

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-4692

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JAN 07 2011

S.C Supreme Court

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' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I Did the trial judge err in holding that the actions of Charleston City Council in enacting Ordinance 2007-147 constitute illegal spot zoning?
- II Does the reasoning of the Order of the trial judge comport with principles applicable to the review of a legislative decision?

STATEMENT OF THE CASE

On August 26, 2007, the City Council of the City of Charleston (herein “City” or “City Council”) enacted Ordinance 2007-147. Ordinance 2007-147 was a zoning ordinance, the effect of which was to apply the 3X height district to the entirety of the site located at 404 King Street, in downtown Charleston. Prior to the enactment of Ordinance 2007-147, 404 King Street was subject to two height districts. Height district 3X applied to the western portion of the site bordering King Street, and height district 55/30 applied to the rear eastern portion of the site.¹

On October 19, 2007, the Historic Charleston Foundation and Preservation Society of Charleston filed suit in the Court of Common Pleas for Charleston County contesting the validity of the Ordinance. By consent, the case was consolidated for trial with another matter contesting a variance for the project at 404 King Street and referred to the Master-In-Equity.

The matter was tried before the Honorable Mikell R. Scarborough on January 12, 2009 and on March 9, 2009. An Order upholding the variance was filed on June 29, 2010. On August 10, 2010, Judge Scarborough issued an order invalidating Ordinance 2007-147 on the basis of its

¹ In height district 3X, height is determined by measuring the distance of the façade of a building from the centerline of the right of way on which the parcel fronts and multiplying that number by three. In the 55/30 height district a building cannot exceed 55 feet in height or be less than 30 feet in height.

constituting illegal spot zoning. A motion to reconsider, alter or amend was filed on September 9, 2010, and by Order dated November 4, 2010 and entered on November 9, 2010, that motion was denied.

Notice of appeal was thereafter timely filed and served.

STATEMENT OF FACTS

Appellant Library Associates, LLC (herein “Library Associates”) owns a parcel of property located at 404 King Street in downtown Charleston, at the southeast corner of King and Hutson Streets. The southern boundary of the property borders Tobacco Street, an unopened right-of-way that forms the northern boundary of Marion Square. Marion Square is a prominent, five acre park in the heart of peninsula Charleston. Calhoun Street, a major east-west thoroughfare on the peninsula, forms the southern boundary of the park. (R. Def. Exhibit 5)

Library Associates has received a number of approvals from various City boards and commissions to allow for the construction of a 185 room hotel on the property. Time and again, Historic Charleston Foundation and the Preservation Society of Charleston (herein “Respondents” or “Preservation Groups”) have contested approvals to include a suit contesting the extension of the hotel’s special exception, a suit contesting a second extension of the special exception for the hotel, a suit contesting a height variance awarded in January 2007, and this suit contesting the rezoning of the height applicable to the site. (R., Complaint and attachments)

Prior to the ratification of the Ordinance at issue, 404 King Street was subject to two different height districts. Approximately 60% of the site was in the 3X district, with the remainder being in the 55/30 district. Height in the 3X district is a function of the distance of the face of the building from the centerline of the right-of-way fronting the property. At 404 King,

the 3X district allowed a height of up to 105 feet over a majority of the site. The 55/30 district sets a ceiling height of 55 feet, and a floor of 30 feet. As applied to 404 King Street, these two districts resulted in an awkward, L-shaped building envelope when viewed from the park, with the 105 foot height amassed along King Street and the lower height distributed to the interior of the site. (R, Def Exhibit 3, City Council minutes, August 21, 2007, Def Exhibit 5, Height District Map, Def Exhibit 6, PowerPoint presentation)

A property having two separate height districts is not unusual. The evidence demonstrated however, that in such instances, the greater height is setback from the street frontage. That was not the case with 404 King Street. There, the more generous height was concentrated along King Street. (R, Def Exhibit 3, City Council minutes, August 21, 2007, Def Exhibit 5, Height District Map)

St. Matthews German Lutheran Church is directly across King Street from 404 King. All the church properties fronting on King Street, as well as all of the properties south of the church properties to Calhoun Street, are in the 3X district. At properties to the west of the church properties, the interior portions are in the 3X district, from Vanderhorst Street to Calhoun Street. (R, Def Exhibit 5, Height District Map)

Over the course of years, the City has commissioned and adopted a number of plans pertaining to the development and revitalization of the downtown area. The most recent plans are the Downtown Plan and the Gibbs Planning Group Study, approved in 1999 and 2003, respectively. The Downtown Plan is built on prior plans and maintains prior strategies, except where it poses alternate approaches. As to 404 King Street, the Downtown Plan identified it as a “significant development opportunity” where redevelopment could “enhance the square to bring

it the prominence it warrants” The Plan also identifies “nodes” for higher intensity public activity, suggestions for which included “art, well-defined civic spaces, parks and squares framed by buildings” to create points of interest throughout downtown Marion Square is designated as a node The Gibbs Planning Group Study identified 404 King Street as the “gateway” to upper King Street It recommended a hotel as an appropriate use for the site Testimony established that height is directly related to intensity of use A more generous height accommodates a more intense use (R , Def Exhibit 7, Downtown Plan, p 7, p 78 , Def Exhibit 8, pp 55-56, Def Exhibit 6, PowerPoint Presentation, Tr 3/9/09, Testimony of Batchelder, p 93, line 21 – p 108, line 4, p 132, lines 10 through p 133, line 24, Testimony of Maher, p 188, line 21 through p 191, line 15)

404 King street is surrounded by the public realm King Street is to the west, Hutson Street is to the north, the Old Citadel is to the east, and Marion Square is to the south Most buildings on King Street have visibility from the front, and at times from the side At 404 King Street, the situation is far different Because it is exposed on all sides, any building constructed there will have visibility on all sides The 3X and 55/30 height districts that split the site posed a challenge to designing a signature building on what all concede to be a very important location in the City

After considerable study, a building design was devised that shifted the height allowed by the 3X district along King Street to the interior of the site The resulting building would be no larger in volume than that allowed by the two height districts, but applying the 3X district across the site enabled the volume to be symmetrically distributed, as opposed to having it all concentrated along the King Street frontage The City’s Board of Architectural Review

conceptually approved the design in December 2005, and preliminarily approved the design in February 2008 (R , Def Exhibit 3, City Council minutes of August 21, 2007, Def Exhibit 6, PowerPoint presentation, Plf Exhibit 17 BAR minutes, 12/14/05, Plf Exhibit 18, BAR minutes, 2/20/08)

Library Associates received a height variance in January 2007 that would accommodate the building envelope approved by the Board of Architectural Review The variance was affirmed by the Master, and the Preservation Groups are pursuing an appeal of that order in the Court of Appeals (R , Order dated August 10, 2010)

In June 2007, City Council initiated a rezoning of the height districts applicable to 404 King Street After a positive recommendation from the Planning Commission and after conducting a public hearing, the City Council, on August 21, 2007, enacted Ordinance 2007-147 The effect of Ordinance 2007-147 was to subject all of 404 King Street to 3X height district (R , Def Exhibit 2, City Council minutes of June 19, 2007, Def Exhibit 3, City Council minutes of August 21, 2007)

On October 19, 2007, the Preservation Groups initiated this action contesting the validity of Ordinance 2007-147 After a hearing, Judge Scarborough issued an order invalidating Ordinance 2007-147 on the basis of spot zoning (R , Order dated August 10, 2010)

STANDARD OF REVIEW

Rezoning is a legislative matter and a decision of a legislative body is presumptively valid Lenardis v City of Greenville, 316 S C 471, 450 S E 2d 597 (Ct App 1994)

The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent to show the arbitrary and capricious character of the ordinance by clear and convincing evidence Scranton v Willoughby, 306 S C 421, 422, 412 S E 2d 424, 425 (1992)

A court will not overturn the action of a city in matters of zoning if the decision is fairly debatable, because a city's action is presumed to have been a valid exercise of power. It is not the prerogative of the court to pass upon the wisdom of the decision. Rushing v. City of Greenville, 265 S. C. 285, 288, 217 S. E. 2d 797, 799 (1975)

An action is fairly debatable where evidence provides a basis for a fair difference of opinion or where reasonable minds could differ on the issue. Salkin, American Law of Zoning, 5th Ed., § 15.10

ARGUMENT

I THE TRIAL JUDGE ERRED IN HOLDING ORDINANCE 2007-147 CONSTITUTED ILLEGAL SPOT ZONING

A ORDINANCE 2007-147 IS NOT SPOT ZONING AS A MATTER OF LAW

The concept of spot zoning was squarely addressed by this Court in the case of Knowles v. City of Aiken, 305 S. C. 219, 407 S. E. 2d 369 (1991). There, it was held

this Court has defined "spot zoning" to be the "process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of owners of such property and to the detriment of other owners." *Bob Jones University v. City of Greenville*, 243 S. C. 351, 361, 133 S. E. 2d 843, 848 (1963), dismissed for lack of Fed. Q., 378 U. S. 581, 84 S. Ct. 1913, 12 L. Ed. 2d 1036 (1964). In *Bob Jones*, this Court also noted that, "it could not be considered as spot zoning where the proposed change is from one use to another and there was already a considerable amount of property adjoining the property sought to be reclassified falling within the proposed classification." *Id.* at 362, 133 S. E. 2d at 848.

Knowles v. City of Aiken, 305 S. C. at 221, 407 S. E. 2d at 641

The Knowles court further held

with respect to judicial review of spot zoning issues, the Court also cautioned in *Talbot* that “Courts cannot become city planners but can only correct injustices when they are clearly shown to result from municipal action” *Talbot* at 175, S E 2d at 75 Hence, in reviewing spot zoning issues, upon a finding that there was in fact spot zoning, the appropriate analysis is to closely scrutinize the following factors (1) the adherence of the zoning to the City’s Comprehensive Plan, and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown

Knowles v City of Aiken, 305 S C at 222-223, 407 S E 2d at 642

The principles of Knowles demand that, for Ordinance 2007-147 to be invalid, it must be shown by clear and convincing evidence that the Ordinance resulted in 404 King Street having a height classification totally different from properties in the surrounding area If and only if the court finds that to be the case does the inquiry then turn to whether the Ordinance adhered to City zoning plans and promoted the public welfare

Uncontroverted evidence belies any contention that Ordinance 2007-147 created a “spot” that permits a height at 404 King Street that is different or inconsistent with adjoining properties One need only reference the Height District Map (R , Def Exhibit 5, Height District Map) Over half of 404 King was already subject to the 3X district, and properties directly across King Street from it were all subject to the 3X height district Ordinance 2007-147 merely extended the 3X height district that already applied to part of the site to its remainder The Ordinance did not create an inconsistent or totally different height from that which already applied to adjoining properties The Ordinance merely authorized a height for the site that was consistent with that allowed on the entire adjoining City block of King Street, from Vanderhorst Street to Calhoun Street Respondents’ expert admitted as much (R , Def Exhibit 5, Height District Maps, Tr 3/9/09, Testimony of Cook, p 52, line 5 through p 53, line 25)

The trial judge incorrectly concluded it was relevant that the rezoning applied to a single parcel. That Ordinance 2007-147 applied to but one property is not dispositive of the issue of spot zoning. Single property rezonings are commonplace. The real test of spot zoning is whether the zoning given in a single parcel rezoning is “totally different from that of the surrounding area.” Knowles v Aiken, 305 S C at 221, 407 S E 2d at 641. The relevant question is whether the height established by Ordinance 2007-147 is “totally different” from that of the surrounding area. The undisputable evidence shows the height is identical to what already existed on part of the site, and is identical to the height allowed at numerous properties directly across the street, as well as to areas of the park south of the site. As it “would not be considered as spot zoning where the proposed change is from use to another and there was already a considerable amount of property adjoining the property sought to be reclassified as falling within the proposed classification”, Bob Jones University, Inc v City of Greenville, 243 S C 351, 362, 133 S E 2d 843, 848 (1963), the holding of the trial judge that Ordinance 2007-147 is illegal spot zoning does not comport with the facts or the law.

Knowles admonishes that if the rezoning does not create a “spot” that differs from surrounding properties, the judicial inquiry is over. There was no judicial justification for considering planning studies or the public good exception, and the trial judge erred in doing so.

**B EVEN IF A “SPOT” WAS CREATED BY ORDINANCE 2007-147,
THE ORDINANCE CONFORMS TO PLANNING STUDIES AND IS
THUS VALID**

Plans adopted by the City recognized the appropriate development of 404 King Street as being critical to anchoring and spurring the continued revitalization of King Street, north of Calhoun. The plans recommended a use for this site that was dense and substantial in scale and

mass, to serve as the draw to upper King Street. One plan specifically recommended a hotel at the site (R, Def Exhibit 7, Downtown Plan, Executive Summary, p 7,41,53,61,78, Def Exhibit 8, p 55). Ordinance 2007-147 allows for the scale and type of development specifically recommended by duly adopted plans.

The trial judge inappropriately seized on a particular section of the Downtown Plan that noted the 3X district as being overly permissive (R, Order dated August 20, 2010).

Respectfully, the trial judge misread this provision. The Plan does not call for the wholesale abandonment of the 3X district in every instance. It provides as follows:

In those areas where the height limits are based on the lot size or setback (the 3X and W zones), the heights are potentially too high to be compatible with the existing city fabric and may be inappropriate.

(R, Def Ex 7, Downtown Plan, p 62)

As noted by testimony at trial, a comprehensive plan is a broad brush approach that sets out general goals and strategies for achieving them. Zoning, the means by which plans are implemented, is a more fine-tuned, site specific application. As for the 3X height district, as a result of the Downtown Plan, it was replaced where deemed inappropriate and retained where appropriate, consistent with the recommendations of the Plan (R, Tr 3/9/09, Riley Testimony, p 199, line 3 – p 201, line18). As to 404 King, to accommodate the strategy of providing an anchor and catalyst for revitalization north of Calhoun Street, an intense use was recognized as a necessity. Once an actual building was under consideration, it became apparent that applying the 3X district across the site better accommodated both the design and strategic growth management recommendations of the Plan (R, Transcript 3/9/09, Batchelder testimony, p 93,

line 12 through p 108, line 4, p 132, line 10 through p 139, line 21) The rezoning comports with the goals and strategies of the Downtown Plan

The half-parcel extension of the 3X district is entirely consistent with the broad brush approach of the Plan and the adjustments it anticipates. The Downtown Plan affirmatively provides

The Downtown Plan establishes parameters to guide future development, anticipating both private sector and public investment in infrastructure. The Plan does not make rigid recommendations for specific uses and buildings. Rather than being a regulatory document, it aims to produce an interpretive framework within which individual decisions can be made, allowing for flexibility and creativity. Similarly, the plans and drawings show intent and overall objectives, rather than hard and fast requirements.

(R , Def Exhibit 7, Downtown Plan, Introduction (Approach), p 2)

City Council's posture with respect to height has been in keeping with the flexibility and creativity encouraged by the Downtown Plan. When dealing with height in general, and on the peninsula in particular, Council has openly recognized the site-specific nature of the exercise. When modifying the 3X district on the peninsula in 2005, City Council, after debate, consciously chose to leave the 3X height district in place at 404 King Street and the properties nearby. The Record reveals justification for this decision, to include the uniqueness of the site fronting on Marion Square enabling it to accommodate a larger building, the existence of other sizeable buildings in the vicinity, the ongoing planning process for this site, and the fact that the Board of Architectural Review has ultimate design authority with respect to the size, scale and mass of construction on the site. (R , Plf Exhibit 9, City Council minutes, 9/27/05, pp 40 through 47)

This flexible approach to height carried forward when Council considered modification of the 3X height district in areas off the peninsula. Council's modification of the district in these areas

was accompanied by a duly adopted Resolution indicating Council's willingness to look at site-specific applications for higher buildings in the future (R , Plf Exhibit 10, City Council minutes, 9/26/10, pp 23-24)

Extending the 3X height district across 404 King Street allowed for a larger, intense use and a more aesthetically pleasing symmetrical design. These results are wholly consistent with the goal of the Downtown Plan that contemplates a node of activity for this area and the approach of the Plan that sanctions flexibility and creativity in achieving its goals (R Def Exhibit 7, Downtown Plan, p 78, p 2). The trial judge's interpretation of the Plan transformed it from being a guide to an exacting, regulatory document. The trial judge's interpretation of the Plan was not only inconsistent with its wording, but also disregarded the flexibility the plan specifically reserved to Council. The trial judge erred in holding Ordinance 2007-147 was inconsistent with City plans, and should be reversed.

**C THE EVIDENCE SUBSTANTIATED THAT ORDINANCE 2007-147
PROMOTES THE PUBLIC GOOD AND IS THUS VALID**

All parties agree that zoning contemplates a balance of varied interests, to include economic, social and aesthetic considerations. Ordinance 2007-147 furthers these interests.

Uncontroverted evidence demonstrated that the direct economic impact to the City as a result of an ordinance enabling a full service hotel of the size proposed to be significant. Evidence also demonstrated that contemplated spin-off impact to surrounding properties would be substantial. And the evidence further demonstrated the Ordinance accommodated a more balanced, symmetrical design, furthering both preservation and aesthetic goals (Def Ex 6, PowerPoint presentation). The minutes of the proceedings of Council reveal that these very

issues, and others, were duly discussed. While some may disagree with the conclusion Council reached, there can be no disagreement but that the Council's action rested on viable and reasonable planning principles. Knowles v City of Aiken, *supra* 407 S E 2d at 642-643. (we hold that even if the City's ordinance does constitute spot zoning, we cannot invalidate this zoning because its propriety is at least "fairly debatable" and is not "so unreasonable as to impair or destroy citizen's constitutional rights" so as to allow us to second guess the City's wisdom in passing the ordinance)

The evidence in the Record falls far short of substantiating that the Ordinance posed detriment or harm to other property owners. All evidence offered on this issue was speculative. That the City's National Register designation "could" be affected or that preservation easement programs "could, perhaps" be harmed is speculation that could be said of any project on the peninsula.

Ordinance 2007-147 is entitled to a presumption of validity. The evidence in the Record does not rise to the level of clear and convincing proof that the Ordinance created an illegal "spot" or that it was inconsistent with City plans or did not promote the public good. The trial judge erred in invalidating the Ordinance, and this Court should so hold.

II THE TRIAL JUDGE MISAPPLIED FUNDAMENTAL PRINCIPLES APPLICABLE TO THE REVIEW OF LEGISLATIVE DECISIONS

A review of the trial judge's order reveals a misapplication of a number of principles governing the judicial review of legislative decisions which undoubtedly contributed to his erroneous conclusion that Ordinance 2007-147 was invalid.

The trial judge was apparently disturbed by what he considered to be the "motive" behind the Council's decision to rezone 404 King Street, that being to moot pending litigation over a

variance As an initial matter, it is error to delve into the motives behind legislative decisions
Precedent could not be clearer

A governmental body's decision on the use of land is a legislative function *Hampton v Richland County*, 292 S C 500, 357 S E 2d 463 (Ct App 1987) Judicial inquiry into legislative motivation is to be avoided *South Carolina Educ Ass n v Campbell*, 883 F 2d 1251 (4th Cir 1989) "Such inquires endanger the separation of powers doctrine, representing a substantial judicial 'intrusion into the workings of other branches of government'" *Id* at 1257 (quoting *Village of Arlington Heights v Metropolitan Housing Dev Corp*, 429 U S 252, 268 N n 18, 97 S Ct 555, 50 L ED 2d 459 (1997))

Pressley v Lancaster County, 343 S C 696, 707, 542 S E 2d 366, 371 (Ct App 2001), rehearing denied, certiorari denied See also Bear Enterprises v County of Greenville, 319 S C 137, 139, 459 S E 2d 883, 885 (1995) (FN 1 We are aware of no authority allowing someone challenging action by Council to interrogate members individually to impeach the Council's decision The governing body of a municipality acts as a collective body, not as individuals, and decisions made in this fashion are the product of debate and compromise)

Even if legislative intent were a relevant consideration, the trial judge misconstrued the testimony and documentary evidence related to this issue Mayor Riley testified as follows

Q Mayor, why would you advocate for the zoning change if the variance had already been approved? What was the logic and reasoning there?

A There was a couple of reasons First of all, we're in the business of civic life, getting things done It's not – so to have a lawsuit over a variance that you felt was correct and withstood any public policy test and to spend a few years on that When we met in my office, the legal staff and all, and said, well, what's – you know, is there something that's being varied from that is __ does it need to be something that requires a variance? Is it __ we said no You

know, we realized that all the stuff I've just said about the fine paint brush and the microscope, and so, then, we don't – let's don't have a game going on here, waste everybody's time and money if the – if we had been smarter when we did the 3X we would have included the whole site realizing it fronted on both Marion Square and King Street, so we should rezone it so that you don't need a variance to accomplish the public purpose that I've outlined

And secondly, if you – the variance is project dependent So let's say you say, well, we go to the variance route and it succeeds Then for some reason the development can't go forward You know, whatever, the economy or something like that Then the next person goes back to square one and here's the City and it's main street and the public policy you're trying to achieve, you know, risking another several years So it was wasteful and better to go ahead and have it zoned the correct way

(R , March 9, 2009 Transcript, p 206, line 19 through p 208, line 1)

Mayor Riley's testimony demonstrates he entertained the rezoning not because of concerns with the legitimacy of the variance litigation Just the opposite because the variance would withstand judicial review, its litigation would unnecessarily delay progress, and would result in a waste of time and money Moreover, even if mooted the variance litigation was a factor in prompting the rezoning, nothing in the law precludes a public body from pursuing acts in furtherance of its legal position Amending ordinances enacted while litigation is pending are not uncommon and are frequently wise legislative efforts to avoid unnecessary legal issues And when, such as here, the amendment accommodates that which has been endorsed by appointed planning, zoning and design professionals and furthers planning strategies, the public interest is better served

The trial judge also placed inappropriate stock in a comment made in a 2005 (sic) Council meeting referring to the 3X height district as “prehistoric” to support his conclusion that the actions of the Council were ill-conceived and ill-motivated. This was error because an opinion of a single member of Council, even if the Mayor, cannot be projected or imputed to other members of the Council, and certainly not to the body as a whole. It is for this very reason that courts refrain from inquiring into the motivation behind legislation. Bear Enterprises, supra. Further, the comment must be read in context. When made, the proposal under consideration did not include altering the 3X district at 404 King or the properties adjoining it.

The trial judge held that Council was acting in a quasi-judicial capacity in enacting Ordinance 2007-147. This holding directly conflicts with precedent. The rezoning of land, even if a single parcel, is a legislative exercise. The so-called *Fasano* doctrine has been specifically rejected in South Carolina.

Regarding the question of whether a local zoning authority’s rezoning of a single tract of land is a legislative or a quasi-judicial act is frequently associated with a decision of the Oregon Supreme Court in *Fasano v Board of County Commissioners*, 264 Or 574, 507 P 2d 23 (1973), *overruled in part Neuburger v City of Portland*, 288 Or 585, 607 P 2d 80 (1980). See N Shortlidge, “*The Fasano Doctrine – Land Use Decisions as Quasi-Judicial Acts*” INST ON PLANNING, ZONING, AND EMINENT DOMAIN, § 3 01 [2] at 3-4 (1985). Several states have adopted the so-called *Fasano* doctrine. *Id* § 3 03 [2] at 3-27-3-33. The majority of the jurisdictions, however, still consider rezoning a legislative act. *Id* § 3 03 [5] at 3-40. South Carolina lines up with the majority. See *Conway v City of Greenville* 254 S C 96, 104, 173 S E 2d 648, 652 (1970) (action by landowner to have municipality rezone a portion of landowner’s property in which the Supreme Court stated that it “recognize[d] that the adoption of zoning ordinances is a legislative function”).

In any case, we reject the *Fasano* doctrine.

Hampton v Richland County, 292 S C 500, 506, 357 S E 2d 463, 466-467 (Ct App 1987)

In his conclusions 19, 20 and 37, the trial judge takes issue with the decision of the Council from both a historic preservation and planning perspective. In reaching these conclusions, the trial judge did what the Talbot court admonished against. He donned the hat of a city planner and substituted his judgment for that of the Council. While the trial judge may have disagreed with the wisdom of the Council's actions, such serves as no basis for displacing it. The wisdom and expediency of a law is beyond the purview of the judiciary. Bob Jones University, Inc , 343 S C at 360, 133 S E 2d at 847 (the power to declare an ordinance invalid because it is so unreasonable to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations)

The sole issue before the trial judge was whether the actions of Council in passing Ordinance 2007-147 were fairly debatable. It was error for the trial judge to delve into legislative motive. It was error for the trial judge to characterize rezoning as quasi-judicial. It was error for the trial judge to substitute his judgment for that of the Council.

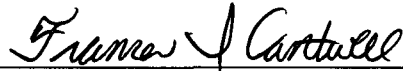
CONCLUSION

For the reasons set forth, it is submitted that the Order of the trial judge should be reversed.

Respectfully submitted,

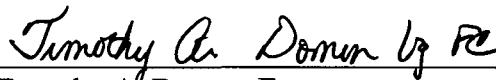
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Appellants

APPELLANTS'
DESIGNATION OF MATTERS TO BE INCLUDED
IN THE RECORD ON APPEAL

Appellants designate the following matters to be included in Record on Appeal

- 1 Order of the Honorable Mikell R Scarborough dated August 19, 2010,
- 2 Order of the Honorable Mikell R Scarborough dated November 4, 2010,
- 3 Complaint,
- 4 Answer,
- 5 Motion to Alter, Amend or Reconsider,
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Charleston, South Carolina

January 6, 2011

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R Scarborough, Master-In-Equity

SC Supreme Court

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

RESPONDENTS' JOINT INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

Did the master err in setting aside an ordinance rezoning a portion of a small parcel of real property from the 55/30 height district to the 3X height district where the purpose of the ordinance was to avoid Respondents' appeal of a variance granted with respect to the same property, the ordinance permitted a height increase unprecedented for similarly-situated parcels in the surrounding area, and the City's comprehensive plan advocated replacing—not expanding—the 3X height district?

STATEMENT OF THE CASE

On August 26, 2007, the City of Charleston (the "City") enacted an ordinance rezoning a portion of a small parcel of real property located at 404 King Street in Charleston, South Carolina ("404 King") from the 55/30 height district to the 3X height district **(Ordinance)** 3X is a height district that allows the maximum height of a building to be three times the distance from the front of the building to the center line of the street it fronts **(01/12/2009 Hr'g Tr p 28 20-25)** 55/30 is a height district with a fifty-five foot maximum and thirty foot minimum height **(01/12/2009 Hr'g Tr p 28 16-19)**

On October 19, 2007, Respondents Historic Charleston Foundation and the Preservation Society of Charleston ("Respondents") filed an action in the Charleston County Court of Common Pleas challenging the ordinance as arbitrary and illegal spot zoning **(Complaint)** The action was consolidated for trial with another matter involving a variance for 404 King, and the consolidated actions were referred to the Charleston County Master-in-Equity by consent of the parties **(Order of Consolidation, Order of Reference)**

The actions were tried before the master on January 12, 2009, and March 9, 2009 **(Order, p 1)** On August 20, 2010, the master invalidated the zoning ordinance, finding it was arbitrary and constituted illegal spot zoning **(Order)** On September 9, 2010, Appellants filed a motion to alter, amend or reconsider, which the master denied by order filed on November 9,

2010 **(Order Denying Mot to Alter or Amend)** On December 3, 2010, Appellants served their notice of appeal of the master's order invalidating the zoning ordinance and the master's order denying their motion to alter, amend or reconsider **(Notice of Appeal)**

FACTS

404 King was the site of the former main branch of the Charleston County Public Library before being purchased by Appellant Library Associates, LLC, ("Developer") in the 1990s. 404 King is located on the southeast corner of the intersection of King and Hutson Streets, adjacent to the historic Old Citadel building and Marion Square, across the street from St. Matthew's Lutheran Church and the historic Aimar Building at 409 King Street, and within Charleston's Old and Historic District, which is also listed as a National Historic Landmark by the U.S. Department of the Interior **(Plts ' Ex 3, Proposed Height Districts)**

The Developer now seeks to construct a 105-foot tall hotel at 404 King **(01/12/2009 Hr'g Tr p 29 1-4)**. At the time the Developer acquired 404 King, the parcel was split zoned **(01/12/2009 Hr'g Tr p 28 15-25)**. The portion of the parcel fronting King Street was zoned 3X, and the back portion of the parcel was zoned 55/30 **(01/12/2009 Hr'g Tr p 28 15-25)**. Split zoning is typical in the area where 404 King is located **(01/12/2009 Hr'g Tr p 124 4-15)**. In fact, all properties on the east side of King Street from George Street to Line Street are split zoned **(Proposed Height District Map)**

Section 8.4 of the Downtown Plan, the portion of the land use element of the City of Charleston's Comprehensive Plan applicable to 404 King, specifically states that the 3X height district is an overly permissive height zone that should be replaced **(Downtown Plan)**. In a 2005 City Council meeting, the City referred to the 3X height district as "prehistoric" and no longer appropriate **(Plts ' Ex 9, Minutes 09/27/2005)**

In September 2006, the City eliminated the 3X height district on King Street for all the blocks north of Hutson Street with one exception in the subject area of 404 King (03/09/2009 Hr'g Tr pp 88 5-89 19) Prior to the rezoning of 404 King, no parcel on the east side of King Street was zoned entirely 3X (Height District Map) Only three parcels on the west side of King Street, between Calhoun and Vanderhorst Streets, are zoned entirely 3X (Height District Map) These three parcels are not available to new development and contain the Francis Marion Hotel, St Matthew's Lutheran Church, and the parking garage in between (03/09/2009 Hr'g Tr p 61 10-20)

The rezoning of 404 King to extend the 3X height district is the one and only instance in which 3X zoning has been expanded since the City's adoption of the Comprehensive Plan (03/09/2009 Hr'g Tr p 116 19-24) Section 8 4 of the Downtown Plan states that a goal of the plan is to preserve downtown's existing skyline and height zones (Downtown Plan) The Downtown Plan allows for only slight increases to the existing skyline of one story and disfavors tall buildings that detract from historic sites (Downtown Plan) Section 9 2 of the Downtown Plan refers to 404 King as the "old library site" and states that new development on this parcel should pay particular attention to preserving the prominence of the church steeples, the old Citadel building and the "Calhoun column" on the skyline (Downtown Plan) If 404 King were entirely rezoned to the 3X height district, the resulting building would be fifty feet taller than the adjacent historic old Citadel building, and substantially taller than many other historic structures in the area (01/27/2009 Hr'g Tr p 49 6-19)

On December 4, 2006, the Developer filed an application with the Board of Zoning Appeals-Zoning ("BZA-Z") seeking a variance from the height limitation of fifty-five feet for the rear portion of 404 King in the 55/30 height district (Defs ' Variance Application) This

portion of 404 King adjoins the old Citadel building (**Height Districts Map**) On January 2, 2007, the BZA-Z conducted a hearing and granted Developer a variance allowing a building height of up to 105 feet on the portion of 404 King that had been zoned 55/30 (**Variance**) Ultimately, Respondents appealed the BZA-Z's decision granting a variance for 404 King to the circuit court (**Plts ' Compl in Variance Case**)

After Respondents appealed the BZA-Z's variance decision to the circuit court, the Developer began discussions with the City to rezone 404 King by expanding the 3X zoning classification to the entire parcel The purpose of the rezoning was to avoid the Respondents' challenge to the variance (**Hr'g Tr dated March 9, 2009, pp 206–7**) Respondents and their members spoke in opposition to the rezoning of 404 King at the City's Planning Commission and City Council deliberations Despite Respondents' objections and despite the admittedly "prehistoric" nature of the 3X height district, on August 21, 2007, the City, acting through City Council, adopted an ordinance rezoning the rear portion of 404 King to the 3X height district that the City's own Comprehensive Plan stated should be replaced (**Ordinance**)

No other parcel in the area was rezoned at the time (**Ordinance**) Further, the zoning on all of the properties to the north, south and west of the property along King Street, as well as the properties to the east on Hutson Street, which were also subject to split zoning, were not rezoned, instead, these parcels retained the exact same split height zoning restrictions they had prior to the rezoning of 404 King (**Height Districts Map**)

Respondents filed the present lawsuit challenging the City's rezoning of 404 King (**Complaint**) After the case was consolidated with the Respondents' appeal of the BZA-Z's variance decision, the master affirmed the BZA-Z's decision granting a variance to the

Developer, and Respondents appealed that ruling to the South Carolina Court of Appeals, where it is currently pending

With respect to Respondents' challenge of the zoning ordinance, the master recognized that "the zoning change was pursued even though the variance had already been approved in order to avoid the Plaintiffs' lawsuit surrounding the variance" **(Order p 3)** The master cited the trial testimony to this effect in ruling that "avoiding litigation as to one small parcel of land was in fact the motive of the City in pursuing the rezoning of 404 King Street" **(Order p 7)** As a result, the master found "that the rezoning was an improper act by the City which sought to insulate the City and Library Associates from judicial review of the purported legal deficiencies in the Variance Decision" **(Order p 7)**

The master did not simply find that the rezoning rested upon an arbitrary purpose, to the contrary, the master also held that the rezoning constitutes illegal spot zoning **(Order pp 8-15)** In particular, the master held that "City Council engaged in spot zoning by rezoning only a portion of one parcel of land to expand the 3X district, a zoning classification that is disfavored by the City and which has been in the process of being phased out in the downtown area" **(Order p 9)** The master concluded "I find that the rezoning of 404 King Street to extend the 3X zoning classification was not only spot zoning, but illegal spot zoning because it did not adhere to the City's Comprehensive Plan and did not promote the good of the common welfare" **(Order p 14)**

STANDARD OF REVIEW

"[A] municipality has the legislative power to amend its general zoning ordinance and rezone small areas, so long as its action is not arbitrary or unreasonable" Bob Jones Univ, Inc v City of Greenville, 243 S C 351, 359, 133 S E 2d 843, 847 (1963) The court should not

disturb the findings of a municipal body “unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority ” Id at 360, 133 S E 2d at 847

An appellate court has the power to set aside a municipal body’s zoning decision where there has been a clear abuse of discretion by the municipal body Talbot v Myrtle Beach Bd of Adjustment, 222 S C 165, 173, 72 S E 2d 66, 70 (1952) The presumption of fairness a municipal body normally enjoys as to their decisions will be set aside when the municipal body has acted arbitrarily or in obvious abuse of its discretion or where the board has acted illegally and in excess of its lawfully delegated authority Id

ARGUMENT

The master did not err in setting aside the ordinance rezoning a portion of 404 King from the 55/30 height district to the 3X height district because the purpose of the ordinance was to avoid Respondents’ appeal of the variance decision, the ordinance permitted a height increase unprecedented for similarly-situated parcels in the surrounding area, and the City’s Comprehensive Plan advocated replacing—not expanding—the 3X height district

In his order invalidating the zoning ordinance, the master appropriately concluded that the City arbitrarily adopted the ordinance for the purpose of avoiding Respondents’ appeal of the BZA-Z decision granting a variance to the Developer The master then recognized that the ordinance applied to only a portion of a small parcel of real property In fact, since the adoption of the City’s Comprehensive Plan in 1999, the zoning ordinance was the first to expand the “prehistoric” 3X height district, which applied to only three other parcels in the area—all of which were not subject to new development

The master also recognized that the zoning ordinance ignored the plain language of the City’s Comprehensive Plan, which advised replacing the 3X height district and placing *greater* (not lesser) height restrictions on the buildings in downtown Charleston to protect the existing

skyline In short, the evidence supports the master's conclusion that the zoning ordinance was arbitrary and constituted an abuse of the City Council's discretion Consequently, the master's decision setting aside the ordinance should be affirmed

A The zoning ordinance, which applies to only a portion of a small parcel of real property and permits a height increase unprecedented for similarly-situated parcels in the surrounding area, constitutes spot zoning

As the master concluded, "the rezoning at issue did apply to a 'spot,' that 'spot' being a portion of the single parcel of 404 King Street " (Order p 8)

"Spot zoning' is a process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of owners of such property and to detriment of other owners " Bob Jones Univ , Inc v City of Greenville, 243 S C 351, 361, 133 S E 2d 843, 848 (1963), see also Knowles v City of Aiken, 305 S C 219, 221, 407 S E 2d 639, 641 (1991) (reiterating this definition from Bob Jones) "Typically, in such a case, the land in question has been 'upzoned' at the owner's request to allow a higher density or more intensive use or development " 3 Rathkopf's The Law of Zoning and Planning § 41 2 (4th ed) "[C]ourts tend to be more lenient with respect to zone changes in relatively undeveloped areas than in established areas " 3 Rathkopf's The Law of Zoning and Planning § 41 8 (4th ed)

Singling out one lot or small area for treatment less onerous than that imposed upon nearby, indistinguishable properties qualifies as spot zoning W R Grace Co v Cambridge City Council, 779 N E 2d 141, 151 (2002) Spot zoning is also defined as an instance where one lot or small area is singled out for different treatment from that accorded to similar surrounding land indistinguishable from it in character for the economic benefit of the owner of that lot Putney v Township of Abington, 108 A 2d 134, 140 (1954)

The rezoning of 404 King falls squarely within the definition of “spot zoning” There is no question that this rezoning applied only to a portion of a single parcel, i.e., a “spot” In fact, the rezoning ordinance changed the height district for a portion of 404 King alone The height districts for other parcels were not changed as part of the rezoning

Further, by expanding the 3X height district classification, the City rezoned the single parcel of 404 King in a manner inconsistent with the surrounding area As the master ruled, “City Council engaged in spot zoning by rezoning only a small portion of one parcel of land to expand the 3X district, a zoning classification that is disfavored by the City and which has been in the process of being phased out in the downtown area” **(Order p 9)**

It is undisputed that 3X zoning is a disfavored zoning classification that is in the process of being actively phased out A year before this rezoning, the City’s mayor went so far as to characterize the 3X height district as “prehistoric” The City’s Comprehensive Plan called for elimination of the 3X height district In September 2006, the City eliminated the 3X height district on King Street for all the blocks north of Hutson Street with one exception According to the City’s zoning administrator, the 3X height district has never before been expanded This was the one and only instance Thus, the rezoning of 404 King to extend the 3X height district was inconsistent with the zoning scheme of not only the surrounding parcels, but the Charleston peninsula as a whole It was *per se* inconsistent with the Comprehensive Plan

Appellants argue that the west side of King Street between Calhoun and Vanderhorst Streets contains parcels that are zoned entirely 3X As the master recognized in his order, these parcels contain the Francis Marion Hotel, St Matthew’s Lutheran Church, and the parking garage in between None of these is a parcel subject to development, and none is on the east side of King Street This portion of the 3X height district where the parcels were not split zoned for

height is atypical for the immediate vicinity, as was clear from the zoning maps admitted into evidence

Finally, the rezoning of 404 King was done for the benefit of the Developer and to the detriment of surrounding properties. The Developer will benefit economically from the rezoning due to the increased number of rooms that extra height allows to be added to the owners' proposed hotel. "The rezoning allowed a larger hotel, which in turn increases the revenue potential from the project." (**Order pp 9-10**)

The "stepback" for the upper floors on the west and east elevations, adjacent to King Street and the Old Citadel building respectively, is minimal at best. The effect is a 105 foot building near to historic buildings that are shorter by 50 feet or more. "City Council's rezoning of 404 King Street is detrimental to surrounding properties and other owners." (**Order p 10**)

One of the primary goals in the Downtown Plan adopted in 1999, which is the current land use comprehensive plan for the City, is the preservation of the existing skyline at Marion Square with only slight increases in elevation. (**Defs' Ex 7, Charleston Downtown Plan**) The rezoning violates this stated public goal. The difference in height would make the building at 404 King the predominant building in comparison to the adjacent, historic Old Citadel building. Its elevation would also shadow the historic Aimar Building across King Street.

The rezoning in this case is distinguishable from those in Bob Jones and Knowles for several reasons. In Bob Jones, 243 S.C. at 355-56, 133 S.E.2d at 845, the Supreme Court of South Carolina was faced with a challenge to a rezoning of "lands commonly known as the Wilson property, from a residential zone into a retail shopping center classification." Unlike in the present case, the evidence in Bob Jones established that the Wilson property was one of only a few properties in the general area that had *not* been rezoned for business purposes. "[A]ll of the

property along Wade Hampton Boulevard, from Main Street in the City of Greenville to the appellant's property, has been zoned for business purposes, with the exception of the Wilson property and certain property across Wade Hampton Boulevard” Id at 357, 133 S E 2d at 845 Thus, whereas the rezoning in this case will make the permissible height at 404 King stand out more from the surrounding parcels, the rezoning in Bob Jones involved *conforming* the permissible uses of the Wilson property to the surrounding uses

Moreover, unlike in the present case, the character of the surrounding area in Bob Jones was changing to become *more like* the uses permitted on the Wilson property “The Master also found that the area here involved has essentially changed and, as a result, the property in question should be rezoned, citing the fact that only recently there was a rezoning in order to allow the erection of a building for the First Federal Savings and Loan Association and for a filling station, both on the northern side of Wade Hampton Boulevard, and the shopping center designated as the Wade Hampton Shopping Center, immediately west of the property in question and on the southern side of Wade Hampton Boulevard” Id at 358-59, 133 S E 2d at 846 In contradistinction, the master in the present case held that “3X zoning was, and is, a disfavored zoning classification that is in the process of being actively phased out” **(Order p 9)** Consequently, unlike in Bob Jones, the rezoning in this case works a *detriment* to the development plan of the surrounding area, not another logical step in such plan

Similarly, although in Knowles the Supreme Court of South Carolina concluded the zoning at issue was not “spot zoning,” the facts of the present case are plainly distinguishable In Knowles, the subject property had been previously unzoned, therefore, its zoning actually created more restrictions for the use and development of the land Knowles, 305 S C at 220, 407

S E 2d at 640 Here, however, 404 King was already zoned, and the rezoning eliminated a critical building dimensional restriction in an effort to benefit the owner alone

Additionally, in Knowles, the subject land was simply being zoned for professional office, a commercial zoning category entirely consistent with the zoning of many surrounding parcels Id at 221, 407 S E 2d at 641 In contrast, the 3X height district in the present case did not apply to any other parcels in the vicinity on the East side of King Street Also, there was no indication in Knowles, as here, that the zoning classification applied to the subject property was “prehistoric” and being phased out in compliance with the municipality’s comprehensive plan

The benefit the Developer received from the rezoning in this case, combined with singling out a portion of 404 King to be rezoned in a manner inconsistent with the surrounding area and the zoning policies of the City, all to the detriment of surrounding properties and the public interest, amounts to “spot zoning” by the City As the master held “The actions of City Council in rezoning a portion of 404 King Street to expand the 3X zoning classification squarely falls within the definition of spot zoning because it was the singling out and rezoning of one small parcel to a classification totally different from that of the surrounding area for the benefit of the owner, Library Associates, and to the detriment of other owners ” (Order p 11) This holding, which is wholly supported by the evidence, should be affirmed

B The zoning ordinance, which negates the stated purpose in the City’s Comprehensive Plan to preserve and protect the existing skyline and which facilitates a building that will dwarf nearby historic properties, constitutes illegal spot zoning

“[W]here an ordinance establishes a small area within the limits of a zone in which are permitted uses different from or inconsistent with those permitted within the larger, such ‘spot zoning’ is invalid where the ordinance does not form a part of a comprehensive plan of zoning or

is for mere private gain as distinguished from the good of the common welfare” Talbot v Myrtle Beach Bd of Adjustment, 222 S C 165, 175, 72 S E 2d 66, 71 (1952) (citations omitted) “Hence, in reviewing spot zoning issues, upon a finding that there was in fact spot zoning, the appropriate analysis is to closely scrutinize the following factors (1) the adherence of the zoning to the City’s comprehensive plan, and (2) promotion of the good of the common welfare but to only correct injustices which are clearly shown” Knowles v City of Aiken, 305 S C 219, 223, 407 S E 2d 639, 642 (1991)

“[T]he decision of the zoning board will not be upheld where it is based on errors of law, or fraud, or where there is no legal evidence to support it, or where the board acts arbitrarily or unreasonably, or in a discriminatory manner or where, in general, the board has abused its discretion” Gurganious v City of Beaufort, 317 S C 481, 486, 454 S E 2d 912, 915 (Ct App 1995) While the municipal body enjoys a presumption of fairness as to their decision, “this presumption of fairness and correctness will fall and if favorable to a variance, the same will be set aside where there is a clear abuse of discretion by the board” Talbot, 222 S C at 173, 72 S E 2d at 70 (citations omitted) Further, “[w]here the board of adjustment or appeals has acted after considering *all the facts and circumstances of a particular case*, the court should not disturb the findings of the board unless the board has acted *arbitrarily or in the obvious abuse of its discretion* or unless *the board has acted illegally* and in excess of its lawfully delegated authority” Id at 174, 72 S E 2d at 70 (emphasis added) (citation omitted)

A municipal body has abused its discretion and acted illegally when it engages in ‘spot zoning’ that “*does not form a part of a comprehensive plan of zoning or is for mere private gain as distinguished from the good of the common welfare*” Id at 175, 72 S E 2d at 71 (emphasis added) (citation omitted) While it is the law of South Carolina that “[c]ourts cannot become city

planners but can only correct injustices when they are clearly shown to result from the municipal action,” the Court here should consider that there are clear injustices emanating from the City’s decision that must be corrected Id at 175, 72 S E 2d at 70 (citation omitted)

The rezoning of 404 King does not adhere to the City’s Comprehensive Plan and does not promote the good of the common welfare. The City’s Comprehensive Plan disfavors tall buildings that detract from historic sites **(Defs ’ Ex 5, Charleston Downtown Plan, p 60)** The City’s Comprehensive Plan further states that the 3X height district is an overly permissive height zone **(Defs ’ Ex 5, Charleston Downtown Plan, p 65)** In fact, the City’s Comprehensive Plan specifically requires particular attention to be paid to the skyline, including the prominence of church steeples and the old Citadel towers located adjacent to 404 King **(Defs ’ Ex 5, Charleston Downtown Plan, p 78)**

City Council adopted the Downtown Plan as the land use comprehensive plan for the City. Ordinances of a local government are subject to the same rules of statutory construction as statutes Arthurs ex rel Estate of Munn v Aiken County, 346 S C 97, 104, 551 S E 2d 579, 582 (2001). While the Appellants argue that the rezoning is consistent with the comprehensive plan’s general goal of economic growth, the rules of statutory construction recognize that specific provisions prevail over general provisions Atlas Food Sys & Servs , Inc v Crane Nat Vendors Div of Unidynamics Corp., 319 S C 556, 558, 462 S E 2d 858, 859 (1995). Additionally, provisions should be read in harmony, to give meaning to all terms if possible Foothills Brewing Concern, Inc v City of Greenville, 377 S C 355, 363, 660 S E 2d 264, 268 (2008). Hence, the Downtown Plan’s specifications as to the skyline and height of buildings around Marion Square controls over the general statements in the comprehensive plan in favor of economic growth. Moreover, the overall economic growth facilitated by a 55 foot tall hotel will

be indistinguishable from that of 105-foot tall hotel—the skyline need not be sacrificed to facilitate a hotel, only a 105-foot tall hotel

Whether the extension of the 3X height district at 404 King to allow an elevation 50 feet above the existing zoning, and 50 feet above the adjacent historic Old Citadel building, complies with the City’s Comprehensive Plan is not “fairly debatable,” as urged by the Appellants. The diagram illustrating the desired height and skyline in the Downtown Plan, as well as the specific text governing Marion Square, clearly cannot be reconciled with the extension of the 3X height district and the radical increase in height—almost double that which would be allowed—by this rezoning.

The rezoning of a portion of 404 King on Marion Square to the 3X height district is additionally contrary to the common welfare. It contributes to material adverse changes in this area of historical significance, and irremediably damages the skyline around Marion Square—the skyline which the Downtown Plan seeks to preserve. “[A]llowing a building nearly twice the height of many adjacent and nearby historically significant structures would have a negative impact on the common welfare [and] the rezoning of 404 King Street to extend the 3X zoning classification does not promote the good of the common welfare.” **(Order p 14)**

The rezoning of 404 King to extend the 3X zoning classification was not only spot zoning, but *illegal* spot zoning because it did not adhere to the City’s Comprehensive Plan and did not promote the good of the common welfare. By engaging in illegal spot zoning, the City clearly abused its discretion, and therefore the presumption of fairness normally applying to a municipal body’s decision does not apply in this case. There is a lack of evidence supporting the City’s zoning decision, and therefore the decision is not fairly debatable. As the master recognized, “the rezoning of 404 King Street to extend the 3X zoning classification was not only

spot zoning, but illegal spot zoning because it did not adhere to the City's Comprehensive Plan and did not promote the good of the common welfare" (**Order p 14**) This ruling, which is supported by the unambiguous language in the Downtown Plan, should be affirmed

C The ordinance rezoning a portion of 404 King was an arbitrary attempt by the City to single out a particular parcel to avoid Respondents' appeal of the BZA-Z's variance decision

"The zoning power must be exercised reasonably and not arbitrarily" Byrd v City of N. Augusta, 261 S C 591, 594, 201 S E 2d 744, 746 (1974) "A zoning regulation is legal or valid only when it is reasonable" Id

During the hearing before the master, the City confirmed that the true purpose of the zoning change was pursued even though the variance had already been approved in order to avoid the Respondents' lawsuit surrounding the variance (**Hrg Tr , March 9, 2009, pp 206-7, 213-14**) Appellants confirm this purpose on appeal "Mayor Riley's testimony demonstrates he entertained the rezoning not because of concerns with the legitimacy of the variance litigation Just the opposite because the variance would withstand judicial review, its litigation would unnecessarily delay progress, and would result in a waste of time and money" (**Apps ' Initial Br p 14**) The City advocated for the zoning change despite the fact that the 3X height district was referred to by the City as "prehistoric" and no longer appropriate in a September 2005 City Council meeting

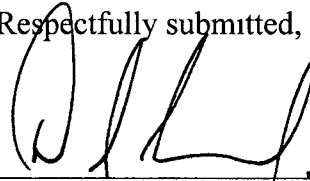
Thus, the rezoning of 404 King was no ordinary act of zoning, but was instead an attempt by the City to single out a particular parcel to avoid litigation over the variance previously granted on that parcel The primary purpose of the rezoning was to subvert the Appellants'

rights to judicial review of the variance decision because the City did not believe such review worthwhile

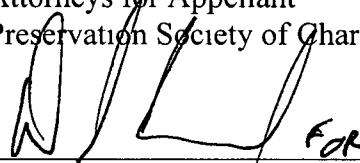
CONCLUSION

City Council's zoning ordinance of August 21, 2007, rezoning a portion of 404 King to extend the 3X height district to the entire parcel, was an invalid act of illegal spot zoning, as confirmed in the testimony and exhibits submitted to the master, as well as the unambiguous language of the Downtown Plan. Based on the foregoing, the master's decision annulling the ordinance should be AFFIRMED

Respectfully submitted,



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Attorneys for Appellant
Historic Charleston Foundation

Charleston, South Carolina
March 11, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 14 2011

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R Scarborough, Master-In-Equity

S C Supreme Court

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

RESPONDENTS' JOINT DESIGNATION OF MATTERS

Respondents Historic Charleston Foundation and Preservation Society of Charleston hereby
propose that the following be included in the Record on Appeal

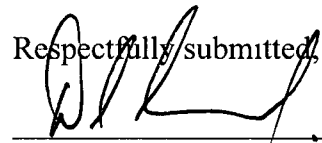
- 1 Complaint Challenging Zoning Ordinance
- 2 Complaint, Petition and Notice of Intent to Appeal Variance Decision,
- 3 Order of Consolidation,
- 4 Order of Reference,
- 5 Transcript of January 12, 2009 Hearing,
- 6 Transcript of March 9, 2009 Hearing,
- 7 Plts ' Exs 1-33,
- 8 Defs ' Exs 1-7,
- 9 Order Affirming Variance,

- 10 Notice of Intent to Appeal Variance Decision,
- 11 Order filed 08/20/10,
- 12 Mot to Alter, Amend, or Reconsider filed 09/09/2010,
- 13 Order Denying Mot to Alter, Amend or Reconsider filed 11/09/2010,
- 14 Notice of Intent to Appeal filed 12/03/2010

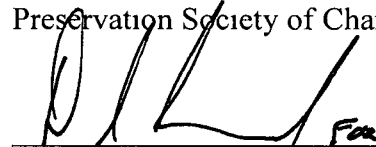
I certify that this designation contains no matter which is irrelevant to this appeal

March 11, 2011

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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' INITIAL JOINT REPLY BRIEF

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City of Charleston City Council

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SC SUPREME COURT

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| <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, 122 (Ct App 2008) | 3 |

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. Def. Exhibit 3, 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. (Def. Ex. 6, Power Point presentation) The evidence proffered as to the potential detriment to 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. Def. Exhibit 7, Downtown Plan, p. 7, 41, 53, 61 and 78) 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 Def Exhibit 7, Downtown Plan, Introduction (Approach) p

2) 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

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

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.

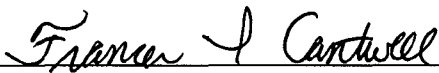
CONCLUSION

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

Respectfully submitted,

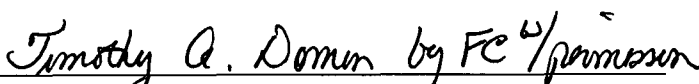
Charleston, South Carolina

March 21, 2011



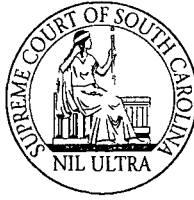
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Attorney for Appellants City of Charleston and the City of Charleston City Council



The Supreme Court of South Carolina

DANIEL E SHEAROUSE
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BRENDA F SHEALY
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October 25, 2011

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Katie F Monoc, Esquire
Pratt-Thomas & Walker, PA
P O Drawer 22247
Charleston, SC 29413-2247

Re Historic Charleston (Respondents) v City of Charleston (Appellants)

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

| | |
|---------------------|------------|
| Appellants | 10 minutes |
| Respondents | 10 minutes |
| Appellants in Reply | 5 minutes |

This case is scheduled for hearing on Thursday, November 3, 2011 at 10 00 a m

Very truly yours,

Daniel E Shearouse, Clerk

By Debbie M Hopkins
Administrative Assistant

DES/dmh



The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

PO BOX 11330
COLUMBIA SC 29211
PHONE NO 734 1080

To G Trenholm Walker Esquire
Lindsay K Smith-Yancey Esquire
Daniel S McQueeney Jr Esquire
Kate F Monoc Esquire
From Daniel E Shearouse
Date August 29 2011
RE November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the November 2011 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of November 1 2 3 15 and 16 Please notify this office in writing prior to September 6 2011 as to any scheduling conflicts for the November term and any changes or additions of counsel that should be made to the record for the purpose of argument If you do have a scheduling conflict please advise as to the specific nature of the conflict

Historic Charleston v City Charleston



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Frances I. Cantwell Esquire
From Daniel E. Shearouse
Date August 29, 2011
RE November Preliminary List

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Historic Charleston v. City Charleston



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
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To Edward K. Pritchard III Esquire
Samia H. Nettles Esquire
From Daniel E. Shearouse
Date August 29, 2011
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Historic Charleston v. City Charleston



The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

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To Timothy A Domin Esquire
From Daniel E Shearouse
Date August 29 2011
RE November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the November 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of November 1 2 3 15 and 16. Please notify this office in writing prior to September 6 2011 as to any scheduling conflicts for the November term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict please advise as to the specific nature of the conflict.

Historic Charleston v. City Charleston



PRITCHARD & ELLIOTT, LLC
ATTORNEYS AND COUNSELORS AT LAW

Writers Email epritchard@pritchardelliott.com

May 9, 2011

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The Honorable Daniel E Shearhouse
Clerk of Court, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

**RE Historic Charleston Foundation and Preservation Society of Charleston v
The City of Charleston, The City of Charleston Board of Zoning Appeals-
Zoning and Library Associates, LLC
Case No 2007-CP-10-4692**

Dear Mr Shearhouse

Enclosed herewith, please find an original and fourteen (14) copies of the *Respondents Joint Final Brief* in connection with the above-referenced matter Please return a filed-stamped copy of the same to me in the enclosed self-addressed, stamped envelope

I am serving all counsel of record in this matter by copy of this letter and its enclosure

With warmest personal regards, I am

Yours very truly,

Edward K. Pritchard, III

Enclosure

CC Frances I Cantwell, Esquire
Timothy A. Domin, Esquire
G. Trenholm Walker, Esquire

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MAY 11 2011

SC SUPREME COURT

Law Offices
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William B Regan (Ret)
Frances I Cantwell

RECEIVED

MAY - 5 2011

S.C. Supreme Court

May 5, 2011

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RE Historic Charleston Foundation, et al v City of Charleston, et al
Supreme Court Case Tracking No 2010-179087
Case No 2007-CP-10- 4692

Dear Mr Shearouse

In regard to the above, enclosed please find the following

- a) An original and fourteen (14) copies of Appellants' Joint Final Brief,
- b) An original and fourteen (14) copies of Appellants' Joint Final Reply Brief, and
- c) An original and fourteen (14) copies of the Record on Appeal

Also enclosed are the Certificates of Service of the Briefs on Counsel

Due to the size of the Record, the above referenced documents are contained in five separate boxes Box 1 contains the Briefs, the unbound original Record, and two copies of the bound Record The remaining boxes each contain three (3) bound copies of the Record

Please let me know if you need anything further from me

With kind regards, I am,

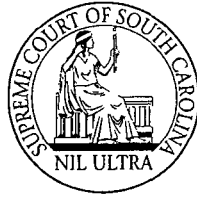
Yours truly,



Frances I Cantwell
FIC/trm
Enclosures (above-referenced documents in 5 boxes)

e mail fcantwell@birch net
tmonteiro@birch net

cc G Trenholm Walker, Esq (w/encls)
Lindsay K Smith-Yancey, Esq (w/encls)
Edward K Pritchard, III, Esq (w/encls)
Samia H Nettles, Esq (w/encls)
Timothy A Domin, Esq (w/encls)



The Supreme Court of South Carolina

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May 5, 2011

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Charleston, SC 29413-2247

Re Historic Charleston v City Charleston

Dear Counsel

Enclosed is the order issued in the above entitled matter

Very truly yours,

CLERK

DES/dmh

Enclosure

Historic Charleston v City Charleston
Page Two
May 5, 2011

cc Frances I Cantwell, Esquire
Timothy A Domin, Esquire
The Honorable Tanya Gee

3

4

The Supreme Court of South Carolina

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


ORDER

Respondents move to transfer this case to the Court of Appeals pursuant to Rule 204(a), SCACR. Appellants oppose the motion. The motion is denied. However, we hereby certify the appeal in Historic Charleston Foundation and Preservation Society of Charleston v. The City of Charleston, The City of Charleston Board of Zoning Appeals – Zoning, and Library Associates, LLC, currently pending in the Court of Appeals, to this Court pursuant to Rule 204(b), SCACR.

IT IS SO ORDERED



C.J.



J

Donald W. B. Smith J

John R. Hedges J

Kay L. Hearn J

Columbia, South Carolina

May 5, 2011

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MAR 14 2011

SC Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
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

RESPONDENTS' JOINT MOTION TO TRANSFER CASE TO THE SOUTH CAROLINA
COURT OF APPEALS

Respondents Historic Charleston Foundation and Preservation Society of Charleston ("Respondents") hereby move the Court to transfer the above captioned case to the South Carolina Court of Appeals on the ground that appellate jurisdiction lies initially with the South Carolina Court of Appeals, not the Supreme Court of South Carolina

"In the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court" Rule 204(a), SCACR Pursuant to Rule 203(d)(1)(A), SCACR, with the exception of a number of specified cases in which exclusive appellate jurisdiction is vested in the Supreme Court of South Carolina, the notice of appeal should be filed with the Clerk of the South Carolina Court of Appeals

While Appellants have not explained why they filed this appeal in the Supreme Court of South Carolina, it is anticipated that Appellants will contend the final judgment of the master involves “a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is one of the constitutionality of the law or ordinance, provided, however, in any case where the Supreme Court finds that the constitutional issue raised is not a significant one, the Supreme Court may transfer the case to the Court of Appeals” See Rule 203(d)(1)(A)(ii), SCACR, S C Code Ann §14-8-200(b)(3)

In this case, the master invalidated a zoning ordinance passed by the City of Charleston, through its City Council, on the ground that the City Council’s adoption of the ordinance was arbitrary and constituted illegal spot zoning (**Order**) Appellants’ initial brief, filed previously with this Court, framed the issues on appeal as follows

- I Did the trial judge err in holding that the actions of the Charleston City Council in enacting Ordinance 2007-147 constitute illegal spot zoning?
- II Does the reasoning of the Order of the trial judge comport with principles applicable to the review of a legislative decision?

Thus, Appellants raised no significant constitutional issues in their brief, which does not cite to the state or federal constitutions Moreover, other appeals involving similar issues have been resolved first by the South Carolina Court of Appeals, then, if necessary, this Court See, e.g., Rest Row Assocs v Horry County, 335 S C 209, 215, 516 S E 2d 442, 445- 46 (1999), La Quinta Motor Inns, Inc v Greenville County Bd of Zoning Appeals, 279 S C 598, 310 S E 2d 438 (Ct App 1983), Heilker v Zoning Board of Appeals, 346 S C 401, 552 S E 2d 42 (Ct App 2000), Gurganious v City of Beaufort, 317 S C 481, 454 S E 2d 912 (Ct App 1995), Colbert v Krawcheck, 299 S C 299, 384 S E 2d 710 (1989), Harbit v City of Charleston, 382 S C 383, 675 S E 2d 776 (Ct App 2009)

Appellants' attempt to "leap frog" the South Carolina Court of Appeals and seek judicial review in this Court also prejudices Respondents Appellant Library Associates, LLC, (the "Developer") owns a parcel of real property lying on Marion Square in the heart of downtown Charleston **(Order, p 2, ¶3)**- The portion of this property adjacent to the historic Old Citadel on Marion Square was limited to a height of 55 feet prior to Developer's acquisition of this property, however, the Developer sought to build a hotel standing 105 feet on the property **(Order, p 2, ¶8)**

To facilitate the development of a hotel much larger than the underlying zoning classification allowed, the Developer originally applied to the City of Charleston's Board of Zoning Appeals-Zoning ("BZA-Z") for a variance, which the BZA-Z granted **(Order, pp 2-3, ¶¶10-11)** Respondents appealed the BZA-Z's decision to the Court of Common Pleas **(Order p 3, ¶14)**

In an effort to avoid having to litigate Respondents' appeal of the BZA-Z's decision, the City decided to rezone the property As the master recognized in the order on appeal in the present case "The trial testimony that the City supported the rezoning as a way to avoid litigation and game playing heavily supports Plaintiffs' argument" that "the primary purpose of the rezoning was to subvert the Plaintiffs' rights to judicial review of the Variance Decision in an effort to cure deficiencies in the Variance Decision " **(Order p 7, ¶¶5-7)**

The lower court ultimately upheld the variance granted by the BZA-Z and, in a separate, subsequent order, overturned the zoning ordinance **(Order)** Respondents' appealed the lower court's decision affirming the variance, and that case is currently pending in the South Carolina Court of Appeals Appellants subsequently appealed the master's decision overturning the zoning ordinance to this Court, which essentially permits Appellants' decision on the zoning

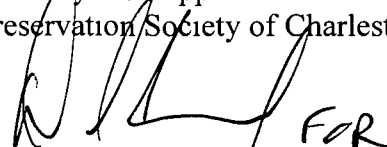
ordinance to be finally adjudicated before the Respondents' appeal relating to the variance. Essentially, this would reward Appellants for what the master characterized as "game playing" (Order, p 7, ¶6)

Based on the foregoing, Respondents would respectfully request that this Court enter an order transferring this appeal to the South Carolina Court of Appeals

Respectfully submitted,



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Charleston, South Carolina
March 11, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
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

PROOF OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Joint Motion to Transfer Case to the South Carolina Court of Appeals on this 11th day of March, 2011 via United States Mail, postage prepaid, upon the following counsel of record


Timothy A Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Frances I Cantwell, Esq
Regan & Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

RECEIVED

MAR 14 2011

SC SUPREME COURT



Janet Segell
Paralegal to Daniel S McQueeney, Jr
Pratt-Thomas Walker, P A
Post Office Drawer 22247
Charleston, South Carolina 29413-2247

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APR 01 2011

SC SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

RETURN TO MOTION TO REMAND

Appellants oppose the motion to transfer this case to the Court of Appeals

This case is an appeal from an order of the lower court invalidating a zoning ordinance ratified by the Charleston City Council. The ordinance rezoned a portion of the property located at 404 King Street to allow for the parcel to be subject to a uniform height regulation. Prior to the rezoning, the parcel was subject to two height districts. One district allowed a height up to 105 feet over approximately 60% of the site. The other allowed a height of 50 feet over the remainder. The ordinance rezoned the portion of the property subject to the 50 foot height limitation to conform to the height already allowed on a majority of the site. The ordinance was invalidated by the lower court solely on the basis of spot zoning.

This Court has long held that a zoning decision will not be disturbed unless there is a clear violation of a citizen's constitutional rights Knowles v City of Aiken, 305 S C 219, 224, 407 S E 2d 639, 642 (1991) (*Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen s constitutional rights Courts have no prerogative to pass upon the wisdom of the municipality s decision unless that decision is so unreasonable so as to impair or destroy citizen s constitutional rights (citations omitted)*) Thus, whether City Council's decision to rezone the property resulted in an impairment or destruction of Respondents' constitutional rights is not just a "significant" issue in the case, it is ultimately the only issue in the case

Respondents alleged a number of causes of action in their complaint, but the only one they tried was that of spot zoning To succeed, it was incumbent that they prove a clear violation of their constitutional rights Respondents' entitlement to relief is bottomed on such proof The assertion that this issue is not significant is tantamount to contending that proof of an essential element of a cause of action is not all that important


It is not difficult to read between the lines The Record in this case reveals that since 2006 Respondents have initiated lawsuits contesting virtually every approval obtained by Appellant Library Associates in its effort to construct a hotel One case has already been decided by the Court of Appeals Historic Charleston Foundation and Preservation Society v The City of Charleston, The City of Charleston Board of Zoning Appeals-Zoning and Library Associates, LLC, Unpublished Opinion No 2008 – UP – 252 (S C Ct App) Submitted May 1, 2008 – Filed May 7, 2008, Withdrawn, Substituted and Refiled August 1, 2008, *cert denied* Another is pending there now Historic Charleston Foundation and Preservation Society of Charleston v The City of Charleston, The City of Charleston Board of Zoning Appeals – Zoning and Library

Associates, LLC, appeal from Charleston County, Case No 07-CP-10-00451 Here, in an apparent effort to perpetuate further delay, Respondents attempt to minimize the significance of the central element in this case upon which their relief is predicated, that being whether their constitutional rights were violated Respondents' contention that this Court deciding this case in the first instance prejudices them makes no sense, unless the underlying purpose in seeking to having this matter transferred to the Court of Appeals is to buy time

This case is properly before this Court and should remain so SCACR, Rule 203(d)(1)(A)(11) provides an ordinance invalidated on constitutional grounds should be reviewed by the this Court unless this Court finds the constitutional issue not to be significant In this case, to affirm the order of the lower court, the appellate court will have to find that the actions of City Council were so unreasonable so as to be in derogation of Respondents' constitutional rights This finding, being central to Respondents' entitlement to relief, can hardly be characterized as insignificant

Charleston, South Carolina

March 30, 2011



Frances I Cantwell, Esq
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Tel 843-762-8282
Fax 843-762-8284

Attorney for Appellant,
Library Associates, LLC

Charleston, South Carolina

March 30, 2011

Timothy A Domin by Fe w/permission

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Tel 577-2026
Fax 722-2867

Attorney for Appellants City of Charleston
and the City of Charleston City Council

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CERTIFICATE OF SERVICE

The undersigned certifies that on the 30th day of March, 2011, a true and correct copy of the Appellants' Return to Motion to Remand was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

Attorneys for Historic Charleston Foundation

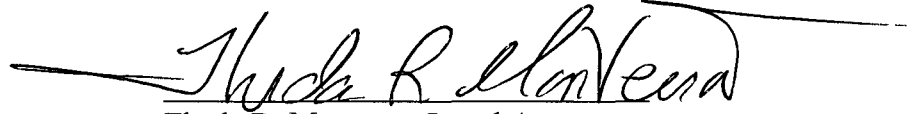
Edward K Pritchard, III, Esq
Samia H Nettles, Esq
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P O Box 630
Charleston, South Carolina 29402

Attorneys for Preservation Society of Charleston

G Trenholm Walker, Esq
Lindsay K Smith-Yancey, Esq
Pratt-Thomas Walker, PA
P O Drawer 22247
Charleston, South Carolina 29413-2247

Charleston, South Carolina

March 30, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro". The signature is written in a cursive style and is positioned above a horizontal line that extends across the width of the signature.

Theda R. Monteiro, Legal Assistant
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R Scarborough, Master-In-Equity

Case No 2007-CP-10-4692

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SC SUPREME COURT

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

RESPONDENTS' JOINT REPLY TO APPELLANTS' RETURN TO RESPONDENTS' JOINT
MOTION TO TRANSFER CASE TO THE SOUTH CAROLINA COURT OF APPEALS

Respondents Historic Charleston Foundation and Preservation Society of Charleston ("Respondents") hereby submit the following joint reply in support of their motion to transfer this appeal to the South Carolina Court of Appeals

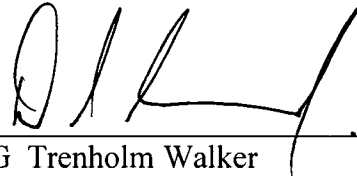
Initially, Appellants contend that this case involves significant constitutional issues, referencing the deprivation of *Respondents* constitutional rights associated with their attempt to spot zone the property located at 404 King Street. While Respondents concede that the spot zoning in this case involves a deprivation of their constitutional *rights*, this appeal involves few, if any, constitutional *issues*. Appellants, who are tasked with setting forth the statement of issues on appeal pursuant to Rule 208(b)(1)(B), SCACR, raised no significant constitutional arguments, instead contending simply that their rezoning of the property should be upheld.

Moreover, there is absolutely no legal support for the proposition necessarily advanced by Appellants that the Supreme Court of South Carolina has exclusive appellate jurisdiction over all appeals in which a party alleges that a local government zoning decision impaired or destroyed the party's constitutional rights. To the contrary, similar issues have been heard and decided by the South Carolina Court of Appeals before being addressed by this Court. See, e.g., Harbit v City of Charleston, 382 S C 383, 675 S E 2d 776 (Ct App 2009) (addressing whether city's decision in refusing to rezone area was so unreasonable as to impair or destroy the property owner's constitutional right), Bear Enterprises v County of Greenville, 319 S C 137, 459 S E 2d 883 (Ct App 1995) (addressing whether county's decision refusing to rezone area was so unreasonable as to impair or destroy the property owner's constitutional rights), Lenardis v City of Greenville, 316 S C 471, 450 S E 2d 597 (Ct App 1994). There is no reason to have the Supreme Court of South Carolina be the exclusive appellate court with jurisdiction over appeals relating to zoning decisions, as the procedural history of previous cases recognizes.

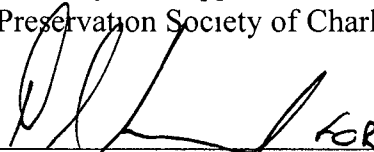
Nor are Respondents attempting to "perpetuate further delay" as Appellants assert in their return. Instead, as the master recognized, Respondents are seeking to vindicate their right to challenge the master's decision granting a variance to Appellants in the face of Appellants' efforts to circumvent that challenge by simply rezoning the property and moving their appeal of that rezoning decision ahead of Respondents' appeal of the variance. As the master emphasized in the very order Appellants are now appealing: "The trial testimony that the City supported the rezoning as a way to avoid litigation and game playing heavily supports Plaintiffs' argument" that "the primary purpose of the rezoning was to subvert the Plaintiffs' rights to judicial review of the Variance Decision in an effort to cure deficiencies in the Variance Decision." (**Order p 7, ¶¶5-7**)

To permit this appeal to continue forward in the Supreme Court of South Carolina in an attempt to avoid the hearing of Respondents' appeal of the variance decision would not serve the ends of justice and would reward what the master characterized as Appellants' "game-playing" (Order p 7, ¶6) Accordingly, Respondents respectfully request that their motion to transfer be granted

Respectfully submitted,



G Trenholm Walker
Lindsay K Smith-Yancey
Daniel S McQueeney, Jr
Katie F Monoc
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Attorneys for Appellant
Preservation Society of Charleston



Edward K Pritchard, III
Samia H Nettles
Pritchard & Elliott, LLC
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(843) 722-3300
Attorneys for Appellant
Historic Charleston Foundation

Charleston, South Carolina
April 11, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
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

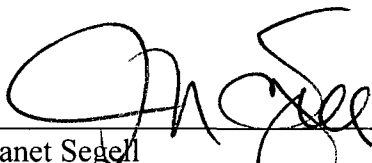
PROOF OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Joint Reply to Appellants' Return to Respondents' Joint Motion to Transfer Case to the South Carolina Court of Appeals on this 11th day of April, 2011 via United States Mail, postage prepaid, upon the following counsel of record

Timothy A Domin, Esq
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Charleston, SC 29492-7595

Frances I Cantwell, Esq
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105 Wappoo Creek Drive, Suite 1-A
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Law Offices
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William B Regan (Ret)
Frances I Cantwell

April 19, 2011

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Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

tel 843 762 8282
fax 843 762 8284

RE HISTORIC Charleston Foundation, et al v City of Charleston, et al
Case Tracking No 2010-179087
Case No 2007-CP-10-4692

Dear Mr Shearouse

In regard to the above, enclosed please find a Certificate of Service of the Record on Appeal in the above matter on opposing Counsel

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosures

cc G Trenholm Walker, Esq (w/encls)
Lindsay K Smith-Yancey, Esq (w/encls)
Edward K Pritchard, III, Esq (w/encls)
Samia H Nettles, Esq (w/encls)
Timothy A Domin, Esq (w/o encl)

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SC SUPREME COURT

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of April 2011, a true and correct copy of
the Record on Appeal was hand delivered to the following

Attorneys for Historic Charleston Foundation

Edward K Pritchard, III, Esq
Samia H Nettles, Esq
Pritchard & Elliott, LLC
129 Broad Street
Charleston, South Carolina 29401

Attorneys for Preservation Society of Charleston

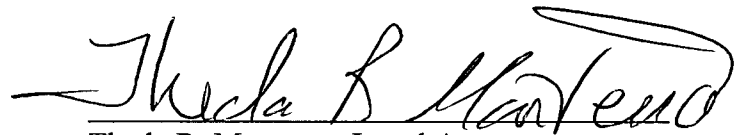
G Trenholm Walker, Esq
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Charleston, South Carolina 294037

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APR 21 2011
SC SUPREME COURT

SIGNATURE PAGE FOLLOWS

Charleston, South Carolina

April 19, 2011

A handwritten signature in black ink that reads "Theda R. Monteiro". The signature is written in a cursive style with a long horizontal flourish at the end.

Theda R. Monteiro, Legal Assistant

Regan and Cantwell, LLC

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PROFESSIONAL ASSOCIATION

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E DOUGLAS PRATT THOMAS
G TRENHOLM WALKER
W ANDREW GOWDER JR
JON L AUSTEN
LINDSAY K SMITH YANCEY (SC NC)
CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

April 11, 2011

(843) 727 2247 (direct dial)
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js@p.tw.com (e mail)

The Honorable Daniel E Shearouse
Supreme Court Clerk
P O Box 11330
Columbia, SC 29211

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SC SUPREME COURT

RE Historic Charleston Foundation v City of Charleston

Dear Mr Shearouse

Please find enclosed an original and six copies of Respondents' Joint Reply to Appellants' Return to Respondents' Joint Motion to Transfer Case to the South Carolina Court of Appeals. As evidenced by the enclosed Proof of Service, I am serving counsel for the Appellants with a copy of the reply.

Thank you for your courtesies. If you have any questions, please do not hesitate to contact me at (843) 727-2247.

Very truly yours,

PRATT-THOMAS WALKER, P A

Janet Segell
Paralegal to Daniel S McQueeney, Jr

jas
enclosures

c Timothy A Domin, Esq
Frances I Cantwell, Esq

The Supreme Court of South Carolina

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

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No 2007-CP-10-04692

ORDER

The request for an extension to serve and file a Reply to the Return to Respondent's Joint Motion to Transfer Case to the SC Court of Appeals is granted and extended until April 11, 2011

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

April 4, 2011

cc Frances I Cantwell, Esquire
Timothy A Domin, Esquire
Edward K Pritchard, III, Esquire
Samia H Nettles, Esquire
G Trenholm Walker, Esquire
Lindsay K Smith-Yancey, Esquire
Daniel S McQueeney, Jr , Esquire
Katie F Monoc, Esquire

PROFESSIONAL ASSOCIATION

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W ANDREW GOWDER JR
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CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

April 1, 2011

The Honorable Daniel E Shearouse
Supreme Court Clerk
P O Box 11330
Columbia, SC 29211

RE Historic Charleston Foundation v City of Charleston
Appeal from Charleston County Court of Common Pleas
C/A No 2007-CP-10-4692

Dear Mr Shearouse

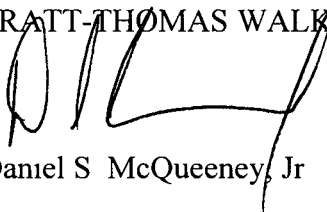
Please be advised that our firm represents Respondent Preservation Society of Charleston ("Preservation Society") in the above-referenced appeal Preservation Society filed a joint motion with Respondent Historic Charleston Foundation to transfer this case to the South Carolina Court of Appeals and Appellants have filed a return in opposition to that motion Pursuant to the South Carolina Rules of Appellate Practice, Respondents have until April 4, 2011, to file a reply to this return I am writing to request an extension of five (5) days for the service and filing of Respondents' reply to Appellants' return There has been no previous request for an extension

I have enclosed our firm's check for \$25 00 If anything further must be submitted to accomplish the extension, please let me know Thank you for your consideration and attention to this matter

With regards, I am,

Sincerely yours,

PRATT-THOMAS WALKER, P A



Daniel S McQueeney, Jr

DSM jas
enclosure

c Timothy A Domin, Esq
Frances I Cantwell, Esq

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SC SUPREME COURT

Law Offices
Regan and Cantwell LLC
William B Regan (Ret)
Frances I Cantwell

March 30, 2011

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APR 01 2011

105 wappoo creek drive
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charleston sc
29412

Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court **SC SUPREME COURT**
P O Box 11330
Columbia, South Carolina 29211

RE Historic Charleston Foundation, et al v City of Charleston, et al
Case Tracking No 2010-179087
Case No 2007-CP-10- 4692

tel 843 762 8282
fax 843 762 8284

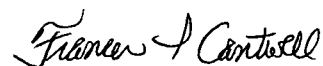
Dear Mr Shearouse

In regard to the above, enclosed please find an original and six (6) copies of the Appellants' Return to Motion to Remand Also, enclosed is a Certificate of Service on counsel

Please let me know if you need anything further from me

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosures

cc G Trenholm Walker, Esq (w/encl)
Lindsay K Smith-Yancey, Esq (w/encl)
Edward K Pritchard, III, Esq (w/encl)
Samia H Nettles, Esq (w/encl)
Timothy A Domin, Esq (w/encl)

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The Supreme Court of South Carolina

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

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No 2007-CP-10-04692

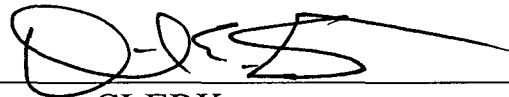
ORDER

For good cause having been shown, the time for serving and filing the Return to Motion to Transfer Case to the South Carolina Court of Appeals in the above entitled matter is hereby extended until March 31, 2011

IT IS SO ORDERED

JÉAN H TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 24, 2011

cc Frances I Cantwell, Esquire
Timothy A Domin, Esquire
Edward K Pritchard, III, Esquire
Samia H Nettles, Esquire
G Trenholm Walker, Esquire
Lindsay K Smith-Yancey, Esquire
Daniel S McQueeney, Jr , Esquire
Katie F Monoc, Esquire

Law Offices
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William B Regan (Ret)
Frances I Cantwell

March 21, 2011

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Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

RE Historic Charleston Foundation, et al v City of Charleston, et al
Case Tracking No 2010-179087
Case No 2007-CP-10-4692

Dear Mr Shearouse

In regard to the above, enclosed please find an original, unbound and six (6) copies of the Appellants' Motion for Extension of Time to file Return to Motion for Remand, along with the \$25 00 filing fee Counsel for Respondents consent to the extension

Also, enclosed is a Certificate of Service on counsel

Please let me know if you need anything further from me

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosure

cc G Trenholm Walker, Esq (w/encl)
Lindsay K Smith-Yancey, Esq (w/encl)
Edward K Pritchard, III, Esq (w/encl)
Samia H Nettles, Esq (w/encl)
Timothy A Domin, Esq (w/encl)

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MAR 23 2011

S C SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

MOTION FOR EXTENSION OF TIME
TO RETURN TO MOTION FOR REMAND

The attorneys for the Appellants hereby move for a ten (10) day extension, until, March 31, 2011, by which to file their Return to Motion to Remand of Respondents

The motion is necessitated due to counsels' workload

Respondents' counsel consent to this motion

Respectfully submitted,

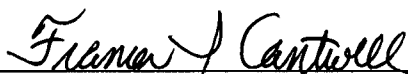
Charleston, South Carolina

March 21, 2011

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MAR 23 2011

SC SUPREME COURT



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Attorney for Appellant,
Library Associates, LLC

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Attorney for Appellants City of Charleston
and the City of Charleston City Council

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon Mikell R Scarborough, Master-in-Equity

Case No 2007-CP-10-4692

Historic Charleston Foundation and
Preservation Society of Charleston,

v

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

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MAR 23 2011

SC Supreme Court

Respondents,

Appellants

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of March, 2011, a true and correct copy of the Appellants' Motion for Extension of Time to Return to Motion to Remand was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

Attorneys for Historic Charleston Foundation

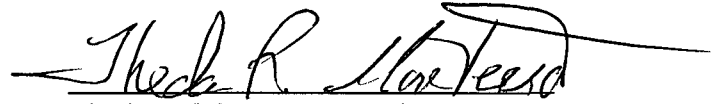
Edward K Pritchard, III, Esq
Samia H Nettles, Esq
Pritchard & Elliott, LLC
P O Box 630
Charleston, South Carolina 29402

Attorneys for Preservation Society of Charleston

G Trenholm Walker, Esq
Lindsay K Smith-Yancey, Esq
Pratt-Thomas Walker, PA
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Charleston, South Carolina

March 21, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Theda R. Monteiro, Legal Assistant
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Frances I Cantwell

March 21, 2011

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Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

RE Historic Charleston Foundation, et al v City of Charleston, et al
Case Tracking No 2010-179087
Case No 2007-CP-10- 4692

Dear Mr Shearouse

In regard to the above, enclosed please find an original, unbound copy of the Appellants' Joint Reply Brief Also, enclosed is a Certificate of Service on counsel

Please let me know if you need anything further from me

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosure

cc G Trenholm Walker, Esq (w/encl)
Lindsay K Smith-Yancey, Esq (w/encl)
Edward K Pritchard, III, Esq (w/encl)
Samia H Nettles, Esq (w/encl)
Timothy A Domin, Esq (w/encl)

RECEIVED

MAR 23 2011

SC SUPREME COURT

e mail fcantwell@birch.net
trmonteiro@birch.net

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of March, 2011, a true and correct copy of the Appellants' Initial Joint Reply Brief was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

Attorneys for Historic Charleston Foundation

Edward K Pritchard, III, Esq
Samia H Nettles, Esq
Pritchard & Elliott, LLC
P O Box 630
Charleston, South Carolina 29402

Attorneys for Preservation Society of Charleston

G Trenholm Walker, Esq
Lindsay K Smith-Yancey, Esq
Pratt-Thomas Walker, PA
P O Drawer 22247
Charleston, South Carolina 29413-2247

Charleston, South Carolina

March 21, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro". The signature is written in a cursive style with a long, sweeping horizontal line extending to the right.

Theda R. Monteiro, Legal Assistant
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403

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CHARLESTON SC 29413 2247

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E DOUGLAS PRATT THOMAS
G TRENHOLM WALKER
W ANDREW GOWDER JR
JON L AUSTEN
LINDSAY K SMITH YANCEY (SC NC)
CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHIEEN FOWLER MONOC

March 11, 2011

(843) 727 2247 (direct dial)
(843) 579 4811 (fax)
js@p.tw.com (e mail)

The Honorable Daniel E Shearouse
Supreme Court Clerk
P O Box 11330
Columbia, SC 29211

RE Historic Charleston Foundation v City of Charleston

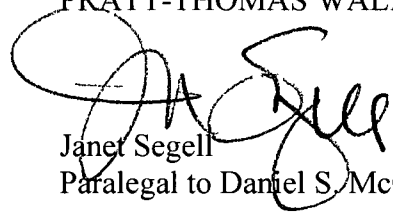
Dear Mr Shearouse

Please find enclosed an original and six copies of Respondents' Joint Motion to Transfer Case to the South Carolina Court of Appeals, as well as our firm's check in the amount of \$25 00 to cover the required filing fee As evidenced by the enclosed Proof of Service, I am serving counsel for the Appellants with a copy of the motion

Thank you for your courtesies If you have any questions, please do not hesitate to contact me at (843) 727-2247

Very truly yours,

PRATT-THOMAS WALKER, P A



Janet Segell
Paralegal to Daniel S. McQueeney, Jr

RECEIVED
MAR 14 2011
SC SUPREME COURT

jas
enclosures

c Timothy A Domin, Esq
Frances I Cantwell, Esq

PROFESSIONAL ASSOCIATION

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DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

March 11, 2011

(843) 727 2247 (direct dial)
(843) 579 4811 (fax)
js@p.tw.com (e mail)

The Honorable Daniel E Shearouse
Supreme Court Clerk
P O Box 11330
Columbia, SC 29211

RE Historic Charleston Foundation v City of Charleston

Dear Mr Shearouse

Please find enclosed an original and six copies of Respondents' Joint Initial Brief and Designation of Matter As evidenced by the enclosed Proof of Service, I am serving counsel for the Appellants with a copy of the motion

Thank you for your courtesies If you have any questions, please do not hesitate to contact me at (843) 727-2247

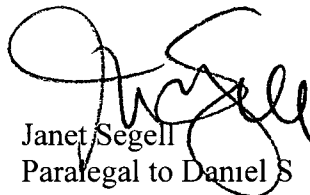
RECEIVED

MAR 14 2011

S.C. SUPREME COURT

Very truly yours,

PRATT-THOMAS WALKER, P A



Janet Segell
Parafegal to Daniel S McQueeney, Jr

jas
enclosures

c Timothy A Domin, Esq
Frances I Cantwell, Esq

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAR 14 2011

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R Scarborough, Master-In-Equity

S.C Supreme Court

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,

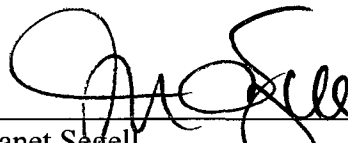
Appellants

PROOF OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Joint Initial Brief and Designation of Matter on this 11th day of March, 2011 via United States Mail, postage prepaid, upon the following counsel of record

Timothy A Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Frances I Cantwell, Esq
Regan & Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412



Janet Segell
Paralegal to Daniel S McQueeney, Jr
Pratt-Thomas Walker, P A
Post Office Drawer 22247
Charleston, South Carolina 29413-2247

RECEIVED

MAR 14 2011

S C SUPREME COURT

The Supreme Court of South Carolina

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

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No 2007-CP-10-04692

ORDER

For good cause shown, the request for an extension to serve and file the Respondents' Joint Initial Brief and Designation of Matter is granted and extended until March 11, 2011

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 8, 2011

cc Frances I Cantwell, Esquire
Timothy A Domin, Esquire
Edward K Pritchard, III, Esquire
Samia H Nettles, Esquire
G Trenholm Walker, Esquire
Lindsay K Smith-Yancey, Esquire

PROFESSIONAL ASSOCIATION

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G TRENHOLM WALKER
W ANDREW GOWDER JR
JON L AUSTEN
LINDSAY K SMITH YANCEY (SC NC)
CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOC

March 7, 2011

(843) 727 2247 (direct dial)
(843) 579 4811 (fax)
js@p.tw.com (e mail)

The Honorable Daniel E Shearouse
Supreme Court Clerk
P O Box 11330
Columbia, SC 29211

RE Historic Charleston Foundation v City of Charleston

Dear Mr Shearouse

Please find enclosed an original and six copies of Respondents' Motion for an extension for their joint initial brief and designation of matter, as well as our firm's check in the amount of \$25 00 to cover the required filing fee As evidenced by the enclosed Proof of Service, I am serving counsel for the Appellants with a copy of the motion

Thank you for your courtesies If you have any questions, please do not hesitate to contact me at (843) 727-2247

Very truly yours,

PRATT-THOMAS WALKER, P A

Janet Segell
Paralegal to Daniel S McQueeney, Jr

jas
enclosures

c Timothy A Domin, Esq
Frances I Cantwell, Esq

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MAR 08 2011
S.C. SUPREME COURT
S.C. SUPREME COURT

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MAR 08 2011
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
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

Respondents' Motion for an Extension of the Time in Which to Serve and File
Respondents' Joint Initial Brief and Designation of Matter

Pursuant to Rule 263(b), SCACR, Respondents Historic Charleston Foundation and Preservation Society of Charleston (collectively "Respondents"), hereby move the Court for an extension of the time in which to serve and file their Respondents' Joint Initial Brief and Designation of Matter. Respondents request an extension from the current due date of Monday, March 7, 2011, to Friday, March 11, 2011. The extension is respectfully requested to accommodate Respondents' attorneys' busy schedule. Appellants' counsel has graciously consented to Respondents' request.

[signatures on following page]

Respectfully submitted,



G Trenholm Walker
Lindsay K Smith-Yancey
Daniel S McQueeney, Jr
Katie F Monoc
Pratt-Thomas Walker, P A
P O Drawer 22247
Charleston, SC 29413-2247
(843) 727-2208
Attorneys for Respondent
Preservation Society of Charleston



Edward K Pritchard, III
Samia H Nettles
Pritchard & Elliott, LLC
129 Broad Street
Charleston, SC 29401
(843) 722-3300
Attorneys for Respondent
Historic Charleston Foundation

Charleston, South Carolina
March 7, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
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,

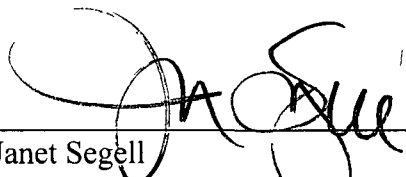
Appellants

PROOF OF SERVICE

I hereby certify that I served a true and correct copy of Respondents' Motion for an Extension of the Time in Which to Serve and File Respondents' Joint Initial Brief and Designation of Matter on this 7th day of March, 2011 via United States Mail, postage prepaid, upon the following counsel of record

Timothy A Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Frances I Cantwell, Esq
Regan & Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412



Janet Segell
Paralegal to Daniel S McQueeney, Jr
Pratt-Thomas Walker, P A
Post Office Drawer 22247
Charleston, South Carolina 29413-2247

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MAR 08 2011
S.C. SUPREME COURT
S.C. SUPREME COURT

The Supreme Court of South Carolina

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

The Honorable Mikell R. Scarborough
Charleston County
Trial Court Case No. 2007-CP-10-04692

ORDER

For good cause having been shown, the time for serving and filing the Initial Brief of Respondents and Designation of Matter in the above entitled matter is hereby extended until March 7, 2011.

IT IS SO ORDERED

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

February 8, 2011

cc Frances I Cantwell, Esquire
Timothy A Domin, Esquire
Edward K Pritchard, III, Esquire
Samia H Nettles, Esquire
G Trenholm Walker, Esquire
Lindsay K Smith-Yancey, Esquire

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON SC 29403PO DRAWER 22247
CHARLESTON SC 29413 2247PHONE 843 727 2200
FAX 843 727 2238

WWW P TW COM

(843) 727 2256 (direct dial)
(843) 579 4811 (fax)
dsm@p tw com (e mail)

February 7, 2011

RECEIVED
FEB 08 2011
S.C. SUPREME COURTE DOUGLAS PRATT THOMAS
G TRENHOLM WALKER
W ANDREW GOWDER JR
JON L AUSTEN
LINDSAY K SMITH YANCEY (SC NC)
CLAYTON B McCULLOUGH
THOMAS H HESSE (SC GA)
IAN W FREEMAN (SC CA)
FRANCIS M ERVIN II (SC MA)
DANIEL S McQUEENEY JR
JAMIE A KHAN
KATHLEEN FOWLER MONOCThe Honorable Daniel E Shearouse
Supreme Court Clerk
P O Box 11330
Columbia, SC 29211RE Historic Charleston Foundation v City of Charleston
Appeal from Charleston County Court of Common Pleas
C/A No 2007-CP-10-4692

Dear Mr Shearouse

Please be advised that our firm represents Respondent Preservation Society of Charleston in the above-referenced appeal Respondent Preservation Society of Charleston intends to file a joint brief and designation with Respondent Historic Charleston Foundation I am writing to request an extension of thirty (30) days for the service and filing of Respondents' initial brief and designation of matter With the extension, the initial brief and designation of matter would be due on March 7, 2011 There has been no previous request for an extension

I have enclosed our firm's check for \$25 00 If anything further must be submitted to accomplish the extension, please let me know Thank you for your consideration and attention to this matter

With regards, I am,

Sincerely yours,

PRATT THOMAS WALKER, P A


Daniel S McQueeney, JrDSM jas
enclosurec Timothy A Domin, Esq
Frances I Cantwell, Esq

Law Offices
Regan and Cantwell LLC
William B Regan (Ret)
Frances I Cantwell

January 6, 2011

RECEIVED

JAN 07 2011

S.C. Supreme Court

105 wappoo creek drive
suite 1 a
charleston sc
29412

Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

tel 843 762 8282
fax 843 762 8284

RE Historic Charleston Foundation, et al v City of Charleston, et al
Case Tracking No 2010-179087
Case No 2007-CP-10- 4692

Dear Mr Shearouse

In regard to the above, enclosed please find a copy of the Appellants' Initial Brief and Designation of Matters to be included in the Record on Appeal Also enclosed is a Certificate of Service on counsel

With kind regards, I am,

Yours truly,



Frances I Cantwell

FIC/trm

Enclosures

cc G Trenholm Walker, Esq (w/encls)
Lindsay K Smith-Yancey, Esq (w/encls)
Edward K Pritchard, III, Esq (w/encls)
Samia H Nettles, Esq (w/encls)
Timothy A Domin, Esq (w/encls)
Michael Bennett

e mail fcantwell@birch.net
tmonteiro@birch.net

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

JAN 07 2011

S.C. 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

CERTIFICATE OF SERVICE

The undersigned certifies that on the 6th day of January 2010 a true and correct copy of the Appellants' Initial Brief and Designation of Matters to be Included in the Record on Appeal were placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

Attorneys for Historic Charleston Foundation

Edward K. Pritchard, III, Esq
Samia H. Nettles, Esq
Pritchard & Elliott, LLC
8 Cumberland Street, Suite 200
Charleston, South Carolina 29401

Attorneys for Preservation Society of Charleston

G. Trenholm Walker, Esq
Lindsay K. Smith-Yancey, Esq
Pratt-Thomas Walker, PA
P O Drawer 22247
Charleston, South Carolina 29413-2247

Charleston, South Carolina

January 6, 2011

A handwritten signature in black ink, reading "Theda R. Monteiro". The signature is written in a cursive style with a large, sweeping flourish at the end.

Theda R. Monteiro, Legal Assistant

Regan and Cantwell, LLC

105 Wappoo Creek Drive, Suite 1-A

Charleston, South Carolina 29412

Tel 843-762-8282

Fax 843-762-8284

Law Offices
Regan and Cantwell LLC
William B Regan (Ret)
Frances I Cantwell

December 8, 2010

105 wappoo creek drive
suite 1 a
charleston sc
29412

Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

RE Historic Charleston Foundation, et al v City of Charleston, et al
Case Tracking No 2010-179087
Case No 2007-CP-10- 4692

tel 843 762 8282
fax 843 762 8284

Dear Mr Shearouse

I am writing to let you know that I received the transcript of the hearing on the motion to reconsider in the above matter on December 8, 2010 By my calculations, the initial brief of Appellants and their designation of matters for the record is due on January 7, 2010

If I have miscalculated the due date, please let me know

With kind regards, I am,

Yours truly,

Frances I Cantwell

Frances I Cantwell

FIC/trm

RECEIVED

DEC 10 2010

S.C. SUPREME COURT

cc G Trenholm Walker, Esq
Lindsay K Smith-Yancey, Esq
Edward K Pritchard, III, Esq
Samia H Nettles, Esq
Timothy A Domin, Esq

e mail fcantwell@birch net
tmontero@birch net

RECEIVED

DEC - 6 2010

SC Supreme Court

Law Offices
Regan and Cantwell LLC
William B Regan (Ret)
Frances I Cantwell

December 1 2010

105 wappoo creek drive
suite 1 a
charleston sc
29412

Bernadette A Cali, CSR
Master in Equity
100 Broad Street
Charleston, South Carolina 29401

Re Historic Charleston Foundation et al v City of Charleston et al
Case No 2007-CP-10-4692

tel 843 762-8282
fax 843 762-8284

Dear Bernadette

I represent Library Associates LLC a defendant in the above matter. A hearing on my motion to reconsider was held before Judge Scarborough on November 3, 2010 at 4:00 p.m. You were the court reporter.

I am hereby requesting a copy of the transcript of that hearing. If you need payment in advance for the transcript, please let me know, and I will make those arrangements.

With kind regards, I am,

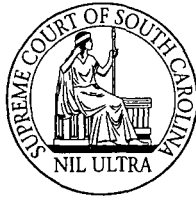
Yours truly,



Frances I Cantwell

FIC/trm

cc G Irenholm Walker Esq
Lindsay K Smith Yancey, Esq
Edward K Pritchard III Esq
Sama H Nettles, Esq
Timothy A Domin Esq



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

December 7, 2010

Frances I. Cantwell, Esquire
Regan & Cantwell
105 Wappoo Creek Drive, Suite 1-A
Charleston, SC 29412

Timothy A. Domin, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-7595

Re Historic Charleston v. City of Charleston
Case Tracking No. 2010-179087

Dear Counsel:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Historic Charleston v City of Charleston

Page Two

December 7, 2010

Very truly yours,

A handwritten signature in black ink, consisting of a large, stylized initial 'D' followed by a series of loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

Enclosure

cc Edward K Pritchard, III, Esquire
Sama H Nettles, Esquire
G Trenholm Walker, Esquire
Lindsay K Smith-Yancey, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

NOTICE OF APPEAL

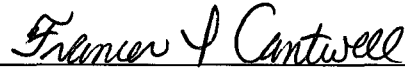
The City of Charleston, The City of Charleston City Council and Library Associates, LLC (Appellants) appeal the order of the Honorable Mikell R Scarborough dated August 19, 2010, and the Order dated November 4, 2010, denying Appellants' Rule 59 (e) motion

Appellants received written notice of entry of the August 19, 2010 order on August 30, 2010 and timely filed and served a motion to reconsider, alter or amend pursuant to Rule 59 (e), SCRCF on September 9, 2010 Appellants received written notice of entry of the order dated November 4, 2010 denying the Rule 59 (e) motion on November 22, 2010 Copies of the orders appealed are attached to this notice

RECEIVED
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S.C SUPREME COURT

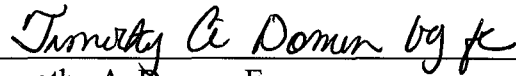
Charleston, South Carolina

December 3, 2010



Frances I. Cantwell, Esq
Regan and Cantwell, LLC
105 Wappoo Creek Drive, Suite 1-A
Charleston, South Carolina 29412
Tel 843-762-8282
Fax 843-762-8284

Attorney for Appellant Library Associates, LLC



Timothy A. Domin, Esq
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, South Carolina 29492-8144
Tel 577-2026
Fax 722-2867

Attorney for Appellants City of Charleston and the
City of Charleston City Council

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 HISTORIC CHARLESTON FOUNDATION)
 and PRESERVATION SOCIETY OF)
 CHARLESTON,)
)
 Plaintiffs,)
)
 vs)
)
 THE CITY OF CHARLESTON, THE CITY)
 OF CHARLESTON CITY COUNCIL)
 and LIBRARY ASSOCIATES, LLC,)
)
 Defendants)

COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

CASE NO 2007-CP-10-4692

ORDER

2010 AUG 20 AM 9 47
 JULIE J ARISTROPO
 CLERK OF COURT

FILED

This matter comes before the Court on the issue of whether the rezoning by the City of Charleston (“City”) of a portion of the property located at 404 King Street, Charleston, South Carolina to extend the 3X height district to the entire parcel should be annulled Plaintiffs Historic Charleston Foundation (“Historic Charleston”) and the Preservation Society of Charleston (“Preservation Society”) challenge the rezoning of 404 King Street as an invalid exercise of illegal spot zoning by the City

A trial on the merits was conducted on January 12, 2009 and March 9, 2009 in Charleston, South Carolina

FINDINGS OF FACT

Having observed the witnesses, weighed their credibility, and fully considered the testimony and exhibits presented at the hearing, I make the following findings of fact

- 1 Plaintiffs’ challenge to rezoning was timely filed

- 2 Notice of the time, date and nature of the hearing was timely given to all parties
- 3 Defendant, Library Associates, is the owner of 404 King Street, the site of the former Charleston County Library
- 4 404 King Street is a corner lot adjacent to the old Citadel building and Marion Square, and across the street from St Matthews Lutheran Church and the historic Aimar building at 409 King Street
- 5 Plaintiff Preservation Society holds a conservation easement on the historic Aimar building at 409 King Street
- 6 Both Historic Charleston and the Preservation Society hold easements on buildings adjacent and in proximity to 404 King Street
- 7 Library Associates intends to build a high-rise hotel on 404 King Street
- 8 At the time Library Associates acquired 404 King Street, the parcel was split zoned The portion of the parcel fronting King Street was zoned 3X and the back portion of the parcel was zoned 55/30 3X is a height district that allows the maximum height of a building to be three times the distance from the front of the building to the center line of the street it fronts 55/30 is a height district with a fifty-five foot maximum and thirty foot minimum height
- 9 Library Associates had actual or constructive knowledge that 404 King Street was split zoned at the time it acquired the property
- 10 On December 4, 2006, Library Associates filed an application with the Board of Zoning Appeals ("BZA") seeking a variance from the height limitation of fifty-five feet for the rear portion of 404 King Street in the 55/30 height zone



- 11 On January 2, 2007, the BZA conducted a hearing and granted Library Associates a variance allowing a building height of up to 105 feet on the portion of 404 King Street that had been zoned 55/30 (hereinafter "Variance Decision")
- 12 Members and representatives of Historic Charleston and the Preservation Society attended the BZA's January 2, 2007 public meeting and addressed and opposed the variance
- 13 On January 9, 2007, Historic Charleston filed a motion to reconsider with the BZA asking it to reconsider the Variance Decision On February 20, 2007, the BZA denied the motion for reconsideration
- 14 On February 1, 2007, Historic Charleston and Preservation Society appealed the Variance Decision to the Circuit Court, which appeal was heard by this Court on March 10, 2009 Historic Charleston and Preservation Society challenged the Variance Decision as arbitrary and erroneous as a matter of law because Library Associates failed to meet their burden of proving the elements of unnecessary hardship required to obtain a variance under the laws of South Carolina and the City of Charleston Zoning Ordinance
- 15 After Plaintiffs filed their appeal of the Variance Decision, Library Associates and the City pursued the rezoning of 404 King Street to expand the 3X zoning classification to cover the entire parcel
- 16 Testimony was presented by the City of Charleston that the zoning change was pursued even though the variance had already been approved in order to avoid the Plaintiffs' lawsuit surrounding the variance (Trial Transcript of March 9, 2009, pp 206-7, 213-14)



- 17 The City advocated for the zoning change despite the fact that the 3X zoning district was referred to by the City as “prehistoric” and no longer appropriate in a September 2005 City Council meeting
- 18 Historic Charleston and the Preservation Society and their members spoke in opposition to the rezoning of 404 King Street at the City’s Planning Commission and City Council deliberations
- 19 Despite objections of the Plaintiffs, on August 21, 2007, the City, acting through City Council, adopted an ordinance rezoning the rear portion of 404 King Street subject to the 55/30 height district so that the entire parcel became zoned a 3X height district
- 20 No other parcel in the area was rezoned at the time of the rezoning, only 404 King Street, the zoning on all of the properties to the north, south and west of the property along King Street as well as the properties to the east on Hutson Street also subject to split zoning were not rezoned and retained the exact same split height zoning restrictions they had prior to the rezoning of 404 King Street
- 21 Split zoning is typical in the area where 404 King Street is located As shown in zoning maps Plaintiffs admitted as exhibits, all properties on the east side of King Street from George Street to Line Street are split zoned
- 22 City Council adopted the Downtown Plan in 1999 as the land use element of the Comprehensive Plan for the City of Charleston
- 23 Section 8.4 of the Downtown Plan specifically states that 3X is an overly permissive height zone that should be replaced



- 24 In September 2006 the City eliminated the 3X district on King Street for all the blocks north of Hutson Street with one exception in the subject area of 404 King Street
- 25 Prior to the rezoning of 404 King Street, no parcel on the east side of King Street was zoned entirely 3X Only three parcels on the west side of King Street, between Calhoun and Vanderhorst Streets, are zoned entirely 3X These three parcels are not available to new development and contain the Francis Marion Hotel, St Matthews Lutheran Church, and the parking garage in between
- 26 Lee Batchelder, Zoning Administrator for the City of Charleston, testified at trial that the 3X height district had never before been expanded in the City of Charleston The rezoning of 404 King Street to extend the 3X district is the one and only instance in which 3X zoning has been expanded since the City's adoption of the Comprehensive Plan (Trial Transcript of March 9, 2009, p 127)
- 27 Section 8 4 of the Downtown Plan states that a goal of the plan is to preserve downtown's existing skyline and height zones The Downtown Plan allows for only slight increases to the existing skyline of one story and disfavors tall buildings that detract from historic sites
- 28 Section 9 2 of the Downtown Plan refers to 404 King Street as the "old library site" and states that new development on this parcel should pay particular attention to preserving the prominence of the church steeples, the old Citadel building and the "Calhoun column" on the skyline



29 A 105 foot building at 404 King Street would be fifty feet taller than the adjacent historic old Citadel building, and substantially taller than many other historic structures in the area

CONCLUSIONS OF LAW

Based on the foregoing, I make the following legal conclusions

- 1 As Plaintiffs hold easements on buildings adjacent and in proximity to 404 King Street, I find that Plaintiffs have standing to bring this action under the injury-in-fact constitutional analysis and the public importance exception outlined in ATC South, Inc v Charleston County, 380 S C 191, 669 S E 2d 337 (2008)
- 2 This Court has the power to set aside a municipal body's zoning decision where there has been a clear abuse of discretion by the municipal body Talbot v Myrtle Beach Bd of Adjustment, 222 S C 165, 72 S E 2d 66 (1952) The presumption of fairness a municipal body normally enjoys as to their decisions will be set aside when the municipal body has acted arbitrarily or in obvious abuse of its discretion or where the board has acted illegally and in excess of its lawfully delegated authority Id
- 3 A municipal body acts arbitrarily and in abuse of its discretion when it engages in illegal spot zoning
- 4 Illegal spot zoning occurs when a rezoning (1) falls within the definition of spot zoning and (2) fails to both adhere to the City's comprehensive plan and promote the good of the common welfare Knowles v City of Aiken, 305 S C 219, 407 S E 2d 639 (1991)



The City's Motive for Enacting the Zoning Ordinance

- 5 Plaintiffs contend that the rezoning of 404 King Street was no ordinary act of zoning, but was instead an attempt by the City to single out a particular parcel to avoid litigation over that parcel. Plaintiffs argue that the primary purpose of the rezoning was to subvert the Plaintiffs' rights to judicial review of the Variance Decision in an effort to cure deficiencies in the Variance Decision.
- 6 The trial testimony that the City supported the rezoning as a way to avoid litigation and game playing heavily supports Plaintiffs' arguments. (Trial Transcript of March 9, 2009, pp. 206-7, 213-14)
- 7 Based on the City's testimony at trial, I find that avoiding litigation as to one small parcel of land was in fact the motive of the City in pursuing the rezoning of 404 King Street. I further find that the rezoning was an improper act by the City which sought to insulate the City and Library Associates from judicial review of the purported legal deficiencies in the Variance Decision, however, this court upheld the decision of the City of Charleston Board of Zoning Appeals in C/A # 2007-CP-10-451 by decision entered June , 2010.

The Rezoning of 404 King Street was "Spot Zoning"

- 8 The leading case in South Carolina on spot zoning is Knowles v. City of Aiken, 305 S.C. 219, 407 S.E.2d 639, 641 (1991).
- 9 In Knowles, the South Carolina Supreme Court held that spot zoning occurs when a small parcel of land is singled out and rezoned to a classification different from that

of the surrounding area for the benefit of owners of such property and to the detriment of other owners Id at 221

- 10 Spot zoning is also characterized as the “upzoning” of an individual tract or relatively small parcel of land at the owner’s request to allow a higher density or more intensive use or development 3 RATHKOPF’S THE LAW OF ZONING AND PLANNING §41.2 (4th ed) Singling out one lot or small area for treatment less onerous than that imposed upon nearby, indistinguishable properties qualifies as spot zoning W.R. Grace Co v Cambridge City Council, 56 Mass App Ct 59, 570, 779 N.E.2d 141, 151 (2002) Spot zoning is also defined as an instance where one lot or small area is singled out for different treatment from that accorded to similar surrounding land indistinguishable from it in character for the economic benefit of the owner of that lot Putney v Township of Abington, 176 Pa Super 463, 476, 108 A.2d 134, 140 (1954)
- 11 Plaintiffs argue that the rezoning of the rear portion of 404 King Street to 3X qualifies as spot zoning under the legal definition of the term in Knowles because the rezoning applied to only a portion of one parcel Plaintiffs emphasize that no other parcel was changed and that the small area rezoned was a “spot ”
- 12 I find that the rezoning at issue did apply to a “spot,” that “spot” being a portion of the single parcel of 404 King Street
- 13 Plaintiffs further argue that rezoning the “spot” to expand the 3X classification is rezoning in a manner inconsistent with the surrounding area and the Charleston peninsula as a whole Parcels adjacent to 404 King Street are all split zoned and remain split zoned despite the different treatment of 404 King Street It is



undisputed that 3X zoning was, and is, a disfavored zoning classification that is in the process of being actively phased out. The City's comprehensive plan called for elimination of 3X zoning, and the rezoning of 404 King Street is the one and only instance in which the 3X zoning district has been expanded since the City's adoption of the Comprehensive Plan.

14 Defendants argue that three parcels along the west side of King Street are zoned entirely 3X. These parcels are the Francis Marion Hotel, St. Matthews Lutheran Church, and the parking garage in between.

15 I find that City Council engaged in spot zoning by rezoning only a portion of one parcel of land to expand the 3X district, a zoning classification that is disfavored by the City and which has been in the process of being phased out in the downtown area.

16 I find that expanding the 3X district is inconsistent with the zoning scheme of surrounding parcels. While there are three parcels on the west side of King Street zoned entirely 3X, it is clear from the zoning maps admitted into evidence that this is atypical for the immediate vicinity. Furthermore, none of these parcels are available to new development.

17 Plaintiffs argue that the rezoning of 404 King Street to expand 3X was done for the benefit of the owner of the property, Library Associates. The extra height allowed by the rezoning allows an increased number of rooms to be added to the proposed hotel, which will in turn increase revenues.

18 I find that City Council's rezoning of 404 King Street was done for the benefit of the owner, Library Associates. The rezoning allowed a larger hotel, which in turn

increases the revenue potential from the project (Trial Transcript of March 9, 2009, p 213)

19 Plaintiffs argue that the rezoning of 404 King Street to expand 3X will be a detriment to surrounding properties and other owners. The rezoning allows a 105 foot building to be built across the entire parcel, dwarfing nearby historic structures such as the old Citadel building and St. Matthews Lutheran Church. A 105 foot building stretching across the entire parcel could also jeopardize the historic status and designation granted to the City that is the basis for all façade conservation easements.

20 I find that City Council's rezoning of 404 King Street is detrimental to surrounding properties and other owners. The 105 foot building permitted under the rezoning would be nearly twice as large as the historic old Citadel building and could jeopardize the historic status granted to the City.

21 While in Knowles the Court concluded that the zoning at issue was not "spot zoning," the facts of the present case are plainly distinguishable. In Knowles, the subject property had been previously unzoned, therefore, its zoning actually created more restrictions for the use and development of the land. Here, on the other hand, 404 King Street was already zoned, and the rezoning eliminated a critical building dimensional restriction in an effort to benefit the owner.

22 Additionally in Knowles, the subject land was simply being zoned for professional office, a commercial zoning category entirely consistent with the zoning of many surrounding parcels. Here, the 3X district did not apply to any other parcels in the vicinity on the east side of King Street. There is no indication in Knowles, as there is



here, that the zoning classification applied to the subject property was “prehistoric” and being phased out in compliance with the Comprehensive Plan. Future rezonings in the area consistent with, not adverse to, the height standards of the Comprehensive Plan’s goals and objectives should be enacted.

23 Based on the foregoing, I find that the actions of City Council in rezoning a portion of 404 King Street to expand the 3X zoning classification squarely falls within the definition of spot zoning because it was the singling out and rezoning of one small parcel to a classification totally different from that of the surrounding area for the benefit of the owner, Library Associates, and to the detriment of other owners

The Rezoning of 404 King Street was *Illegal Spot Zoning*

24 Spot zoning ordinances are not *per se* invalid, but are ordinarily found to be invalid Knowles, 305 S C at 222

25 In determining whether spot zoning is illegal or invalid, the Court must consider whether the zoning (1) adheres to the City’s comprehensive plan, and (2) promotes the good of the common welfare Id at 223

26 While the municipal body enjoys a presumption of fairness as to their decisions, the presumption of fairness and correctness will fall and a variance will be set aside where there is a clear abuse of discretion Talbot v Myrtle Beach Bd of Adjustment, 222 S C 165, 72 S E 2d 66 (1952)

27 When there is a lack of evidence supporting a municipal body’s zoning decision, the decision is not fairly debatable and the Court must overturn the selective zoning as illegal spot zoning Knowles, 305 S C at 224



- 28 The “piecemeal” zoning process undertaken by the City here is a quasi-judicial process, rather than a legislative process, and judicial review of this piecemeal rezoning must include the determination of whether the fact-finding process has been properly pursued and whether the evidence of record supports the City’s decision Anderson House, LLC v Mayor and City Counsel of Rockville, 402 Md 689, 708, 939 A 2d 116, 127 (2008)
- 29 Plaintiffs argue that the rezoning of 404 King Street to extend the 3X height district across the parcel failed to adhere to the City’s Comprehensive Plan in several respects. Plaintiffs cite specific provisions of the Downtown Plan, adopted as part of the City’s Comprehensive Plan, including the plan’s disfavor of tall buildings that detract from historic sites and the statement in the plan that 3X is an overly permissive height zone which should be phased out. Plaintiffs also point out that the Downtown Plan specifically requires particular attention to be paid to the skyline, including the prominence of church steeples and the old Citadel towers located adjacent to 404 King Street.
- 30 Plaintiffs entered into evidence a diagram from the Downtown Plan showing examples of the current, desired and undesired skyline for Charleston. The current and desired skylines were nearly identical. The undesired skyline was characterized by tall buildings that rose above the church steeples.
- 31 Defendants argue that the propriety of the rezoning is fairly debatable and is consistent with the Comprehensive Plan’s general goal of economic growth.
- 32 Under rules of statutory construction, specific provisions prevail over general provisions. Atlas Food Sys and Serv., Inc v Crane Nat Vendors Div of



Undynamics Corp., 319 S C 556, 558, 462 S E 2d 858, 859 (1995) See also, Mikell v County of Charleston, et al , 386 S C 153, 687 S E 2d 326 (2009) Additionally, provisions should be read in harmony, to give meaning to all terms if possible Foothills Brewing Concern, Inc v City of Greenville, 377 S C 355, 363, 660 S E 2d 264, 268 (2008)

33 Based on this well-founded rule of statutory construction, I find that the Downtown Plan's specifications as to the skyline and height of buildings around Marion Square control

34 I further find that City Council's rezoning of 404 King Street to extend the 3X district and allow a 105 foot building to stretch across the entire parcel does not adhere to the City's Comprehensive Plan The propriety of the rezoning is not even fairly debatable The rezoning is in direct conflict with the Comprehensive Plan's provision that tall buildings should not detract from historic sites, particularly the old Citadel towers and St Matthews Lutheran Church The rezoning is also in direct conflict with the Comprehensive Plan's statement that 3X is an overly permissive height zone which should be phased out Further, the rezoning conflicts with the Comprehensive Plan's diagram illustrating the desired skyline of Charleston The diagram illustrating the desired height and skyline in the Downtown Plan, as well as the specific text governing Marion Square, clearly cannot be reconciled with the extension of the 3X district and the radical increase in height, almost double, that would be allowed by this rezoning

35 As to whether the rezoning promotes the good of the common welfare, Plaintiffs argue that it does not Plaintiffs argue that the rezoning adversely affects the historic



character of the surrounding area and damages the historic skyline of Charleston that so many visitors come to see each year Plaintiffs further argue that a possible change in Charleston's historic status due to taller buildings in the downtown area would adversely impact the City's tourist appeal, thereby negatively impacting the common welfare

36 I agree with Plaintiffs that allowing a building nearly twice the height of many adjacent and nearby historically significant structures would have a negative impact on the common welfare, and I find that the rezoning of 404 King Street to extend the 3X zoning classification does not promote the good of the common welfare

37 I find that the rezoning does not adhere to the City's Comprehensive Plan See Knowles, 305 SC at 222-223, 407 SE 2d at 642 If the city is to preserve its colonial skyline heritage, more stringent height standards as envisioned in the Comprehensive Plan, not less stringent standards as pursued in this single instance, must be pursued The result of continued single instances of lessened height standards will, ultimately and inevitably, result in a loss of the unique and historic skyline of the City of Charleston

38 I find that the rezoning of 404 King Street to extend the 3X zoning classification was not only spot zoning, but illegal spot zoning because it did not adhere to the City's Comprehensive Plan and did not promote the good of the common welfare

39 I find that by engaging in illegal spot zoning, the City clearly abused its discretion, and therefore the presumption of fairness normally applying to a municipal body's decision does not apply in this case

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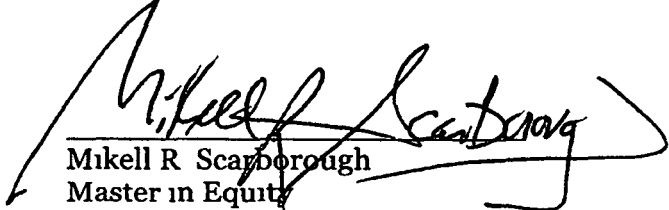
40 I find that there is a lack of evidence supporting the City's zoning decision, and therefore the decision is not fairly debatable

ORDER

41 IT IS THEREFORE ORDERED that City Council's zoning ordinance of August 21, 2007, rezoning a portion of 404 King Street to extend the 3X height district to the entire parcel, was an invalid act of illegal spot zoning

42 IT IS THEREFORE ORDERED that the City of Charleston's August 21, 2007 zoning ordinance extending the 3X district be, and hereby is, declared annulled

AND IT IS SO ORDERED'


Mikell R. Scarborough
Master in Equity

Charleston, South Carolina
8/19, 2010

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
MASTER IN EQUITY COURT

JUDGMENT IN A CIVIL CASE
CASE NO 2007-CP-10-4692

HISTORIC CHARLESTON FOUNDATION
and PRESERVATION SOCIETY OF
CHARLESTON

THE CITY OF CHARLESTON,
THE CITY OF CHARLESTON
CITY COUNCIL and LIBRARY
ASSOCIATES, LLC

PLAINTIFF(s)

DEFENDANT(s)

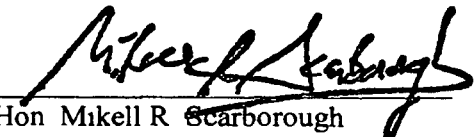
- Jury Verdict This action came before the court for a trial by jury The issues have been tried and the verdict rendered
- Decision by court This action came to trial or hearing before the court The issues have been tried or heard and a decision rendered
- Action Dismissed Rule 12(b) SCRPC Rule 40(j) SCRPC
 Rule 41(a) SCRPC (Voluntary Nonsuit) Settled Other, Explain

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 JULIE J ARMSTRONG
 CLERK OF COURT
 BY

IT IS ORDERED AND ADJUDGED See attached order
 Statement of Judgment by Court

DEFENDANT'S MOTION TO ALTER, AMEND OR RECONSIDER, PURSUANT TO
RULE 59 (e), IS RESPECTFULLY DENIED

Dated at Charleston, South Carolina, this 4th day of NOVEMBER, 2010


 Hon Mikell R Scarborough
 Master In Equity

This judgment was entered on the ____ day of _____, 19____, and a copy mailed first
class this ____ day of _____, 20____, to attorneys of record or to parties (when
appearing pro se) as follows

Attorney(s) for Plaintiff

Attorney(s) for Defendant

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CERTIFICATE OF SERVICE

The undersigned certifies that on the 3rd day of December 2010, a true and correct copy of the Appellants' Notice of Appeal was placed in an envelope with first class postage prepaid and affixed thereto and mailed to the following

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Charleston, South Carolina

December 3, 2010

A handwritten signature in black ink that reads "Theda R. Monteiro". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Theda R. Monteiro, Legal Assistant

Regan and Cantwell, LLC

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December 3, 2010

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Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
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Columbia, South Carolina 29211

tel 843 762 8282
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RE Historic Charleston Foundation, et al v City of Charleston, et al
Case No 2007-CP-10- 4692

Dear Mr Shearouse

Enclosing for filing is a Notice of Appeal in the above case Also enclosed are the following

- 1 Proof of Service of the Notice of Appeal on Respondents,
- 2 A copy of the orders which are to be challenged on appeal, and
- 3 A filing fee of \$100 00

This case challenges the validity of a City of Charleston zoning ordinance It is filed with the Supreme Court pursuant to Rule 203(d) (1) (A), SCACR, because the order of the lower court invalidated the ordinance, thereby implicating its constitutionality Knowles v City of Aiken, 305 S C 219, 224, 407 S E 2d 639, 642 (1991) (Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is "so unreasonable as to impair or destroy citizen's constitutional rights", Hampton v Richland County, 292 S C at 503, 357 S E 2d at 465 (Ct App 1987) [quoting Rush v City of Greenville, 246 S C 268, 276, 143 S E 2d 527, 531 (1965)])

The transcripts of the merits hearing are in possession of counsel A request for the transcript of the Rule 59 (e) hearing transcript has been requested by letter of to the court reporter, a copy of which is also enclosed

e mail fcantwell@birch net
tmonteiro@birch net

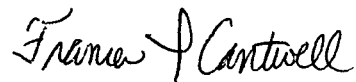
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Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
December 3, 2010
Page 2

Please let me know if you need anything further from me

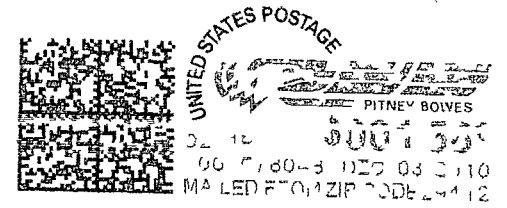
With kind regards, I am,

Yours truly,

A handwritten signature in cursive script that reads "Frances I Cantwell".

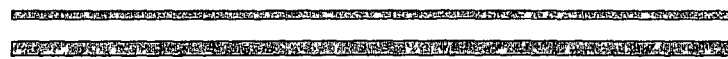
Frances I Cantwell
FIC/trm
Enclosures

cc Hon Julie J Armstrong, Charleston County Clerk of Court (w/encls)
Edward K Pritchard, III, Esq (w/encls)
Samia Hanafi Nettles, Esq (w/encls)
G Trenholm Walker, Esq (w/encls)
Lindsay Smith-Yancey, Esq (w/encls)
Timothy A Domin, Esq (w/encls)



First Class Mail
First Class Mail

REGAN AND CANTWELL, LLC
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TO Hon Daniel E Shearouse
Clerk, South Carolina Supreme Court
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