

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2013-CP-400-1643

Appellate Case No. 2014-000583

Samuel T. Brick

Appellant

v.

Richland County Planning Commission

Respondent

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err by not applying collateral estoppel regarding Intervener/ Appellee Fairways Development LLC's argument that it should have been joined as a necessary party in the instant case when it successfully argued in a separate matter involving the same parties in the same circuit court regarding a declaratory judgment involving ownership of the same property and development that it was not a necessary party?
2. Did the circuit court, while acting as an appellate body and in response to a motion for reconsideration, err by its interpretation and application of the terms of a local government ordinance as they applied to a determination of indispensability regarding the joinder of an intervening party?
3. Did the circuit court, while acting in a similar manner as stated above, err by dismissing the case based on a lack of timely joinder of a litigating intervener when the statutory filing requirements were met and the intervener was subject to its jurisdiction?

STATEMENT OF THE CASE

Project Application and its Applicant: On November 7, 2012, John Champoux, a registered architect, on behalf of Sustainable Design Consultants, submitted a Subdivision Review Application accompanied by a proposed sketch/concept plan for approval regarding a 100.7 acre area in Richland County to Tracy Hegler, the county planning director. (Des. Matter #5, App. 1, P. 1 and Des. Matter # 24, the sketch plan). The submission included a letter from, Fairways Development LLC, the land owner, to Ms. Hegler stating that "Fairways Development Group is pleased to submit the required

submittals for consideration of the above LID residential project being developed under the Richland County Green Code.” (Des. Matter # 5, App. 1, p. 2). The Green Code is Section 26-186 of the Richland County Code (Green Code) (Des. Matter #20)¹. The Richland County Subdivision Review Application states the Property Owner as “Fairways Development Group (John Bakhaus)”. (Des. Matter #5, App. 1, p. 3). The Applicant is designated Fairways Development Group (John Bakhaus). The form is signed by the corporate property owner. The project application includes a checklist form (Id., p. 4) required by the county of all subdivision projects. The checklist that forwards the sketch plan and other documents lists Fairways Development Group (John Bakhaus) as the developer and Fairways Development LLC as the property owner and the Green Code property-owner applicant. The application fee was marked not applicable. The sketch/concept plan (Des. Item # 24) contains a statement on the title page that it is prepared by Sustainable Design Consultants, Inc. for its client Longcreek Associates, LLC (the name of the project is “Villages at LongCreek”). The sketch/concept plan includes the initialed stamp of John Champoux as a registered South Carolina architect, the same individual who transmitted the package for its approval. The sketch plan makes no reference to the property owner other than on property designated as existing golf course that reads “now or formerly Fairways Development LLC.” (Id. pp. SP-01-SP-02). The golf course is not included in the 100.7 acres of the proposed development although the development surrounds the course. It names on each page

¹ The Green Code as Section 26-186 was repealed by an amendment to read provision known as open space on September 10, 2013. The County Council designation of this action is “045-13HR.” The Green Code in effect before that date is found in the record at (Des. Matter Item # 20). As of the preparation of this initial brief the new provision has not been included in the codified version of the Richland County Code.

following the title page various surveying, soils, and wetlands consultants and each page refers to “Longcreek Assocs., LLC” as the client. (Id.). Subsections (e) and (f) of the Green Code (Des. Matter # 20, relate to an owner or developer submitting an Existing Features Site Analysis Plan, known as the sketch plan, and a developer submitting a concept plan (Des. Matter # 20, p. 1, and p. 3). The application for plan approval combines the site and concept plans and the county development permit accepted and treated it that way (Des. Matter Item # 5, App A-4).

Development Review Team Action: Notice of the Richland County Development Review Team (DRT) action on the project was that it would meet on November 29, 2012; that zoning for the project was RS-LD (Residential Single Family, Low Density District) (Section 26-89 of the Richland County Code) (Des. Matter # 21); and that the Applicant was Fairways Development Group, c/o John Bakhaus. (Des. Matter # 5, App. A-2). The DRT met on the advertised date, November 29, 2012, and on December 7, 2012, the county Land Development Administrator issued a land development permit to John D. Champoux stating the Sketch/Concept Plan entitled “The Villages at LongCreek”, dated November 12, 2012, is approved (Des. Matter #5, App. A-4).

Appeal to the Planning Commission: On December 20, 2012, Appellant, as an interested party, appealed the December 7, 2012, DRT permit approval to the Richland County Planning Commission under Section 26-54(c)(3)d.3 of the Richland County Code (Des. Matter #23), the authority for the Planning Commission to hear his appeal (Des. Matter # 5, App. B-1). Appellant alleged the DRT improperly interpreted and applied various provisions of the Green Code in approving the permit and requested as relief that the project be rejected as improperly submitted, but if considered submitted properly,

then that it be returned to the DRT for enforcement of the applicable zoning standards for the Green Code development (Id., p. 9).

Planning Commission Action on the Appeal: On February 4, 2013, the Planning Commission met as a tribunal to consider the appeal. Commission Member Kathleen McDaniel recused herself from partaking in the appeal with a letter introduced as part of the hearing minutes stating that her law firm represented the seller of the subject property which could be a potential conflict of interest. (Des. Matter # 5, App. B-3, pp 16-17) The Appellant; the Planning Director, Tracy Hegler; and Mr. Ron Johnson spoke at the hearing. Mr. Johnson spoke as the project developer. He said he had worked with staff and residents of the area about what it is to operate and develop under the Green Code. He said staff knows that his group engaged outside services to have a tree study done, that they had wetlands surveyed and delineated, and that the areas that his group was proposing would be developed with the least damaging impact on the land (Des. Matter # 5, App. B-6). The Planning Commission voted on February 4, 2013, to deny the appeal.

Planning Commission Order on the Appeal: The Planning Commission Order of March 4, 2013, was signed by the Chair (Id.). Appellant received notice of the Order on March 11, 2013. The Order makes findings of fact that were a close recitation of the testimony of each speaker. Appellant Samuel T. Brick and the Planning Director had conflicting views that the Order did not address other than with conclusions of law. Mr. Johnson's testimony that his group was the developer was not contested or contradicted. The order denied the appeal (Id.).

Appeal of the Order: On March 18, 2013, Appellant filed a notice of appeal and appeal with the Circuit Court for Richland County naming the Richland County Planning Commission as sole Appellee (Des. Matter # 5). Appellant served the Acting Clerk and filed his return of service with the Clerk of Court on March 20, 2013. Appellant's appeal to the circuit court alleges that the planning commission erred in its action on Appellant's appeal to that body (A) by failing to enforce zoning standards of Article V of the Richland County Land Development Code (§§ 26-81, et. seq.); (B) by incorrectly interpreting the Green Code by authorizing a new zoning district in which no lot density is applied, no minimum lot widths are enforced, and conservation set asides are rewarded with incorrect bonuses; (C) by not enforcing a correct initial application for the use of the Green Code and by ignoring the appeal to it regarding a 50% pervious surface requirement as a prerequisite for the Green Code relaxed standards and; (D) by failing to provide fair notice of its hearing and procedures; by failing to make specific findings and determinations with regard to the appeal before it; by failing to provide a fair hearing; and by failing to consider Appellant's Memorandum of Law, Statutory Construction, in its decision (Id., pp. 3-4). Appellant requested as relief, among other things, that the Order on Administrative Review should be reversed and returned to the Planning Commission for an Order returning the proposed project, the Villages at Longcreek, to the Development Review Team for its application of the Green Code utilizing correct requirements and standards (Id., pp. 18-19).

Respondent's Actions and Motion to Dismiss: Respondent Richland County Planning Commission filed the Record on Appeal on June 5, 2013 (Des. Matter # 18).

On the same date it filed a Return on the Appeal and concurrently moved to dismiss the case for Appellant's lack of standing. (Des. Matter # 6).

Fairways Development LLC Actions: On June 17, 2013, Intervener/Appellee Fairways Development LLC, filed motions to intervene in the matter (Des. Matter # 9), to require Appellant to post a bond or in the alternative that the case be expedited, and to dismiss the appeal (Des. Matter # 13) . Appellant did not oppose the Motion to Intervene and the Court granted that motion at its hearing on the matter. In an Order published on December 17, 2013 (Des. Matter #3), the Court reiterated its August 30, 2013, grant of the motion to intervene (Des. Matter # 17, pp. 38-40). Also on that date, Intervener/Appellee withdrew its motion to require a bond and for an expedited hearing (Des Matter # 17, p. 7).

Intervener/Appellee's June 17, 2013, Motion to Dismiss alleged Appellant failed to join Fairways Development LLC as the development permittee, in a timely manner (Des. Matter # 13, p. 2). It also opined Appellant lacked standing because he did not have substantial interest in the matter (Id., p. 3).

Appellant's Motion to Amend and Notice of Defective File: On June 27, 2013, Appellant filed a Motion to Amend his Appeal and Notice of Defective File (Des. Matter # 12). Appellant stated the proposed amendment, among other things, would add the owner of the property as a respondent to the appeal (Id., p. 1). He opined that the owner is not indispensable to the appeal because it is not the applicant for the project and does not propose or intend to develop it (Id., pp 1-2). Appellant pointed out that the property owner sought to intervene as a respondent in the matter and that he does not object.

Appellant stated that the relief requested in the appeal is almost identical to the relief requested in another matter that was pending at the time before the Richland County Circuit Court alleging various violations by Richland County of the South Carolina Freedom of Information Act (FOIA)² and seeking declaratory relief to return the development project to the DRT for further action (Id., p.3). Appellant's Notice of Defective File stated that Appellant was working with Respondent's attorney to clarify what was presented to the Planning Commission before its action on appeal because the Record on Appeal, as presented, among other things did not include Appellant's December 20, 2012, appeal. Appellant also mentioned other matters in the Record on Appeal were incorrect for consideration by the Planning Commission yet were part of its record for the appeal (Id., pp. 4-5).

Appellant's Memoranda of Law on Motions to Dismiss: On July 31, 2013, Appellant filed a Memorandum of Law responding to Respondent's Motion to Dismiss. In that Memorandum Appellant addressed his standing and his status as an adjacent and contiguous landowner (Des. Matter # 7).

Also on July 31, 2013, Appellant filed a Memorandum of Law in response to Intervener/Appellee's Motion to Dismiss (Des. Matter # 14). He addressed the manner of the application for a development permit to Richland County and opined that Fairways Development Group was a different entity than Fairways Development LLC (Id., p.1). He alleged the permittee of the project is John D. Champoux and Mr. Champoux has no known connection to Fairways Development LLC (Id., p.2). He referred to the statement of Mr. Ron Johnson as incorporated in the planning commission findings and as to Mr.

² §§30-4-10, et seq., S.C. Leg. Web, S.C. Code of Laws, (2013).

Johnson's participation in the preparation of the application and his contacts with staff (Id., p.3). He alleged that Fairways Development LLC did not participate in community meetings and that during the meetings, Mr. Johnson clarified that the project was not being developed by the land owner, Fairways Development LLC (Id.). He alleged that the land owner has developed in the area for years following traditional zoning procedures and opined that there is nothing stopping it from continuing to do so (Id., pp. 3-4). He alleged the Villages project does not apply traditional zoning rules. Appellant referred to Spanish Wells Property Owners Ass'n v. Board of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 367 S.E. 2d 160 (1988) and that case stating a permittee is a necessary party to an appeal. He opined Spanish Wells only mentions a property owner as a permittee one time while referring to a Washington state zoning case (Id., pp. 4-5). Appellant contended that Fairways Development LLC is not knowledgeable of the project because it failed to understand the project includes substantial development well beyond the depictions it exhibits in its Motion to Dismiss. Appellant alleged the project boundary is on the shore of a lake directly across and a distance of 175 yards from Appellant's property. He pointed out the proposed village across from his property would have 130 dwelling units, some of which appear on the sketch plan as attached units (Des. Matter # 24, pp. SP-01-SP-03), and that such units are not authorized under the applicable residential single-family low density zoning district (Section 26-89 of the Richland County Land Development Code) (Des. Matter # 21). Appellant reiterated that he attempted to join Fairways Development LLC in a case seeking similar relief only to be faced with sanctions and a successful Motion to Dismiss. Appellant alleged during the pendency of the FOIA case and within the 30 day period for filing the Notice of Appeal

to the Circuit Court in the instant case, he provided the attorney for Fairways Development LLC, the attorney for Intervener/Appellee in this matter, a copy of the Notice of Appeal and Appeal. Appellant alleged that Fairways Development LLC has not experienced any prejudice as a consequence of not being joined as a party and that his motions are the first actions on the matter (Id., pp. 5-6). Appellant stated his willingness to join any necessary party and cited 3A James W. Moore et al., *Moore's Federal Practice* ¶ 19.05[2] (2d ed. 1991) as stating that the concept of indispensability involves a court making an equitable adjudication (Id., p.6). Appellant also opined that his motion to amend under Rule 15(c), SCRPC, would meet relation back requirements if the claim arose out of the conduct set forth or attempted to be set forth in the original proceeding. It further states an amendment changing a party relates back to be within the period provided by law for commencing the action provided the party to be brought in by amendment received such notice of the institution of the action so that he would not be prejudiced in maintaining his defense on the merits, and such party knew or should have known that, but for a mistake concerning the identity of the proper party, it would have been brought against him (Id., pp. 6-8).

Supplemental Record on Appeal: On August 19, 2013, Respondent filed a Supplemental Record of Appeal (Des. Matter # 19).

Appellant's Affidavits: On August 21, 2013, Appellant filed an affidavit and response to Appellee's Motion to Dismiss (Des. Matter # 8). Appellant stated there was no objection made by the Richland County Planning Department or Planning Commission to his authority to make an appeal. Aside from matters related to standing, the Appellant/Affiant contended that with Appellee's August supplemental appeal file

and no removal of the initial matter filed with the court in June, the matter provided the planning commission for its action on Appellant's appeal still was improper. Appellant noted that the file certified as being provided the planning commission now contained two DRT actions and two differing appeals (Id., pp. 4-5).

Also on August 21, 2013, Appellant filed his affidavit in response to Fairways Development LLC's Motion to Dismiss (Des. Matter # 15). Appellant, as an affiant, identified the permittee John D. Champoux as a registered landscape architect in the employee of Sustainable Design Consultants that prepared the sketch plan on behalf of Longcreek Associates, LLC (Id., p. 2). Affiant said he conducted a search of the South Carolina corporate records and that such records contain no corporate entities such as Fairways Development Group or Fairways Development Group (John Bakhaus) (Id., p. 2). Appellant swears that during the community meetings, to which Mr. Johnson referred in testimony before the planning commission appeal, Mr. Steve McNair acting as developer of the project responded to a question as to ownership that he and Mr. Johnson were not the owners of the property but were its developers (Id. p.3). Appellant swears that Fairways Development LLC and Mr. Bakhaus did not participate in those meetings (Id., p.3).

Appellant's affidavit further refers to his attempted joinder of Fairways Development LLC as a respondent in a FOIA matter that Appellant was prosecuting at the same time as he instituted this action (Id. p.5). Appellant stated the requested relief was the same as the instant case but as a declaratory relief matter under FOIA. In Appellant's affidavit (Des. Matter # 11, p.3) regarding Fairways Development LLC's Motion to Intervene, Appellant further stated that Fairways objected to its joinder and

exhibited a lack of interest in whether the case might involve a declaratory judgment affecting Fairways Development LLC's property interests (Id. p. 3).

The remainder of the affidavit contains statements Appellant made in his Memorandum of Law mentioned above, but in affidavit form.

August Hearing on the Motions: The Transcript reflects five motions were addressed-- motions to dismiss by Appellee and the Intervener, the Intervener's motions to intervene and to require a bond, and Appellant's motion to amend. The motions are related above with the exception that the motion to require a bond was withdrawn for lack of evidence to support the amount of a bond (Des. Matter # 17, p. 7) and the motion to amend is not part of this appeal. The transcript relating to motions to dismiss for lack of standing and to amend are not included as part of the record. The transcript otherwise relates to the motions to intervene and to dismiss for lack of jurisdiction. (Id. pp. 31-46 and p. 51). Appellant, pro se, stated he had no objection to Fairways Development LLC's intervention in the matter but contested it was as a necessary party. He pointed out that the same issue was addressed in a FOIA case where he had joined Fairways Development LLC as a respondent because he thought as a property owner it might have been affected by requested FOIA declaratory relief. He stated that you must include a party in interest under the Declaratory Judgment Act and he joined Fairways Development LLC because of that but it moved to dismiss and sought sanctions for him doing it (Id. pp. 35-36). Appellant stated he did not mind it intervening but it should not be joined as a necessary party. Fairways Development LLC made no response other than contending they were the permittee for the project and, as such, "it makes all sense in the world that we be allowed to intervene." (Id. p. 38) The court then granted the intervention

under Rule 24 (a)(2), SCRCP (Id.). Intervener said it was the development permittee but provided no proof to that effect (Id., p. 40). Intervener then stated that under the Spanish Wells case it was a necessary party. It stated that since it was not joined within 30 days was what the Spanish Wells case was all about (Id., p. 41). Intervener then contended Appellant did not have substantial interest in the project. Appellant responded that Fairways Development LLC was not the permittee stating it did not file the sketch plan and it did not expend any funds for development. He referred the court to the sketch plan that was prepared for Longcreek Associates (Id. p. 46). The court then cut the discussion short and moved on to the motion to amend stating that it would look over the responses. The court finally stated that it would review the documents regarding the case and take the case under advisement (Id. p. 51).

Orders Granting Motions to Dismiss: On December 17, 2013, the circuit court granted Appellee's Motion to Dismiss (Des. Matter # 2). It stated as an issue Fairways Development LLC's allegation that Appellant lacked standing to appeal the decision of the planning commission. The court stated § 6-29-1150(D)(1) (S.C. Leg. Web, S.C. Code of Laws, 2013) does not limit standing to appeal to a property owner. It cited § 6-29-1150 (D)(2) and § 6-29-1155(A) (S.C. Leg. Web, S.C. Code of Laws, 2013) as sections providing standing to appeal to property owners and individuals with a substantial interest in a decision of a planning commission. The court deferred to the planning commission's decision to accept standing on that issue and rejected that ground for dismissal (Id., pp 2-3). The court noted that although Respondent did not address Appellant's failure to join Fairways Development LLC, the matter was raised in a "companion" motion to dismiss made by Fairways Development LLC. It said, "For

reasons set forth in that order, this Court has dismissed the Appellant's appeal." (Id., p.3)
The Court then granted Respondent's Motion to Dismiss.

On December 17, 2013, the circuit court granted the Intervener/Appellee's Motion to Dismiss (Des. Matter # 1). It stated two issues were involved, an issue of standing that the Court reiterated, as noted in the statement above as to its action of Appellee's Motion to Dismiss, and stated the planning commission's actions waived any arguments refuting the Appellant's interest in the matter (Id., pp. 2-3).

The Court, in addressing Appellant's "Failure to Join Fairways in the Appeal," cites Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. Of Adjustment of Town of Hilton Head Island, 295 S.C. 67, 367 S.E.2d 160 (1988) that a development permittee is a necessary party to an appeal of its permit (Id. p 3). It then cites as authority for its decision Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008) while stating it was vacated by Friends of McLeod, Inc. v. City of Charleston, 384 S.C. 438, 682 S.E.2d 488 (2009) (Id.). It says failure to file and serve notice on a necessary party within the statutory period to appeal was fatal to an appeal from a zoning board decision (Id.). The Court, in its order of dismissal, stated the Court of Appeals Friends decision was vacated due to an agreement mooting the case (Id.). The Court found that although documents were submitted in the name of Fairways Development Group (John Bakhaus), because two documents were signed by Fairways Development LLC, it is the development permittee in the matter (Id., p. 4). The Court found that Appellant timely filed his appeal and sent a copy of the appeal to Fairways Development LLC within the thirty days of his receipt of the planning commission order (Id.). The Court, citing the Court of Appeals Friends decision, stated that

notwithstanding a consent order joining a necessary party to the appeal, the failure to do it on time was fatal (Id). It then granted the motion to dismiss.

Motion for Reconsideration The presiding judge's law clerk forwarded electronic copies of the Orders dismissing the appeal at 3:27 P.M. on December 17, 2013 (Des. Matter # 25). Appellant received the notice on December 18, 2013. On December 27, 2013, Appellant filed a Motion for Reconsideration and forwarded copies to the judge and counsel for Respondent and Intervener/Appellee (Des. Matter # 16).

Appellant's motion was filed under sworn affidavit format (Id. p. 12). The record contains no contest or contradiction to any of Appellant's sworn statements. The motion was for reconsideration of the circuit court's order dismissing the appeal. Appellant stated that his requested relief for the appeal to the circuit court was to reject or return the submitted concept/sketch plan to the DRT to enforce the Green Code requirements for the project and its zoning standards (Id., p. 2). He stated the order made factual findings and conclusions of law and that the factual findings included an uncontroverted statement by Ronald Johnson that his group was developing the project and that he had held open forum meetings and engaged tree and wetlands surveys (Id., p. 3). Appellant reiterated the sworn statement that he attended a meeting in which, in response to his question as to whether the persons holding the meeting, who said they were the developers, were the owners of the property, they answered they were not (Id., p. 3). Appellant pointed out that Sustainable Design Consultants designed the sketch plan for Longcreek Associates, LLC, for whom Mr. Johnson is the registered agent. He also pointed out that Mr. John Champoux is the registered architect that certified the submitted sketch plan and refers to

Sheet # SP-02 that states the names of the client and the consultant company that prepared the sketch plan for it (Id., p. 3) which are not the Intervener/Appellee.

Appellant cited Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) as providing authority for written documents and records of proceedings being used as formats for final decisions in contested administrative proceedings (Id., p. 4). Appellant reserves his right, should this appeal be granted, to argue whether the planning commission record was properly adopted and whether it is sufficiently clear for a reviewing body to examine its decisions on other appeal issues. Appellant limits this notation to Mr. Johnson's uncontroverted statement that the group to which he was a part is the development permittee. Appellant further stated that the DRT in approving the concept/sketch plan, the matter that forms the basis for the appeal, treated Fairways Development Group as the development permittee. Appellant pointed out that Subsection 26-186 (c) of the Richland County Land Development Code requires an owner to make the Green Code application while Subsections 26-186 (e) and (f) of such Code respectively require a developer or owner to prepare and submit a development site plan sealed by a registered architect and, concurrently, a developer to submit a Concept Plan (Id., p. 5). Appellant also noted that the public record of the proceedings of the planning commission action on the appeal includes as part of the record a member's recusal statement that the owner is in the process of selling its property (Id., p. 4) (See also Des. Matter # 5, App. B-3).

Appellant pointed out that the planning department is in the best position to determine the developer and that the DRT issued a permit not to the owner, Fairways Development LLC, who submitted the green code application but to the developer by

permitting its landscape architect who certified the site plan for Sustainable Design Consultants, Longcreek Associates LLC contractor for the sketch/concept plan (Id., p. 6-7). A copy of the permit was provided the Fairways Development Group, the same entity the owner in its project application identified as the developing party. Appellant argued that the DRT's action, to include its determination of the permittee, is a regulatory function required under § 6-29-1150 (B) (S.C. Leg. Web, S.C. Code of Laws, 2013) and pursuant to that provision is a public record (Id., p.6). Appellant stated there is no public record of Intervener/Appellee being the developer (Id., p.6). Appellant further stated he filed a FOIA request for a copy of the Development Review Team action taken on the project and was provided John Champoux's permit approval. Appellant cited State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008) and Savannah Riverkeeper v. S.C. Department of Health and Environmental Control, 400 S.C. 196, 205, 733 S.E.2d 903, 908 (2012) stating that, as a general rule, agencies charged with applying ordinances should be provided deference as to the application of those laws (Id., p.7). Appellant opined that a reviewing court should defer to the agency decision especially when a factual finding is supported by substantial evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.

Appellant's motion argued that Spanish Wells Property Owners Association v. Board of Adjustment of the Town of Hilton Head, 295 S.C. 67, 367 S.E.2d 160 (1988) involved a property development matter and after a property owners association objected and appealed, the local board of adjustment denied the appeal, and the appellants then appealed to the circuit court. He pointed out that the Supreme Court limited its action in Spanish Wells to developers and did not rule that the failure to join such as a necessary

party within a specified period is fatal to the appeal. He pointed out that the circuit court in that case allowed the appellant fifteen (15) days to join the developer and that the Supreme Court affirmed that order. Appellant stated that since Fairways Development LLC was joined as an intervener that matter is moot (Id., p.8).

Appellant noted that the Court in dismissing his appeal relies on Friends of McLeod v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008) while stating that since Fairways Development LLC executed the application, it is the developer. Appellant stated that the Supreme Court granted certiorari to examine the Court of Appeals decision in the Friends case and that the Supreme Court order dismissing the appeal was based on an agreement by the parties. It then denied a motion to substitute parties after which it states, “Finally, we vacate the Court of Appeals opinion in Friends of McLeod v. City of Charleston, 376 S.C.610, 658 S.E.2d 544 (Ct. App.2008).” Friends of McLeod v. City of Charleston, 384 S.C. 438, 682 S.E.2d 488 (2009). Appellant further differentiated Friends from the instant matter because Friends involves a zoning issue while the instant matter involves land development (Id., p.9). He argued that zoning relates to elected officials enacting ordinances while land development projects may be modified, revised, resubmitted, etc. Appellant pointed out this flexibility with the first application of the Villages at Longcreek project being returned and revised with new application fees waived (Id., pp. 9-10). Furthermore, Appellant noted that in a zoning issue the owner of property is a matter or record and has different interests than a developer in a land planning matter. Appellant stated that under the applicable Green Code, owners and developers have differing roles.

The Appellant also noted that dismissing the case is akin to granting a Motion for Summary Judgment and that not until well after he filed his appeal was it brought to his attention that the file provided the planning commission for its action on the matter contained matters of which he had no notice (Id., p.10). Appellant stated he had alleged other violations of South Carolina Constitutional provisions by improper administration of the hearing. He specified that S.C. Const. Art. I, 22 provides no person shall be subject to the same person for both prosecution and adjudication of his case and the Constitutional necessity for due notice and a fair hearing (Id., pp 10-11). Appellant cited Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997) regarding an attorney acting as counsel for both the adjudicators and the appellee in the same matter (Id., pp. 10-11).

Appellant finally states that the circuit court's hearing was truncated due to a heavy docket that involved five motions on this appeal following an appeal of another action and followed by several other appeals (Id., p.11)(See also Des. Matter # 17, pp. 4-5, 7, 31, 46, 50). Appellant states the court cut off the hearing with a statement that the motion to dismiss would be decided on submitted papers (Id., p. 11, Des Matter # 17, p. 51). Appellant states that his inability to argue the true nature of Green Code development, with its varied submittals by differing parties in the project and the actions of the administrative agencies makes the drastic step of dismissal not only unfair but a violation of S.C. Const. Art. I, 22 that provides South Carolina citizens an opportunity to be heard before being bound by an administrative agency decision affecting private rights (Id., p.11).

Circuit Court Action on the Motion for Reconsideration: On February 5, 2014, the court published a Rule 4 disposition of the case with the Clerk of Court. (Des. Matter # 4). The Rule 4 statement of Judgment by the Court is as follows:

“The Appellant’s motion to alter or amend the Court’s previous order under Rule 59 (e), SCRCF is denied with oral argument. The Court’s previous order ordering dismissal of the appeal still stands.” Order information in the Form 4 is that “this order ends the case.” (Des. Matter # 4). There was no hearing on the Motion for Reconsideration. Appellant received a copy of the Form 4 disposition on February 20, 2014, in the mail.

The record of the action contains no indication of notice that the Court conducted a hearing or heard oral argument on the Motion for Reconsideration (Des. Matter # 26).

Appellant’s Notice of Appeal: On March 11, 2014, Appellant served a Notice of Appeal in the instant action on William H. Davidson and Michael B. Wren of Davidson and Lindemann, P.A. and on Tobias G. Ward, Jr. counsel for the Appellee and the Intervener/Appellee, respectively. Proof of such service was filed with this Honorable Court on March 19, 2014.

ARGUMENTS

1. ***Overview.*** This appeal involves land development administration and an appeal. It relates to a local agency issuing a development permit (Des. Matter # 5 App. A-4), an appeal to the local planning commission based on alleged errors of interpretation as to the manner the development evades zoning standards (Id., App. B-1), the planning commission’s denial of the appeal (Id., App. B-6) and the circuit court’s denial of the

appeal to it based on Appellant's not joining the property-owner to the appeal within 30 days (Des Matter # 1). It does not involve a zoning change. The appeal does involve an application of zoning standards and a green code zoning bonus for conservation set asides. A green code project proposing no minimum lot standards and impervious surfaces are the object of Appellant's requests for the circuit court's interpretations of controlling ordinances (Des. Matter # 5, pp. 3-4). The primary issues on this appeal are the identity of the permittee, whether lack of joinder under the circumstances is a jurisdictional defect, and whether the indispensability issue was previously decided. Under the applicable local green code ordinance a property owner must apply for its use, affirm no recent tree cutting, and state there are no disparate covenants of title (Des Item # 20, p. 1). Once application is made, the Green Code has separate application provisions for sketch and concept plan permit approvals (Id., pp. 1 and 3, respectively). The administering agency and the appealed to planning commission both regard an unincorporated "group" of developers not the corporate land-owner as the development permittee. The administrators issued a permit to the representative of that group with a copy to the group (Des. Matter #5, App. B-6). The permit does not mention or copy Intervener/Appellee. The circuit court gave no deference to the permit administrative determination and the planning commission's factual findings regarding the permittee. Instead, it found the property owner and not the permitted group to be the developer. The circuit court based this on the property owner signing the initial Green Code application (Des # 1, pp 3-4). The circuit court did not indicate its standard of review or comment on the variance between the green code requirements for application of its use and application of the sketch/concept plans. A permit for purposes of the land development

as used in Article 7 (§ 6-29-1145, et seq., S.C. Leg. Web, S.C. Code of Laws, (2013)) is specified as not an authorization to build or to place a structure on a tract or parcel of land. Article 7 is part of Title 6, Chapter 29, South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (Enabling Act). The permit in the instant case involves the submission and approval of a preliminary plan (a sketch/ concept plan), as required under Section 6-29-1150 of the Enabling Act. It is not a statutory change by a legislative body to the zoning standards to authorize non conforming zoning use. The standard of review for this appeal is *de novo* because it involves an interpretation of the local governing ordinance in its application to the indispensability of a party. Although the circuit court made a finding of fact, it is based on an erroneous interpretation of the Green Code requirements regarding application for a preliminary sketch/concept plan and an interpretation of the Enabling Act that would broaden its intent in regulating preliminary approval of local planning at the sketch/concept plan stages. The circuit court ignored the public notice required for planning permits by Section 1150(C) of the Enabling Act. It also disenfranchised the Appellant's statutory right to appeal a DRT permit approval. Fairways Development LLC is not named in any public notice of the permit and the county in providing information on the project did not mention or refer to it. This appeal seeks a correct interpretation and application of a local ordinance in a decision regarding indispensability and the application of equitable principles, to include equitable estoppel and the equities involved with South Carolina Court Rules and decisions relating to joinder.

2. ***Collateral Estoppel.*** Appellant was in the process of litigating a South Carolina Freedom of Information Act (FOIA)³ case against Richland County in the same circuit court as this case was brought when this case was instituted. Fairways Development LLC was named as a party respondent. The FOIA suit included allegations of the county violating various provisions of the FOIA in administering the same project as is the object of the instant matter. Appellant requested as relief in that matter a declaratory judgment seeking that the project be returned to the Richland County Development Review Team (DRT), relief the same as the requested relief for the county not properly administering its land development permit process in this matter. The sought after FOIA declaratory relief⁴ was, among other things, the return of the project application to the DRT to reconsider its permit approval. The Uniform Declaratory Judgments Act at § 15-53-80 (S.C. Leg. Web, S.C. Code of Laws, 2013) states, “all parties shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.” Fairways Development LLC moved to dismiss in those proceedings with a request for sanctions stating it was not a proper party defendant/respondent. Appellant cited the requirement for declaratory judgment relief and argued that as the reason for his joinder. The Court granted the motion and dismissed Fairways Development LLC from the FOIA case but denied sanctions. Appellant argued this issue to the circuit court in his affidavit and filings in response to Fairways Development LLC’s Motions to Dismiss and Intervene. (Des. Matter # 15, pp. 5-7, Des. Matter # 14, pp 5-8, and Des. Matter # 11, p. 3). This issue also was brought to the circuit court’s attention during the motions hearings

³ Fifth Judicial Circuit, In the Court of Common Pleas; Case No. 2-12-CP-400-7337, Samuel T. Brick, Plaintiff v. Richland County, et al. FOIA cited above at Footnote 2.

⁴ § 30-4-100 of the FOIA authorizes application for declaratory judgment for violations of its provisions.

specifically with an offer to fully brief the issue (Des. Matter # 17, pp. 35-36). Appellant contends the circuit court erred in not stopping Fairways Development LLC from complaining it is an indispensable party in this matter. The circuit court in limiting argument in the hearing on the appeal stated it would consider the filed papers in making its decision. (Des. Matter # 17, Record, p. 46). The circuit court orders make no finding as to this issue. That the circuit court knew of the issue is evident because it refers to timely notice provided to Fairways Development LLC by notice to its attorney in the FOIA matter (Des. Matter #1, p. 4).

Nelson v. Coker, 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003) discusses the South Carolina law with regard to collateral estoppel and res judicata. Collateral estoppel is appropriate in this matter because the claim in the first instance was for an alleged county error relating to county FOIA procedures regarding the same project as the instant case with the same requested relief as the instant appeal. The parties are the same. Intervener/ Appellee's motion to dismiss in the instant matter is based on Appellant's failure to join it in this case while in the FOIA case when Appellant did join Fairways Development LLC, it requested to be dismissed and for Appellant to be assessed sanctions. In the FOIA case Appellant joined Fairways Development LLC because he considered his failure to do so might affect his rights under the Uniform Declaratory Relief provision, cited above, as to a party who could be affected by the relief. The issue in each case is the same, the indispensability of Fairways Development LLC as a necessary party to a case regarding development of the Villages at Longcreek project. Fairways Development LLC expressed disinterest and sought dismissal with sanctions regarding the declaratory judgment FOIA relief and now requests this matter be

dismissed for Appellant's failure to join it stating it has such an interest. Irrespective of Fairways LLC's lack of financial participation in the development project, the issue in both cases is the same; i.e. the indispensability of Fairways Development LLC as a party to the proceeding and allegations of county errors in both cases. The circuit court in the FOIA matter granted Fairways Development LLC's motion to dismiss to from the proceedings and in doing so determined Fairways was not an indispensable party with regard to the same requested relief as in the instant matter.

3. ***Incorrect determination on indispensability.*** Applicant never objected to Fairways Development LLC developing its property in accordance with relevant zoning standards or to a proper use of the Green Code and its bonus provisions (Des. Matter #5, p. 18, and App. B-1, p. 9). Appellant's objection consistently has been to the developers' proposition that use of the Green Code provides an overriding exemption to any minimum lot area zoning standards. See the sentence starting with "And it specifically states" in middle of second page of the Planning Commission Order on the Appeal (Des. Matter # 5, App. B-6, p. 3). The Green Code has varied requirements for developers and property owners. It authorizes varied bonus provisions in the nature of smaller than otherwise required lot size zoning standards depending on the amount of conservation set asides (Des. Matter # 20, Subsection 26-186(i)) and meeting the green code requirements. The developer in the instant case does not use the bonus provisions but instead, for relief from any minimum required lot sizes, relies on a Green Code requirement (Id., Subsection 26-186 (h)(2)), that says no minimum lot area is required. It interprets that provision to provide relief from otherwise applicable zoning standards and from the

necessity of using the bonus provisions of Subsection 26-186(i) of the Green Code.⁵ The Green Code requires that a property owner “must first submit an application” for Green Code use (Id., Subsection 26-186 (c)). At time of development, the “applicant or developer” must submit an “Existing Features Site Analysis Plan” (Id., Subsection 26-186(e)) and, at the same time under Subsection 26-186 (f) of such Green Code, a “developer” must submit a “Concept Plan,” Subsection 26-186(e) of the Green Code requires a registered engineer or landscape architect to seal the site analysis plan. The DRT treats a site analysis plan as the same thing as the sketch plan referred to in the second sentence of § 6-29-1150(A) of the Enabling Act (Des. Matter #5, App. A-4). The sketch plan was submitted for approval and prepared not by or for Fairways Development LLC, the Intervener/Appellee, but by Sustainable Design Consultants, Inc. for Longcreek Associates, LLC, a South Carolina corporation of Greenville, South Carolina (Des. Matter # 24). The only reference to Fairways Development LLC in the sketch/concept plan is to a golf course, not included in the 100.7 acre project. The reference reads as to an area on the plan, “Now or formerly Fairways Development LLC, TMS#20406-02-01.” (Id., SA-01-SA-03 of the Sketch/Concept Plan). There is no other reference to the Intervener/Appellee in the record of administration of the permit approval for the sketch/concept plan, the object of Appellant’s appeal. Intervener/Appellee is noted in the Sketch Plan application as the Applicant for the Green Code *use* with the form designating Fairways Development Group as the applicant for the sketch plan *project* (Des. Matter # 5, App. A-1, p 4). Such is the manner in which the Richland County

⁵ Appellant contends that the developer did not use the Green Code as intended and that the primary effect of its use is to eliminate lot size zoning standards instead of following the stated purposes of the ordinance and its bonus. He would argue that the developer chose a specific method and did not follow it and the permit should be invalidated for the same reasoning as set forth in Sinkler v. County of Charleston, 387 S.C. 67, 690 S.E.2d 777 (2010) and Mikell v. County of Charleston, 386 S.C. 153, 687 S.E.2d 326 (2009).

Planning Department administered the application (Id., App. A-4, pp. 1-3) with the permittee being the Landscape Architect employed by Sustainable Design Consultants on behalf of Longcreek Associates, LLC of Greenville, South Carolina (Des Matter # 24, title page).

The formal public notice for the DRT's approval of the preliminary development sketch/concept plan stated the applicant of the project is Fairways Development Group (Des. Matter # 5, App. A-2). Section 26-34, of the Richland County Code (Des. Matter # 22) designates the DRT as the designated staff to approve site plans under the provisions of Section 6-29-1150 (A) of the Enabling Act. The Development Review Team (DRT), acting as designated staff, approved the project and granted a permit to the agent of the Fairways Development Group for its sketch and concept plans regarding the Villages at LongCreek project (Id., App. A-4). There is no permit approval as of this date, to Appellant's knowledge, or in the Record of this action to Fairways Development, LLC.

The Richland County Planning Commission, through its Chairman, published an order that contained an uncontroverted statement by Mr. Ronald Johnson (Id., App B-6, p.4). Mr. Johnson identifies himself as a responsible developer. He stated he held open neighborhood meetings and referred to his application as low impact development. He mentions that his group engaged outside services to have a tree study done and wetlands surveyed and delineated. His statement, as adopted as a factual finding by the Planning Commission, is that he is the developer of the project. Such uncontroverted findings are a recognized form of administrative tribunal findings. Vulcan Materials v. Greenville City Board, 342 S.C. 480, 536 S.E.2d 892 (2000). Appellant's affidavits (Des. Matters # 15 , pp. 2-4, and # 16, pp. 3-4) state Mr. Johnson and another individual, Mr. McNair, in

a community forum said they were the developers, not the project property owner. The statement is uncontroverted.

The record of this matter lacks any indication that Fairways Development LLC incurred financial expenses in the preliminary development permit process or otherwise participated in its development. The application fee was waived (Des. Matter # 5, App.-1, p. 1). The November 7, 2012, letter from Fairways Development LLC noting Fairways Development Group as the party submitting the development application (Id., p. 2) does not mention fees. The sketch plan checklist notes the \$500.00 application fee is not applicable (Id., p. 4). The project plans are prepared by Sustainable Design Consultants, Inc. for Longcreek Associates, LLC. (Des. Matter # 26, p. 1).

The circuit court's grant of Appellee's motion to dismiss is based on its granting the Intervener/Appellee's motion to dismiss (Des Matter # 2, p 3). That decision is based on the court's finding that Fairways Development LLC is the development permittee in the matter (Des. Matter # 1, pp. 3-4). The court explains this by stating that since Fairways Development LLC signed the application, it is the developer. The court admits the application was signed in the name of Fairways Development Group. Its order states Appellant attempted to indicate the separate functions of an owner and developer under the Green Code and that Fairways Development LLC did not participate but found that argument unavailing (Id., p. 3). After Appellant sought reconsideration of the dismissal and, in affidavit form, pointed out the varied requirements for developers and owners under the Green Code as well as reiterating the statements by Mr. Johnson that he was the developer of the project (Des. Matters # 15 and # 16, pp.3-6) the court in a Form 4 Order states, "The Appellant's Motion to alter or amend the Court's previous order under Rule

59(e), SCRCF, is denied with oral argument. The Court's previous ordering of dismissal of the appeal still stands." (Des. Matter # 4). There was no notice of oral argument on the motion (Des. Matter # 26) nor did Appellant know of or participate in any such oral argument on his motion for reconsideration. The Form 4 order does not provide clear reasoning that the circuit court considered the varied requirements as pointed out in the motion for reconsideration which makes this Honorable Court's task more difficult to understand the circuit court's reasoning.⁶ Even though Rule 52, SCRCF, while referring to motions presented under Rule 12, SCRCF, to include motions for lack of joinder under Rule 19, SCRCF, Intervener/Appellee's motion to dismiss is not based on Rule 12 but on a timely joinder of a necessary party. It is not a failure to join because Fairways Development LLC is joined as an intervener. The dismissal is based on a failure to join within a specified period. The exception of Rule 41, SCRCF, regarding involuntary dismissal notes a special exception regarding failure to join as it relates to an adjudication on the merits. The Form 4 order in this case makes such a statement thereby rendering the dismissal adjudication without the specified findings of fact and conclusions of law required by Rule 52, SCRCF. The other reason a written order is required in the instant proceeding is that the court is not acting as a trial court but as an appellate body and Rule 52 is directed to court findings by a trial level decision-maker.

⁶ This case is akin to a summary judgment but summary judgment cases rely on sufficiency of facts while this case relies on sufficiency of parties to reach a proper resolution. Bowen v. Lee Process Systems Company, 342 S.C. 232, 536 S.E.2d 86 (2000) states a trial court's order on summary judgment must set forth facts and legal analysis sufficient to permit meaningful appellate review. In a recent decision, the S.C. Supreme Court, while stating that it is better practice and beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment, limited Bowen to the extent that it is relied on to vacate and remand orders granting summary judgment. Woodson v. DLI Properties, LLC, et al., Op. No. 27344 (S.C. Sup. Ct. filed January 8, 2014).

The legal framework of Fairways Development Group, if any, is not found in the record of the permit process. The public record contains no indication as to who might be a proper agent for the group, what binds them together such as by laws or agreements, or the nature of its existence. Longcreek Associates, LLC, the corporation named as client for the sketch/concept plan, may be part of the group. Fairways Development LLC also could be a part of the group although it apparently is selling the property since a member of the Planning Commission recused herself from the tribunal based on her law firm representing the owner of the property, the object of the appeal, in the sale of the property. (Des. Matter # 5, App. B-3 pp. 3-4 (pp. 16-17 of Feb. 4, 2013, minutes)). Furthermore, as noted above in the argument relating to equitable estoppel, Fairways Development LLC sought and was provided dismissal from a similar case requesting declaratory relief that might have affected the development. There is no record that Fairways Development LLC participated in the development concept or its sketch plan.

The papers forwarding the project for approval indicate the varied functions of differing parties (Id., App. A-1). Fairways Development LLC is the Green Code applicant and the Fairways Development Group is the applicant for approval of the sketch/concept plan. The DRT's action was to approve the sketch/concept plan which is the object of Appellant's appeal (Id., pp. 18-19). Appellant's objection consistently has been to the sketch/concept plan that proposes interpretations of two Green Code provisions that would negate otherwise applicable zoning standards (Des. Matter # 5, pp. 3-4, App B-1, pp. 5-8, and App. B-6, pp.1-2). Fairways Development Group proposed that plan and invested in it. The property, as noted above is for sale. Also note the designation on the golf courses on the Sketch/Concept plans of the property owner as "Now or formerly

Fairways Development LLC” with the tax number reference (Des. Matter # 24). It is conjecture as to whom the property is contracted with, if anybody, or what the agreement between Fairways Development Group and Fairways Development LLC is or may be. Spanish Wells v. Board of Adjustment of the Town of Hilton Head Island, 295 S. C. at p. 68 limits its finding to whether a permittee is a necessary party to an action to revoke a development permit. The public record for the project indicates the permittee is an unincorporated group with no known or public footprint that would enable it to sue or be sued. The nature of a developer’s continuing involvement in a Green Code development further is evident with the requirement for its subsequent transfer of control to the new property owners as set forth in Green Code Section 26-186(g)(4)b. f. (Des. Matter # 20, bottom of page 5). The property owner is not a part of this function because the developer has a continuing interest in the project while the property owner is divested of interest when he sells the land.

The circuit court in ordering a dismissal provided no deference to the administrative permitting process or the findings of the planning commission. Zoning appeals, handled under the provisions of Article 5 of the Enabling Act include a specific statutory standard for zoning board findings. Such findings must be treated the same as jury findings. In land development cases, Section 6-19-1150(D)(1) of the Enabling Act provides that an appeal from a decision of the Planning Commission must be taken to the circuit court within thirty days of actual notice of its decision but it does not indicate the manner of review. Such reviews otherwise are performed as an appellate body. Rowe v. City of West Columbia, 334 S.C. 400 at 405, 513 S.E.2d 379 (Ct. App.1999). The South Carolina Administrative Procedures Act and its reviewing standards do not apply

because they apply only to State agencies (Id.). The circuit court acting as an appellate body in its review of the decision of the administrative tribunal made an inherently factual determination regarding the identity of the preliminary development permittee where such identity previously was uncontested and administratively determined. The circuit court's finding was that because Fairways Development LLC signed the Green Code application, it was the permittee. It erred in not seeing that more than one application is involved in processing Green Code projects. The first is by the land owner (26-186(c)) to apply for Green Code use and the second is for the developer (26-186(e) and (f)) to provide a preliminary sketch plan for approval. The concept plan by the developer sets forth the details of the lots, setbacks, etc. (See pages SP-01 Through SP-03 of Des. Matter # 24). The failure of the developer to abide by applicable zoning standards and the county to enforce those standards is the basis of Appellant's appeals. The landowner could submit a sketch plan, as the developer, but in this case the public record and the plan itself do not signify it did. The preponderance of the evidence is that the permittee is an unincorporated group. (Des Matter # 5, App.A-4 and App-B-6). The standard of review by this Honorable Court of Appeals should be *de novo* because it involves an interpretation of the Green Code as to what is intended by designating varied functions between the owner of property who desires to develop property and the actual developer of the property who lives through the entire development process. The Supreme Court in Bursey v. S.C. Dept. of Health, 369 S.C. 176, 631 S.E.2d 899 (2006), examined a mixed determination of fact and law to determine a correct standard of review. The issue in Bursey was a contested factual situation as to what constituted an excavation. In this matter, the determination of applicant, as it applies to the

sketch/concept plan is governed by an ordinance. The property owner signed a letter to the administrator stating a separate group was providing required submittals for development under the Green Code. (Des. Matter # 5, App. A-1, p. 2). The county interpreted its forms to initiate the sketch plan review in a manner consistent with the bifurcated Green Code application process and issued a permit to the landscape architect for the company hired by a separate corporation, Longcreek Associates, LLC that has no public notice posture in the matter (Des. Matter # 5, App. A-4, and App. A-2, pp. 2-3). See the Sketch/Concept Plan title page (Des. Matter # 24) as to the identity of the named permittee, the landscape architect for Sustainable Design Consultants that was hired not by Fairways Development LLC, the property owner, but by Longcreek Associates, LLC, a corporation from Greenville. The circuit court appears to have made her finding based on an erroneous interpretation of the law. The review of that error is a *de facto* standard. The factual interpretation of who is the developer for purposes of the Green Code permit depends more on the function of the permitting body and the public record of the permit than the factual determination by a reviewing court. In Burse (supra) the majority Court in applying a mix of factual and legal issues leaned to a factual determination because the determination of concern was an administrative interpretation of mining that the court felt was more factual based than legal. In the instant case, the administrative determinations treat an unincorporated group as the permittee, not the landowner. The legal interpretation regarding the permittee in the matter, as applied by the administrators, follows the legal structure of the bifurcated Green Code process. The circuit court's standard of review failed to apply or differentiate the procedural variance in applications and made a finding that ignored the ordinance and the public notice repercussions of the

Enabling Act (§ 6-29-1150 (B)). This court can examine the application of the ordinance under a *de novo* review because the result is determined by the circuit court's error in stating that since Fairways Development LLC signed the application and not Fairways Development Group, it was the developer. (Des. Matter # 1, pp. 2-3). The circuit court ignored that the application being appealed referred to the Fairways Development Group's sketch plan, the required submittals for the development with lot sizes, etc.

When the factual issue before an administrative body involves a jurisdictional or equitable issue a preponderance of the evidence standard is often appropriate. The facts in the record clearly show that the Fairways Development Group is the preliminary development permittee for the sketch/concept plan which is and has been the object of Appellant's appeals. See Porter v. Labor Depot, 372 S.C. 560 at 566 and 567, 643 S.E.2d 96, (2007) discussing varied standards of review of a Workers' Compensation decision and review of jurisdictional issues generally (internal citations omitted)). Porter v. Labor Depot , states questions of subject matter jurisdiction are a question of law. As argued below, indispensability of parties is an equitable matter and the review of equity issues would be under the preponderance of the evidence rules. Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (2011). The property owner has no known financial investment in the development of the property other than ownership. No fees were paid and the record shows other parties paying for the permit process but not Fairways Development LLC. (See Des. Matter # 5, App. A-1, p. 1, 2,4, App. B-6, and Des. Matter # 24).

There is no evidence of an agency connection between the developers and the landowner. The record shows that the preliminary development plan was developed by a separate corporation and that the developers, not the land owner, were active in the

community in explaining the development and stated they were not the owners, and that developers engaged services appropriate for a green code development, and have a continuing relationship with the lot owners after the development is completed. The preponderance of the evidence is that an informal group is attempting to develop the property and the owner has done nothing more than attempt to meet the basic requirements under Section 26-186 (c) of the Green Code that an owner must apply for its use. The public records, the DRT notice, a FOIA response, and the permit itself, point to a developer of the project not the owner or agent of the owner as the preliminary development permittee in this matter as required by the Green Code and its Enabling Act.

4. ***Lack of Joinder as Fatal to Appeal.*** The requirement for joinder, as considered in this appeal is based on indispensability of a party. The party is necessary in order for the court to adjudge matters that may affect a permittee's interests. In this appeal, the Intervener/Appellee is a party to the proceeding with its intervention under the court's jurisdiction. It has opportunity to provide opposing views to Appellant's arguments and positions. Spanish Wells Owners Ass'n v. Board of Adjustment of Town of Hilton Head Island, 295 S.C 67, 367 S.E.2d 160 (1988), the leading case on indispensability in South Carolina, in dicta at page 68, states that the circuit court in that case allowed the appellant 15 days to join an indispensable party. The S.C. Supreme Court in that case affirmed the circuit court's order while making no comment about jurisdictional failure. It did say the appellant declined the offer to join the permittee. Spanish Wells (Id. at pages 68 and 69) cites Cathcart v. Snohomish County, 96 Wash. (2d) 201, 634 P. 2d 853 (1981), as leading the majority rule for requiring a development permittee as a necessary party to a land development appeal. It notes the "most vitally interested" party's participation

serves judicial economy and, where the circuit court reverses a permit approval, it insures the permittee will be bound because it is a party to the appeal. Judicial economy, however, is not the purpose of the Enabling Act. An examination of that Act, particularly Article 7 with its 30 day limiting period for appeals, states as a purpose the “harmonious, orderly, and progressive development of land...” (§§ 6-29-1120, et seq. of the Enabling Act). Paragraph 6-29-1145 (C)(2) of such Act states a permit does not mean authority to build or place a structure on a tract or parcel of land. Considering the provision in its entirety and reading it as a whole, Article 7 of the Enabling Act is aimed at the necessity for a governing authority to provide permitting procedures to ensure harmonious land development. See Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005) to consider a statute read in its entirety to interpret its meaning. Such Article 7 provides a specific appeal mechanism for appeals by property owners. (Section 6-29-1150 (C)(2) of the Enabling Act). That varies from the limiting provision for appeals from interested parties and requires pre litigation mediation, not required of interested party appellants (Des. Matter # 7 and # 8, pp. 2-3, in each). To require a joinder for judicial economy may be appropriate but the statutory period within which such joinder must be filed is not driven by the intent or specific language of the Enabling Act thirty day limiting period within which an interested party must appeal from the decision of a planning commission. Whereas, courts may seek judicial economy and require joinder of an indispensable party, the Enabling Act does not require this. Some statutes do, such as the Uniform Declaratory Judgments Act, as noted above regarding collateral estoppel, but the purposes of Article 7 of the Enabling Act do not include joinder for judicial economy as a part of its jurisdictional mandate.

As argued above, the most vitally interested party in this matter is an unincorporated body with no publicly known or evident ability to sue or be sued. Cathcart v. Snohomish County, 96 Wash 2d 201 relies on 3 A. J. Moore, Federal Practice ¶ 19.19, at 19-345 (2d ed. 1979) in its determination that the doctrine of indispensability is not jurisdictional but rather based on equitable circumstances. Cathcart and its progeny are almost exclusively zoning review cases imbued with responsibilities related to ownership. Following Cathcart, Washington State courts applying equitable principles relating to indispensability look to the nature of the matter and the effect of a dismissal. They apply joinder as an equitable matter and do not treat it as jurisdictional. Crosby v. County of Spokane, 137 Wash.2d 296, 971 P.2d 32, 38-39 (1999), one of such cases, describes its Rule 19(b), two step process to a determination of joinder of persons needed for a just adjudication.⁷ The Washington State court notes the examination of equitable principles in such determination first, in deciding whether the party is needed for a just adjudication and, second by examining the effects of not joining the necessary party. In the instant matter, Fairways Development LLC, the complained of party is joined and participating and has demonstrated no damage should Appellant's requested relief be granted. The requested relief, as stated above, is not to change its ability to develop its property under the law. Spanish Wells, as argued above, referred to the failure of the appellant in that case to join the necessary party after being offered to do so by the circuit court. That failure to join forced the indispensability issue. The issue was not a

⁷ Rule 19, SCRCP is similar, "If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.." In the instant case the first two situations are inapplicable because relief may be obtained without the intervener's participation, its interest is the object of the complaint not the subject, and it already is a party.

failure to join within a statutory period. Furthermore, Fairways Development LLC's intervention into this matter is based on Rule 24 (a)(2), SCRCF, that specifically anticipates an intervention to protect the intervener's interest in the proceedings. The successful intervention moots any argument the intervener may have as to not having its rights protected. Furthermore, with the intervener having knowledge of the appeal within thirty days of the order being published and participating in the action before anything has occurred in the case, to include the completion of a certified file from the county, is similar to the equitable relation back procedures for amendments under Rule 15 (c), SCRCF. Appellant attempted to amend his pleadings in this regard but the circuit court denied such amendment. (Des. Matter # 17, pp. 50-51).

A further consideration whether joinder is jurisdictional or not is Section 18-1-100 (S.C. Leg. Web, Code of Laws, 2013) providing that an appellant who omits, "through mistake, to do any other act necessary to perfect the appeal or to stay proceedings the court may permit an amendment on such terms as may be just." Appellant provided notice of the appeal to Intervener/Appellee but did not join the Intervener. Section 18-1-100 applies an equitable resolution to perfect an appeal when an appellant or respondent makes a mistake. The General Assembly vested the circuit court acting as an appellate body with discretion in such matters and the court's ruling of dismissal shows no exercise of that discretion. (Des. Matter # 1, pp. 3-4). Appellant followed the permit public notice and its record which showed no involvement by Fairways Development LLC with the sketch/concept plan being appealed. In an equitable determination, the court also should have applied laches with regard to Fairways Development LLC waiting after being provided a copy of the appeal until the appeals

period had expired and then moving for intervention. Appellant brought this issue to the attention of the circuit court in its affidavits and motions (Des. Matter # 14 and # 15, p. 6 each). The circuit court acknowledged this in its Order Granting Intervener's Motion to Dismiss (Des. Matter Item # 1, p.4). The Order is not based on the notice to Fairways Development LLC but rather on a failure to join Fairways within the prescribed period.⁸ The failure to exercise discretion or to state reasons not to as provided by Section 18-1-100 (Id.) is an abuse of discretion. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006), citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987).

Article 7 of the Enabling Act relates to land development and land developers. It emphasizes developer rights and responsibilities and provides rights to interested parties.⁹ Zoning standards and changes of zoning to authorize nonconforming or varied development use of property differ from authorized procedures for developers to change land characteristics through development or redevelopment of property and to subdivide property into parcels.¹⁰ The object of this appeal is not the rights of a property owner to its use of property but rather how a preliminary development permittee intends to develop

⁸ The Order reads with regard to this issue (page 4), "Although the Appellant timely filed his appeal and sent a copy of his appeal to Fairways within thirty days of his receipt of the Planning Commission's Order, he failed to join Fairways within the time prescribed by statute."

⁹ Article 7 of the Enabling Act relates to land development and land developers. The use of the property does not have the permanence of zoning laws. Section 6-29-1150 of such Enabling Act speaks to local governing authorities including procedures for developing sketch, preliminary, and final plans for review and approval or disapproval. Sections 6-29-1150 (A) and (B) of the Enabling Act provide rights of developers regarding actions and notifications, respectively, and Section (B) requires that a record of all actions of plans and subdivision plats be maintained as a public record.

¹⁰ Article 5 of the Enabling Act relates exclusively to zoning matters. Zoning districts limit property use and property owners are responsible to know and understand zoning. See Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011) cert den. U.S. Sup.Ct. Order No. 11-1440, Oct. 1, 2012, where the zoning ordinances controlled the use of property to an owner's financial detriment notwithstanding county officials advising and applying incorrect use standards for the area.

the property. Appellant is appealing the developer's interpretation of the Green Code to obtain complete relief from any zoning standards.¹¹ The issues are substantially different from permanent legislative changes to zoning ordinances to obtain different zoning standards for development as examined in the vacated Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008) case upon which the circuit court relies for its dismissal. The Article 7 statutory provision (§ 6-29-1150(D)(1) of the Enabling Act) requiring appeals to be filed within thirty days relates to actions by designated staff (the DRT) and refers to a permit approval of a sketch plan that must be filed as a public document. (Id. §§ 1150 (A) and (B), respectively). The relationship between the public document and the appeal is paramount. The public document provides the basis for the appeal, not an application under the Green Code. Appellant, in this regard, met the statutory requirement by filing his appeal of the permit considering the permittee under that public document (see argument above relating to the purposes of such Article 7). Appellant did not include Fairways Development Group because it is not a private or public body capable of service of process or referred to as a corporate or contractual body in the record of the development proceedings or this matter.

The circuit court cites Friends of McLeod, Inc. v. City of Charleston, supra, 376 S.C. 610, as providing direction that failure to file and serve notice on a necessary party within the statutory period to appeal is fatal to an appeal from a zoning board decision. The circuit court acknowledges the case is vacated and suggests it is due to an agreement

¹¹ The Green Code (Sec. 26-186 (b)) and the applicable zoning standard (Sec. 26-89(c)) require a developer to meet its requirements to obtain a bonus of relaxed zoning with Subsection 26-186 (h)(11) being limited use of impervious surfaces in the developed area, a requirement not enforced with an interpretation that only if a developer uses impervious surfaces on sidewalks and driveways does it otherwise apply (Des. Matter Item #5, App. B-6, p. 3 near bottom of page). The developer also considers a requirements provision that states no minimum lot area (26-186(h)(2)) as being a standard nullifying the bonus provision entirely. (Id.).

mooting the case. Friends of McLeod, Inc. v. City of Charleston, 384 S.C. 438, 682 S.E.2d 488 (2009). The Federal courts, following United States Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 28 (1994) discourage vacatur for purposes of settlement.¹² The Supreme Court in vacating the Appeals Court Friends of McLeod decision does not state it is vacated by settlement. In Friends, the parties mooted the case by agreement. That rendered the appeal moot. The Supreme Court then denied a motion regarding substituting parties and dismissed the appeal. After that, it vacated the lower court decision, a matter it did not have to do. In any event, vacatur is to rescind, annul, or render an act void.¹³ It is not *stare decisis* and should not guide future action, especially action of a differing nature than the zoning action on which it was based. Zoning matters differ from land development issues or matters. For one, the findings of a zoning board must be treated the same as the findings of a jury (§ 6-29-840 (A) of the Enabling Act). Another difference is the first sentence of such Section 6-29-820 (A) that states the petition to the circuit court must set forth “plainly, fully, and distinctly why the decision is contrary to law.” Section 820 (A) limits zoning appeals to “a person who may have a substantial interest in any decision of the board of appeals”. These zoning requirements are not requirements for land development appeals. For an appeal to a staff action on a land development matter as forms the basis in the instant matter, Section 6-29-1150 (C) of the Enabling Act authorizes an appeal by any party in interest. Subsection (D)(1) of such Act relates to an appeal from that planning commission decision to the circuit court.

¹² S. Katrina Starke, *Exceptional Circumstances Justifying Vacatur When Lower Court Decision Mooted by Settlement; Repeat Litigants Slide into Home with Second Circuit Decision-Major League Properties, Inc. v. Pacific Trading Cards, Inc.* 1999 J. Disp. Resol. (1999) (Available at <http://scholarship.law.missouri.edu/jdr/vol99/iss1/9>)

¹³ The Law Dictionary, (thelawdictionary.org) Featuring Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed., provides, “What is VACATE? To annul; to cancel or rescind; to render an act void; as, to vacate an entry of record, or a judgment”.

Zoning matters are objects of legislative action relating to permanent changes in the law as opposed to developers interpreting sketch plans for their own purposes. The vacated Friends of McLeod, 376 S.C. at 613 cites Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct App. 2000) with regard to timeliness of an appeal being a jurisdictional matter. Vulcan relates to a variance between statutory limiting appeals periods by a new and former provision of law and not to joinder. Vulcan, quoting from Restaurant Row Assocs. v. Horry County, 327 S.C. 383, 391, 489 S.E.2d 641, 645 (Ct. App. 1997) states that the adoption of a zoning ordinance is a legislative function and a review of the ordinance requires a practical, reasonable, and fair interpretation consonant with the purposes, design, and policy of the lawmakers. The circuit court's ruling treats the matter as an appeal from a zoning board decision to bolster its reliance on Friends. (Des Matter # 1, p.3., in particular, the second sentence of the first paragraph of the Part II ruling). This is an error of law that affects the court's decision and is an abuse of the circuit court's discretion. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). If Friends of McLeod is considered of some guidance in the matter, the limiting period in Article 7 still is inapplicable with regard to a joinder of private parties. Joinder, in the instant case, is an equitable and not a jurisdictional issue. Not only does it denigrate the appeals provision to cure mistakes (§18-1-100, S.C. Leg. Web, S.C. Code of Laws, (2013)) but it has no relation to judicial economy under the circumstances of this matter.

CONCLUSION

Fairways Development LLC owns property upon which designated county staff (the DRT) granted an unincorporated group with an unknown structure a permit to

develop 100 acres under the Green Code, a county density bonus program for conservation set asides. The Green Code has a bifurcated application process requiring a land owner to apply for its use and a developer to submit for approval sketch and development concept plans. The county approved the submitted sketch/concept plan and Appellant appealed alleging erroneous interpretations of county ordinances. The county appellate body affirmed the DRT action and Appellant appealed that to the circuit court. The South Carolina Enabling Act anticipated this scenario in its requirements for local land development and provided interested parties a right to appeal. The circuit court dismissed Appellant's appeal for his failure to join the land owner, alleged as the development permittee, within the period the Enabling Act provided to file the appeal.

Appellant contends the landowner is not the developer and points out the permit was granted to someone else, the sketch plan was prepared for a separate corporate entity, the planning commission factual findings included someone else as the developer, and that the Appellant's uncontroverted affidavit states in a community meeting describing the project two individuals said they were the project developers and the property owner was not. Appellant contends the permit, a public document required by statute, was issued to an unincorporated group and not to the landowner. County applications and public documents related to the development refer to that unincorporated group and not the land owner as the project developer. The Green Code has a bifurcated administration with varied responsibilities of the land owner and the developer. The developer has lasting concerns to the development and in the instant case invested in the project while the land owner stood by awaiting the property sale. Appellant contends the landowner is not an indispensable party to the appeal and since the landowner successfully intervened,

the joinder issue is moot in any event. He refers to a recent FOIA case where he requested similar relief regarding the project and upon the land owner's motion that it be dismissed from that case the circuit court dismissed it as not an indispensable party. The circuit court in the instant matter should have applied equitable estoppel based on the collateral matter and disregarded the property owner's argument that it now is indispensable.

Appellant contends the requirement to join within a statutory period was met in accord with the statutory intent of the controlling Enabling Act and local ordinances. He contends the requirements for joinder are equitable and based on judicial economy and not the purposes set forth in the Enabling Act. He contends it is clear he would have joined the landowner if he had to because he previously did so in the similar case and also he provided a copy of the appeal to the landowner within the required period. He sets forth the state appeals provision authorizing amendments for errors and argues the issue of joinder is an equitable, not a jurisdictional issue. Appellant points out his requested relief does not hamper the landowner's ability to develop the property in accordance with the law and that the issue is land development and not a permanent legislative revision or change such as zoning. Appellant distinguishes the vacated case the circuit court relies on as a zoning case with a different character than land development regulation. He also argues that the Spanish Wells required joinder for judicial economy is based on equity and in that case the Supreme Court referred to the circuit court permitting joinder with the inference that such joinder after the statutory limiting period would have mooted the issue. Appellant argues that even if the landowner

were an indispensable party, his joinder moots the issue because it is not harmed by delays and its interests are protected.

Appellant requests this Honorable Court to determine:

1) Since Fairways Development LLC, in a similar proceeding, stated it was not a proper indispensable party when the relief requested was basically the same as that requested in the instant case and its request for dismissal was granted in that similar proceeding, the circuit court erred in not applying collateral estoppel as regarding Fairways Development LLC's indispensability in the instant matter.

2) The circuit court erred in finding Fairways Development LLC is the preliminary development permittee of the project, the object of Appellant's appeal.

3) Even if the land owner were the preliminary development permittee, Appellant's failure to join it as a necessary party is not a fatal jurisdictional defect and Fairways Development LLC's successful intervention in the matter moots any issue of judicial economy by it not being under the court's jurisdiction.

Finally, Appellant requests this Honorable Court to vacate the circuit court's Order of Dismissal and return his appeal to the circuit court as ripe for a hearing and determination of its appeal of the Richland County Planning Commission's decision to uphold the County Development Review Team's interpretations regarding a proposed sketch/concept plan that would be known as, "The Villages at LongCreek," and for such other relief to include costs and fees as this Honorable Court determines necessary and proper.

Very Respectfully Submitted,



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CERTIFICATE OF SERVICE

I, Samuel T. Brick, Appellant, Pro Se, hereby certify that this Initial Brief of Appellant was served upon the parties to this action by my depositing a copy of same, enclosed in a First Class postpaid envelope addressed to the attorneys of record in a post office or official postal depository under the exclusive care and custody of the United States Postal Service, on May 23, 2014, addressed in the following manner:

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