

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Supreme Court

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-4692

Historic Charleston Foundation and
Preservation Society of Charleston

Respondents,

v

The City of Charleston, The City of Charleston
City Council and Library Associates, LLC

Appellants

APPELLANTS' JOINT FINAL REPLY BRIEF

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INDEX

	PAGE
TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	11
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
ARGUMENT	1
I ORDINANCE 2007-147 DOES NOT CONSTITUTE SPOT ZONING	1
II ORDINANCE 2007-147 IS NOT INCONSISTENT WITH THE COMPREHENSIVE PLAN	2
III WHETHER ORDINANCE 2007-147 MOOTS PENDING LITIGATION IS IRRELEVANT TO THE ISSUE OF SPOT ZONING	3
CONCLUSION	4
CERTIFICATE OF COUNSEL	5

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bob Jones University, Inc v City of Greenville,</u> 243 S C 351, 133 S E 2d 843 (1963)	1
<u>First Union Nat'l Bank v FCVS Communications,</u> 321 S C 496, 469 S E 2d 613 (Ct App 1996)	3
<u>Knowles v City of Aiken,</u> 305 S C 219, 407 S E 2d 597 (1994)	1
<u>Turner v South Carolina Dept of Health and Environmental Control,</u> 377 S C 540, 661 S E 2d 118 (Ct App 2008)	4

STATEMENT OF ISSUES ON APPEAL

Appellants reiterate the Statement of Issues on Appeal as set forth in their brief

STATEMENT OF THE CASE

Appellants reiterate the Statement of the Case as set forth in their brief

STATEMENT OF FACTS

Appellants reiterate the Statement of Facts as set forth in their brief

ARGUMENT

I ORDINANCE 2007-147 DOES NOT CONSTITUTE SPOT ZONING

Spot zoning is implicated when a property is given a benefit not made available to other properties in the vicinity, to the detriment of those other properties. This Court has said, unequivocally, that it cannot be spot zoning when the zoning classification sought is the same classification already in existence at a considerable amount of property adjoining the property sought to be reclassified. Knowles v. City of Aiken, 305 S C 219, 407 S E 2d 597 (1994), Bob Jones University, Inc v City of Greenville, 243 S C 351, 133 S E 2d 843 (1963). That is exactly the situation here. The 3X district already applied to a majority of 404 King Street before the ratification of Ordinance 2007-147. And, it applied to adjoining properties as well, those being a portion of the Square on the east side of King Street and the entire city block on the west side of King Street directly across from 404. (R Vol II, p 596, Def Exhibit 5, Height District Map). This circumstance belies any contention that Ordinance 2007-147 constitutes spot zoning.

Respondents seize on the fact that, as but one parcel of property was subject to the Ordinance, a “spot” situation is implicated. The inquiry with respect to spot zoning, however, is

not the size or number of properties at issue. The inquiry is whether the classification sought is totally different from that at adjoining properties. The Height District Map is proof positive that applying the 3X district across all of 404 King Street was not only in keeping with height already existing on the site, but also in keeping with adjoining properties to the south and west.

As for any detriment posed to adjoining properties, the evidence demonstrated that extending 3X across the site allowed for a more balanced, symmetrically designed building at what all concede to be a special location. The evidence also demonstrated that the accommodation of an intense use at this site resulted in significant direct economic benefits to the City and indirect spin-off benefits to neighboring properties. (R Vol II, pp 597-618, Def Ex 6, Power Point presentation) The evidence proffered as to the potential detriment from this Ordinance was speculative. And the considerable amount of property in the vicinity already zoned 3X necessarily begs the question of how extending the district less than 12,000 square feet would cause the sky to fall.

II ORDINANCE 2007-147 IS NOT INCONSISTENT WITH THE COMPREHENSIVE PLAN

Respondents' citation to portions of the Downtown Plan to buoy their contention that Ordinance 2007-147 is spot zoning tells but part of the story. The Downtown Plan does advocate the protection of the skyline and admonish that the 3X zoning may not be appropriate in places. The Plan also says, however, that 404 King Street should have an intense use, and that buildings constructed in this area of the City should frame the Park. (R Vol II, p 637, 673, 685, 693, 710, Def Exhibit 7, Downtown Plan) More fundamentally, the Downtown Plan affirmatively states that it establishes only parameters to guide future development. It

affirmatively states that its recommendations are not to be deemed as rigid for specific uses or buildings. It affirmatively states that its recommendations and drawings are not to be construed as hard and fast requirements. (R. Vol. II, p. 632, Def. Exhibit 7, Downtown Plan, Introduction (Approach)). Here, the Record reflects a city council giving careful consideration not only to the delicate location of this site, but also to its importance in revitalizing the heart of its downtown area. These considerations are consistent not just with general zoning policies, but also with the specific recommendations of the Plan itself.

Respondents' urged construction of the Plan transforms the Plan from a guide to a regulatory document, in contradistinction to its very wording.

III WHETHER ORDINANCE 2007-147 MOOTS PENDING LITIGATION IS IRRELEVANT TO THE ISSUE OF SPOT ZONING

Respondents contend, without foundation, that the sole motivation driving the enactment of Ordinance 2007-147 was to moot the variance litigation pending with respect to this site. The propriety of this issue is addressed in Appellants' Brief. And the fact that Respondents did not respond to this argument in their Brief is noteworthy, as the failure to respond to an argument in one's brief may be treated by this Court as a confession that Appellants' position on this issue is correct. First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), reversed on other grounds, 328 S.C. 290, 494 S.E.2d 829 (1997). (*We note initially First Union's failure to respond to this argument in its brief could amount to a confession that the trial court ruled correctly.* 5 AmJur2d Appellate Review §555 at 254 ([I]f an appellee fails to respond to an issue in its brief, the [appellate] court may treat this failure to

respond as a confession that the appellant s position is correct)) See also Turner v South Carolina Dept of Health and Environmental Control, 377 S C 540, 661 S E 2d 118, 122 (Ct App 2008)¹ Even if a motivating factor was to improve a legal position, nothing in the law prevents a public body from attempting to do so, nor should there be as unnecessary litigation squanders public time and assets

Moreover, Respondents' position on this issue would require the adoption of a policy whereby a decision of an administrative board would bind the hands of a council in exercising its legislative powers This position would require ignoring the fact that the functions of an administrative board and a legislative body are separate and distinct and are subject to different standards of review Such a position is not just bad public policy, but runs afoul of the doctrine of separation of powers


CONCLUSION

For the reasons stated herein, and in the final brief, Respondents submit that the Order of the trial court should be reversed

Respectfully submitted,

Charleston, South Carolina

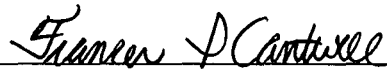
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¹ Respondents also failed to respond to the other issues raised in Argument II of Appellants Brief



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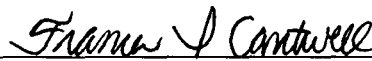
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I certify this Appellants' Final Joint Reply Brief complies with Rule 211(b), SCACR

Charleston, South Carolina

April ____, 2011



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CERTIFICATE OF SERVICE

The undersigned certifies that on the 5th day of May 2011, a true and correct copy of the Appellants' Joint Final Reply Brief was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

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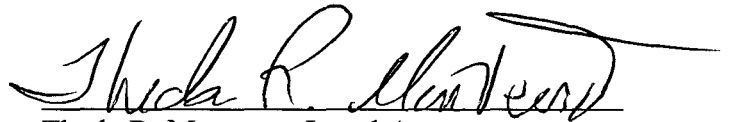
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