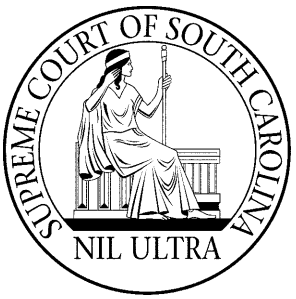

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
July 24, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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The Supreme Court of South Carolina

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

Appellate Case No. 2010-160047

ORDER

The petition for rehearing is denied. While no changes are made to the dissenting opinion, the attached majority opinion is substituted for the majority opinion previously filed in this matter.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina
July 24, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

Appellate Case No. 2010-160047

Appeal from Pickens County
Charles B. Simmons, Jr., Special Circuit Court Judge

Opinion No. 27124
Heard September 18, 2012 – Refiled July 24, 2013

AFFIRMED AS MODIFIED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, and Christopher D. Scalzo, of Greenville, for Appellant.

Tommy Evans, Jr. and John B. Aplin, both of Columbia, for the Respondent.

E. Charles Grose, Jr. of the Grose Law Firm, of Greenwood, Chief Appellate Defender Robert M. Dudek, of Columbia, and Assistant Public Defender Shane E. Goranson, of Greenwood, for Amicus Curiae, Anthony Nation.

JUSTICE KITTREDGE: Jennifer Dykes appeals the circuit court's order requiring that she be subject to satellite monitoring for the rest of her life pursuant to sections 23-3-540(C) and (H) of the South Carolina Code of Laws (Supp. 2011). We affirm as modified.

Section 23-3-540 represents a codification of what is commonly referred to as Jessica's Law. Many states have some version of this law, which was enacted in memory of Jessica Lunsford, a nine-year-old girl who was raped and murdered by a convicted sex offender in Florida. Across the country, these laws heightened criminal sentences and post-release monitoring of child sex offenders. The specific issue presented in this case concerns the mandate for lifetime global positioning satellite monitoring with no judicial review. The complete absence of judicial review under South Carolina's legislative scheme is more stringent than the statutory scheme of other jurisdictions. A common approach among other states is either to require a predicate finding of probability to re-offend or to provide a judicial review process, which allows for, upon a proper showing, a court order releasing the offender from the satellite monitoring requirements. *See generally*, N.C. Gen. Stat. Ann. § 14-208.43 (West 2010) (providing a termination procedure one year after the imposition of the satellite based monitoring or a risk assessment for certain offenders). While we hold that the statute's initial mandatory imposition of satellite monitoring is constitutional, the lifetime requirement without judicial review is unconstitutional.

I.

Dykes, when twenty-six years old, was indicted for lewd act on a minor in violation of Section 16-15-140 of the South Carolina Code (2006) as a result of her sexual relationship with a fourteen-year-old female. Dykes pled guilty to lewd act on a minor and was sentenced to fifteen years' imprisonment, suspended upon the service of three years and five years' probation.[1]

Upon her release, Dykes was notified verbally and in writing that pursuant to section 23-3-540(C) she would be placed on satellite monitoring if she were to

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[1] Because her offense predated the satellite monitoring statute, she was not subject to monitoring at the time of her plea.

violate the terms of her probation. Shortly thereafter, Dykes violated her probation in multiple respects.[2] Dykes did not contest any of these violations, though she did offer testimony in mitigation.

The State recommended a two-year partial revocation of Dykes' probation and mandatory lifetime satellite monitoring. S.C. Code Ann. section 23-3-540(A) mandates that when an individual has been convicted of engaging in or attempting criminal sexual conduct with a minor in the first degree (CSC-First) or lewd act on a minor, the court must order that person placed on satellite monitoring. Likewise, if a person has been convicted of such offenses before the effective date of the statute and violates a term of her probation, parole, or supervision program, she must also be placed on satellite monitoring. *See* S.C. Code Ann. § 23-3-540(C). The individual must remain on monitoring for as long as she is to remain on the sex offender registry, which is for life. S.C. Code Ann. § 23-3-540(H); *see also* S.C. Code Ann. § 23-3-460 (requiring biannual registration for life).[3] Significantly, the lifetime monitoring requirement for one convicted of CSC-First or lewd act on a minor is not subject to any judicial review process. *See* S.C. Code Ann. § 23-3-540(H) (prohibiting judicial review of the lifetime monitoring for CSC-First and lewd act on a minor).

In contrast, if a person is convicted of committing or attempting any offense which requires registration as a sex offender *other than* CSC-First or lewd act on a minor, the court has discretion with respect to whether the individual should be placed on satellite monitoring. *See* S.C. Code Ann. § 23-3-540(B), (D), (G)(1).[4] In addition,

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[2] Five citations and arrest warrants were issued to her for various probation violations: a citation pertaining to her relationship with a convicted felon whom Dykes met while incarcerated and with whom she was then residing; an arrest warrant for Dykes' continued relationship with that individual; a citation for drinking an alcoholic beverage; a citation for being terminated from sex offender counseling after she cancelled or rescheduled too many appointments; and an arrest warrant for failing to maintain an approved residence and changing her address without the knowledge or consent of her probation agent.

[3] Once activated, the monitor can pinpoint the individual's location to within fifteen meters.

after ten years, an individual who has committed the above-stated crimes may petition the court to have the monitoring removed upon a showing that she has complied with the monitoring requirements and there is no longer a need to continue monitoring her. If the court denies her petition, she may petition again every five years.[5] S.C. Code Ann. § 23-3-540(H).

II.

At her probation revocation hearing, Dykes objected to the constitutionality of mandatory lifetime monitoring. In support of her arguments, Dykes presented expert testimony that she poses a low risk of reoffending and that one's risk of reoffending cannot be determined solely by the offense committed. The State offered no evidence, relying instead on the mandatory, nondiscretionary requirement of the statute.

The circuit court found Dykes to be in willful violation of her probation and that she had notice of the potential for satellite monitoring. The court denied Dykes' constitutional challenges and found it was statutorily mandated to impose satellite monitoring without making any findings as to Dykes' likelihood of reoffending. The court also revoked Dykes' probation for two years, but it ordered that her probation be terminated upon release. This appeal followed.

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[4] The offenses include: criminal sexual conduct with a minor in the second degree; engaging a child for sexual performance; producing, directing, or promoting sexual performance by a child; assaults with intent to commit criminal sexual conduct involving a minor; violation of the laws concerning obscenity, material harmful to minors, child exploitation, and child prostitution; kidnapping of a person under the age of eighteen unless the defendant is a parent; and trafficking in persons under the age of eighteen if the offense includes a completed or attempted criminal sexual offense. S.C. Code Ann. § 23-3-540(G)(1).

[5] As long as the individual is being monitored, she must comply with all the terms set by the State, report damage to the device, pay for the costs of the monitoring (unless she can show financial hardship), and not remove or tamper with the device; failure to follow these rules may result in criminal penalties. S.C. Code Ann. §§ 23-3-540(I) to (L).

III.

The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. Dykes contends that the imposition of mandatory, lifetime satellite monitoring without consideration of her likelihood of re-offending violates her due process rights.

A.

Dykes asserts she has a fundamental right to be "let alone." We disagree. The United States Supreme Court has cautioned restraint in the recognition of rights deemed to be fundamental in a constitutional sense. *See Washington v. Glucksberg*, 521 U.S. 702 (1997) (noting the Supreme Court's reluctance to expand the concept of substantive due process). Indeed, courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [members of the judiciary]." *Id.* at 720. The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720-21 (internal citations omitted). We reject the suggestion that a convicted child sex offender has a fundamental right to be "let alone" that is "deeply rooted in this Nation's history and tradition."

Our rejection of Dykes' fundamental right argument flows in part from the premise that satellite monitoring is predominantly civil. *See Smith v. Doe*, 538 U.S. 84 (2003) (noting that whether a statute is criminal or civil primarily is a question of statutory construction). Where, as here, the legislature deems a statutory scheme civil, "only the clearest proof" will transform a civil regulatory scheme into that which imposes a criminal penalty. *Id.* at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)) (internal quotations omitted).

Notwithstanding the absence of a fundamental right, we do find that lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference. We agree with other jurisdictions that have held the requirement of satellite monitoring places significant restraints on offenders that amount to a liberty interest. *See*

Commonwealth v. Cory, 911 N.E.2d 187, 196 (Mass. 2009) (finding satellite monitoring burdens an offender's liberty interest in two ways, by "its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities"); *United States v. Smedley*, 611 F.Supp.2d 971, 975 (E.D. Mo. 2009) (holding that imposing home detention with electronic monitoring as condition of release impinged on liberty interest); *United States v. Merritt*, 612 F.Supp.2d 1074, 1079 (D. Neb. 2009) (stating that "[a] curfew with electronic monitoring restricts the defendant's ability to move about at will and implicates a liberty interest protected under the Due Process Clause"); *State v. Stines*, 683 S.E.2d 411 (N.C. Ct. App. 2009) (holding that requiring enrollment in satellite-based monitoring program deprives an offender of a significant liberty interest). Therefore, having served her sentence, Dykes' mandatory enrollment in the satellite monitoring program invokes minimal due process protection.

Thus, courts must "ensure[] that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary . . . ." *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002); *see also Nebbia v. N.Y.*, 291 U.S. 502, 525 (1934) ("[T]he guarant[ee] of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious . . . ."); *Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist.*, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984) (holding that, to comport with due process, the legislation must have a rational basis for the deprivation and may not be "so inadequate that the judiciary will characterize it as arbitrary").

B.

The General Assembly has expressly outlined the purpose of the state's sex offender registration and electronic monitoring provisions:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens [by] . . . provid[ing] law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of reoffending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (2007). This Court has examined this language and held "it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Thus, a likelihood of re-offending lies at the core of South Carolina's civil statutory scheme.

In light of the General Assembly's stated purpose of protecting the public from sex offenders and aiding law enforcement, we find that the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test. Accordingly, we find constitutional the baseline requirement of section 23-3-540(C) that individuals convicted of CSC-First or lewd act on a minor mandatorily submit to electronic monitoring upon their release from incarceration or violation of their probation or parole.

Although we find the initial mandatory imposition of satellite monitoring under section 23-3-540(C) constitutional, we believe the final sentence of section 23-3-540(H) is unconstitutional, for it precludes judicial review for persons convicted of CSC-First or lewd act on a minor.[6] The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending. *See Luckabaugh*, 351 S.C. at 139-40, 568 S.E.2d at 346 (finding due process ensures that a statute which deprives a person of a liberty interest has "at a minimum, a rational basis, and may not be arbitrary"); *see also Lyng v. Int'l Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) (noting that although allegedly arbitrary legislation invokes the least intrusive rational basis test, that standard of review "is not a toothless one") (quoting *Matthews v. De Castro*, 429 U.S. 181, 185 (1976))); *Addington v. Texas*, 441 U.S. 418, 427 (1979) (noting that although Texas has legitimate interest to protect the community from those that are mentally ill, Texas "has no interest in confining individuals involuntarily if they

[6] "A person may not petition the court if the person is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140."

are not mentally ill or if they do not pose some danger to themselves or others").[7] Thus, we hold it is unconstitutional to impose lifetime satellite monitoring with no opportunity for judicial review, as is the case with CSC-First or lewd act pursuant to section 23-3-540(H).

The finding of unconstitutionality with respect to the non-reviewable lifetime monitoring requirement in section 23-3-540(H) does not require that we invalidate the remainder of the statute. This is so because of the legislature's inclusion of a severability clause. *See* 2006 Act No. 346 § 8 (stating that if a court were to find any portion of the statute unconstitutional, that holding does not affect the rest of the statute and the General Assembly would have passed it without that ineffective part). The only provision invalidated by today's decision is the portion of section 23-3-540(H) that prohibits only those convicted of CSC-First and lewd act on a minor from petitioning for judicial relief from the satellite monitoring.[8]

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[7] This finding of arbitrariness is additionally supported by the South Carolina Constitution, which, unlike the United States Constitution, has an express privacy provision. *See* S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ."). Our constitution's privacy provision informs the analysis of whether a state law is arbitrary and lends additional support to the conclusion that section 23-3-540(H)'s preclusion of judicial review for those offenders mandated to satellite monitoring under section 23-3-540(C) is unconstitutional. *Cf. State v. Weaver*, 374 S.C. 313, 649 S.E.2d 479 (2007) (holding that by articulating a specific prohibition against unreasonable invasions of privacy, the people of South Carolina have indicated a higher level of privacy protection than the federal Constitution).

[8] We respond to the dissent in two respects. First, the dissent misapprehends our position by its suggestion that "[f]ormulating the right by couching it in terms of a specific class of persons fails to appreciate the extent of the right at stake" and that "the Constitution does not recognize separate rights for different classes of citizens and instead guarantees rights to all American citizens." Certainly, in the abstract, people generally have a right to be let alone. Respectfully, however, fundamental rights are not to be defined or examined in a vacuum, but rather must be viewed in the context of the situation presented. Even the dissent's analysis so acknowledges, as it refers to Dykes's status, stating "when viewed in light of the facts of this case" and quoting Justice Kennedy's opinion in *Lawrence v. Texas*,

Consequently, Dykes and others similarly situated must comply with the monitoring requirement mandated by section 23-3-540(C). However, persons convicted of CSC-First and lewd act on a minor are entitled to avail themselves of the section 23-3-540(H) judicial review process as outlined for the balance of the offenses enumerated in section 23-3-540(G). We affirm the circuit court as modified.[9]

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539 U.S. 558, 562 (2003), in which he observed that "[l]iberty protects the person from *unwarranted* government intrusions . . . ." (emphasis added). The dissent's multiple invocations of the word "unwarranted" with regard to government intrusions necessarily implicate a context-specific analysis when examining the right asserted. *Compare District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding the Second Amendment confers to an individual the right to keep and bear arms) *with* 18 U.S.C. § 922(g)(1) (2012) (unlawful for a person with a prior felony conviction to possess a firearm). Indeed, the question before us is whether the state may constitutionally impose civil satellite monitoring for convicted child sex offenders. In the context of this case, as much as the dissent wishes otherwise, Dykes cannot avoid her unalterable status as a convicted child sex offender, and pursuant to *Glucksberg*, she holds no fundamental right to be let alone.

Secondly, the dissent attributes to the majority a position we have never taken. With our opinion today, we have not, as the dissent suggests, upheld mandatory *lifetime* monitoring with no judicial review for assessment of the risk of reoffending. In fact, although refusing to recognize a fundamental right, we have found the statutorily prescribed mandatory lifetime monitoring without a risk assessment is arbitrary and therefore unconstitutional. Going forward, pursuant to the savings clause and despite the dissent's suggestion to the contrary, Dykes and others similarly situated are entitled to periodic judicial reviews under section 23-3-540(H) to determine if satellite monitoring remains necessary.

[9] In addition to her substantive due process claim, Dykes asserts constitutional violations of procedural due process, the prohibition on *ex post facto* laws, equal protection, and unreasonable search and seizure. We reject her additional claims pursuant to Rule 220, SCACR, and the following authorities: *Connecticut v. Doe*, 538 U.S. 1, 8 (2003) (rejecting sex offender's due process argument requesting a hearing on his current level of dangerousness, and stating those "who assert a right to a hearing under the Due Process Clause must show that the facts they seek to

AFFIRMED AS MODIFIED.

TOAL, C.J., concurs. PLEICONES, J., concurring in result only. HEARN, J., dissenting in a separate opinion in which BEATTY, J., concurs.

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establish in the hearing are relevant to the to the statutory scheme"); *Smith v. Doe*, 538 U.S. 84 (2003) (rejecting an *ex post facto* challenge where sex offender registration and monitoring requirements are civil in nature); *Phillips v. State*, 331 S.C. 482, 482, 504 S.E.2d 111, 112 (1998) (holding "[i]t is not a violation of the *ex post facto* clause for the legislature to enhance punishment for a later offense based on a prior conviction, even though the enhancement provision was not in effect at the time of the prior offense"); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995) ("The *sine qua non* of an equal protection claim is showing that *similarly situated* persons received disparate treatment.") (emphasis added)); *Curtis v. State*, 345 S.C. 557, 575, 549 S.E.2d 591, 600 (2001) (noting if the case does not involve a suspect classification or a fundamental right, the question is whether the legislation is rationally related to a legitimate state purpose); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable.").

JUSTICE HEARN: Respectfully, I dissent. Because I believe Dykes' status as a sex offender does not diminish her entitlement to certain fundamental rights, I would hold section 23-3-540(C) is unconstitutional because it is not narrowly tailored. I express no opinion on the constitutionality of section 23-3-540(H) because that subsection was never challenged and is thus not before us. [10] Dykes' argument is, and always has been, that subsection (C) of 23-3-540—the provision requiring lifetime satellite monitoring for persons who violate a term of probation and were convicted of committing criminal sexual conduct with a minor in the first degree or committing or attempting a lewd act upon a child under sixteen—violates her substantive due process rights by imposing monitoring without any showing of her likelihood to reoffend. By invalidating a statutory provision not challenged, the majority ignores those settled principles of error preservation and appellate jurisprudence, and awards Dykes a consolation prize she has never requested and arguably has no standing to accept.

Proceeding to the question presented, I agree with Dykes that subsection (C) of 23-3-540 unconstitutionally infringes on her right to substantive due process. The Fourteenth Amendment to the United States Constitution's command that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law," U.S. Const. amend. XIV, § 1, guarantees more than just fair process; it "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them,'"

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[10] I question whether Dykes would even have standing to challenge subsection (H). The constitutional minimum of standing requires the showing of "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," a causal connection between the injury and the challenged action, and evidence that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dept. of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted)). Here, Dykes would fail the initial inquiry because she cannot demonstrate any particularized, imminent injury. Subsection (H) allows a person to petition the court for release from electronic monitoring "[t]en years from the date the person begins to be electronically monitored." Dykes was ordered to begin GPS monitoring on April 22, 2010 and would therefore not be eligible to avail herself of this provision until 2018. Any claim that she suffered an injury under subsection (H) would be speculative at this point.

County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The core of the Due Process Clause, therefore, is the protection against arbitrary governmental action. *Id.* at 845.

However, one does not have a right to be free from government action merely because a law is arbitrary or unreasonable. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting.). Rather, "the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest." *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (en banc). Substantive due process in particular protects against the arbitrary infringement of "fundamental rights that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *Doe v. Moore*, 410 F.3d 1337, 1342–43 (11th Cir. 2005) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969)). If the interest infringed upon is a fundamental right, the statute must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). If the right is not fundamental, the statute is only subject to rational basis review. *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347. Accordingly, the initial inquiry is whether the alleged right impacted by the statute is fundamental.

As a threshold matter, I acknowledge the Court must tread carefully in this arena. Over the years, the United States Supreme Court has acknowledged the "liberty" protected by the Due Process Clause extends beyond the specific freedoms contained in the Bill of Rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the Supreme Court has found the right to marry, have children, direct the education of one's children, marital privacy, use contraception, retain bodily integrity, and receive an abortion are all protected). The Supreme Court, however, "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Furthermore, when a court recognizes a right as fundamental under the umbrella of substantive due process, it effectively removes the matter from the democratic process. *Glucksberg*, 521 U.S. at 720. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (internal citations and quotations

omitted). Hence, the Due Process Clause only "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *See id.* at 720–21 (internal citations and quotations omitted).

In articulating the precise right that section 23-3-540(C) infringes, Dykes frames it as the right "to be let alone." However, in determining whether the right at stake is fundamental, we must first make "a 'careful description' of the asserted liberty right or interest [to] avoid[] overgeneralization in the historical inquiry." *Hawkins*, 195 F.3d at 747. I profoundly disagree with the majority's characterization of the right at issue as the right of "a convicted sex offender" to be "let alone." Formulating the right by couching it in terms of a specific class of persons fails to appreciate the extent of the right at stake and instead focuses on the the State's asserted justification for infringing upon that right. The Constitution does not recognize separate rights for different classes of citizens and instead guarantees rights to all American citizens. Furthermore, determining whether a law violates an individual's substantive due process rights is a two-pronged analysis that first requires a determination as to whether a fundamental right has been implicated, and if so, whether the State has a compelling interest to justify the infringement. Injecting the State's interest—here, Dykes' status as a convicted sex offender—into the articulation of the right at stake conflates the analysis and dooms from the outset any possibility of finding the alleged right fundamental. While a person's status as a sex offender may affect whether the State can infringe upon her fundamental rights in certain ways, that factor should be considered in the second part of the analysis. Therefore, when viewed in light of the facts of this case and the authorities relied upon by Dykes, I believe the narrow right on which she relies is the right to be free from the permanent, continuous tracking of her movements.

Although Dykes has overstated the exact right on which she relies, traditional notions of liberty and the right to be let alone are instructive for they provide the context within which the Court must analyze Dykes' specific right. Sir William Blackstone, in his landmark *Commentaries on the Laws of England*, noted the government's right to restrict an individual's free will is not immutable and any greater restriction than necessary threatens liberty in general:

> [W]e may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural,

> increases the civil liberty of mankind: but every wanton and causeless restraint on the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny.

1 William Blackstone, *Commentaries* *121–22. Blackstone's commentary reflects our substantive due process milieu, where the core rights of freedom and liberty can only be limited when sufficiently necessary to advance the public good.

Furthermore, various members of the Supreme Court have voiced their views that the government has an acutely constrained power to infringe on one's liberty. Louis Brandeis, before he was appointed to the Supreme Court, wrote,

> [T]here came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges . . . .

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890). After joining the Supreme Court, Justice Brandeis noted the Founding Fathers

> recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). Additionally, in an oft-quoted dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan wrote,

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep

> and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

Id. at 543 (Harlan, J., dissenting).[11] As the Supreme Court later noted, these words "eloquently" describe our role in the substantive due process inquiry. *Moore*, 431 U.S. at 501.

In *Glucksberg*, however, the Supreme Court admonished overreliance on these expansive concepts of freedom in the due process analysis. Although the Supreme Court has, in the past, relied on Justice Harlan's dissent in *Poe* in its fundamental rights analysis, at no point has the Court jettisoned its "established approach" of searching for concrete examples of the claimed right in the Court's jurisprudence. *Glucksberg*, 521 U.S. at 721–22 & n.17. While satellite monitoring itself may not have an analogous precursor in the Court's jurisprudence, in the absence of a history to rely on in similar circumstances, the Court has resorted to examining more traditional notions of liberty. *Cf. Griswold*, 381 U.S. at 482–86 (detailing general concepts of privacy under the Constitution and concluding that proscribing the use of contraception "is repulsive to the notions of privacy surrounding the marriage relationship"). In my opinion, the right at stake—preventing a government's ubiquitous eye from following an individual's every movement throughout her life—rests easily within our established conception of liberty. As Justice Kennedy has noted,

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds.

Lawrence v. Texas, 539 U.S. 558, 562 (2003). A basic tenet of liberty is that there are places and aspects of our lives in which the State may not invade without clear justification.

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[11] The majority in *Poe* did not reach the substantive issue involved because it found the case to be nonjusticiable. *Poe*, 367 U.S. at 507–09.

Recognizing the growing threat of technological advances on individual liberty, Justice Douglas warned almost fifty years ago that "[t]he dangers posed by wiretapping and electronic surveillance strike at the very heart of the democratic philosophy." *Osborn v. United States*, 385 U.S. 323, 352 (1966) (Douglas, J., dissenting). Even then, the scope of the government's ability to enter an individual's private life was troubling, and it has only increased with the advent of GPS monitoring. I therefore believe an examination of the general impact of the satellite monitoring scheme is helpful in understanding how the articulated right is here infringed and the extent to which Dykes' liberty is impacted. Recently, the Supreme Court had the opportunity to consider a similar issue in *United States v. Jones*, 132 S. Ct. 945 (2012), albeit in a different context. At issue in *Jones* was whether the government's surreptitious placement of a GPS tracking device on Jones's car without a warrant was an unreasonable search in violation of the Fourth Amendment to the United States Constitution. *Id.* at 947. The majority held it was because the attachment of the monitor to the car was a physical trespass on personal property for the purpose of obtaining information. *Id.* at 949.

In his concurring opinion, Justice Alito tackled the thornier question of whether this satellite monitoring violated an individual's reasonable expectation of privacy. Justice Alito observed that recent technological advancements have placed vast swaths of information in the public realm, a development which "will continue to shape the average person's expectations about the privacy of his or her daily movements."[12] *Id.* at 963 (Alito, J., concurring). With that in mind, he concluded monitoring one's movements on a public street for a relatively short period of time would not violate an individual's reasonable expectations of privacy. *Id.* at 964 (citing *United States v. Knotts*, 460 U.S. 276, 281–82 (1983)). When that monitoring becomes long-term, however, the nature of the invasion changes:

> But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others

[12] In *Jones*, the monitor placed on the underside of Jones's car constantly tracked the car's movements over a four-week period without his knowledge. 132 S. Ct. at 947. The majority's contention to the contrary, Justice Alito noted there is no eighteenth century analogue to this type of investigation, because that "would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience." *Id.* at 958 (Alito, J., concurring).

> would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.

Id. Applying this principle to the four-week monitoring at issue in *Jones*, Justice Alito concluded, "We need not identify with precision the point at which the tracking of th[e] vehicle became a search, for the line was surely crossed before the 4-week mark." *Id.*

Justice Sotomayor similarly noted we live in an age so inundated with technology that we may unwittingly "reveal a great deal of information about [our]selves to third parties in the course of carrying out mundane tasks." *Id.* at 957 (Sotomayor, J., concurring). In that vein, she agreed with Justice Alito's concerns about the intrusiveness of satellite monitoring: "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[13] *Id.* at 955. Thus, satellite monitoring invites the State into the subject's world twenty-four hours per day, seven days per week, and it provides the State with a precise view of her intimate habits, whether she is in public or not. If we are not careful about and cognizant of this fact, "the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse" and "may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id*. at 956 (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

Although decided under the rubric of the Fourth Amendment, *Jones* is nevertheless instructive here. As Justice Alito and Justice Sotomayor incisively observed, the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives. More importantly, at issue in this case is not just the tracking of individuals for a period of time while they are being investigated for a specific crime—as with a Fourth Amendment search—but the statutorily mandated monitoring of certain

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[13] Justice Alito's concurrence was joined by three other members of the Court, Justice Ginsburg, Justice Breyer, and Justice Kagan. After noting she shared the same concerns as Justice Alito, Justice Sotomayor wrote that "[r]esolution of these difficult questions . . . is unnecessary" at this time because the majority's trespass theory was dispositive of the case. *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

individuals for as long as they live with no ability to have it removed. *See Osborne*, 385 U.S. at 343 (Douglas, J., dissenting) ("These examples . . . demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will."); *United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc) ("By holding that this kind of surveillance doesn't impair an individual's reasonable expectation of privacy, the panel hands the government the power to track the movements of every one of us, every day of our lives.").

I therefore conclude that the right of an individual to be free from the government's permanent, continuous tracking of her movements is easily encompassed by the larger protection of liberty and personal privacy accorded by the Constitution. As our history of protestations on government intrusion from Blackstone to *Jones* illustrates, our Constitution was designed to guarantee a certain freedom from government interference in the day-to-day order of our lives which lies at the heart of a free society. Accordingly, I believe neither liberty nor justice would exist if the government could, without sufficient justification, constantly monitor the precise location of an individual twenty-four hours a day until she dies. In my opinion, safeguarding against this Orwellian nightmare[14] falls squarely within the ambit of fundamental precepts embraced by the drafters of the Constitution. I would therefore hold that Dykes has a fundamental right to be free from the permanent, continuous tracking of her movements which the State may only infringe upon where it demonstrates the statute at issue is narrowly tailored to serve a compelling interest.

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[14] George Orwell's novel *1984* increasingly appears less of a dystopian fantasy and more a cautionary tale:

> There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time.

George Orwell, *1984* 6 (1949).

Before progressing to the second portion of the analysis, I question whether the majority's holding that the statute implicates "a protected liberty interest" is meaningfully different from my conclusion that it implicates a fundamental right or whether it is just an exercise in semantics. The issue is whether the interest/right is fundamental and in my opinion, a general liberty interest in being free from permanent, unwarranted government interference is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721. Unpalatable though it may be to recognize that persons guilty of sex crimes against children have fundamental rights, the Constitution was not designed to protect only the rights of people we like. *See Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 190 (1961) (Douglas, J., dissenting) ("Our Constitution protects all minorities, no matter how despised they are."). Constant, unjustified government intrusions in the lives of an individual are the types of tyrannical acts the Founding Fathers sought to protect against when establishing our nation. I therefore believe even under the majority's iteration of the interest at stake, that interest is fundamental and the statute must be evaluated under a strict scrutiny analysis.[15] *Flores*, 507 U.S. at 302 (1993) (holding that substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347 (2002) (acknowledging that the constitutionality of a statute which implicated the defendant's "liberty interest from bodily restraint" should be analyzed under strict scrutiny).

Accordingly, I proceed to the consideration of whether section 23-3-540(C) is narrowly tailored to serve a compelling state interest—thus surviving strict scrutiny—and conclude it is not. One cannot "minimize the importance and fundamental nature of [an individual's liberty interest]. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently

[15] I note as well my disagreement with the majority's assertion that merely because it is civil in nature, rather than criminal, the statute does not implicate a fundamental right. Whether a statute is characterized as civil or criminal is immaterial to this analysis and certainly not dispositive. *See Luckabaugh*, 351 S.C. at 135–140, 568 S.E.2d at 344–347 (recognizing that although the Sexually Violent Predator Act is civil and non-punitive in nature, it nevertheless infringes the "fundamental right to liberty, free from bodily restraint").

weighty, be subordinated to the greater needs of society." *United States v. Salerno*, 481 U.S. 739, 750–51 (1987). Dykes concedes that protecting the public from sex offenders who pose a high risk of reoffending is a compelling state interest; nevertheless, she steadfastly maintains, and I agree, that protecting the public from those who have a low risk of reoffending is not.

It is beyond question that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002). In fact, "the victims of sexual assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 32–33. Thus, the General Assembly noted "[s]tatistics show that sex offenders often pose a high risk of re-offending," S.C. Code Ann. § 23-3-400 (2007), prompting it to enact provisions "to protect the public from those sex offenders who may re-offend," *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Accordingly, I recognize Dykes' status as a convicted sex offender is relevant to the analysis. However, any infringement which is substantially justified by the possibility that an individual may reoffend—without any actual consideration of her likelihood to reoffend—belies a conclusion that the statute is narrowly tailored. Monitoring sex offenders who pose a low risk of reoffending for the rest of their lives is not "sufficiently weighty" such that the subject's liberty interest in being free from government monitoring must be "subordinated to the greater needs of society." *Salerno*, 481 U.S. at 750–51.

I therefore find that requiring Dykes to submit to satellite monitoring for the rest of her life without an assessment of her risk of reoffending violates her substantive due process rights. To paraphrase Blackstone, section 23-3-540(C)'s application to Dykes has the potential to decrease her natural liberty without any attendant increase in overall civil liberty. Accordingly, I would hold that subsection (C) of 23-3-540 is unconstitutional and must be stricken from the statute.

BEATTY, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Centex International, Inc. and Affiliates, Appellant,

v.

South Carolina Department of Revenue, Respondent.

Appellate Case No. 2011-196887

Appeal From The Administrative Law Court
John D. McLeod, Administrative Law Judge

Opinion No. 27288
Heard April 17, 2013 – Filed July 24, 2013

AFFIRMED

Burnet Rhett Maybank, III, of Nexsen Pruet, LLC, of Columbia, for Appellant.

Milton Gary Kimpson, Adam Nicholas Marinelli and Harry A. Hancock, all of Columbia, for Respondent.

JUSTICE BEATTY: Centex International, Inc. (Appellant) filed consolidated income tax returns for its three corporate affiliates that wholly owned the general partnership of Centex Homes, a developer of residential communities. Appellant appeals the Administrative Law Court's (ALC's) order upholding the South Carolina Department of Revenue's (the Department's) denial of its claim for infrastructure tax credits for the 2002-2005 income tax years. Appellant contends the ALC erred in: (1) concluding the corporate affiliates of Appellant were not eligible to claim the infrastructure tax credit as partners of Centex Homes; (2) its

interpretation and application of the aggregate and entity theories of partnership taxation; and (3) concluding that Appellant and its affiliates are not a single taxpayer that may claim the infrastructure tax credit on its consolidated tax return. This Court certified the appeal from the Court of Appeals pursuant to Rule 204(b), SCACR. We affirm.

I. Factual/Procedural History

The underlying facts of the instant case are not in dispute. Centex Homes is a general partnership that operates in South Carolina and is wholly owned by Appellant's three corporate affiliates. Centex Homes acquires and develops land for the purpose of establishing communities and constructing single-family homes in South Carolina and other states. As a result of constructing developments within this state, Centex Homes incurred infrastructure project expenses of approximately $68,000,000.

In 2007, Appellant filed amended corporate income tax returns for tax years 2002 to 2005, which included amended partnership returns for Centex Homes. In these returns, Appellant claimed tax credits in the amount of $5,113,040 based upon the expenses incurred by Centex Homes for the development of roads and water and sewer lines. Appellant sought these credits pursuant to section 12-6-3420 of the South Carolina Code, which provides in pertinent part:

> (A) A **corporation** may claim a credit for the construction or improvement of an infrastructure project against taxes due under Section 12-6-530 for:
>
> (1) **expenses paid or accrued by the taxpayer**;
>
> (2) contributions made to a governmental entity; or
>
> (3) contributions made to a qualified private entity in the case of water or sewer lines and their related facilities in areas served by a private water and sewer company.

S.C. Code Ann. § 12-6-3420(A) (2000) (emphasis added) (the "Infrastructure Credit Statute").[1]

[1] We cite to the code section in effect at the time of the designated tax years as it was amended in 2006. Act No. 335, 2006 S.C. Acts 2684. This amendment did not effectuate any substantive changes.

The Department conducted a Field Audit of Appellant for the South Carolina corporate income tax periods ending March 2002 through March 2005. The Department's audit, which was dated July 25, 2007, determined Appellant: (1) incorrectly calculated its South Carolina corporate income by failing to apportion the amounts of revenue from the out-of-state intangibles generated from activity in South Carolina; and (2) was not entitled to the claimed infrastructure tax credits as the credits were earned by the partnership, Centex Homes, rather than the corporation.

On October 23, 2007, Appellant filed a written protest in response to the Department's audit and notice of proposed assessment. On December 4, 2009, the Department issued Appellant its final Determination in which it confirmed the Field Audit and set forth the legal basis for its adjustments and denial of the claim for credits. Specifically, the Department denied Appellant's claim for the infrastructure tax credits because "Centex Homes was not eligible for the corporate tax credit as a general partnership and therefore could not pass through the credit to its individual corporate partners."

Upon receipt of the Determination, Appellant requested a contested case hearing before the ALC to dispute the Department's determination. The Department filed a Motion for Partial Summary Judgment on the infrastructure tax credit issue. In response, Appellant filed a Cross-Motion for Summary Judgment on the same issue. Both parties stipulated that no issue of fact remained on the infrastructure tax credit issue.

Following a hearing, the ALC granted the Department's motion and denied Appellant's cross-motion by order dated June 2, 2011. In so ruling, the ALC initially determined the Infrastructure Credit Statute mandated that a corporation *directly* incur the expenses that generate the claimed tax credit. The ALC reasoned that section 12-6-3420, when read in its entirety, limited "the taxpayer" in subsection (A)(1) to the "corporation" attempting to claim the credit under subsection (A). Because the infrastructure expenses were directly incurred by Centex Homes, a general partnership, the ALC concluded Appellant could not claim the credit "based upon its indirect involvement in the partnership's business activity." Additionally, the ALC found this conclusion was consistent with the Department's long-standing policy that "a credit must be used by the taxpayer that earns it."

Despite this conclusion, the ALC acknowledged a statutory exception that "would allow an avenue for indirect expenditures to create access to tax credits." Specifically, section 12-6-3310(B)(1) outlines a "pass-through" provision, which states:

> Unless specifically prohibited, an "S" corporation, limited liability company taxed as a partnership, or **partnership that qualifies for a credit pursuant to this article may pass through the credit earned to** each shareholder of the "S" corporation, member of the limited liability company, **or partner of the partnership**.

S.C. Code Ann. § 12-6-3310(B)(1) (Supp. 2010) (emphasis added) (the "Pass-Through Statute").[2] The ALC interpreted this code section to mean that "a tax credit may only be passed through to individual partners after the partnership itself *qualifies* for the tax credit." Because the ALC found the infrastructure tax credit was limited solely to corporations, the court concluded that a partnership cannot qualify to claim the credit. The ALC explained that, "[i]n order for the flow through provisions to remain consistent with the corporate limitations of § 12-6-3420, the word 'claim' must be interpreted as synonymous with 'generate.' " Thus, the ALC concluded that "because the partnership was not qualified to claim the tax credit in the first place, none of its corporate partners may do so under § 12-6-3310(B)(1)."

In reaching this ultimate conclusion, the ALC rejected Appellant's contentions that: (1) provisions for partnerships in the Internal Revenue Code, which have been adopted by South Carolina,[3] dictate that the tax credit be treated as if the individual corporate partners generated the credits directly under a modified "aggregate theory"; and (2) disallowance of the infrastructure credits would be inequitable as the corporate partners "spent over 68 million dollars on infrastructure and have to pay corporate income taxes on their distributive share from the partnership."

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[2] We cite to the 2010 supplement as that is the date cited in the ALC's order. However, we would note that subsection (B)(1) became effective on June 18, 2003. Act No. 69, 2003 S.C. Acts 733. Section 12-6-3310 was subsequently amended on June 12, 2008 to provide for tax credits claimed by a limited liability company. Act No. 352, 2008 S.C. Acts 3460.

[3] *See* S.C. Code Ann. §§ 12-6-40, -50, -600 (Supp. 2010) (adopting select provisions of the Internal Revenue Code).

Subsequently, Appellant filed a timely motion for reconsideration pursuant to Rule 59, SCRCP. After hearing arguments from the parties, the ALC denied Appellant's motion for reconsideration and specifically confirmed each of the prior rulings. Additionally, the ALC rejected Appellant's contention that it was entitled to claim the infrastructure credit because it filed a consolidated return and, thus, all of its affiliates constituted a single taxpayer for purposes of the credit. The ALC reasoned that, "[i]n order for a consolidated group to claim the credit on a consolidated basis, § 12-6-3420 requires that at least one corporation of the group must first be entitled to the credit." Although the ALC acknowledged that a credit can be applied on a consolidated basis, it found the corporate partners in the instant case were never entitled to the credit in the first place.

Appellant filed a timely appeal with the Court of Appeals. This Court certified the appeal pursuant to Rule 204(b), SCACR.

II. Standard of Review

Because the parties presented this tax case in the posture of a motion for summary judgment, it is governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"Tax appeals to the ALC are subject to the Administrative Procedures Act (APA)." *CFRE, L.L.C. v. Greenville County Assessor*, 395 S.C. 67, 73, 716 S.E.2d 877, 880 (2011). "The decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law." *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008); *see Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 144, 694 S.E.2d 525, 528 (2010) ("A reviewing court may reverse the decision of the ALC where it is in violation of a statutory provision or it is affected by an error of law." (citing S.C. Code Ann. § 1-23-610(B)(a), (d) (Supp. 2009)). However, "[q]uestions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881.

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Accordingly, we "read the statute as a whole" and "should not concentrate on isolated phrases within the statute." *CFRE,* 395 S.C. at 74, 716 S.E.2d at 881.

In conjunction with these rules of statutory construction, we must also be cognizant of our policy to strictly construe a tax credit against the taxpayer as it is a matter of legislative grace. *See CFRE,* 395 S.C. at 74, 716 S.E.2d at 881 ("[I]nterlaced with these standard canons of statutory construction is our policy of strictly construing tax exemption statutes against the taxpayer."); *SCANA Corp. v. S.C. Dep't of Revenue*, 384 S.C. 388, 394, 683 S.E.2d 468, 471 (2009) (recognizing that a tax credit is analogous to a tax deduction and, thus, is strictly construed against the taxpayer (Beatty, J., dissenting)). "This rule of strict construction simply means that constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor." *CFRE,* 395 S.C. at 74, 716 S.E.2d at 881 (citation omitted). "It does not mean that we will search for an interpretation in [DOR]'s favor where the plain and unambiguous language leaves no room for construction." *Id.* at 74-75, 716 S.E.2d at 881. "It is only when the literal application of the statute produces an absurd result will we consider a different meaning." *Id.* at 75, 716 S.E.2d at 881 (citation omitted).

III. Discussion

A. Arguments

Initially, we note that Appellant does not assert the Department unjustly deprived it of a $68,000,000 expense against its income for infrastructure costs. Instead, Appellant contends it was denied additional tax credits in the amount of $5,000,000. In support of this contention, Appellant posits four primary theories upon which it can claim the credit.

First, because a partnership is included in the statutory definition of "taxpayer," the infrastructure expenses paid by Centex Homes satisfied the provision of the Infrastructure Credit Statute that requires "expenses paid or accrued by the taxpayer." Second, Centex Homes "earned the credit by paying the qualifying expenditures" and, thus, constituted a "partnership that qualifies for a credit" under the Pass-Through Statute. Third, Appellant's corporate partners directly earned the credit as any expenses made by Centex Homes were not strictly those of the partnership but, rather, were attributed to each corporate partner in accordance with their ownership interest. Finally, the consolidated tax return filed by Appellant necessarily included the income and deductions related to the qualifying infrastructure expenses incurred by the "consolidated group" of corporate partners as they constituted a "single taxpayer."

B. Analysis

(1) "A Taxpayer" versus "The Taxpayer" under the Infrastructure Credit Statute

Because the term "taxpayer" is statutorily defined to include partnerships, Appellant asserts the plain language of the Infrastructure Credit Statute allows Appellant to claim the tax credit as Centex Homes constitutes a "taxpayer" and, thus, satisfied the requirement of subsection (A)(1) that "expenses [were] paid or accrued by the taxpayer." S.C. Code Ann. § 12-6-3420(A)(1). Simply stated, Appellant maintains Centex Homes was statutorily authorized to earn the credit. In turn, Appellant could claim the credit via its corporate affiliates.

In its argument, Appellant directs the Court's attention to other sections of the Infrastructure Credit Statute to establish that the credit is not strictly limited to corporations. Instead, Appellant asserts the legislature used the word "corporation" in the Infrastructure Credit Statute to identify only the entity that may **claim** the credit. According to Appellant, the use of the term "corporation" did not limit the type of entity that can generate or earn the credit as other entities, such as electric cooperatives, also qualify for the credit.

We find the ALC properly analyzed and rejected each of Appellant's arguments. Although Appellant is correct that the term "taxpayer" is statutorily

defined to include partnerships,[4] Appellant uses a forced construction to achieve its desired result.

As evident from the plain terms of the statute, the legislature used the phrase "**the** taxpayer" rather than "**a** taxpayer." By using the word "the", the legislature precluded partnerships from earning the infrastructure credit as it relates back to "a corporation." *See People v. Enlow*, 310 P.2d 539, 546 (Colo. 1957) ("The word '*the*' is a word of limitation—a 'word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of 'a' or 'an.'"). Moreover, the credit is to be applied to corporate income taxes as the legislature specifically referenced S.C. Code Ann. § 12-6-530, which imposes state income taxes on corporations doing business in this state. Thus, the entity earning the credit is limited to the claiming corporation.

This limitation was purposeful as it is consistent with the general rule that tax credits should be claimed by the entity that earns or generates the credit. *See Berks County Tax Collection Comm. v. Penn. Dep't of Cmty. & Econ. Dev.*, 60 A.3d 589, 592 (Pa. Commonw. Ct. 2013) ("A tax credit is commonly accepted to mean a direct reduction against the liability for tax owed. As defined in Black's Law Dictionary 1310 (5th ed. 1979), a tax credit is a '(t)ype of offset in which the taxpayer is allowed a *deduction from his tax* for other taxes paid.' " (citations omitted)). Furthermore, if we were to take Appellant's argument to its logical extreme, an individual (which is included in the statutory definition of "taxpayer") could generate the credit for a corporation. Thus, when read in the context of the Infrastructure Credit Statute, we conclude the phrase "the taxpayer" specifically refers to "a corporation" attempting to claim the credit in subsection (A).

Finally, we find the other code sections cited by Appellant do not support its position. Reading section 12-6-3420 in its entirety, and not just the isolated sections identified by Appellant, reveals the legislature's intent that a corporation must be the entity that incurs the expenses to generate the tax credit. Significantly, subsections (G), (H), and (I) specifically identify a "corporation" as the entity that may claim the credit. S.C. Code Ann. § 12-6-3420(G), (H), (I) (2000).

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[4] Pursuant to the South Carolina Income Tax Act, "**unless otherwise required by the context,**" the term "taxpayer" includes "an individual, trust, estate, **partnership**, association, company, **corporation**, or **any other entity** subject to the tax imposed by this chapter or required to file a return." S.C. Code Ann. § 12-6-30(1) (2000) (emphasis added).

Furthermore, Appellant's reliance on the legislature's inclusion of a "qualifying private entity" in subsection (F) of the Infrastructure Credit Statute is not dispositive. S.C. Code Ann. § 12-6-3420(F) (2000). Essentially, Appellant contends this section authorizes an electric cooperative, as a "qualified private entity," to claim the infrastructure credit. In support of this contention, Appellant references section 12-20-105,[5] a section that provides a tax credit for entities that pay license taxes under section 12-20-100.[6] Because electric cooperatives are not "incorporated in the same manner as traditional corporations," Appellant inferentially argues that a non-corporate entity may claim the infrastructure tax credit; thus, the credit is not limited to corporations.[7]

Appellant's attempt to expand the scope of the Infrastructure Credit Statute is unavailing. Subsections (A)(3) and (C)(1)(c) outline the fact that water and sewer lines deeded to a "qualified private entity," which maintain the infrastructure, are acceptable projects and eligible for the tax credit. S.C. Code Ann. § 12-6-3420(A)(3), (C)(1)(c) (2000). Neither of these sections includes qualified private **non-corporate** entities as possible claimants. Additionally, subsection (C)(2), which defines a "qualified private entity" as properly licensed utilities to which such a project is needed, makes no mention of an electric cooperative. *Id.* § 12-6-3420(C)(2). Accordingly, we find the legislature intended only for a corporate utility company to qualify for the credit.

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[5] Section 12-20-105 provides tax credits for companies subject to a license tax under section 12-20-100 against its license tax liability for amounts paid in cash to provide infrastructure for an eligible project. S.C. Code Ann. § 12-20-105 (2000 & Supp. 2012). This section includes electric cooperatives and cross-references the Infrastructure Credit Statute to preclude a company from claiming a credit under both statutes. *Id.* § 12-20-105(G).

[6] Section 12-20-100 provides for license tax on utility companies and electric cooperatives. S.C. Code Ann. § 12-20-100 (2000).

[7] Appellant's argument appears to be based on the "Cross-Reference" in section 12-6-3420, which states, "Utilities companies and electric cooperatives claiming credit under this section ineligible to claim credit against license tax liability, see § 12-20-105." S.C. Code Ann. § 12-6-3420.

(2) "Partnership that Qualifies for a Credit" under the Pass-Through Statute

Alternatively, Appellant asserts it may claim the credit pursuant to the Pass-Through Statute, which states:

> **Unless specifically prohibited**, an "S" corporation, limited liability company taxed as a partnership, or **partnership that qualifies for a credit pursuant to this article may pass through the credit earned to** each shareholder of the "S" corporation, member of the limited liability company, **or partner of the partnership**.

S.C. Code Ann. § 12-6-3310(B)(1) (Supp. 2010) (emphasis added). Because Centex Homes "made qualified expenditures and contributed to the resulting infrastructure projects to local municipalities on behalf of its corporate partners and therefore earned the credit," Appellant asserts it is "eligible to claim the credit." Appellant further argues there is no statutory provision that "specifically prohibits" the pass through of the tax credit from a partnership to the corporate taxpayer. Additionally, Appellant notes that a 2008 amendment to the Pass-Through Statute provides that limited liability companies, which are taxed as partnerships, are entitled to all credits applicable to corporations. Thus, by implication, the legislature intended for partnerships to qualify for a corporate tax credit.

Strictly construing the Pass-Through Statute, we find that Centex Homes does not qualify for the credit. Although not defined in the statute, the word "qualified" connotes that the entity is "entitled" or "eligible," i.e., possessing the properties or characteristics necessary or complied with specific requirements or precedent conditions to become eligible or entitled. *Black's Law Dictionary* 1116-17 (5th ed. 1979); *Merriam-Webster's Collegiate Dictionary* 936 (8th ed. 1981). As previously discussed, the infrastructure credit may be claimed only by a corporation; thus, a partnership can never qualify for the infrastructure credit. Such an express limitation constitutes a specific prohibition against a pass through from a partnership to a corporation. Moreover, unlike several other tax credits,[8] the Infrastructure Credit Statute does not contain language incorporating the pass-through provisions of section 12-6-3310.

[8] *See, e.g.*, S.C. Code Ann. § 12-6-3340 (2000) (Renewable Energy Credit); *id*. § 12-6-3370 (Water Control Structure Credit); S.C. Code Ann. § 12-6-3560 (Supp. 2010) (Motion Picture and Advertisement Company Credit).

Furthermore, Appellant's reference to the 2008 amendment does not affect this conclusion. With an effective date of June 12, 2008, the legislature amended section 12-6-3310 to add subsection (C) in order "to provide for the application of tax credits when earned by certain limited liability companies." Act No. 352, 2008 S.C. Acts 3458. Thus, the amended version of section 12-6-3310 expressly authorizes limited liability companies, which are taxed for South Carolina income tax purposes as partnerships and corporations, to **earn** and pass through allowable credits. S.C. Code Ann. § 12-6-3310(C) (Supp. 2012).

Although this amendment post-dates the tax years in question, it is instructive as to the intended purpose of the statutes at issue. Specifically, we find the explicit inclusion of limited liability companies and silence as to partnerships indicates a legislative intent to purposefully restrict the types of entities that may earn and pass through tax credits. Had the legislature intended to authorize all entities to earn and pass through tax credits, it would not have been necessary to enact the 2008 amendment as the definition of "taxpayer," which broadly includes "any other entity subject to the tax imposed by this chapter or required to file a return," would have been sufficient to encompass limited liability companies. S.C. Code Ann. § 12-6-30(1) (2000) (defining "taxpayer"). Moreover, by delineating the types of entities that may earn the credit, it is clear that the mere payment of infrastructure expenses is not sufficient to qualify for the credit. Rather, in order to earn the credit, the entity must statutorily qualify and make the requisite expenditures to the infrastructure project.

Because the legislature is presumed to be aware of prior legislation and does not perform futile acts, we find the 2008 amendment represents a conscious decision by the legislature to preclude partnerships from earning and passing through certain tax credits. *See State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."); *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964) ("In seeking the intention of the legislature, we must presume that it intended by its action to accomplish something and not to do a futile thing."). Accordingly, this amendment is confirmation that our decision to deny Appellant's claim for the Infrastructure Tax Credits effectuates the intent of the legislature.

Although our rules of statutory construction mandate this conclusion, we question the wisdom of the statutory language as we believe an entity that

legitimately expends funds for state infrastructure deserves to be rewarded with a tax incentive.

Given this harsh result, we have looked to other jurisdictions to see if courts have permitted the type of pass through that Appellant seeks. While these cases are not dispositive as they are based on specific state statutes, we view them as instructive. In *Bell Atlantic Nynex Mobile, Inc. v. Commissioner of Revenue Services*, 869 A.2d 611 (Conn. 2005), the Connecticut Supreme Court analyzed whether corporations, which held partnership interests in a partnership, could claim a tax credit as a result of the partnership's payment of personal property taxes on electronic data processing equipment. The court ruled that under the terms of the applicable statute, section 12-217t of the Connecticut General Statutes, the partnership could not establish eligibility for the tax credit as it did not fall within the statutory definition of "taxpayer" for purposes of the statute. *Id.* at 620-21 (citing section 12-213(a)(1) of the Connecticut General Statutes, which defines "taxpayer"). Specifically, the court found "the text of the statute indicates that the legislature intended to grant eligibility for the § 12-217t tax credit to a 'taxpayer' who has paid the personal property taxes on the electronic processing equipment and who can use the tax credit against tax liabilities arising from the corporation business tax or other specific chapters of the tax code." *Id.* at 620. As a result, the court concluded the credit could not pass through to the corporate partners as no tax credit existed for their use. *Id.* at 622.

In reaching this conclusion, the court rejected the corporate partners' argument that partnership law, specifically the conduit treatment of partnership tax attributes, warranted the pass through of the credit. *Id.* at 625. Although the court acknowledged the existence of this theory and statutory pass-through provisions, it found that "[n]ot every action taken by the partnership passes through to the partners as if they performed the act." *Id.* More specifically, these provisions do not "create credits" as an entity may only be entitled to a credit by "virtue of state law." *Id.*

Finally, the court rejected the corporate partners' claim that denial of the credit "leads to an absurd result because it denies two corporations acting through a partnership a benefit that each party could obtain if it acted on its own." *Id.* at 626. Noting that the corporate partners were "sophisticated business entities," the court found the selection of the partnership form of business was "a critical decision that carries with it certain legal consequences, including tax implications." *Id.* Accordingly, the court concluded that the "legislature's decision to grant a tax credit to certain business forms while denying it to others does not constitute an

absurd result" as the "fairness of such decisions remains within the prerogative of the legislature" and not the court. *Id.*

Similarly, the Wisconsin Court of Appeals concluded that a taxpayer corporation was not entitled to income tax reduction for sales and use tax made by a partnership, of which the taxpayer was a general partner, as the tax credit statute allowed a credit for "the sales and use tax . . . *paid by the corporation*." *L&W Constr. Co. v. Wisc. Dep't of Revenue*, 439 N.W.2d 619, 620 (Wisc. Ct. App. 1989) (quoting section 71.0432(2) of the Wisconsin Statutes). Thus, the statute unambiguously provided that a credit was only available to corporations that *directly* pay such sales and use taxes. *Id.* at 621. The court found the possibility that the claiming corporation *could* have become liable for partnerships debts did not bring the corporation within the ambit of the statute. *Id.*

(3) "Entity" and "Aggregate" Partnership Theories

Even if the Pass-Through Statute does not permit Centex Homes to earn and pass through the credit to its three corporate partners, Appellant asserts state and federal partnership law dictates that the tax credit be treated as if the individual corporate partners generated the credits directly under the "aggregate" and "entity" theories[9] of partnership law.

In support of this assertion, Appellant cites: (1) section 702(b) of the Internal Revenue Code (I.R.C.); (2) section 12-6-600 of the South Carolina Code; and (3) *Dalton v. South Carolina Tax Commission*, 295 S.C. 174, 367 S.E.2d 459 (Ct. App. 1988) and *Ellis v. South Carolina Tax Commission*, 280 S.C. 65, 309 S.E.2d 761 (1983),[10] wherein this Court addressed the general pass-through statute now codified at section 12-6-600.

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[9] "Under the 'entity theory' it is the partnership entity which owns its assets, not the partners. Partners are only secondarily liable for the tax debts of the partnership as they are for any debt of the partnership." 68 C.J.S. *Partnership* § 100 (Supp. 2013) (footnotes omitted). "Under the 'aggregate theory' as opposed to the 'entity theory,' a partnership is an aggregate of individuals and does not constitute a separate legal entity." *Id.* "Under this view, except for tax and other liabilities and rights created specifically by statute, a partnership has no juridical existence except through its partners." *Id.*

[10] *See Ellis*, 280 S.C. at 68, 309 S.E.2d at 762-63 (recognizing that although a partnership files an informational return, "the income or losses must be passed

Section 702 of the I.R.C. provides in relevant part:

> The character of any item of income, gain, loss, deduction, or **credit** included in a partner's distributive share under paragraphs (1) through (8) of subsection (a) shall be determined as if such item were realized directly **from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership**.

26 U.S.C.A. § 702(b) (West 2013) (emphasis added). In conjunction, section 12-6-600 states:

> An entity treated as a partnership for federal income tax purposes is not subject to tax under this chapter. Each partner shall include its share of South Carolina partnership income on the partner's respective income tax return. All of the provisions of the Internal Revenue Code apply to determine the gross income, adjusted gross income, and taxable income of a partnership and its partners, subject to the modifications provided in Article 9 of this chapter and subject to allocation and apportionment as provided in Article 17 of this chapter.

S.C. Code Ann. § 12-6-600 (2000).

Based on these authorities, Appellant maintains that a "credit is treated as if it were realized or incurred by the partner directly from the source without ever having passed through the partnership." Thus, because the three partners of Centex Homes were corporate partners that reported tax deductions for qualifying infrastructure expenses, they each earned the credit directly through Centex Homes as an "entity" or through the partners individually as an "aggregate." In turn, the credit could be claimed by Appellant.

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through and distributed to the individual partners for separate inclusion or deduction in their individual tax returns"; explaining that "each item of income, gain, loss, deduction or credit is treated as if it were realized or incurred by the partner directly from the source without ever having passed through the partnership"); *Dalton*, 295 S.C. at 180, 367 S.E.2d at 462 (citing *Ellis* and reaffirming principle that every item of gain, loss, deduction or credit retains its character as before the pass through takes place).

We find that none of the above-cited authorities support Appellant's position. Although Appellant is correct that a credit may be passed through a partnership to its individual partners either through the aggregate theory or the entity theory, the condition precedent to the pass through is that the credit is initially earned by the partnership. As previously stated, Centex Homes did not qualify for the infrastructure credit as it may be claimed only by corporations. Thus, there was no credit to distribute or allocate to its three corporate partners and, in turn, Appellant.

(4) Consolidated Corporate Tax Return

Finally, Appellant asserts it should be allowed to claim the credits as its consolidated return reflected the single tax liability of its corporate affiliates.[11] By filing a consolidated return, Appellant maintains that all income tax credits must be determined on a consolidated basis and should, therefore, reduce the consolidated group's tax liability "regardless of whether or not the corporation entitled to the credit contributed to the tax liability of the consolidated group."[12] Because the qualifying infrastructure expenditures were incurred by Appellant's corporate partners, Appellant argues it should be allowed to claim the credit against its consolidated tax liability.

Although Appellant is correct that a consolidated group may be treated as a single taxpayer and claim a credit on a consolidated basis, the group must first be **entitled** to the credit as stated in subsection (H) of the Infrastructure Credit Statute. *See* S.C. Code Ann. § 12-6-3420(H) (2000) ("A corporation which files or is required to file a consolidated return is entitled to the income tax credit allowed by this section on a consolidated basis. The tax credit may be determined on a consolidated basis regardless of whether or not the corporation **entitled** to the credit contributed to the tax liability of the consolidated group." (emphasis added)).

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[11] *See* S.C. Code Ann. § 12-6-5020(A)(1) (2000 & Supp. 2012) (authorizing the filing of a consolidated return for a parent corporation and substantially controlled subsidiaries); *id.* § 12-6-5020(D) (providing that "[a] consolidated return means a single return for two or more corporations in which income or loss is separately determined").

[12] *See* S.C. Code Ann. § 12-6-5020(F) (providing that corporation, which files a consolidated return and is entitled to one or more income tax credits, must determine credits on a consolidated basis).

In the instant case, neither the Centex Homes partnership nor its corporate partners were ever eligible to claim a credit. Appellant, simply by filing a consolidated return, cannot change this statutory prohibition. *Cf. Emerson Elec. Co. v. Wasson*, 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986) (recognizing that "when two or more corporations join in a consolidated tax return, each remains an identifiable taxpayer" and that "[a] corporation does not lose its status as an identifiable entity by affiliating with another").

IV. Conclusion

Based on the foregoing, we find the plain language of the Infrastructure Credit Statute is clear that only a corporation may claim the credit. Because the partnership of Centex Homes incurred the infrastructure project expenses, it did not qualify for the credit. Thus, there was no credit available to pass through to its partners and, in turn, to Appellant. Furthermore, we find the legislature's 2008 amendment to the Pass-Through Statute, which allowed limited liability companies to earn the same tax credits as a corporation, confirms this result as it represents a purposeful act to restrict the types of entities that may earn and pass through tax credits. Although Appellant presents several potential methods of acquiring the credit directly or indirectly from its affiliates, we find none to be persuasive as the terms of the statutes may not be ignored or circumvented.

Even though we question the reasoning for restricting the infrastructure credit to corporate entities, we believe the statutory language is clear that the legislature intended this limitation. The result here may appear to be inequitable; however, we are constrained to conclude it is correct under extant law. The wisdom of tax policy is exclusively within the purview of the legislature and may not be supplanted by this Court. *See Taiheiyo Cement U.S.A., Inc. v. Franchise Tax Bd.*, 138 Cal. Rptr. 3d 536, 538-39 (Cal. Ct. App. 2012) ("It is fundamental that the extent of allowable deductions is dependent exclusively upon legislative grace and does not turn upon equitable considerations and that a taxpayer claiming a deduction must bring himself *squarely within the terms of a statute expressly authorizing it*." (citation omitted)). Accordingly, we affirm the ALC's order that denied Appellant's claim for the infrastructure credits.

AFFIRMED.

HEARN, J., and Acting Justice James E. Moore, concur. TOAL, C.J., dissenting in a separate opinion in which KITTREDGE, J., concurs.

CHIEF JUSTICE TOAL: I respectfully dissent. In my view the ALC erred in concluding that Appellant's corporate affiliates were not eligible to claim infrastructure tax credits pursuant to section 12-6-3420 of the South Carolina Code. I would reverse and remand.

> Section 12-6-3420 provides, in pertinent part:
> (A) A corporation may claim a credit for the construction or improvement of an infrastructure project against taxes due under Section 12-6-530 or Section 12-11-20 for:
>
> (1) expenses paid or accrued by the taxpayer;
>
> (2) contributions made to a governmental entity; or
>
> (3) contributions made to a qualified private entity in the case of water or sewer lines and their related facilities in areas served by a private water and sewer company.

S.C. Code Ann. § 12-6-3420 (Supp. 2012).

In my view, section 12-6-3420 requires a corporation claim the credit on its corporate tax return, which must reflect permitted infrastructure related expenses or contributions by "the taxpayer." The Department argues that "the taxpayer" refers exclusively to the "corporation" mentioned in subsection (A).[13] I disagree.

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[13] In my opinion, the Department's argument regarding the definition of "taxpayer" differs significantly, and notably, from prior interpretations. For example, in *Media General Communications, Incorporated v. South Carolina Department of Revenue*, 388 S.C. 138, 694 S.E.2d 525 (2010), three associated corporations (the corporations) challenged the accounting procedure the Department utilized in calculating the corporations' South Carolina income tax. That case centered on section 12-6-2320 of the South Carolina Code, which provides in pertinent part:

> (A) If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or [the Department] may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

S.C. Code Ann. § 12-6-2320(4).

The Department initially issued tax assessments for the corporations utilizing the separate entity apportionment method (the SEA method), the Department's standard method for apportioning income among multi-state, related business entities. *Id.* at 142, 694 S.E.2d at 526–27 ("South Carolina's statutory apportionment methodology as utilized in the Department's assessments . . . results in income taxes and license fees . . . in the amount of $3,758,320."). The corporations filed a protest requesting the Department use the combined entity apportionment method (the CEA method). The CEA method's details are not pertinent to the instant case, but resulted in a significantly lower tax burden of $863,179. *Id.* at 142, 694 S.E.2d at 527. The Department determined that the CEA method fairly represented the corporations' business activities, but denied the corporations' petition on the ground that the Department did not have the authority to require use of the CEA method. *Id.* at 143, 694 S.E.2d at 527. The ALC reversed, finding that the allowance of the use of "any other method" as provided by section 12-6-2320(4) encompassed [the CEA method]. *Id.* The Department appealed, and advanced an argument rooted firmly in the statutory definition of "taxpayer:"

> The Department . . . argues section 12–6–2320(A)(4) should not be construed to allow [the CEA method] based on the legislative intent expressed in the corporate tax statutes requiring the filing of tax returns by a single entity. Specifically, the South Carolina Code defines "taxpayer" as including "an individual, trust, estate, partnership, association, company, *corporation*, or any other entity subject to the tax imposed by this chapter or required to file a return." S.C. Code Ann. § 12–6–30(1) (2000). The Department notes the definition refers to a single corporation as a taxpayer and thus to separate filing requirements for each entity. Consequently, this definition must be used for the meaning of "taxpayer" as it appears in section 12–6–2320(A) and it limits the statute's application to a separate entity.

Id. at 148–49, 694 S.E.2d at 530 (finding that the ALC was not required to defer to an interpretation contrary to the plain language of the statute (emphasis in

The term "taxpayer" is statutorily defined, "unless otherwise required by context," to mean an individual, trust, estate, partnership, association, company, corporation, or any other entity subject to taxation. *See* S.C. Code Ann. § 12-6-30(1). In my view, the current context—the General Assembly's intent to encourage and reward infrastructure investment—does not demand limiting the statutory definition of "taxpayer." Moreover, in my opinion, the General Assembly's use of the word "the," preceding "taxpayer," does not evince an intent for that term to only denote corporation. Said another way, the General Assembly could have consistently used the term "corporation," rather than taxpayer. For example, and as Appellant notes, the statute would have then provided:

> A) A corporation may claim a credit for the construction or improvement of an infrastructure project against taxes due under Section 12-6-530 or Section 12-11-20 for:
>
> (1) expenses paid or accrued by the ~~taxpayer~~ *corporation*;

However, the General Assembly did not provide such limiting language. *See Brown v. Martin*, 203 S.C. 84, 88, 26 S.E.2d 317, 318 (1943) ("The General Assembly has power to prescribe legal definitions of its own language, and such definitions are generally binding upon the Courts, and should prevail." (citation omitted)); *see Bell Finance Co., Inc. v. S.C. Dept. of Consumer Affairs*, 297 S.C. 111, 114, 374 S.E.2d 918, 920 (Ct. App. 1988) ("Where the statute, however, contains words that are statutorily defined, the statutory definitions should generally be followed in interpreting the statute."); *see also Introini v. S.C. Nat'l Guard*, 828 F. Supp. 391, 396–97 (D.S.C. 1993) (finding legislative definitions controlling).

In my opinion, section 12-6-3420 is not ambiguous, and the clear and plain meaning of the language allows Appellant to claim a credit for infrastructure expenses accrued by Centex Homes, the statutorily defined "taxpayer."

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original)). However, in the instant case, the Department asks the Court to ignore the statutory definition of taxpayer to achieve their now intended result, one at odds with the General Assembly's intent.

The Department relies heavily on the general rule that tax credits and exemptions are a matter of legislative grace, and thus, strictly construed against the taxpayer. *See, e.g., C. W. Matthews Contracting Co., Inc. v. S.C. Tax Comm'n*, 267 S.C. 548, 230 S.E.2d 223 (1976) ("However, [*Southern Soya Corp. v. Wasson*, 252 S.C. 484, 167 S.E.2d 311 (1969)], and *Chronicle Publishers*, [*Inc. v. S.C. Tax Comm'n*, 244 S.C. 192, 136 S.E.2d 261 (1964)] recognize a principle that applies in the present case: that a deduction is a matter of legislative grace; and that a statute allowing a deduction, if ambiguous, is construed strictly against the taxpayer."). However, this policy does not place a thumb on the scale of the Department, and simply means that "constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor," and this Court will not seek an interpretation in the Department's favor "where the plain and unambiguous language leaves no room for construction." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74–75, 716 S.E.2d 877, 881 (2011) (citing *Se.-Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981)). In fact, it is "[o]nly when the literal application of the statute produces an absurd result will we consider a different meaning." *CFRE*, 395 S.C. at 75, 716 S.E.2d at 881 (citation omitted). In my opinion, allowing Appellant to claim the infrastructure tax credit is not an absurd result given the General Assembly's clear intent.[14]

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[14] The Department argues that the term "taxpayer" is limited to the corporation mentioned in section 12-6-3420, and that if this Court relies on the statutory definition of "taxpayer," the "absurdity arises that subsections (A)(2) and (A)(3) remain devoid of a reference to any type of entity, leaving a relation back to the corporation as the only proper conclusion." According to the Department, to "argue that expenditures under these two subsections should be made by corporations only, but qualifying expenses under subsection (A)(1) opens the infrastructure credit to all forms of taxpayers is patently illogical." However, subsections (A)(2) and (A)(3) also do not contain the word "taxpayer" as used in subsection (A)(1). Thus, the Department actually advances the argument subsections (A)(2) and (A)(3) both relate back to the term "taxpayer" in subsection (A)(1), and taken together, all three subsections relate back to the term corporation, a *single* corporation, as found in section (A)'s first paragraph. In my opinion, it is just as plausible that the General Assembly intended taxpayer's *applicable* statutory definition to control subsections (A)(2) and (A)(3). Thus, in my view, there are competing and conceivable interpretations of the import of the term taxpayer in section 12-6-3420, and the Department fails to demonstrate any absurd result.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *See Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) (citing *Bankers Trust of S.C. v. Bruce*, 275 S.C. 35, 37–38, 267 S.E.2d 424. 425 (1980). In my view, the statute is clearly intended to encourage and reward infrastructure investment in South Carolina, and the Department and ALC articulate an interpretation which frustrates the General Assembly's intent.

Additionally, in my opinion, the pass-through provisions of section 12-6-3310 allow the general partnership in this case to pass through the tax credit earned in section 12-6-3420 to Appellant. Section 12-6-3310 provides in pertinent part:

> (B)(1) *Unless specifically prohibited*, an "S" corporation, limited liability company taxed as a partnership, or *partnership that qualifies for a credit pursuant to this article* may pass through the credit earned to each shareholder of the "S" corporation, member of the limited liability company, or partner of the partnership.

S.C. Code Ann. § 12-6-3310 (Supp. 2012) (emphasis added). In my opinion, as discussed *supra*, because the expenses Centex Homes incurred qualify for the credit, the general partnership should be allowed to "pass through" this credit to its three corporate partners—wholly owned subsidiaries of Appellant. In my opinion, the "unless specifically prohibited" language in section 12-6-3310 is significant. There is no statutory provision specifically prohibiting a corporation from claiming a tax credit generated by a partnership the corporation controls, nor is there a provision explicitly preventing the partnership from passing this credit back to the entity's partners.

For the foregoing reasons, I would reverse the ALC's decision.

KITTREDGE, J., concurs

The Supreme Court of South Carolina

Adoptive Couple, Appellants,

v.

Baby Girl, a minor child under the age of fourteen years, Birth Father, and the Cherokee Nation, Respondents.

Appellate Case No. 2011-205166

ORDER

This case reaches this Court again from the decision of the Supreme Court of the United States, reversing our prior decision, *Adoptive Couple v. Baby Girl*, 398 S.C. 625, 731 S.E.2d 550 (2012), and remanding the case for further proceedings "not inconsistent with" its opinion. *Adoptive Couple v. Baby Girl*, 570 U.S. at ___, No. 12-399, slip op. at 17 (U.S. June 25, 2013). On June 28, 2013, the Supreme Court expedited the issuance of the mandate, which transferred jurisdiction to this Court on July 5, 2013.[1] *See* Adoptive Couple v. Baby Girl, No. 12-399 (U.S. June 28, 2013) (order expediting mandate issuance). On July 3, 2013, the Respondent Birth Father (Birth Father) filed a Motion to Remand this case to the Family Court to address the matter *de novo* with explicit instructions regarding how to proceed. An Emergency Motion for Final Order Following Remand with this Court filed by

[1] Despite our understanding that numerous petitions for adoption have been filed in Oklahoma and the Cherokee Tribal Court, we retain jurisdiction to finally resolve Baby Girl's adoption in the courts of South Carolina by virtue of the Supreme Court's transfer of jurisdiction to this Court. We note further that an Oklahoma court already declined to exercise jurisdiction in this case. *See Adoptive Couple v. Baby Girl*, 398 S.C. at 643–44, 731 S.E.2d at 559. Moreover, the adoption has been pending in South Carolina since Adoptive Couple instituted the proceedings. *See Knoth v. Knoth*, 297 S.C. 460, 464, 377 S.E.2d 340, 342–43 (1989) (stating "once a custody decree has been entered, the continuing jurisdiction of the decree state is exclusive" and "[e]xclusive continuing jurisdiction is not affected by the child's residence in another state" (citations omitted)).

Appellants (Adoptive Couple) followed, along with a petition to appear as amica curiae filed by Birth Mother.[2] On July 8, 2013, Adoptive Couple filed a Return to Birth Father's Motion to Remand.[3] On July 12, 2013, Respondent Cherokee Nation notified this Court via letter that it was joining Birth Father's request to remand this case to the Family Court.[4]

In his Motion to Remand, Birth Father raises a number of "new" issues he claims should be resolved by the Family Court in this case, in particular: "(1) [whether] the case should be transferred to Oklahoma where Baby Girl has lived for 18 months, where the relevant witnesses are all located, and where competing adoption petitions are pending; (2) whether, on the current record, [Birth] Father's parental rights may be terminated, or whether it is in Baby Girl's best interest[s] for her to remain with the natural parent who has cared for her and with whom she has bonded over those 18 months; and (3) whether, in light of the competing adoption petitions, the ICWA placement preferences preclude adoption of Baby Girl by the self-styled Adoptive Couple." We deny Birth Father's motion in its entirety. Because we can resolve the issues of law here, nothing would be accomplished by a *de novo* hearing in the Family Court, except further delay and heartache for all involved—especially Baby Girl.

A majority of the Supreme Court has cleared the way for this Court to finalize Adoptive Couple's adoption of Baby Girl. In denying Adoptive Couple's petition for adoption and awarding custody to Birth Father, we held that Birth Father's parental rights could not be terminated under the federal Indian Child Welfare Act, 25 U.S.C. §§ 1901–23 (the ICWA). *See Adoptive Couple v. Baby Girl*, 398 S.C. at 644, 731 S.E.2d at 560. The Supreme Court has unequivocally found that the ICWA does not mandate custody be awarded to Birth Father, thereby reversing our previous holding:

> Contrary to the State Supreme Court's ruling, we hold that 25 U.S.C. § 1912(f)—which bars involuntary termination of a parent's rights in the

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[2] We granted Birth Mother's request on July 8.

[3] Likewise, counsel for the Guardian *ad litem* filed a responsive brief on July 8.

[4] On July 15, 2013, Birth Father filed a Return to Adoptive Couple's Emergency Motion for Final Order and a Reply to Adoptive Couple's Return to Motion to Remand.

> absence of a heightened showing that serious harm to the Indian child is likely to result from the parent's "continued custody" of the child—does not apply when, as here, the relevant parent never had custody of the child. We further hold that § 1912(d)—which conditions involuntary termination of parental rights with respect to an Indian child on a showing that remedial efforts have been made to prevent the "breakup of the Indian family"—is inapplicable when, as here, the parent abandoned the Indian child before birth and never had custody of the child. Finally, we clarify that § 1915(a), which provides placement preferences for the adoption of Indian children, does not bar a non-Indian family like Adoptive Couple from adopting an Indian child when no other eligible candidates have sought to adopt the child.

570 U.S. ___, slip op. at 1–2.

The Supreme Court has articulated the federal standard, and its application to this case is clear: the ICWA does not authorize Birth Father's retention of custody. Therefore, we reject Birth Father's argument that § 1915(a)'s placement preferences could be an alternative basis for denying the Adoptive Couple's adoption petition.[5] The Supreme Court majority opinion unequivocally states:

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[5] In making this argument, Birth Father relies on the following language in Justice Sotomayor's dissent:

> [T]he majority does not and cannot foreclose the possibility that on remand, Baby Girl's paternal grandparents or other members of the Cherokee Nation may formally petition for adoption of Baby Girl. If these parties do so, and if on remand . . . [Birth] Father's parental rights are terminated so that an adoption becomes possible, they will then be entitled to consideration under the order of preference established in § 1915. The majority cannot rule prospectively that the § 1915 would not apply to an adoption petition that has not yet been filed.

570 U.S. ____, slip op. at 25 (Sotomayor, J., dissenting) (alterations added).

> § 1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child . . . .
>
> In this case, Adoptive Couple was the only party that sought to adopt Baby Girl in the Family Court or the South Carolina Supreme Court. [Birth] Father is not covered by § 1915(a) because he did not seek to *adopt* Baby Girl; instead, he argued that his parental rights should not be terminated in the first place. Moreover, Baby Girl's paternal grandparents never sought custody of Baby Girl. Nor did other members of the Cherokee Nation or "other Indian families" seek to adopt Baby Girl, even though the Cherokee Nation had notice of—and intervened in—the adoption proceedings.

570 U.S. ___, slip op. at 15–16 (emphasis in original) (internal citations and footnotes omitted) (alteration added). As the opinion suggests, at the time Adoptive Couple sought to institute adoption proceedings, they were the only party interested in adopting her. Because no other party has sought adoptive placement in this action, § 1915 has no application in concluding this matter, nor may that section be invoked at the midnight hour to further delay the resolution of this case. We find the clear import of the Supreme Court's majority opinion to foreclose successive § 1915 petitions, for litigation must have finality, and it is the role of this court to ensure "the sanctity of the adoption process" under state law is "jealously guarded." *Gardner v. Baby Edward*, 288 S.C. 332, 334, 342 S.E.2d 601, 603 (1986).

With the removal of the perceived federal impediment to Adoptive Couple's adoption of Baby Girl, we turn to our state law. In our previous decision, we held that, under state law, Birth Father's consent to the adoption was not required under section 63-9-310(A)(5) of the South Carolina Code. *See Adoptive Couple v. Baby Girl*, 398 S.C. at 643 n. 19, 731 S.E.2d at 560 n. 19 ("Under state law, Father's consent to the adoption would not have been required."). That section provides consent is required of an unwed father of a child placed with the prospective adoptive parents six months or less after the child's birth only if:

> (a) the father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement

> of the child for adoption, and the father openly held himself out to be the father of the child during the six months period; or
>
> (b) the father paid a fair and reasonable sum, based on the father's financial ability, for the support of the child or for expenses incurred in connection with the mother's pregnancy or with the birth of the child, including, but not limited to, medical, hospital, and nursing expenses.

S.C. Code Ann. § 63-9-310(A)(5) (2010).[6] Because Birth Father's consent is not required under the statute, we need not turn to our parental termination provision, section 63-7-2570 of the South Carolina Code, to terminate Birth Father's parental rights, as the effect of a final adoption decree will be to automatically terminate any legal or parental right he has with respect to Baby Girl. *See* S.C. Code Ann. § 63-9-760 (stating the effect of an adoption is, in part, that "the biological parents of the adoptee are relieved of all parental responsibilities and have no rights over the adoptee"); *S.C. Dep't of Soc. Servs. v. Parker*, 275 S.C. 176, 179, 268 S.E.2d 282, 284 (1980) (noting a father who has no right to object to the adoption is not permitted to "block a termination of his purported parental rights"). Once the final adoption decree is entered, therefore, "the relationship of parent and child and all the rights, duties, and other legal consequences of the natural relationship of parent and child" will exist between Adoptive Couple and Baby Girl. S.C. Code Ann. § 63-9-760(A).

We think the Supreme Court plainly contemplated an expeditious resolution of this case, and we believe the facts of this case require it. There is absolutely no need to compound any suffering that Baby Girl may experience through continued litigation. As it stands, Adoptive Couple is the only party who has a petition pending for the adoption of Baby Girl, and thus, theirs is the only application that should be considered at this stage.

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[6] Thus, Birth Mother's consent is the only consent required under the statute, and she gave her consent in accord with the requirements of our adoption provisions. *See* S.C. Code Ann. §§ 63-9-310(A)(3); 63-9-330; 63-9-340. In fact, in her amica curiae brief, she avers that she will revoke her consent to the adoption of Baby Girl by any other prospective adoptive parents.

For these reasons, we remand this case to the Family Court for the prompt entry of an order approving and finalizing Adoptive Couple's adoption of Baby Girl, and thereby terminating Birth Father's parental rights, in accordance with section 63-9-750 of the South Carolina Code. Upon the entry of the Family Court's order, custody of Baby Girl shall be transferred to Adoptive Couple. If additional motions are pending or are filed prior to the entry of the order finalizing the adoption, the family court shall promptly dispose of all such motions and matters so as not to delay the entry of the adoption and the return of Baby Girl to the Adoptive Couple. Further, if any petition for rehearing is to be filed regarding this Order, it shall be served and filed within five (5) days of the date of this Order.

s/ Jean H. Toal C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

I agree that we should remand this matter to the family court for further proceedings consistent with the United States Supreme Court's ruling. As I understand that decision, the Court held that we erred when we held that two provisions of the Indian Child Welfare Act (ICWA)[7] barred the termination of Father's parental rights. *Adoptive Couple v. Baby Girl*, 570 U.S. ___, No. 12-399, slip op. at 11, 14 (U.S. June 25, 2013). Further, the majority indicated we erred when we suggested that the adoptive preference provisions of ICWA[8] would have been applicable if Father's parental rights had been terminated because, as the Court explained, no person entitled to invoke these statutory preferences was then seeking to adopt the child in the South Carolina proceedings. Nothing in the majority opinion suggests, much less mandates, that this Court is authorized to reject the jurisdiction of other courts based upon a 1989 case deciding jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA),[9] nor obligated to

[7] 25 U.S.C. §§ 1912(d) and 1912(f).

[8] 25 U.S.C. § 1915(a).

[9] *Knoth v. Knoth*, 297 S.C. 460, 377 S.E.2d 340 (1989) cited in footnote 1, *supra*. I note that in 2008, the UCCJA was replaced by the Uniform Child Custody

order that the adoption of this child by Adoptive Parents be immediately approved and finalized. Further, the majority orders the immediate transfer of the child, no longer an infant or toddler, upon the filing of the family court's adoption order, without regard to whether such an abrupt transfer would be in the child's best interest.

Much time has passed, and circumstances have changed. I have no doubt that all interested parties wish to have this matter settled as quickly as possible, keeping in mind that what is ultimately at stake is the welfare of a little girl, and that of all who love her. I would remand but I would not order any specific relief at this juncture, as I believe this is a situation where the decisions that are in the best interests of this child, given all that has happened in her short life, must be sorted out in the lower court(s).

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

Columbia, South Carolina
July 17, 2013

Jurisdiction and Enforcement Act, S.C. Code Ann. §§63-15-300 *et seq.*, which specifically provides that it "does not govern an adoption proceeding. . . ." § 63-15-304; *see also* § 63-15-306 (A)(ICWA trumps state law concerning custody of an Indian child).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lance Williams, Appellant.

Appellate Case No. 2011-189886

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5161
Heard June 6, 2013 – Filed July 24, 2013

AFFIRMED

Richard A. Harpootlian, M. David Scott, and Graham L. Newman, all of Richard A. Harpootlian, PA, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., and Assistant Attorney General John Benjamin Aplin, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

KONDUROS, J.: Lance Williams appeals his convictions of criminal sexual conduct (CSC) with a minor, first degree, and unlawful conduct towards a child. He argues the trial court erred in (1) admitting statements given in violation of *Miranda*[1]; (2) denying his motion for a directed verdict for the unlawful conduct towards a child charge; and (3) admitting enlarged anatomical diagrams and photographs of the victim. We affirm.

FACTS

On April 15, 2010, Williams cared for his girlfriend's fifteen-month-old daughter (Victim) for about ten hours. That evening, Victim's mother and other family members took her to the emergency room after they noticed bruises on her face, arms, and genital area. Detective Ed Prestigiacomo visited the hospital to investigate Victim's injuries the following day. He learned Williams had cared for Victim on the day her injuries were discovered. He contacted Williams and asked him to come to the Lexington County Sheriff's Department to talk to him. Williams told Detective Prestigiacomo he wanted to clear up the matter that night because he had a wedding to attend in Alabama the following day. Williams arrived at the Department that night around 7 p.m. with his mother and two-year-old daughter.

Detective Prestigiacomo escorted Williams to an interview room while his mother and daughter stayed in the lobby. The door to the interview room was locked to people entering the room but a person could exit the room without a key or code.[2] Detective Palkowski joined them in the interview room after Detective Prestigiacomo had gotten some background information from Williams. Detective Prestigiacomo informed Williams Victim had bruises all over her body, and Williams said she had fallen. Detective Prestigiacomo showed Williams pictures of Victim's arms, which had circular bruises on them that Detective Prestigiacomo believed to be finger marks from someone holding her too tightly. Williams told Detective Prestigiacomo he sometimes picks his daughter up like that and his mother has told him he should not pick up a child like that. He informed the detectives a shard of glass had gone into his hand when he was in school and the

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Detective Prestigiacomo provided this in his testimony at trial, but during the *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, he had testified the door was locked and Williams did not have a key or the combination to open it.

injury caused his hand to be numb because of the severed nerves. Williams indicated that as a result of the injury, sometimes he is heavy handed. Williams offered to shake Detective Prestigiacomo's hand to demonstrate his grip, and Detective Prestigiacomo allowed him to do that.

Detective Prestigiacomo next showed Williams pictures of Victim's ears, revealing bruising on and behind the ears, which Detective Prestigiacomo testified is common when a person is slapped or punched in the ear. Williams stated Victim had misbehaved and the injuries occurred when he disciplined her during those two occurrences. Williams said Victim had a temper tantrum and was throwing her toys and he slapped her twice on one ear. Later, she threw her bottle down and he slapped her on the other ear twice. He said he did it for discipline and demonstrated on himself to show how he could not tell his own strength. Williams also punched the desk at some point during the interview to demonstrate how he could not feel his hand.

Detective Prestigiacomo showed Williams the third picture, which was her forehead that had several circular bruises, and another of the outside of her vagina, which was bruised. Williams stated Victim had injured her head by falling and he had to put eczema cream on her vagina and did not realize how hard he was pressing. He told Detective Prestigiacomo he was angry about having to clean her and demonstrated how much force he had used. Detective Prestigiacomo then stopped the interrogation and advised Williams of his *Miranda* rights.[3] Williams waived those rights and wrote a formal statement repeating the explanations given for Victim's injuries. In response to direct written questions by Detective Prestigiacomo, Williams added he had injured Victim's vagina while cleaning her during a diaper change because he was angry. He also wrote that he had an anger problem. Williams was arrested for physical assault and sexual assault or assault against sexual organs. A grand jury indicted him for CSC with a minor, first degree, and unlawful conduct towards a child.

At the start of the trial, the court held a *Jackson v. Denno* hearing. Detective Prestigiacomo testified about the evening Williams came to the Department. He provided that Williams was the primary suspect but Victim's mother and her roommate were also suspects. He testified Williams was not in custody during his

[3] This occurred approximately fifteen to twenty minutes after they had started speaking about Victim's injuries.

interview before he was advised of his *Miranda* rights. Detective Prestigiacomo testified Williams was free to leave at the beginning of the interview until he gave the incriminating statements and at that point Detective Prestigiacomo administered the *Miranda* warnings.

The trial court first analyzed the oral statement and looked at *State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838 (2010). It noted that it was to look at the totality of the circumstances from an objective standard. The trial court determined that based on "the method of arrival, the voluntary arrival, the agreement to participate, the accidental explanations, [and] the officer's testimony that the Defendant was free to leave," the oral statement was admissible because Williams was not in custody and therefore *Miranda* warnings were not required. The court noted it was making that decision based on an objective standard and not just the officer's subjective testimony that Williams was free to leave. The trial court found that "a reasonable person arriving voluntarily in a private vehicle, never requests any help, not under the influence, cooperating with the officers, wanting to clear it up, that a reasonable person would believe they were free to leave." The trial court further found once Detective Prestigiacomo decided to place Williams under arrest, he was appropriately advised of his *Miranda* rights. Thus, the written statement was admissible.[4]

During the testimony of Marlena Clary, a forensic nurse examiner, the State sought to admit enlarged copies of a report, including anatomical diagrams (State's Exhibits 9, 10 and 11). Williams objected, and the trial court overruled the objection, instructing the jury the fact that it was enlarged should not enhance or disenhance the evidence or testimony. Later, the State sought to introduce photographs into evidence (State's Exhibits 12, 13, 14, and 15). Williams stated he had no objection, and the trial court admitted the photographs into evidence.

Dr. Susan Breeland Luberoff was qualified as an expert in child abuse pediatrics and testified. During her testimony, the State sought to introduce photographs Dr. Luberoff had taken during her examination of Victim (State's Exhibits 16, 17, 18, 19, and 20). Williams stated he had no objection to the photographs.

[4] Williams later testified on his own behalf and repeated the explanations he had given during his questioning by the officers.

At the close of the State's case, Williams moved for a directed verdict on the count of unlawful conduct towards a child. He argued he was not a person responsible for Victim's welfare because he was not the parent of Victim. The trial court denied the motion, finding the State presented evidence he was an adult who assumed the role or responsibility of a parent or guardian for a child, in that he stayed at the house overnight with Victim's mother a majority of the time and interacted with Victim. The court found he had more than incidental contact.

The jury convicted Williams of both counts. The trial court sentenced him to twenty-five years' imprisonment for CSC and ten years' imprisonment for unlawful conduct towards a child, to run concurrently. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. *Miranda* Rights

Williams argues the trial court erred in admitting statements he gave before and after he was advised of his *Miranda* rights because he was in custody at the time he gave the statements. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). Our review of whether a person is in custody is confined to a determination of whether the ruling by the trial court is supported by the record. *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003).

The State may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id*. Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating response. *State v. Kennedy*, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996), *aff'd as modified*, 333 S.C. 426, 510 S.E.2d 714 (1998).

Whether a suspect was in "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.'" *State v. Ledford*, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002) (quoting *State v. Easler*, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997)). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." *Evans*, 354 S.C. at 583, 582 S.E.2d at 410. A person is "in custody" when a person's freedom has been restricted. *State v. Caulder*, 287 S.C. 507, 515, 339 S.E.2d 876, 881 (Ct. App. 1986).

To determine whether a suspect was in custody for the purposes of *Miranda*, the Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010). "The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." *Stansbury v. California*, 511 U.S. 318, 324-25 (1994) (internal quotation marks omitted). "[A]ny inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*."
Id. at 326.

> In [*Missouri v. Seibert*, 542 U.S. 600 (2004)], the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then

> administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the *Seibert* plurality opinion, are:
> 1) the completeness and detail of the question and answers in the first round of interrogation;
> 2) the timing and setting of the first questioning and the second;
> 3) the continuity of police personnel; and
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841-42 (2010). In *Seibert*,

> Justice Kennedy wrote separately, stating that while he agreed with much of the plurality opinion, he wished to emphasize that not every *Miranda* violation would require suppression. He explained that an exception should be made where the officer may not have realized that a suspect is in custody and therefore a warning was required, or where the officer did not plan to question the suspect at that juncture. Justice Kennedy noted that in *Seibert*, the two-step technique was used to deliberately avoid *Miranda*, using a strategy based on the assumption that *Miranda* warnings will mean less when given after an incriminating statement has already been made. Under these circumstances, Justice Kennedy agreed the statements must be suppressed unless "curative measures" were taken. As examples of curative actions, Justice Kennedy suggested a substantial break in time and circumstances between the pre-warning statement and the warned, or an additional warning before questioning resumes that the pre-warned statement is not admissible.

Navy, 386 S.C. at 302-03, 688 S.E.2d at 842. Our supreme court held the evidence of a deliberate police practice, the "question first" strategy, was not determinative in *Seibert*. *Navy*, 386 S.C. at 304, 688 S.E.2d at 842.

In *Navy*, the supreme court noted:

> The officers began the questioning of [defendant] with knowledge that the child had been suffocated and with the intention of eliciting a confession. After [defendant]'s first oral statement, the officers "sprang" the suffocation/healing rib fractures information on [defendant], and began an unwarned custodial interrogation designed to elicit incriminating information, that is, questioning designed to have [defendant] admit to having hit the child and to having smothered him. Once those incriminating answers were given—i.e. after [defendant] admitted he had popped the child on the back and "patted" his mouth—[defendant] was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately. Thus the four elements outlined in *Seibert* were met here.

Navy, 386 S.C. at 303, 688 S.E.2d at 842.

Simply because an interview takes place at a law enforcement center and at the initiation of police investigators does not render it a "custodial interrogation." *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). Rather, the fact a defendant voluntarily agreed to accompany investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation. *Id.* In *Navy*, the supreme court found it was debatable whether a reasonable person would have believed he was in custody at the time the first statement was given, and thus held the trial court's finding the defendant was not in custody should have been upheld as it was supported by the record. 386 S.C. at 301, 688 S.E.2d at 841.

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law

> enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him in custody. It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (internal quotation marks omitted).

> The initial determination of whether an individual is in custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Thus, a police officer's subjective view that the person being questioned is a suspect, if undisclosed, does not bear upon the question of whether that person is in custody, and the same is true where the officer's undisclosed assessment is that the person being questioned is not a suspect. However, an officer's knowledge or beliefs may bear upon the issue of whether the person being questioned is in custody if they are conveyed, by word or deed, to the person being questioned; those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the person being questioned would gauge the breadth of his or her freedom of action.

George L. Blum, Annotation, *What Constitutes "Custodial Interrogation" of Adult by Police Officer Within Rule of Miranda v. Arizona Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation—At Police Station or Sheriff's Office, Where Defendant Voluntarily Appears or*

Appears at Request of Law Enforcement Personnel, or Where Unspecified as to Circumstances Upon Which Defendant Is Present, 29 A.L.R.6th 1, § 2 (2007).

In determining whether an interrogation was "custodial" within the meaning of the *Miranda* rule, courts have considered the following factors: (1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person's freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation. *Id.* at § 3.

> Some courts have outlined several factors used to assess how a reasonable person in the defendant's situation would have understood the situation: (1) What was the location where the questioning took place, that is, was the defendant comfortable and in a place a person would normally feel free to leave, for example, at home as opposed to being in the more restrictive environment of a police station; (2) Was the defendant a suspect at the time the interview began, bearing in mind that *Miranda* warnings are not required simply because the investigation has focused; (3) Was the defendant's freedom to leave restricted in any way; (4) Was the defendant handcuffed or told he was under arrest; (5) Were threats . . . made during the interrogation; (6) Was the defendant physically intimidated during the interrogation; (7) Did the police verbally dominate the interrogation; (8) What was the defendant's purpose for

> being at the place where questioning took place? For example, the defendant might be at a hospital for treatment instead of being brought to the location for questioning; (9) Were neutral parties present at any point during the questioning; (10) Did police take any action to overpower, trick, or coerce the defendant into making a statement?

Id.

The Court of Appeals of Georgia has noted:

> Even if the police have probable cause to arrest at the time of the interview and secretly intend to charge the suspect at some future time, such facts are immaterial to a determination of whether the suspect was in custody at the time of the interview, except when and to what extent the police communicate their future intent to arrest during the course of the interview.

Ray v. State, 615 S.E.2d 812, 815-16 (Ga. Ct. App. 2005).

In *Evans*, the interview lasted three hours and officers challenged the defendant on the answers she gave. 353 S.C. at 581, 584, 582 S.E.2d at 409, 410. There, the trial court found the defendant to be in custody, and thus, the appellate court based its decision on whether any evidence supported that finding. Id. at 584, 582 S.E.2d at 410. In *Navy*, the court noted that the defendant was upset during the interview, which lasted three hours, and the police called into doubt his responses to their questions. 386 S.C. at 297, 303, 688 S.E.2d at 839, 842. Here, the record demonstrates Williams was not upset and the officers were not confrontational towards him.

Evidence supports the trial court's finding Williams was not in custody before he was given his *Miranda* warnings. He came to the Department voluntarily; his mother and young daughter were waiting for him; he wanted to get the matter taken care of before leaving the state for a wedding the following day; he talked with the detectives about Victim's injuries for fifteen to twenty minutes before he was given *Miranda* warnings; he never asked if he could leave or asked for

anything; and the conversation leading to his incriminating statements included information about where he was from and his background. Therefore, evidence supports the trial court's finding Williams was not in custody and thus *Miranda* was not violated. Accordingly, we affirm the trial court's admission of Williams's statements.

II. Directed Verdict

Williams argues the trial court erred in denying his motion for a directed verdict on the unlawful conduct towards a child charge because he was not a person responsible for the child's welfare. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in a light most favorable to the State. *State v. Venters*, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). Additionally, an appellate court must find a case is properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648.

> It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in [s]ection 63-7-20 to:
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
> (3) wilfully abandon the child.

S.C. Code Ann. § 63-5-70(A) (2010).

Section 63-7-20(16) of the South Carolina Code (2010) provides:

> "Person responsible for a child's welfare" includes the child's parent, guardian, foster parent, an operator, employee, or caregiver, as defined by [s]ection 63-13-20, of a public or private residential home, institution, agency, or childcare facility or *an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child*. A person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian.

(emphasis added).

The trial court did not err in denying Williams's motion for a directed verdict. Williams and Victim's mother had been dating for four months, and he stayed overnight with them between two and four nights a week. Williams and Victim's mother had discussed moving in together once Victim's mother finished school. She testified he wanted to be a stepfather to Victim. She would ask him to tell Victim to stop if she was doing something wrong. Williams would instruct Victim verbally but was not allowed to physically discipline her. He had changed Victim's diaper before and would watch her while her mother was cooking. He had also bathed her before with Victim's mother in the house. He had watched her before with other adults or other children present. Williams's involvement in Victim's life was some evidence that he has assumed the role of a parent. Accordingly, the trial court did not err in denying the motion for the directed verdict. Therefore, we affirm the trial court's denial of the directed verdict motion.

III. Admission of Photographs

Williams argues the trial court erred in admitting enlarged anatomical diagrams and photographs of the victim. We disagree.

To preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made. *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). The failure to object to photographs at the time they are offered waives the right to object to them on appeal. *Ramos v. Hawley*, 316 S.C. 534, 536,

451 S.E.2d 27, 28 (Ct. App. 1994). However, once the trial court has ruled on an objection, counsel does not need to object every time the issue arises. *Bennett v. State*, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (stating because the trial court had already ruled on an issue, trial counsel did not need to renew objection); *see also* Rule 17, SCRCrimP ("If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.").

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* "[E]vidence should be excluded when its probative value is outweighed by its prejudicial effect." *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

> Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance. Demonstrative evidence is distinguishable from exhibits that comprise "real" or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements.

Clark v. Cantrell, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). In *Kelley*, the court found the trial court did not abuse its discretion in admitting hand-drawn outlines of a victim's face and body, showing numerous wounds, because they corroborated the pathologist's testimony. 319 S.C. at 177, 460 S.E.2d at 370.

"The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008). The trial court must balance the prejudicial effect of graphic photographs against their probative value, and that decision should be reversed only in exceptional circumstances. *Id.* at 249-50, 669 S.E.2d at 607. "Admitting photographs which serve to corroborate testimony is not an abuse

of discretion. However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *Id.* at 250, 669 S.E.2d at 607 (citations omitted). "To constitute unfair prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (internal quotation marks omitted). A trial court is not required to exclude relevant evidence simply because it is unpleasant or offensive. *Id.*

Williams only objected to the admission of the anatomical diagram enlargements (State's Exhibits 9, 10, and 11). He did not object to the admission of any of the photographs.[5] He contends that any objection to the photographs was futile in light of the trial court's ruling on the diagrams. We disagree. The photographs and anatomical diagrams are not the same thing. He objected to each of the diagrams. He needed to object to at least the first picture to be able to argue that further objections would be futile. Therefore, the admission of the photographs is not preserved for our review because Williams did not object to their admission.

As to the diagrams, the nurse used them to point out Victim's injuries. Accordingly, they were relevant and corroborated her testimony. They were not graphic at all; they were simply black and white diagrams of a child's head, body, and vagina. They did not have any prejudicial effect. Therefore, the trial court did not err in admitting the diagrams.

CONCLUSION

The trial court's admission of Williams's statements, denial of the directed verdict motion, and admission of the photographs and diagrams are

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

[5] Williams submitted State's Exhibits 9, 10, 11, 13, 14, 16, 19, and 20 to this court.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Town of Kingstree, a Body Corporate and Politic,
Respondent,

v.

Gary W. Chapman, Jr., Terilyn J. McClary, Waccamaw Housing, Inc., Lydia F. Duke, Alice H. Kellahan, and South Carolina Department of Transportation,
Defendants,

Of Whom Lydia F. Duke and Alice H. Kellahan are the Appellants.

Appellate Case No. 2012-205928

Appeal From Williamsburg County
G. Wells Dickson, Jr., Special Referee

Opinion No. 5162
Heard April 11, 2013 – Filed July 24, 2013

REVERSED

Larry G. Reddeck, of Nettles Turbeville & Reddeck, of Lake City; and William M. O'Bryan, Jr., of O'Bryan & O'Bryan, of Kingstree, for Appellants.

Ernest Joseph Jarrett, of Jenkinson Jarrett & Kellahan, PA, and Mary Amanda Harrelson Shuler, of Whetstone

Perkins & Fulda, LLC, both of Kingstree, for Respondent.

KONDUROS, J.: Lydia F. Duke and Alice H. Kellahan (collectively, Appellants) appeal the special referee's order granting the Town of Kingstree's (the Town's) petition to close a portion of Porter Street, arguing (1) the Town was bound by the allegation in its petition that Appellants had an easement for the use of Porter Street; (2) Appellants had an express written easement across the area in question, which had not been abandoned; (3) the area in question was not properly dedicated as a public roadway or street; (4) the Town lacked statutory authority to petition to close the area in question; (5) the Town failed to prove Appellants had abandoned the easement; (6) the Town failed to prove the closure of the area in question was in the public interest; (7) the Town failed to plead or prove Appellants were estopped to object to the closing of the area in question; (8) the evidence did not support the special referee's finding Appellants purchased the easement to make Porter Street a public road; and (9) the closure of Porter Street constituted a taking and Appellants are entitled to just compensation. We reverse.

FACTS/PROCEDURAL HISTORY

In 1879, John T. Nelson purchased a substantial amount of property in the Town but could not obtain the title until he turned twenty-one years old. In 1899, he acquired the title. In 1903, he had the land platted, which showed twenty lots that were to be sold along a road that became known as Ashton Avenue and a road or alley[1] between Lots 13 and 14. In 1909, he sold Lots 13 and 14 to two separate buyers. Both deeds indicated the street between them was "a new Street" or "a New Side Street." Nelson retained the land to the South of the lots, and Marie L. Nelson inherited this land from her father in 1938. In 1981, John McIntosh inherited this land from Marie.

In 1993, Appellants purchased a 20.97-acre tract of property from McIntosh, which was part of the land he inherited from Marie. At the same time, Appellants also acquired from McIntosh a fifty-foot easement from Ashton Avenue to Nelson Boulevard. The easement stated that the property Appellants purchased was "bounded on the West by a proposed fifty (50) foot street or road know as Porter

[1] This area is now known as Porter Street and is the area at issue.

Street." Further, the easement stated, "Whereas the lands on the Western side of proposed road or street known as Porter Street were devised by Marie L. Nelson to the trustees under her last Will and Testament as will appear by reference to the same and whereas said devise may have included the proposed fifty (50) foot road or street known as Porter Street . . . ." The easement specified: "said proposed fifty (50) foot road or street should be opened and remain open for the mutual use and benefit of the owners of the lands of the Estate of Marie L. Nelson now held in trust and the owners of the twenty and ninety-seven hundredths (20.97) acres this day conveyed to [Appellants]." The easement further stated:

> The grantor does agree that the grantee, their heirs or assigns may take such steps and make such improvements as may be necessary to have said street or road opened and maintained as a public street or road and that grantor will assist in such endeavor and that said street or road when opened shall be for the mutual use and benefit of the owners of property lying on either side of the same.

In 1998, several of the charities to which Marie had devised property in the same area sold their land to the Town in order for the Town to build a recreation complex. Part of Porter Street was within the boundaries of the land sold.

In 2003, Waccamaw Housing, Inc. agreed to purchase 2.15 acres of Appellants' property for a senior citizens housing project, contingent upon the zoning for the area being changed from highway commercial to planned unit development. Nehemiah Corporation on behalf of Waccamaw requested the rezoning of the property. On January 26, 2004, at the town council meeting, the Town had a first reading on the rezoning. Alice's husband, W. N. Kellahan, Jr.,[2] was present. After a council member indicated he had received calls from residents concerned about the development, the council decided to have a public hearing before the second reading.

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[2] Kellahan managed the acquisition, management, development, and sale of Appellants' property. He is a civil and structural engineer licensed in North Carolina, South Carolina, and Georgia for engineering and surveying.

The council held the public hearing on February 20, 2004, and discussed pedestrian traffic. Kellahan was unable to attend the public hearing and second reading because he was out of town. He and Senator John Yancey McGill had discussed that he would be absent. A council member asked if the developer was willing to close Porter Street on the Ashton Avenue side. J.W. Campbell responded that would only stop vehicle traffic, not pedestrian traffic. Senator McGill made a recommendation for a second reading of the ordinance with the understanding that Porter Street would be closed permanently from Ashton Avenue and a barricade and fence would be erected. The second reading of the rezoning immediately followed at a special meeting of town council. The council approved the ordinance to rezone the property with the amendment that Porter Street be blocked on the Ashton Avenue side. The minutes provided that Kellahan would fence his property line to within fifty feet of Highway 377, which Kellahan did.

On May 3, 2004, Waccamaw purchased the 2.15-acre tract from Appellants. Construction of the housing project began within sixty days of the zoning change approval and took approximately one year to complete.

On November 14, 2005, the Town filed a petition for abandonment and closure of the area. The Town named Appellants, Gary W. Chapman, Jr., Terilyn J. McClary, the South Carolina Department of Transportation (SCDOT), and Waccamaw as defendants. McClary and Chapman, who at the time owned the two lots that bordered the area at issue, Lots 13 and 14, did not answer and were held in default.[3] Both SCDOT and Waccamaw filed answers stating they had no objection to the closing. SCDOT stated Porter Street "is not shown as part of the State Highway System. SCDOT records do not find any file or documents for this section of road." Appellants filed an answer and counterclaim, requesting the petition be dismissed and if it was not, asking for just compensation for the termination of their rights to their easement based on a reduction in value to their property. The circuit court referred the matter to the special referee.

Following a hearing, the special referee ordered a portion of Porter Street be closed. The referee found the Town and Appellants "have unequivocally agreed that Porter Street would be used as a public road. Public funds were used for the paving of Porter Street and the original easement conveyed to [Appellants]

[3] Both of them later sold their lots, and the subsequent owners are in favor of the closure of the property.

underscores the desire to have the street opened and used for their benefit and members of the public." Additionally, the special referee found an agency relationship was established between Appellants and Senator McGill and thus, Appellants were bound by the deal brokered by Town Council with the input of Senator McGill. The referee also determined the closing would not affect emergency vehicles because they have other means of access and the part of the street to be closed was not in use. Further, the referee found:

> Porter Street is owned by the Town . . . as evidenced by the deeds for the purchase of the land for the recreation complex, the negotiated agreement to rezone the property to permit the housing project, and the paving of a substantial portion of Porter Street using public funds. Although there was never a public dedication of Porter Street, Porter Street has been used by the public and all of the street except the length of one lot has been paved using public CTC funds which benefitted [Appellants]. Porter Street is therefore by the agreement and the actions of the parties to this litigation a public street.

The special referee further noted the deed from Appellants to Waccamaw did not contain an easement, evidencing that Porter Street was public. Additionally, the referee determined the closing would be in the best interests of the citizens and residents of the surrounding area and the Town, including abutting property owners and interested parties, and would not be prejudicial to abutting property owners or interested parties. The referee found the determination of the scope of an easement was one in equity and thus, found Appellants' counterclaim should be denied because they purchased the easement for the purpose of making Porter Street a public road. The special referee ordered the title for the property that was closed to be split equally between the owner of lots 13 and 14. On November 4, 2010, Appellants filed a motion to alter or amend pursuant to Rules 59(e) and 60, SCRCP.

The special referee denied the motion to alter or amend, finding: "Porter Street is a publically dedicated road which has been delineated on a number of plats since 1903. It was expressly dedicated to the public when the 1903 subdivision plat was recorded." The referee further found, "The public later accepted that dedication by using the roadway, albeit light use. Porter Street was dedicated to the public and

accepted by the public prior to the easement granted by Samuel McIntosh to [Appellants]." The referee further found that "[e]ven if the portion of the road was not dedicated and accepted by the public, there is strict, cogent[,] and evincing convincing evidence that [Appellants] dedicated the easement to the public making it a public road." The referee found the grant contained a dedication by writing when it stated "'proposed fifty (50) foot road or street should be opened and remain open for the mutual use and benefit of the owners of the lands of the Estate of Marie L. Nelson' . . . and . . . 'the parties have agreed that efforts should be made to have [Porter] street opened and used for their benefit and members of the public who may need to use the same.'" (alterations by special referee). The special referee found pavement of the road was not a requirement for a dedication.

The special referee also found Appellants conveyed the land that adjoined the easement for the senior citizens housing developments without expressly retaining any easement rights. Additionally, he found Appellants knew the rezoning was approved based on the closing of an unpaved portion of the road. The referee therefore determined Appellants intended to abandon the easement and not retain any rights to the roadway.

The special referee found Porter Street could be closed pursuant to section 57-9-10 of the South Carolina Code. The referee determined the Town established Porter Street was a street used for vehicular travel and it had a right to close the street. The referee found Michael Kirby, the Community Planning and Development Director for the Town, testified it would be in the best interests of the residents of the Town that the street be closed. The referee also stated that one of the adjacent landowners testified "'people would just drive through all the time'" and vehicles had used the road since 1997 or 1998. The special referee found, "The closing of the portion of Porter Street is for the safety of landowners in the area, the public, and Town property." The referee stated, "The closing of Porter Street decreases foot and automobile traffic to the rear of the Recreation Center, and to the residential neighborhood located behind the Recreation Center. The Town has provided sufficient proof that the closing of Porter Street is in the best interests of the residents of the Town."

Further, the special referee determined because the land was dedicated to the public, Appellants were "not entitled to compensation as they have lost the ability to control the future use of the property." The referee noted McIntosh did not have

an easement to grant Appellants, or if he did, the grant was dedicated to the public and was accepted.

Additionally, the special referee found although the defense of estoppel was not included as a defense in the Town's reply to Appellants' counterclaim, the issue was raised, thus allowing it to be considered. The referee found an agency relationship was established between Appellants and Senator McGill because Kellahan testified he had sent Senator McGill to represent his interest and the intent of the principal determines whether an agency relationship exists. The referee found Senator McGill understood that a portion of Porter Street would be closed permanently to allow for the rezoning. "The representation that this portion of Porter Street would be permanently closed was made so that Town Council would agree to the rezoning. This representation would be reasonably calculated to induce the Town to act, and it did so." The referee found Appellants were able to sell a portion of their property because of the agreement "and are estopped from arguing that they do not want the unpaved section of Porter Street closed, or in the alternative, that they should be compensated for the extinguishment of their easement." This appeal followed.

LAW/ANALYSIS

I. Easement Issues and Dedication

Appellants argue because they had an express written easement across the area in question, which had not been abandoned, the Town was not entitled to close the area and they are entitled to continued and unrestricted use of the area for access. They maintain the Town failed to plead or prove they abandoned the easement. Additionally, they assert the area in question was not dedicated as a public roadway or street and as such, the Town is not entitled to close the area, preventing Appellants from having access and use of the area to access their property. Finally, Appellants argue the evidence does not support the special referee's finding they purchased the easement to make Porter Street a public road. It maintains the language in the easement is clear that the road is proposed. We agree.

An easement is a right to use the land of another for a specific purpose. *Steele v. Williams*, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944). This right of way may

arise by grant,[4] from necessity, by prescription, or by implication by prior use. *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006); *Steele*, 204 S.C. at 132, 28 S.E.2d at 647-48. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (quotation marks omitted).

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006) (quotation marks omitted). "In a law case tried by the judge without a jury, this court reviews for errors of law and reviews factual findings only for evidence which reasonably supports the court's findings." *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998).

"However, the determination of the scope of the easement is a question in equity." *Hardy*, 369 S.C. at 165, 631 S.E.2d at 541. On appeal in an action in equity, the appellate court may find facts in accordance with its views of the preponderance of the evidence. *Grosshuesch v. Cramer*, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). Thus, this court may reverse a factual finding by the trial court in such cases when the appellant satisfies us the finding is against the preponderance of the evidence. *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). This does not require the appellate court to disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility. *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000). Furthermore, the appellant is not relieved of the burden of convincing this court the trial court committed error in its findings. *Pinckney v. Warren*, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001).

"One claiming title by deed has no greater title than the original grantor in the chain of title upon which he relies." *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 313, 433 S.E.2d 875, 880 (Ct. App. 1992); *see also Belue v. Fetner*, 251 S.C.

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[4] "A reservation of an easement in a deed by which lands are conveyed is equivalent, for the purpose of the creation of the easement, to an express grant of the easement by the grantee of the lands." *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 419, 143 S.E.2d 803, 806 (1965).

600, 606, 164 S.E.2d 753, 755 (1968) (holding a deed cannot convey an interest the grantor does not have).

"Any interested person, the State[,] or any of its political subdivisions or agencies may petition a court of competent jurisdiction to abandon or close any street, road[,] or highway whether opened or not." S.C. Code Ann. § 57-9-10 (Supp. 2012).

> By creating a formal judicial procedure for terminating a public right of way over land, [Section 57-9-10] removes the uncertainty attending the common law of dedication and abandonment. It also ameliorates the rigor of the common law rule requiring strict proof of intent to abandon a public right of way before that right can be extinguished.

S.C. Dep't of Transp. v. Hinson Family Holdings, LLC, 361 S.C. 649, 655, 606 S.E.2d 781, 784 (2004) (internal quotation marks omitted) (alteration by court).

> "Highway", "street", or "road" are general terms denoting a public way for the purpose of vehicular travel, including the entire area within the right-of-way, and the terms shall include roadways, pedestrian facilities, bridges, tunnels, viaducts, drainage structures, and all other facilities commonly considered component parts of highways, streets, or roads.

S.C. Code Ann. § 57-3-120(1) (2006).

> Under [s]ection 57-9-20, the court is empowered to close roads on a finding that it is in the best interest of all concerned. A public street may not be vacated for the sole purpose of benefiting an abutting owner. However, the mere fact that the vacation was at the instigation of an individual who owns abutting property does not invalidate the vacation or constitute abuse of discretion, nor does the fact that some private interest may be served incidentally. On the other hand, it must appear clearly

> that no consideration other than that of public interest could have prompted the action.

First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 229, 417 S.E.2d 592, 593-94 (1992) (citations omitted).

"The determination of whether a roadway has been dedicated to the public is an action in equity." *Mack v. Edens*, 320 S.C. 236, 239, 464 S.E.2d 124, 126 (Ct. App. 1995). "As such, we have jurisdiction on appeal to find facts in accordance with our own view of the preponderance of the evidence." *Id.* "Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. Second, there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication." *Id.* (citation omitted). "[T]he burden of proof to establish dedication is upon the party claiming it." *Anderson v. Town of Hemingway*, 269 S.C. 351, 354, 237 S.E.2d 489, 490 (1977).

"No particular formality is necessary to effect a common law dedication." *Boyd v. Hyatt*, 294 S.C. 360, 364, 364 S.E.2d 478, 480 (Ct. App. 1988). "An intention to dedicate may be implied from the circumstances." *Id.* "Any act or declaration on the part of the dedicator which fully demonstrates his intention to appropriate [his] land to public use, or from which a reasonable inference of his intent to dedicate may be drawn, is sufficient." *Id.* (alteration by court) (internal quotation marks omitted). "However, absent an express grant, one who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly and unequivocally indicating the owner's intention to create a right in the public to use the property in question adversely to the owner." *Id.*

"South Carolina law recognizes two types of implied dedication-one where the question of implied dedication arises from the sale of land with reference to maps or plats; the other when the dedication arises . . . from an abandonment to or acquiescence in public use." *Vick v. S.C. Dep't of Transp.*, 347 S.C. 470, 477, 556 S.E.2d 693, 697 (Ct. App. 2001) (alteration by court) (internal quotation marks omitted). "Only the owner of a fee simple interest can make a dedication." *Hoogenboom*, 315 S.C. at 316, 433 S.E.2d at 883. "The owner's intention to dedicate must be manifested in a positive and unmistakable manner." *Id.* at 317, 433 S.E.2d at 883. "A dedication need not be made by deed or other writing, but may be effectually made by acts or declarations. Intent to dedicate may also be

implied from long public use of the land to which the owner acquiesces." *Id.* (citation omitted).

> Nevertheless, dedication is an exceptional mode of passing an interest in land, and proof of dedication must be strict, cogent, and convincing. The acts proved must not be consistent with any construction other than that of a dedication, and dedication may not be implied from the permissive, sporadic, and recreational use of property. The record must contain evidence the owner of the property clearly, convincingly, or unequivocally intended to dedicate the property for public use.

Mack, 320 S.C. at 239, 464 S.E.2d at 126.

"As with intention to dedicate, no formal acceptance by a public authority is necessary to show public acceptance. Acceptance may be implied by the public or a public authority continuously using or repairing the property." *Id.* "The use, repair, and working of the streets by public authorities is a mode of acceptance." *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 326, 487 S.E.2d 187, 192 (1997). "The mere fact the County approved the plat does not constitute an acceptance of the proposed public dedication." *Id.* at 326-27, 487 S.E.2d at 192. "The nonassessment of taxes is a factor in the determination of dedication and acceptance. The payment of taxes on disputed property is evidence contrary to the intent to dedicate property to the public." *Id.* at 327, 487 S.E.2d at 192 (citation omitted). "It is the duty of the fact finder to determine whether or not the public dedication has been accepted." *Id.*

In *Mack*, this court found "the trial [court] correctly held the evidence insufficient to prove an implied dedication of the road." 320 S.C. at 240, 464 S.E.2d at 126. We determined the record supported the trial court's "conclusion that historical use of the road by the public was basically recreational or religious. Additionally, the evidence of public acceptance of the road [was] insufficient." *Id.* This court found no evidence (1) public authorities had maintained the road, (2) any portion of the property had been excluded from tax assessment, and (3) the deeds delineated a public road. *Id.* at 240, 464 S.E.2d at 126-27.

"A recorded plat may be sufficient to disclose a landowner's intent to dedicate property to public use." *Van Blarcum v. City of N. Myrtle Beach*, 337 S.C. 446, 450, 523 S.E.2d 486, 488 (Ct. App. 1999). "If a landowner subdivides and plats an area of land into lots and streets and then sells lots with reference to the plat, the owner manifests an intent to dedicate those common areas to be used by both the purchasers and the public, absent evidence of a contrary intent." *Id.* at 451, 523 S.E.2d at 488. However, in *Home Sales, Inc. v. City of North Myrtle Beach*, 299 S.C. 70, 78, 382 S.E.2d 463, 467 (Ct. App. 1989), this court determined a legend on a subdivision plat that gave developers discretion whether or not to open avenues did not dedicate the avenues.

"The essence of a dedication is that it shall be for the use of the public at large." *Timberlake Plantation Co. v. Cnty. of Lexington*, 314 S.C. 556, 560, 431 S.E.2d 573, 575 (1993). "A dedication must be made to the use of the public exclusively, and not merely to the use of the public in connection with a user by the owners in such measure as they may desire." *Id.* "[W]hile a landowner may dedicate land for a specific, limited, and defined purpose, he cannot retain discretion to alter or control future use of the property once it has been accepted by the public." *Id.* "[P]ublic dedications for a limited purpose are permissible, and . . . where the dedicator's intended use of the property is clearly and specifically expressed, no deviation from such use may be permitted, no matter how advantageous the changed use may be to the public." *Id*.

Owners of lots in a subdivision have a private easement that survives the vacation, abandonment, or closing of a portion of a road in the subdivision by the public authorities, independent of their right therein as a member of the public. *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 121, 145 S.E.2d 922, 926 (1965). When lots in a subdivision are sold by reference to a map or plat upon which roads are shown that are or become public highways, the private easement that arises upon such a sale survives the vacation, abandonment, or closing of the road or highway by the public. *Id*. "[P]ersons who own lots fronting on or adjacent to property dedicated as public streets or highways have such special property interests as entitle them to maintain a suit for the enforcement and preservation of the use of the property as such." *Id.* at 121-22, 145 S.E.2d at 926. "[P]ersons acquiring lots of land according to a map showing a street thereon are entitled to enjoin other landowners, who also purchased according to such map, from closing a portion of such street on the vacation thereof, since they have a special property right or easement in the street, although not abutting on the portion closed and

although they have ample means of ingress and egress notwithstanding the closing." *Id.* at 122, 145 S.E.2d at 927.

"Whe[n] land is subdivided, platted into lots, and sold by reference to the plats, the buyers acquire a special property right in the roads shown on the plat. If the deed references the plat, the grantee acquires a private easement for the use of all streets on the map." *Murrells Inlet Corp. v. Ward*, 378 S.C. 225, 233, 662 S.E.2d 452, 455-56 (Ct. App. 2008) (internal quotation marks omitted). In *Murrells Inlet*, the court found "[t]he easement referenced in the plat is dedicated to the use of the owners of the lots, their successors in title, and to the public in general." *Id.* at 233, 662 S.E.2d at 456. "As to the grantor, who conveyed the property with reference to the plat, and the grantee and his successors, the dedication of the easement is complete at the time the conveyance is made. The grantee receives a private easement at the time of conveyance in any streets referenced in the plat." *Id.* (citations omitted). When "lands are platted and sales are made with reference to the plat, the acts of the owner in themselves merely create private rights in the grantees entitling the grantees to the use of the streets and ways laid down on the plat or referred to in the conveyance." *Id.* at 234, 662 S.E.2d at 456 (internal quotation marks omitted). "Recordation of a plat containing an easement may be sufficient to show that the owner intended to dedicate that easement." *Id.*

"While dedication for public use is significant to the creation of a public easement, it is irrelevant to the determination whether a private easement exists." *Newington Plantation Estates Ass'n v. Newington Plantation Estates*, 318 S.C. 362, 365, 458 S.E.2d 36, 38 (1995). "Absent evidence of the seller's intent to the contrary, a conveyance of land that references a map depicting streets conveys to the purchaser, as a matter of law, a private easement by implication with respect to those streets, whether or not there is a dedication to public use." *Id.* "As between an owner who has conveyed lots according to a plat and the grantee, the dedication of a private easement is complete when the conveyance is made." *Id.*

In *Vick*, 347 S.C. at 477, 556 S.E.2d at 697, this court found the plat alone did not conclusively manifest an intent to dedicate the road to the public, particularly in light of the fact that nearly all of the deeds the grantor prepared conveying the lots merely granted the buyer an easement for ingress and egress over the road. The court found this gave rise to the inference the grantor intended to retain ownership. *Id.* at 477-78, 556 S.E.2d at 697. The court noted that although the plat may have created a private right of easement between the grantor and the purchasers, "the

fact that [the grantor] allowed this small group to use the road did not vest any rights in the public at large or convey an offer of the road to the county." *Id.* at 478, 556 S.E.2d at 697. The court recognized "[t]here is a clearly defined distinction between the rights acquired by the public through dedication effected by platting and sale, and the private rights acquired by the grantees by virtue of the grant or covenant contained in a deed which refers to a plat, or bounds the property upon a street through the grantor's lands. *Id.* (internal quotation marks omitted).

> [W]here lands are platted and sales are made with reference to the plat, the acts of the owner in themselves merely create private rights in the grantees entitling the grantees to the use of the streets and ways laid down on the plat or referred to in the conveyance. But these rights are purely in the nature of private rights founded upon a grant or covenant, and no public rights attach to such streets or lands until there has been an express or implied acceptance of the dedication evidenced either by general public use or by the acts of the public authorities.

Id. (alteration by court). The court concluded "a plat alone is not determinative of implied dedication whe[n] there is evidence of the grantor's contrary intent." *Id.* "When property is subdivided and sold according to a plat showing streets or roads, the grantees acquire a private easement in the streets, but the easement does not become a public easement until there has been an express or implied acceptance of the dedication, evidenced either by general public use or by acts of the public authorities." *Id.* at 478-79, 556 S.E.2d at 698 (internal quotation marks omitted). In *Vick*, this court decided the evidence demonstrated no public acceptance: "Aside from the buyers of the five lots, there was no evidence of general use by the public or of acceptance or maintenance by city or county authorities." *Id.* at 479, 556 S.E.2d at 698. "Whe[n] land is divided into lots according to a plat, showing streets, and lots are sold and conveyed with reference to said plat, the owner thereby dedicates the streets to the use of the lot owners, their successors in title, and the public." *Helsel v. City of N. Myrtle Beach*, 307 S.C. 24, 27, 413 S.E.2d 821, 823 (1992). In *Helsel*, the court found "the acts of the original owner in developing the property in accordance with a recorded plat evidence an intent to dedicate the street end to public use." *Id.*

> The approval of the land development plan or subdivision plat may not be deemed to automatically constitute or effect an acceptance by the municipality or the county or the public of the dedication of any street, easement, or other ground shown upon the plat. Public acceptance of the lands must be by action of the governing body customary to these transactions.

S.C. Code Ann. § 6-29-1170 (2004).

In a Maryland Court of Appeals case, the court determined that in accepting a dedication, the county, "even in the absence of conditions, restrictions and limitations, necessarily takes the dedicated property subject to all of the existing rights of the [easement holders] in and to the same." *Armiger v. Lewin*, 141 A.2d 151, 155 (Md. Ct. App. 1958). The court held "if the [c]ounty . . . should ever close the street to public use, or abandon it, the rights of the [easement holders] to continue to use the [e]asement-if it still exists under the terms of the reservation which created it-would remain intact." *Id.*

"In some cases, acceptance of part of a single street offered for dedication by plat is acceptance of that part only and does not necessarily extend to the entire street. Generally, however, acceptance of part of the street amounts to acceptance of the entire street." 23 Am. Jur. 2d *Dedication* § 43 (2002) (footnote omitted).

"By a common-law dedication the fee does not pass; the public acquires only an easement in the land designated for its use." 23 Am. Jur. 2d *Dedication* § 54 (2002). "The legal or equitable title to land is not lost or destroyed by dedication. The fee ordinarily remains in the proprietor with the public holding the easement in trust." *Id.* (footnotes omitted). "A defeasible fee simple can be granted by dedication if the express language in the conveyance or other evidence makes clear that such a limitation on the fee is intended." *Id.*

In a Montana Supreme Court case, the court held the property owner's dedication to the county of a road over which the homeowners' association had easement rights pursuant to an agreement for road maintenance and establishment of the homeowners' association did not extinguish the association members' easement rights, absent any language in dedication indicating the public right was exclusive

or expressly extinguishing prior easement right. *Gibson v. Paramount Homes, LLC*, 253 P.3d 903 (Mont. 2011).

A "dedication is permanent unless the land so dedicated is abandoned by the public or by the proper authority, or the highway has been vacated in due course of law." 23 Am. Jur. 2d *Dedication* § 57 (2002). "Whe[n] property dedicated to the public is abandoned or relinquished, the public's rights in the property are terminated and, by operation of law, it reverts to the original dedicator or to his or her heirs or grantees . . . ." 23 Am. Jur. 2d *Dedication* § 64 (2002) (footnote omitted). "Generally, a mere misuse or nonuse does not constitute abandonment of land dedicated to public use. Thus, if a street has been dedicated and the dedication accepted, mere delay in opening and improving it does not work an abandonment." 23 Am. Jur. 2d *Dedication* § 63 Practice Guide (2002) (footnotes omitted).

> Diverted use is authorized if it (1) is fairly within the terms of the dedication, (2) reasonably serves to fit the property for enjoyment by the public, and (3) is used in the manner contemplated. The dedicator is presumed to have intended the property to be used by the public, within the limitations of the dedication, in such way as is most convenient and comfortable and according to not only the properties and usages known at the time of the dedication, but also to those justified by lapse of time and change of conditions.

Id. (footnotes omitted).

> [A]n easement may be lost by abandonment and in determining such question the intention of the owner to abandon is the primary inquiry. The intention to abandon need not appear by express declaration, but may be inferred from all of the facts and circumstances of the case. It may be inferred from the acts and conduct of the owner and the nature and situation of the property, where there appears some clear and unmistakable affirmative act or series of acts clearly indicating, either a present intent to relinquish the easement, or purpose inconsistent with its further existence.

Carolina Land Co. v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975). The burden of proof is upon the party asserting abandonment to show the abandonment by clear and unequivocable evidence. *Id.* Mere nonuse of an easement created by deed will not amount to an abandonment. *Witt v. Poole*, 182 S.C. 110, 115, 188 S.E. 496, 498 (1936).

On the matter of dedication, this court makes findings of fact in accordance with our own view of the preponderance of the evidence, and the evidence must be strict, cogent, and convincing. *Mack*, 320 S.C. at 239, 464 S.E.2d at 126. The Town did not present sufficient evidence for the special referee to find there was a dedication, either in 1903 or 1993. The plat from 1903 simply shows an opening between lots 13 and 14. It is not labeled. When the lots were sold in 1909, the deeds referred to that area as a new street. This was not sufficient to show the intent of John Nelson to dedicate the area. Further, the language in the 1993 easement was not sufficient to dedicate the land to the public. While it states that efforts should be made for the streets be open to the public, it only demonstrates Appellants and McIntosh were planning on doing that, not that they had accomplished it. Kellahan testified that McIntosh informed him when Appellants purchased the property that the road had not been dedicated. He further testified that when purchasing the property, a title search revealed no dedication, which is why Appellants requested the easement. Kellahan testified he did not know if Appellants received a separate tax notice for the area in question. Accordingly, the Town did not meet its burden of proof to establish a dedication.

Additionally, the Town had to prove the area was accepted by the public. Kellahan testified Appellants had previously tried to dedicate the area in question to the Town but the Town would not accept it. He also testified the area Appellants purchased was used for agricultural purposes until a few years before the purchase and it was covered in weeds and broom straw. Kirby testified the area had never been developed as a road until the senior citizens housing was built and thus was never used for vehicular traffic. However, he also testified it was used as a dirt road entrance and exit one year for a "Pig Pickin" held at the recreation center. It was not used for that purpose in the following years due to citizens' complaints. Kirby also testified that prior to the recreation center being built, the road had two dirt lanes and one of those lanes was used to access a telephone substation.

One of the owners of the adjacent property testified that before the road was paved, it was a dirt road and there were little pine trees and "people would drive through all the time." However, she testified that when she bought her property, although the prior owners had told her that people were using the road as a cut through, there was no street there and she did not expect people to be driving or walking through the area. She stated it was all forest when she bought the property. She provided it is now all dirt, which she had the Town place there due to a mud problem. She further testified the Town has not maintained the street.

The owner of the other adjacent lot testified that although the road was unpaved and unimproved, cars had used it since he moved there in 1995. He testified he previously believed the street was a lot and tried to purchase it from the Town because of the traffic driving through the area. He stated that he was told at the courthouse it was not being used. He testified the area did not look like a street. Further, he provided that he used the area as his driveway when he purchased his house because it did not have a driveway. Because the evidence does not establish it was a public road, the special referee erred in finding for the Town on this issue.

Further, when a subdivision is created, the property owners have a private easement in the roads. When John Nelson originally divided his property, any landowner that purchased the property would have an easement regardless of whether or not the roads became public. Several cases explicitly state that the public easement or dedication does not extinguish the private easement. Further, Appellants' easement from McIntosh stated it was for their use, not just the public's use. Therefore, regardless of whether the 1903 plat or Appellants' 1993 purchase of the easement from McIntosh was a dedication, they still had an easement. Accordingly, the special referee erred in finding the Town could close the road.

II. Allegation in the Pleadings

Appellants argue the Town was bound by the allegation in its petition that they had an easement for the use of Porter Street. We find this issue to be unpreserved for our review.

"[B]ut for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court." *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004).

> [P]arties are judicially bound by their pleadings unless withdrawn, altered[,] or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts [that] are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

This issue was first discussed at the hearing on Appellants' motion to alter or amend. The referee asked, "[T]here is no question that [Appellants] had an easement, right[?]" Appellants responded:

> [T]hat's what I thought. The allegation is in the Complaint, the Petition, stated that. I think on page 11 and 18, the arguments in that second hearing, [the Town] said that they were the easement owners. In the Reply Memorandum I got some indication that there was now a claim that there was a prior dedication, and the easement was no longer there. I'm just kind of amazed by that.

Later, Appellants stated:

> I'm not clear as to whether or not based on the pleadings it stated [Appellants] have an easement, and the record on page 11, says there is a recorded easement to [Appellants] which is the subject of this. We are asking that the easement be extinguished for a little portion at the end, and then on page 18 I think it is. [The Town] is again talking about the [T]own's property, pled and notified all adjoining property owners and also notified them talking about [Appellants]. The easement owners have specifically pled that they were easement owners, and when I read their Reply, the Opposition memorandum, I got there was a question whether or not it was a valid easement.

Appellants seemed to be arguing the Town admitted they had an easement in its petition to close the road.[5] However, at the hearing they did not cite to any case law or specifically state the Town should be bound by its statement. In their proposed order granting their motion for reconsideration they submitted to the referee, they stated, "The [Town], in its Petition, specifically states that [Appellants] have an easement. The statement is a clear, unequivocal admission by the plaintiff, without any qualification. There is no testimony, no other pleading or any other action by the [Town] to retract this admission in any manner." However, the special referee never ruled on it. If an issue has been raised at trial, and the trial court fails to rule on it, and it is raised again in a motion for reconsideration, the issue is preserved for appellate review even if the trial court does not rule on it. *See Pye v. Estate of Fox*, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510 (2006). Here, that was not the case, as the issue was not raised until the hearing on the motion for reconsideration. The special referee did not rule on the issue in the order denying Appellants' motion to alter or amend, and Appellants did not file a subsequent motion for reconsideration. In *Coward Hund Construction Co. v. Ball Corp.*, this court distinguished when an issue is first raised at trial and when one is not raised until after trial. 336 S.C. 1, 4-5, 518 S.E.2d 56, 58 (Ct. App. 1999) (*citing Payton v. Kearse*, 319 S.C. 188, 460 S.E.2d 220 (Ct. App. 1995), *rev'd on other grounds*, 329 S.C. 51, 495 S.E.2d 205 (1998)). The issue in the present case did not arise until the special referee issued its order. Therefore, because Appellants did not make a motion for reconsideration when the special referee failed rule on it, it is not preserved for our review.

III. Estoppel and Agency

Appellants allege the Town failed to plead or prove Appellants were estopped to object to the closing of the area in question because it maintained Senator McGill was serving as their agent at the meeting when the closure was suggested. We agree.

"[E]stoppel must be affirmatively pled as a defense and cannot be bootstrapped onto another claim." *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d

[5] At the close of the hearing on the petition to close the road, the Town stated, "There is a recorded easement into [Appellants] which is the subject of this, and we are asking that that easement be extinguished for that little portion at the end."

262, 270 (Ct. App. 2005). "The failure to plead an affirmative defense is deemed a waiver of the right to assert it." *Wright v. Craft*, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006).

The elements of equitable estoppel for "the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001). The elements as to the party estopped are: (1) conduct by the party estopped amounting to a false representation or concealment of material facts; (2) the intention such conduct be acted upon by the other party; and (3) actual or constructive knowledge of the true facts. *Id.* "The burden of proof is upon the party who asserts an estoppel." *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 122, 145 S.E.2d 922, 927 (1965).

"A true agency relationship may be established by evidence of actual or apparent authority." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority." *Id.* "[T]he principal is bound by the acts of its agent when it has placed the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption." *Id.* "Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal." *Id.* at 432, 540 S.E.2d at 118.

An agency may not be established solely by the declarations and conduct of an alleged agent. *WDI Meredith & Co. v. Am. Telesis, Inc.*, 359 S.C. 474, 479, 597 S.E.2d 885, 887 (Ct. App. 2004). "Apparent authority must be established based upon manifestations by the principal, not the agent. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party." *R & G Constr.*, 343 S.C. at 432-33, 540 S.E.2d at 118 (citation omitted).

> Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the

> third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.

Id. at 433, 540 S.E.2d at 118. "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." *WDI Meredith*, 359 S.C. at 478-79, 597 S.E.2d at 887. To establish apparent agency, a party must prove the purported principal has represented another to be his agent by either affirmative conduct or conscious and voluntary inaction. *Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct. App. 1986).

"The elements of apparent agency are: (1) purported principal consciously or impliedly represented another to be his agent; (2) third party reasonably relied on the representation; and (3) third party detrimentally changed his or her position in reliance on the representation." *R & G Constr.*, 343 S.C. at 433, 540 S.E.2d at 118. "In the principal and agent relationship, apparent authority is considered to be a power which a principal holds his agent out as possessing or permits him to exercise under such circumstances as to preclude a denial of its existence." *Id.* "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *Id.* "A principal creates apparent authority as to a third person by the principal's written or spoken words or any other conduct which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him." *WDI Meredith*, 359 S.C. at 478, 597 S.E.2d at 887 (internal quotation marks omitted). "The apparent authority of an agent results from conduct or other manifestations of the principal's consent, whereby third persons are justified in believing the agent is acting within his authority." *R & G Constr.*, 343 S.C. at 433-34, 540 S.E.2d at 118. "Such authority is implied where the principal passively permits the agent to appear to a third person to have the authority to act on his behalf." *Id.* at 434, 540 S.E.2d at 118. "Generally, agency is a question of fact." *Id.* "Agency may be implied or inferred and may be proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal." *Id.*

Initially, Appellants are correct the Town was barred from asserting estoppel because it failed to plead it. Further, the special referee erred in finding Appellants were estopped due to Senator McGill being their agent.

Kirby testified nothing indicated Senator McGill attended the meeting on Appellants' behalf. Kellahan testified Senator McGill went to the meeting for him because he was going to be out of town but they had no discussion about closing the road. On cross-examination, he testified he sent Senator McGill to represent his interest. On redirect, he testified he never authorized Senator McGill to offer to close the road on his behalf and the closing of the road had not been discussed at the previous meeting. Senator McGill testified he attended the meeting because he was interested in having senior citizens housing in Kingstree. He testified Appellants and Kellahan did not authorize him to take any action on their behalf at the meetings. He further testified he participated in the meetings because he believed his constituents needed more senior housing.

The Town did not establish Senator McGill was Appellants' apparent agent. The crux of apparent agency is that the principal holds out to a third party the agent is acting on his or her behalf. Although Kellahan testified he sent Senator McGill to represent his interests, nothing from the minutes of the meeting or the testimony, including Kirby's, indicates anyone at the meetings thought Senator McGill was acting on Appellants' behalf. Accordingly, the special referee erred in finding Appellants should be estopped from contesting the road closing.

VI. Other Issues

Appellants also contend the Town lacked statutory authority to petition to close the area in question, the Town failed to prove the closure of the area in question was in the best interest of all concerned, and the closure of Porter Street constituted a taking and Appellants are entitled to just compensation in the amount of $100,000. Because we find the special referee erred in closing the road, we need not decide these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

Based on the foregoing, the special referee's order is

REVERSED.

HUFF and WILLIAMS, JJ., concur.