dr. Garrie Moore approached to provide testimony in his individual capacity and as an expert on behalf of the Brookhaven Community Association.

29. When asked a series of questions to determine whether he had standing, Dr. Moore unambiguously asserted that he is an expert in education and has a PhD in education. This expertise is invaluable when evaluating the impacts of the RaceWay development, as

Wellcome Middle School—a school of approximately 400 adolescent students who are overwhelmingly low-income students of color—is located within 1000ft of the proposed site. Dr. Moore personally works with troubled Wellcome Middle School students through the Center for Science Technology and Leadership Development, a non-profit he founded where he serves as CEO.

30. However, despite Dr. Moore’s attempt to be certified as an expert witness, his assertion that he was an expert was completely ignored by the Board of Adjustment.

31. The Board of Adjustment did not ask Dr. Moore to elaborate upon his qualifications as an expert, as they had with every other witness asserting expertise.

32. The Board of Adjustment did not provide other parties the opportunity to object to Dr. Moore’s certification as an expert, as they had with every other party asserting to be an expert witness.

33. The Board of Adjustment did not move to certify Dr. Moore as an expert, as they had with every other party asserting to be an expert witness.

34. The official Findings of Fact upon which the Board of Adjustment relies to ensure necessary standards are met under Greenville Code § 9-4-186(E), states that “[n]o expert testimony was provided by any opponent.”<sup>7</sup> Contrary to this statement, Dr. Moore attempted to provide expert testimony in his capacity as CEO of the Center for Science Technology and Leadership Development and was procedurally denied the ability to present that testimony for the Board of Adjustment’s consideration. Because Dr. Moore did not have access to an online version of the BOA’s policies and procedures, he was disadvantaged in his attempts to offer

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<sup>7</sup> **Exhibit D**, Order, at 13.

expert witness testimony when the BOA ignored his assertion that he was an expert and was unaware of rules necessary to prepare for the hearing as an expert.

35. During his testimony, Dr. Moore nevertheless spoke at length about the harms of putting a gas station in such close proximity to the approximately 400 adolescent students attending Wellcome Middle School, the most troubled of which he personally works with weekly as an education expert and nonprofit founder. His testimony included observations of health issues facing Wellcome Middle School students and the ways in which approving a gas station nearby would exacerbate these problems. He also noted that students at Wellcome Middle School will take every opportunity to go to the gas station, to their detriment (as the RaceWay plans to sell tobacco products).

36. Dr. Moore also submitted eleven pages of written testimony to the Board of Adjustment and other parties. This testimony included letters of opposition to the RaceWay, a map of the proposed RaceWay in relation to Wellcome Middle School, and Dr. Moore's expert research on the RaceWay's potential harms. This written expert testimony included research that gas stations within a 10-minute walk of a school increase student obesity.<sup>8</sup> Dr. Moore also cited EPA guidance, which he relied upon in his expert testimony and which is consistent with his informed opinion as an expert, which recommends that schools within 1000 feet of large gas stations should be initially screened for environmental hazards, including air pollution, soil contamination, ground water contamination, vapor intrusion into structures, and heavy vehicular traffic.<sup>9</sup>

37. At no point during this testimony did the Board of Adjustment ask any follow-

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<sup>8</sup> See **Exhibit G**, Dr. Moore Written Testimony, at 8.

<sup>9</sup> *Id.*

up questions about his expert observations and opinions concerning the impacts to Wellcome Middle School and its students; only one BOA member briefly asked for clarification about the EPA study.

38. Dr. Moore even asked for a continuance, based on the circumstances, which was opposed by RaceTrac and summarily denied by the Board of Adjustment.

39. The Board of Adjustment did not include any of Dr. Moore's verbal testimony about the RaceWay's harms to Wellcome Middle School students and the surrounding community in the record and, therefore, did not base their decision on his expertise. N.C. Gen. Stat. § 160D-406(j) ("Every quasi-judicial decision shall be based upon competent, material, and substantial evidence in the record."). At the conclusion of Dr. Moore's testimony, the Chairman of the BOA, Daniel Worrall, even stated "they're giving us lay opinion which we shouldn't be considering." As previously stated, the Board of Adjustment also asserted in their Findings of Fact that no expert testimony was provided by any opponent.

40. All of Dr. Moore's testimony was relevant for the Board of Adjustment's determination of whether RaceTrac's application would adversely affect health and safety, be deleterious to public welfare, constitute a nuisance or hazard, be in harmony with the surrounding environment, and many other requirements set forth in Greenville Code § 9-4-81 and Greenville Code § 9-4-186(E).

41. However, the Board of Adjustment admits they did not consider any of Dr. Moore's written evidence in making their decision because they claim the evidence was not competent, substantial, and material.<sup>10</sup> The Board of Adjustment also found all of the submitted

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<sup>10</sup> **Exhibit D**, Order, at 23.

materials to be hearsay.<sup>11</sup> Assuming *arguendo* the materials submitted were hearsay, however, Boards of Adjustment may freely rely on hearsay if they so choose. N.C. Gen. Stat. § 160D-1402(j)(3); *Harding v. Bd. of Adjustment*, 170 N.C. App. 392, 397-98 (2005).

42. The Board of Adjustment stated in its conclusions of law that “there [was] a lack of competent, material, and substantial evidence that was introduced to support the denial of the Applicant’s Special Use Permit,” so the Applicant was *prima facie* entitled to the Special Use Permit.<sup>12</sup> In other words, the Board of Adjustment held that the Applicant was the only party who presented evidence worth considering, so the Applicant was entitled to the permit by law.

#### **LEGAL BACKGROUND**

43. A reviewing court shall ensure Petitioner’s rights were not prejudiced because the Board of Adjustment’s findings, inferences, conclusions, or decisions were in violation of (a) due process rights, (b) in excess of their statutory authority, (c) inconsistent with applicable procedures, (d) affected by other error of law, (e) unsupported by competent, material, and substantial evidence in view of the entire record, or (f) arbitrary and capricious. N.C. Gen. Stat. § 160D-1402(j)(1).

#### **(1) The City of Greenville, Through the BOA, Violated Petitioners’ Due Process When It Denied Dr. Moore the Opportunity to Present Expert Testimony.**

44. The standard of review for an appellate court evaluating a due process violation in a quasi-judicial proceeding is *de novo*. N.C. Gen. Stat. § 160D-1402(j)(2).

45. The due process rights of a Petitioner that a trial court is responsible for ensuring were not violated include “the right to offer evidence.” *Young v. City of Durham*, 287 N.C.

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<sup>11</sup> *Id.*

<sup>12</sup> See **Exhibit D**, Order, at 25-27.

App. 521, 2023-NCCOA-19, ¶ 13.

46. Every quasi-judicial decision must be based on evidence *in the record* that is *competent, material, and substantial*. N.C. Gen. Stat. § 160D-406(j); N.C. Gen. Stat. § 160D-1402.

47. The “material” and “substantial” requirements essentially seek to ensure the proffered testimony is relevant. “Substantial evidence is defined as that which a reasonable mind would regard as sufficiently supporting a specific result. Material evidence is evidence having some logical connection with the consequential facts.” *Young v. City of Durham*, 287 N.C. App. 521, 2023-NCCOA-19, ¶ 19 (quotations omitted). Dr. Moore’s verbal testimony and the handouts he submitted to the Board of Adjustment are undoubtedly substantial and material.

48. Whether testimony offered by a party is “competent,” hinges on a witness’s status as a lay witness or an expert witness. “Competent” evidence cannot include matters for which only expert testimony would be acceptable. N.C. Gen. Stat. § 160D-1402(j)(3). Therefore, lay witness testimony is disregarded in quasi-judicial proceedings whenever lay witnesses testify to matters only appropriate for experts to opine on. *See, e.g., Innovative 55, LLC v. Robeson Cty.*, 253 N.C. App. 714, 724, 801 S.E.2d 671, 678 (2017). This is precisely what happened to Dr. Moore—but Dr. Moore was denied his opportunity to be tendered as an expert witness.

49. Although Dr. Moore unequivocally stated he was an expert in education, the Board of Adjustment treated him differently than every other expert witness and disregarded his expert opinions as incompetent. Dr. Moore’s due process right to offer evidence was therefore infringed, because there was no proper way for him to present his research and opinions. *See, e.g., Young v. City of Durham*, 287 N.C. App. 521, 2023-NCCOA-19, ¶¶ 34-35



(demonstrating the exclusion of expert testimony from a lay witness because it is “incompetent”); *see also* N.C. Gen. Stat. § 160D-1402(j)(3). This additionally harmed Dr. Moore’s nonprofit, as the students he serves will be unquestionably harmed by the RaceWay and their impacts, as testified to by Dr. Moore, were not considered.

**(2) The City of Greenville, Through the BOA, Committed Multiple Errors of Law by Failing to Make Appropriate Findings of Fact and Keeping BOA Procedures Hidden.**

50. The standard of review for an appellate court evaluating errors of law in a quasi-judicial proceeding is *de novo*. N.C. Gen. Stat. § 160D-1402(j)(2).

51. Greenville Code § 9-4-186(E) requires the Board of Adjustment to “make *appropriate findings to insure* that the [local Special Use Permit requirements] are met.” Greenville Code § 9-4-186(E) (emphasis added).

52. The City of Greenville stated in their findings of fact that “[n]o expert testimony was submitted by any opponent,” which is plainly incorrect—Dr. Moore submitted expert testimony and was fundamentally denied his “right to offer evidence” as an expert. *Young v. City of Durham*, 287 N.C. App. 521, 2023-NCCOA-19, ¶ 13.

53. As a result of this finding, the BOA concluded the Applicant was *prima facie* entitled to the Special Use Permit because there was “a lack of competent, substantial, and material evidence that was introduced to support the denial of the Applicant’s Special Use Permit.”<sup>13</sup>

54. Dr. Moore’s expert opinions concerning impacts to Wellcome Middle School students were indeed substantial, competent, and material.

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<sup>13</sup> **Exhibit D**, Order, at 27.

55. Therefore, the City of Greenville’s *inappropriate* findings of fact *prevented* the BOA from ensuring necessary permit requirements were met. Greenville Code § 9-4-186(E) (emphasis added). This was a harmful error of law. N.C. Gen. Stat. § 160D-1402(j)(1).

56. These injustices are further exacerbated by the fact that the City of Greenville, upon information and belief, failed to post their *Board of Adjustment Rules of Procedure* on the City of Greenville website, in violation of N.C. Gen. Stat. § 160D-308.

57. This error of law concealed unknown procedures (or lack thereof) for Petitioners to consult, heightening the difficulty for Petitioners to oppose RaceTrac’s Special Use Permit application. N.C. Gen. Stat. § 160D-1402(j)(1). This was an additional harmful error of law. N.C. Gen. Stat. § 160D-1402(j)(1).

**(3) The City of Greenville, Through the BOA, Failed to Establish the RaceWay Would**

**Conform with Horizons 2026.**

58. “Whether the record contains competent, material, and substantial evidence is a conclusion of law, reviewable *de novo*.” N.C. Gen. Stat. § 160D-1402(j)(2); *see Schooldev E., LLC v. Town of Wake Forest*, 284 N.C. App. 434, 444 (2022).

59. In applying for a Special Use Permit the burden is on the applicant to “produce[] competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of [the Special Use Permit].” *Schooldev E., LLC*, 284 N.C. App. at 442.

60. To be granted a Special Use Permit in the City of Greenville, the proposed use must be “in general conformity with the Comprehensive Land Use Plan of the city and its extraterritorial jurisdiction.” Greenville Code § 9-4-81(B). “Horizons 2026” is the City of Greenville Comprehensive Land Use Plan.

61. Upon information and belief, RaceTrac did not mention Horizons 2026 at all during the BOA Hearing or present any discussion indicating conformance therewith. Horizons 2026 has a “Vision Framework” that establishes eight guideposts for the City of Greenville’s future, including “Growing a Healthy City,” but RaceTrac failed to show how granting this permit aligned with these guideposts. Horizons 2026 also has “Sustainability Themes,” which are an “important theme of this plan” and “central to addressing the long term challenges and opportunities of the community,” as well as consistent messaging regarding the importance of community vision and involvement. Approving a gas station near a middle school in the face of strong community opposition undermines Horizons 2026’s central tenant of sustainability, yet RaceTrac failed to mention these themes—or how positioning a gas station next to a middle school builds a healthy city—at all.

62. The Board of Adjustment also did not mention or ask about Horizons 2026 during the BOA Hearing.

63. RaceTrac therefore failed to meet their burden of establishing that the Special Use Permit would be in conformity with Horizons 2026.

64. Accordingly, the City of Greenville, through the Board of Adjustment, violated Greenville Code § 9-4-81(B) when it nevertheless issued the Special Use Permit to RaceTrac.

**(4) The City of Greenville, Through the BOA, was Arbitrary and Capricious Because it Lacked Fair and Careful Consideration in Making its Decision.**

65. While denial of due process and errors of law are evaluated *de novo*, the reviewing court must undertake a “whole record” test to assess whether the Board of Adjustment’s actions were arbitrary and capricious. *Frazier v. Town of Blowing Rock*, 286 N.C. App. 570, 573 (2022).

66. A decision that lacks fair and careful consideration is arbitrary and capricious under the “whole record” test. *Mann Media, Inc. v. Randolph County Planning Bd.*, 356 N.C. 1, 16 (2002).

67. The Board of Adjustment failed to consider expert testimony presented by Dr. Moore and neglected to consider Horizons 2026 at all. This showed a lack of fair and careful consideration, and so was inherently arbitrary and capricious.

**PRAYER FOR RELIEF**

WHEREBY, Petitioners respectfully request the Court:

1. Issue the attached Writ of Certiorari, pursuant to N.C. Gen. Stat. 160D-1402(e), directed to Respondent City of Greenville, requiring that the City of Greenville prepare and certify to the Court a complete record of the proceedings in this case, including, but not limited to, video recordings of the BOA Hearing, on or before the date specified in the proposed Writ;
2. Conduct judicial review of the record and decision in this case;
3. Issue an order reversing the Decision of the Board of Adjustment and revoking the Special Use Permit, pursuant to N.C. Gen. Stat. § 160D-1402(k)(3)(b), and conclude that RaceTrac was not entitled to a Special Use Permit on October 25, 2024.
4. Remand this matter to the City of Greenville Board of Adjustment as necessary to take further action consistent with this Court’s decision;
5. Award reasonable attorney’s fees and costs incurred pursuant to N.C. Gen. Stat. § 6-21.7 and 42 U.S.C. § 1988 for violation of Petitioners’ constitutional due process rights.
6. Tax the costs of this action against Respondent City; and
7. Finally, Petitioners request such further relief as the Court deems just and proper.

Respectfully submitted this the \_\_\_ day of November, 2024

This is the 20<sup>th</sup> day of November, 2024.

SOUTHERN COALITION FOR SOCIAL JUSTICE

By:  \_\_\_\_\_

James Huey  
State Bar No.:60933  
Anne Harvey  
State Bar No.:56502  
PO Box 51280  
Durham, NC 27717  
Telephone: (919)-323-3380, Ext. 152  
Email: [james@scsj.org](mailto:james@scsj.org)  
Email: [anne@scsj.org](mailto:anne@scsj.org)  
Attorneys for the Petitioners

NORTH CAROLINA  
COUNTY OF PITT

VERIFICATION

I, Walter E. Fields, affirm under the penalty of perjury, that the foregoing representations in this Verified Petition are true to my own knowledge, except as to matters stated upon information and belief, and as to those matters, I believe them to be true.

By: Walter E. Fields

Walter E. Fields

Date: 11-20-24

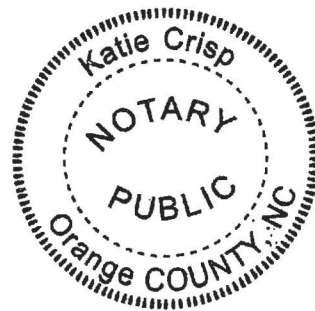
Sworn and subscribed before me this, the 20 day of November, 2025

Katie Crisp

Notary Public

October 3, 2028

My commission expires



NORTH CAROLINA  
COUNTY OF PITT

VERIFICATION

I, Vivian Kennion, affirm under the penalty of perjury, that the foregoing representations in this Verified Petition are true to my own knowledge, except as to matters stated upon information and belief, and as to those matters, I believe them to be true.

By: Vivian Kennion

Vivian Kennion

Date: Nov. 20, 2024

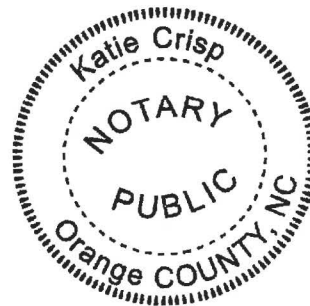
Sworn and subscribed before me this, the 20 day of November, 2025

Katie Crisp

Notary Public

October 3, 2024

My commission expires



NORTH CAROLINA  
COUNTY OF PITT

VERIFICATION

I, Garrick W. Moore, affirm under the penalty of perjury, that the foregoing representations in this Verified Petition are true to my own knowledge, except as to matters stated upon information and belief, and as to those matters, I believe them to be true.

By: Garrick W. Moore

Garrick W. Moore

Date: 11/20/24

Sworn and subscribed before me this, the 20<sup>th</sup> day of November, 2025

Katie Crisp

Notary Public

October 3, 2028

My commission expires

