THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Equity Court

The Honorable S. Jackson Kimball, III, Master-in-Equity

Case No. 2013-CP-46-1986

York County and Cultural and Heritage Commission
of York County, ...Respondents,

v.

Culture and Heritage Foundation, Inc.; Sustainable
Development Group, Inc.; SDG Properties, LLC;
and CHF Property Management, LLC. .....Appellants.

RESPONSE TO MOTION TO DISMISS OF RESPONDENTS

Pursuant to Rule 240(e), SCACR, Appellants hereby submit the within response to motion to dismiss submitted by Respondents (Response).

I. Prior Memorandum on Appealability

Although the November 27, 2013 letter from the Clerk of Court requesting a memorandum on the issue of appealability indicated that the deadlines and time limits for perfecting the appeal would be held in abeyance pending the Court's consideration of the requested memoranda both due within ten (10) days, in an abundance of caution Appellants are submitting this Response to Respondents'

motion to dismiss because the subsequent December 9th letter from the Clerk granted Appellants additional time to furnish a response. Appellants hereby incorporate by reference the entirety of the Memorandum on Issue of Appealability filed on December 7, 2013, received by the Court on December 9, 2013. The Memorandum on Issue of Appealability is responsive to both the November 27th letter and Respondents' motion to dismiss.

II. Respondents have overstated the holding in *Breland*.

In *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000), the Supreme Court said, "Currently, this Court does not allow immediate appellate review of the *denial* of any Rule 12(b), SCRCP motion," and then listed the Rule 12(b)(1), (b)(2) and (c) cases in which immediate appellate review was not allowed. No mention was made of a motion to dismiss pursuant to Rule 12(b)(7), SCRCP, for failure to join indispensable parties. *Id.*, p. 93-94, 529 S.E.2d at 13. Further, *Breland* found the denial of a motion for change of venue (which was not a motion to dismiss) was not immediately appealable because "any error in the order can be corrected on appeal following the trial." *Id.* at 93, 529 S.E.2d at 13. The Court in *Breland* recognized that those "situations where the substantial right could not be vindicated on appeal after the case" are entitled to an immediate appeal. *Id.*

In this case, there could be no vindication of a substantial right on appeal after the case. Appellants will be subjected to the substantial risk of incurring multiple or inconsistent obligations by reason of the failure to join not just indispensable parties

but a *parens patriae* over Appellants.[1] Should the case proceed in the lower court without the necessary and indispensable parties, and such parties are thereafter compelled to join in the action after appeal, Appellants and the newly joined parties will be legally prejudiced by written discovery and especially depositions which cannot practically be re-done or forgotten during re-litigation.[2]

III. Conclusion

For purposes of appealability, South Carolina courts "have previously looked beyond the labels on motions and orders to discern their actual effect." *Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 303 n. 6, 705 S.E.2d 475, 478 (Ct. App. 2011). The "narrow construction of section 14-3-330(2) requires [the Court] to focus on the effect of the order, not the label given to the motion or to the order granting it." *Id.* Respondents focus on the technical names of the orders, whereas Appellants ask the Court to examine the actual effect of these orders. Here, the effect requires Appellants to litigate through to a conclusion in this case, only to have to re-

[1] "The function of the attorney general, as parens patriae of charitable trusts, is to oversee the activities of the trustees to the end that the trust is performed and maintained in accordance with the provisions of the trust document, and to bring any abuse or deviation on the part of the trustees to the attention of the court for correction." *Wilson v. Dallas*, 403 S.C. 411, 456, 743 S.E.2d 746, 771 (2013) (Internal citation omitted). The Attorney General is not merely an indispensable party. It is the party with exclusive supervisory control over Appellants as a charity.

[2] The legal prejudice analysis here is similar to that under Rule 15(a), SCRCP, when deciding whether to allow an amendment to a complaint. No amendment will be permitted if the amendment would inflict legal prejudice on the other party. *See Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997) (Plaintiffs denied the right to third amended complaint.); *Parker v. Spartanburg Sanitary Sewer District*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005) ("The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it."); *Delacey v. Medical University of South Carolina, Inc.*, 2007 WL 2025037 (Tr. Ord., Judge Perry M. Buckner) (S.C. Com. Pl. Feb. 13, 2007) (proper to deny amendment on grounds of prejudice if discovery would have to be retaken) *citing Ball v. Canadian American Exp. Co., Inc.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994), cert. denied (Dec. 8, 1994). Appellants should not have to re-litigate with Respondents and newly-added parties the same facts after discovery and a trial on the merits.

litigate the same case a second time once the necessary, indispensable parties are named in the proceeding. This is a highly prejudicial result that can be avoided by allowing the appeal to proceed.

WHEREFORE, Appellants respectfully request that the motion to dismiss be denied and the appeal be allowed to proceed.

Date: 12/12/13

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondents with a copy of the *Response to Motion to Dismiss of Respondents* by mailing a copy of the same via First Class, U.S. Mail, postage-paid on the date set forth below.

Brian A. Autry
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P.O. Drawer 2426
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Date: 12/12/13

Respectfully submitted,

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December 12, 2013

Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, S.C. 29201

Re: York County and Cultural and Heritage Commission of York County v. Culture and Heritage Foundation, Inc., *et al*
C.A. No.: 13-CP-46-1986

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Response to Motion to Dismiss of Respondents and a Certificate of Service in the above referenced matter. Please file the original and six copies with the records of your office and return a clocked copy to me in the enclosed envelope.

By copy of this letter, I am serving a copy of the Response to Motion to Dismiss of Respondents on counsel of record.

With kindest regards, I remain

Respectfully,

DRISCOLL SHEEDY, P.A.

James W. Sheedy

cc: William Easley
Jane Peeples
Brian Autry, Esq.

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