

MAYOR:

John Labriola

TOWN ADMINISTRATOR:

Stephanie Monroe Tillerson

TOWN ATTORNEY:

Joseph Wilson

TOWN OF



TOWN COUNCIL MEMBERS:

John Moffitt

Bradley D. Belt

Michael Heidingsfelder

Russell A. Berner

TOWN COUNCIL TRAINING WORKSHOP

Municipal Center Council Chambers

March 27, 2023; 11:30 PM

AGENDA

- I. Call to Order:**
- II. Roll Call:**
- III. New Business:**
 - A. Elected Official Training with the Municipal Association of South Carolina**
- IV. Adjournment:**

Town Council Training Workshop South Carolina

**Town of Kiawah Island
March 23, 2023**




**Municipal Association
of South Carolina**

**WHITE &
SMITH, LLC**
PLANNING AND
LAW GROUP

WORKSHOP OVERVIEW

- Municipal Association Civility Campaign
- Structure of Municipal Government
- Roles of Council & Mayor in Mayor-Council Governments
- Sources of Duties for Elected Officials
- Laws and Regulations affecting Council Action
- The Council, the Commission, and the BZA
- Quasi-Judicial and Legislative Actions
- The Comprehensive Plan, the Ordinances, and the LDRs
- Results and Remedies
- Best Practices

A faint, stylized background graphic featuring a city skyline with various buildings in light blue, green, and red, partially enclosed by a large, light blue arc.

Overview of the Association; Civility Campaign



Municipal Association
of South Carolina

The Municipal Association

- Nonprofit organization founded in 1930.
- Mission is to offer the services, programs, and tools that will give municipal officials the knowledge, experience, and tools to efficiently and effectively administer their municipalities.
- All 271 cities and towns are members.
- 19-member board of 17 elected officials and 2 managers/administrators.



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Association Services

- Training and education, including the Municipal Elected Officials Institute.
- Advocacy at the General Assembly on behalf of municipalities.
- Field service managers.
- Statewide business license collections for insurers, insurance brokers, and telecommunication companies.
- Legal support, including amicus briefs.
- Insurance programs.



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Civility Campaign



I pledge to build a stronger
and more prosperous
community by advocating for
civil engagement, respecting
others and their viewpoints,
and finding solutions for the
betterment of my city or town.

Civility. Respect. Solutions.

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Civility Resolution

“The City of Newberry pledges to practice and promote civility within the governing body.

“The elected officials of the Council enact this civility pledge to build a stronger and more prosperous community by advocating for civil engagement, respecting others and their viewpoints, and finding solutions for the betterment of the City of Newberry.

“This pledge ensures all communication — both spoken and written — to be open, honest and transparent as this is vital for cultivating trust and relationships.

“This pledge ensures mutual respect to achieve municipal goals, recognizing that patience, tolerance and civility are imperative to success.

“This pledge ensures opportunities for finding common ground and engaging in civil discussion to seek solutions while actively listening and thoughtfully participating.”



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ICMA Practices for Effective Local Government Leadership



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ICMA Practices

1. **PERSONAL AND PROFESSIONAL INTEGRITY:** Being fair, honest, and ethical in all personal and professional relationships and activities.
2. **COMMUNITY ENGAGEMENT:** Ensuring and managing community involvement in local government to support good decision making.
3. **EQUITY AND INCLUSION:** Creating an environment of involvement, respect, and connection of diverse ideas, backgrounds, and talent throughout the organization and the community.
4. **STAFF EFFECTIVENESS:** Taking responsibility for the development, performance, and success of employees throughout the organization.
5. **PERSONAL RESILIENCY AND DEVELOPMENT:** Demonstrating a commitment to a balanced life through ongoing self-renewal and development in order to increase personal capacity.



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ICMA Practices

6. **STRATEGIC LEADERSHIP:** Defining and communicating a vision and leveraging all resources and tools to achieve it.
7. **STRATEGIC PLANNING:** Developing a plan of action that brings the community together, provides clarity of purpose and priorities, and guides the organization's actions in achieving its goals and objectives.
8. **POLICY FACILITATION AND IMPLEMENTATION:** Engaging with elected officials and other community stakeholders to create and execute policies that achieve common goals and objectives.
9. **COMMUNITY AND RESIDENT SERVICE:** Discerning community needs and providing responsive, equitable services.
10. **SERVICE DELIVERY:** Understanding the basic principles of service delivery, using strategic decision making and continuous improvement to serve the organization and community, and influencing the components and relationships between operational areas.



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ICMA Practices

11. **TECHNOLOGICAL LITERACY:** Demonstrating an understanding of information technology and ensuring that it is incorporated appropriately in service delivery, information sharing, and public access.
12. **FINANCIAL MANAGEMENT AND BUDGETING:** Implementing long-term financial analysis and planning that integrates strategic planning and reflects a community's values and priorities; preparing and administering the budget.
13. **HUMAN RESOURCES MANAGEMENT AND WORKFORCE ENGAGEMENT:** Ensuring that the policies and procedures of the organization are applied consistently and fairly, and motivating and engaging the workforce to its highest potential.
14. **COMMUNICATION AND INFORMATION SHARING:** Effectively facilitating the flow of ideas, information, and understanding.



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A stylized background graphic featuring a city skyline with various buildings in light blue, green, and pink. A large, light blue arc curves around the buildings from the bottom left to the top right.

Structure of Municipal Government



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Structure of Government

- Separation of powers.
- Three forms of government: Council, Mayor-Council, Council-Manager.
- In all three forms, the council is the legislative branch.
- In the Mayor-Council form, the mayor is head of the executive branch.
- The judicial branch exists through the municipal court (SC Code § 14-25-5 *et seq.*) and quasi-judicial bodies (BAR, BZA, BL appeals board, etc.).



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Structure of Government

- In Mayor-Council form, the council may establish “departments, offices, and agencies” and prescribe their functions, SC Code § 5-9-40. These entities are under the “direction and supervision” of the mayor.
- Locally created agencies are often referred to as “boards and commissions,” which handle certain matters under terms established by council.
- State law also creates boards and commissions for specific purposes – e.g., commissions of public works, housing authorities, planning bodies.
- In each case, the relationship between council and the respective boards and commissions will be subject to a rules-based separation of powers.



Powers of Mayor in Mayor-Council Form

- Mayor presides over meetings, SC Code § 5-9-30(3), and calls special meetings, SC Code § 5-7-250.
- Mayor acts as chief administrative officer and appoints and removes employees subject to personnel rules adopted by council, SC Code § 5-9-30(1).
- Mayor supervises departments, acts and votes as a member of council, and ensures the faithful execution of laws, SC Code § 5-9-30(2) and (4).
- Mayor prepares and submits a budget and capital program to council, makes an annual financial report to the public and council, and reports to the council on the operation of departments. SC Code § 5-9-30(5) – (7).



Sources of Duties for Municipal Elected Officials



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Sources: Oaths of Office

Constitutional Oath, Article VI, Section 5: “I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been elected, (or appointed), and that I will, to the best of my ability, discharge the duties thereof, and preserve, protect, and defend the Constitution of this State and of the United States. So help me God.”



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Sources: Oaths of Office

Statutory Oath, SC Code § 5-15-150: “As mayor (councilman) of the municipality of _____ I will equally, fairly, and impartially, to the best of my ability and skill, exercise the trust reposed in me, and I will use my best endeavors to preserve the peace and carry into effect according to law the purposes for which I have been elected. So help me God.”



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Sources: State Ethics Act

- See SC Code §§ 8-13-100 *et seq.*
- Generally covers statements of economic interest, self-dealing and influence, representing a person before the body, campaign practices, and influencing the outcome of an election.
- In most cases, the test is whether the official has an “economic interest,” which can arise directly (e.g., the award of a contract) or indirectly (e.g., through the ownership of affected property).



Sources: State Ethics Act

Section 8-13-700(A), Self-Dealing

“No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a family member, an individual with whom he is associated, or a business with which he is associated.”

Exception for incidental use not resulting in additional public expense.



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Sources: State Ethics Act

Section 8-13-700(B), Influence

“No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a family member, an individual with whom he is associated, or a business with which he is associated has an economic interest.”



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Sources: Federal and State Constitutions

- Due Process, Equal Protection, Privileges and Immunities, First and Fourth Amendments.
- The First Amendment is an increasingly important consideration for local governments, for example:
 - Sign ordinances (content-neutrality).
 - First Amendment audits.
 - Social media presence creating a First Amendment forum.



Sources: State Ethics Act

Section 8-13-740(A)(5), Representation

“A public official, public member, or public employee of a municipality may not knowingly represent a person before any agency, unit, or subunit of that municipality for which the public official, public member, or public employee has official responsibility except as required by law.”



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Sources: Fiduciary Duty to the Public

- “Elected officials generally owe a fiduciary duty to the electorate. When a government officer decides how to proceed in an official endeavor ... his constituents have a right to have their best interests form the basis of that decision.” United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997).
- “The existence of a fiduciary relationship, under any definition of that term, [is] usually beyond dispute” as between a public official and the public. Skilling v. United States, 561 U.S. 358 n.41 (2010)



Sources: Local Codes of Conduct or Ethics

Many municipalities have local codes of conduct or ethics that regulate, among other things:

- Attendance and conduct at meetings.
- Interactions with staff.
- Use of municipal facilities and services for personal purposes.
- Disclosure of confidential information.
- Use of social media or other communications potentially subject to the First Amendment and defamation laws.



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Laws and Regulations Affecting Council Action



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FOIA: Scope and Applicability

The South Carolina Freedom of Information Act is codified at Chapter 4 of Title 30 of SC Code of Laws of 1976 (SC Code §§ 30-4-10 to -165).

FOIA provides rules for two functions of government:

- Disclosing public records.
- Conducting public meetings.



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FOIA: Public Records

“Public record” includes all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.

Definitely a public record:

- Records of the municipality in hardcopy and electronic formats.
- Emails on city servers.
- Text messages on phones provided by the public body.

Almost certainly a public record:

- Emails or texts related to municipal business, even on private accounts or devices.



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FOIA: Public Record Exemptions

S.C. Code § 30-4-40 lists records that a public body may exempt from disclosure.

- Most exemptions are not mandatory.
- SC Code § 30-4-40(a)(7) exempts “correspondence or work products of legal counsel for a public body and any other material that would violate attorney-client relationships.”
- Records that contain both exempt and non-exempt material must be redacted and the non-exempt part disclosed.
- Many other exemptions are located elsewhere in State and federal law.



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FOIA: Meetings

- Under the South Carolina Freedom of Information Act, SC Code § 30-4-20(d), “meeting means the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.”
- If a gathering is a meeting, then notice must be posted in advance and the public must be allowed to attend.



FOIA: Meetings by Email

- “[I]t is this Office’s opinion that our state courts would likely hold an email chain in which a quorum of a public body’s membership discusses or takes action upon a matter over which the public body has supervision, control, jurisdiction or advisory power constitutes a ‘meeting’ according to the S.C. FOIA.” 2021 WL 1832297, at *7 (S.C.A.G. Feb. 18, 2021).



FOIA: Executive Session

Meetings must be open to the public unless closed as an executive session. S.C. Code § 30-4-70 allows executive sessions for:

- Certain personnel matters;
- Contractual negotiations; sales or purchases of property; and the receipt of legal advice or other matters covered by the attorney-client privilege;
- Development of security personnel or devices;
- Investigative proceedings regarding allegations of criminal misconduct; and
- Economic development matters.



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Duty of Confidentiality

- The South Carolina courts have held that the public record exemptions in FOIA do not create a duty of confidentiality. See Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991).
- The South Carolina courts have not addressed whether the executive session provisions create a duty of confidentiality.
- Some local codes of conduct provide a duty of confidentiality for matters discussed in executive session. In addition, disclosure of such matters could implicate the State Ethics Act.



Attorney-Client Privilege

- Both the public record exemptions and the executive session provisions respect matters covered by the attorney-client privilege.
- But “any voluntary disclosure by a client to a third party waives the attorney-client privilege not only as to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject.” Marshall v. Marshall, 282 S.C. 534, 538, 320 S.E.2d 44, 46–47 (Ct. App. 1984).



THE SOUTH CAROLINA PLANNING ACT

SOUTH CAROLINA CONSTITUTION

- **Art. I: Declaration of Rights**
 - Sec. 2: Religion, speech, assembly, petition
 - Sec. 3: Due process, equal protection
 - Sec. 13: Taking of private property, economic development, blight
- **Art. VII: Counties and County Government**
- **Art. VIII: Local Government**
- **Art. XIV: Eminent Domain**

MISCELLANEOUS STATUTORY PROVISIONS

- **Title 4: Counties**
- **Title 5: Municipal Corporations**
- **Title 6: Local Government**
 - Chap. 1: General Provisions
 - Chap. 7: Planning by Local Gov'ts
 - Chap. 29: Planning Enabling Act

S.C. LOCAL GOVERNMENT COMPREHENSIVE PLANNING ENABLING ACT OF 1994

- **Title 6, Chapter 29**

- Art. 1: Creation of Planning Commission
- Art. 3: The Comprehensive Planning Process
- Art. 5: Zoning
- Art. 7: Land Development Regulation
- Art. 9: Educational Requirements for P & Z Officials & Employees
- Art. 11: Vested Rights

THE COUNCIL, THE COMMISSION AND THE BZA

ROLE OF THE COUNCIL IN SOUTH CAROLINA

- To adopt a **Comprehensive Plan**, by ordinance(s), after a public hearing and *recommendation of the Planning Commission*
- To adopt a **Zoning Ordinance and Districts**, “in accordance with” the Plan (6-29-720), *after recommendation of the Planning Commission* (6-29-760)
- To adopt **Land Development Regulations**, after a public hearing and *recommendation of the Planning Commission* (6-29-1130)

TWO PARKS V. KERSHAW COUNTY

- Staff & P.C. recommends rezoning approval in First Application, Council denies with citizen outcry
- Applicant submits traffic study
- Staff & P.C. recommends approval again in Second Application, Council denies again with citizen opposition
- Federal District Court upholds denial
- Distinguishes **legislative** from quasi-judicial
- Applies “fairly debatable” standard
- Met by evidence of community opposition in the record

PLANNING COMMISSION'S POWERS AND DUTIES

- Recommends **Plan Elements**, by resolution, to City Council (*advisory*);
- May appoint **Advisory Subcommittees** in developing their plans
- May hear **Appeals** from staff determinations on land development plans, including plats
- May approve **land development plans and plats**
- PC decisions on plats and appeals **are final**.

KURSCHNER V. CITY OF CAMDEN PLANNING COMMISSION

- What procedural due process requires:
 - Notice
 - Opportunity to be meaningfully heard
 - Judicial review
- **Subdivision applications are legislative, discretionary, not “adjudicative”**
- Does not require a ‘trial-type’ hearing in legislative context:
 - Reliance on hearsay is allowed
 - Voir dire questioning isn’t required
 - Cross-examination isn’t required
 - Disclosure of adverse evidence prior to hearing isn’t required
- **Any legal evidence is sufficient to support a decision of “a zoning board”** (public records supporting historic significance)

ROLE OF THE BOARD OF ZONING APPEALS (BZA)

- Hear Appeals from **Administrative Decisions** (6-29-800)
- Grant **Variances** (excluding use variance, unless expressly authorized), with conditions the *BZA deems advisable*
- Grant **Special Exceptions**, subject to conditions *set forth in the zoning ordinance*
- **Decisions** must include written findings and conclusions
- Proceedings are **Quasi-Judicial**

Appeals go to Circuit Court

WYNDHAM ENT. V. NORTH AUGUSTA

- Court of Appeals reversed BZA denial of special exception
- Staff recommended approval based on code criteria
- BZA denied after much community opposition and sworn testimony of impacts on neighborhood
- Court of Appeals reversed in favor of applicant
- ***Quasi-Judicial*** decision was arbitrary and capricious
- Not supported by “competent, substantial evidence”

QUASI-JUDICIAL AND LEGISLATIVE ACTIONS

QUASI-JUDICIAL BODIES AND DECISIONS

- **Role:**

- ascertain and investigate facts
- conduct a hearing
- weigh evidence (that is “competent, substantial, material”)
- draw conclusions from the evidence...*as a basis for official action*
- avoiding speculative, non-specific assertions of opinion in decision-making

- **Communications:** Avoid considerations outside of the public process and hearing (i.e., “*ex parte* communications”)
- 1997 AGO (*ex parte* communication by when acting in quasi-judicial capacity raises presumption of prejudice)

CITY OF HARDEEVILLE CODE, *EX PARTE* COMMUNICATION

- communications **outside a duly noticed, open hearing on the record** at which all parties and decision-makers have an opportunity to be present;
- regarding any matter pending before or which may be **reasonably expected to be pending** before the decision-making body
- a decision is **voidable if the decision-maker engaged in an substantive written or oral *ex parte* communication** with a party or a person who has a direct interest in any issue in the matter
- **unless** the decision maker:
 - promptly **notifies the parties** of the ex parte communication,
 - makes the ex parte communication a **part of the record** and
 - provides the parties **an opportunity to rebut the *ex parte* communication** prior to a final decision being rendered.

QUASI-JUDICIAL BODIES AND DECISIONS

- **Commonly considered Quasi-Judicial (appeals to Cir. Ct.):**
 - Variances
 - Special Exceptions
 - Appeals
 - Other “final decisions” on development applications
- **Why should *ex parte* communications be avoided here?**
 - Applicant’s rights are preserved (due process, fair hearing, cross-examination/rebuttal, relevant criteria)
 - They can raise a (rebuttable) presumption of prejudice;
 - May result in the decision being reversed if it cannot be cured.

CITY OF HARDEEVILLE CODE

EX PARTE COMMUNICATION

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THE PLAN, THE ORDINANCES, AND THE LDRs

COMP PLAN ADOPTION

- **PC**: Recommends **Plan Elements**, by resolution, to Council (*advisory*)
- **Council**: Adopts Plan Elements, by ordinance (*legislative*)

ZONING TEXT AND MAP

- Council makes final decision, *following recommendation of the Planning Commission*
- Are **Legislative** (not quasi-judicial) in nature, whether large- or small-scale
- Carry a **Presumption of Validity**
- Usually upheld when the reasoning for the decision is at least “**fairly debatable**” (*violations of constitutional rights are different*)

Appeals are to the State or Federal Courts

SUBDIVISION AND LAND DEVELOPMENT PLANS

- **Land Development Plans and Plats:**

- Preliminary Plats and Plans
- Sketch Plans
- Final Plats and Plans

- **Decision:**

- May be considered **quasi-judicial** in nature (or administrative/ministerial)
- Made by **Staff or Planning Commission**, incl. with conditions
- Record of **decision and grounds** must be maintained on file

Appeals are to Planning Commission (from staff decision) or Circuit Court (from P.C. decision)

A stylized graphic of a city skyline is centered on the page. It features several buildings in light blue, yellow, and green, with a large light blue arc curving around them from the bottom left to the right. The text "Results and Remedies" is overlaid on this graphic.

Results and Remedies



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Invalidation of Council Action

- Courts have found that unlawful acts, including a violation of FOIA, may invalidate the resulting action.
- See, e.g., Bus. License Opposition Comm. v. Sumter Cnty., 311 S.C. 24, 28, 426 S.E.2d 745, 748 (1992): “The evidence of record demonstrates that the amendment to the ordinance was illegally adopted at the closed meeting.... we find no abuse of discretion on the part of the Master in ordering the equitable relief of invalidation of the ordinance.”



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Compromise of Appeal

- In quasi-judicial actions, evidence of improper influence or ex parte communications could undermine a municipality's position on appeal.
- See, e.g., 1997 WL 568829, at *2 (S.C.A.G. July 9, 1997): "An ex parte communication raises a rebuttable presumption of prejudice. Once the plaintiff shows that an improper ex parte communication has occurred, the burden of showing that the communication was harmless shifts to the party seeking to uphold the validity of the zoning commission's decision. The presumption of prejudice may be rebutted by evidence that the ex parte evidence or testimony was not received by the commission or was not considered by it and, therefore, did not affect the commission's final decision."



Due Process Violation

- “Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal.” Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002)
- Unlawful actions, ex parte communications, or improper influence could therefore also be a violation of due process.



Complaint under the Ethics Act

- See, e.g., IN THE MATTER OF COMPLAINT C2018-038, May 26, 2019.
- “Respondent ... is in violation of the Ethics Act for knowingly representing a person before a unit of a municipality for which he had official responsibility in violation of Section 8-13-740(A)(5). Therefore, Respondent is hereby Publicly Reprimanded and assessed a civil penalty of \$2,000 and an administrative fee of \$500, for a total of \$2,500.”



Impact on Town's Credibility and Workplace Environment

- Improper communications, violations of FOIA, and council disharmony may undermine the media's and the public's trust in the integrity of governmental processes.
- Employees may be adversely affected by council disharmony, conflicting directions, undue administrative burdens that distract from primary job responsibilities, and triangulation.



BEST PRACTICES

BEST PRACTICES

- Be cognizant of your bodies' **Role**
- When acting in a **Quasi-Judicial** role:
 - Avoid (or cure) *ex parte* communications
 - Try to articulate code standards as basis of decisions
 - Articulate why evidence was considered more or less persuasive than other evidence
 - Avoid reliance on unsupported (*irrelevant*) assertions and those contradicted by credible evidence
- Consider published **rules of procedure and conduct**

SAMPLE RESOURCES:

- 1997 *Attorney General Opinion* (*ex parte* communication by when acting in quasi-judicial capacity raises presumption of prejudice)
- *Bannum v. City of Columbia* (special exception denial overruled due to arbitrariness)
- *Wyndham Enterprises v. North Augusta* (special exception denial overruled due to arbitrariness)
- *Town Parks, LLC v. Kershaw County* (denial of rezoning request upheld since basis of decision was “fairly debatable”)
- State Ethics Rules

Town Council Training Workshop South Carolina

Town of Kiawah Island
March 23, 2023



Municipal Association
of South Carolina

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