

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

SC Court of Appeals

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2013-CP-400-1643

Samuel T. Brick,

Appellant,

v.

Richland County Planning Commission and,
Fairways Development, LLC, Intervenor,

Respondents.

**BRIEF OF RESPONDENT
FAIRWAYS DEVELOPMENT, LLC**

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL COURT PROPERLY DISMISS BRICK'S APPEAL BECAUSE HE FAILED TO TIMELY JOIN FAIRWAYS, THE DEVELOPMENT PERMITTEE, AS A NECESSARY PARTY TO THE APPEAL?**

- II. **SHOULD THE TRIAL COURT'S DISMISSAL OF BRICK'S APPEAL BE AFFIRMED FOR THE ADDITIONAL SUSTAINING GROUND THAT BRICK LACKS STANDING TO APPEAL?**

STATEMENT OF THE CASE

On November 7, 2012, Fairways Development, LLC ("Fairways") submitted an application and sketch concept plan for a project, known as "The Villages at LongCreek," to the Richland County Planning and Development Services Department for review and approval. (R.5, 43-46) After its submission, the application was approved by the Richland County Development Review Team ("DRT") at its meeting, which was held on November 29, 2012. (R. 47-51) The Appellant, Samuel T. Brick ("Brick") appealed the decision of the DRT to the Richland County Planning Commission on December 20, 2012. (R.5, 52-60)

The Planning Commission voted on February 4, 2013 to deny Brick's appeal. (R. 279-280) The Planning Commission issued its order on March 4, 2013. (R. 6, 66-69) Brick filed an appeal with the Richland County Clerk of Court on March 18, 2013. (R. 32-69) The only party named by Brick in the appeal was Richland County Planning

Commission (R. 7-8, 32). On June 5, 2013, the Planning Commission filed a motion to dismiss Brick's appeal because he did not have standing under the statute to appeal. (R. 70) On June 17, 2013, Fairways filed a motion to dismiss Brick's appeal based on Brick's lack of standing and Brick's failure to timely join Fairways, the development permittee, as a necessary party to the appeal. (R. 104) Fairways also filed a motion to intervene in the action because Brick failed to name it as a party to the appeal. (R. 85)

On June 27, 2013, Brick filed a motion to amend his appeal to add Fairways as a party and a "Notice of Defective File." (R. 99)

A hearing was held before the Honorable Judge DeAndrea Gist Benjamin on August 30, 2013. (R. 5, 165-(1)-198) At this hearing, Judge Benjamin granted Fairways' motion to intervene, denied Brick's motion to amend his appeal and took the motions to dismiss under advisement. (R. 187, 198) Subsequently, Judge Benjamin entered orders dated December 17, 2013 granting Fairways and the Planning Commission's motion to dismiss Brick's appeal for failure to join Fairways as a party to the appeal. (R. 5-12) Judge Benjamin denied Fairways and the Planning Commission's argument on standing. (R. 6-7, 10, and 12) Brick filed a motion to reconsider which was denied by form order dated and filed February 5, 2014. (R. 17) Brick timely served his notice of appeal from these order on March 11, 2014, this appeal followed.

ADDITIONAL FACTS

Brick's property is not adjacent or contiguous to the property being developed. His property is located across a golf course and a 150 acre lake from the property being developed, so it is not near "The Villages at Longcreek". (R. 110-111). Furthermore, Brick's property is not subject to the Longcreek Covenants, Conditions and Restrictions, nor is he a member of the Longcreek Property Owners Association. (R. 121-122)

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED BRICK'S APPEAL BECAUSE HE FAILED TO JOIN FAIRWAYS, THE DEVELOPMENT PERMITTEE AS A NECESSARY PARTY TO THE APPEAL.

The outcome of this appeal is governed by the *Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island*, 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988) and the reasoning of the South Carolina Court of Appeals in *Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 615, 658 S.E.2d 544, 546 (Ct. App. 2008)¹. In *Spanish Wells*, the South Carolina Supreme Court adopted the majority position that a development permittee is a necessary party to an appeal of its permit. *Id.* at 69, 367 S.E.2d at 161. The court affirmed the circuit court's dismissal of an appeal by the property owners association that failed to join the development permittee. In this case,

¹ The South Carolina Supreme Court granted petitioner's request for a writ of certiorari to review the Court of Appeals decision in *Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544 (Ct.App.2008). Respondents filed a motion to dismiss the appeal based on an agreement that renders the appeal moot. The Supreme Court granted the motion and vacated the opinion. It is not cited by Fairways herein as binding precedent but for its reasoning and to show proper credit for the arguments.

Brick failed to join Fairways as a party to the appeal and therefore his appeal was properly dismissed.

While Fairways sought to intervene and was later added by the court on August 30, 2014, such intervention does not save Brick's defective appeal. As noted by the trial judge in her opinion, "In *Friends of McLeod Inc.*, the parties, by consent order, joined the necessary party to the appeal. However, in that case, the Court still found the appeal to be untimely because the appellant failed to join the necessary party within the statutorily required time to appeal. *Id.* at 613-15, 658 S.E.2d at 545-46." (*Emphasis Added*). (R. 8) "In order for the Appellant to have perfected his appeal to the circuit court, he would have had to join Fairways in the appeal by April 9, 2013². For this reason, the Court finds that Fairways' motion dismiss should be granted." (R. 8) Failure to timely join Fairways was jurisdictional and fatal to Brick's appeal. This court should affirm the trial court on this issue.

II. BRICK'S ARGUMENT ABOUT COLLATERAL ESTOPPEL IS MISPLACED AND HIS FOIA ACTION REFUTES RATHER THAN SUPPORTS HIS ARGUMENT BECAUSE IT SHOWS BRICK KNEW PRIOR TO FILING HIS APPEAL THAT FAIRWAYS SHOULD HAVE BEEN JOINED AS A PARTY.

Brick argues that because Fairways Development, LLC filed a motion to dismiss in a separately filed, FOIA case by Brick against Fairways and Richland County³ (R. 234) that Fairways is collaterally estopped from asserting that Fairways is a necessary

² Fairway was joined by its motion to intervene on August 30, 2013.

³ *Brick vs Richland County et. al.*, 2012-CP-40-7337 ("FOIA action").

party to his appeal from the Planning Commission. (Appellant's Brief, Argument 2)

However, Brick is comparing apples and oranges.

As noted by the Judge Alison Renee Lee in her order granting Fairway's motion to dismiss, the FOIA applies only to a public body, not a person such as Fairways, (2) there is no private cause of action against Fairways under the FOIA and (3) the Plaintiff has not alleged any violation of the FOIA by Fairways. (R. 20-21).

Thus, Fairways dismissal in that action has nothing to do with whether or not it is a necessary party as a development permittee in a separate appeal from the Planning Commission. Indeed, it's surprising that Brick even mentions the FOIA action because it makes clear that, despite all his protestation in his brief to the contrary, Brick always knew Fairways was the development applicant and should have been a party to his appeal.

In paragraph 6 of Brick's complaint (filed in the FOIA act case on October 31, 2012 and prior to his appeal), Brick alleges that Fairways Development, LLC applied to the Richland County Planning and Development Services Department for development of approximately 100.7 acres under section 26-186 of the code. (Emphasis added). (R. 236). In a motion to amend those same pleadings on January 9, 2013 (again prior to his appeal), Brick states, "...Defendant Fairways Development LLC is included as a vested party of interest only." (Appendix to the Record on Appeal, 4)

In his final order granting Richland County an involuntary dismissal after Brick's case in chief on the FOIA case, Judge Roger M. Young, Sr. notes, "...each of the alleged violations of FOIA asserted by the Plaintiff pertain to a development application submitted by Fairways Development, LLC ("Fairways") regarding the proposed development of a parcel of land in Richland County. (R. 24)

This court should find that Brick's argument about collateral estoppel lacks merit, that he is comparing apples and oranges, and that the FOIA action shows that Brick knew prior to his appeal Fairways was the development applicant with a "vested interest".

III. BRICK'S ARGUMENT THAT FAIRWAYS IS NOT THE DEVELOPMENT PERMITTEE MISSES THE POINT THAT HE FAILED TO JOIN ANYONE OTHER THAN THE COUNTY IN HIS APPEAL.

As alluded to in the previous argument, Brick devotes a substantial part of the argument in his brief to argue that Fairways Development Group, an alleged unincorporated entity, was the proper party to be included in his appeal. For example on page 33 of his brief, Brick states, "The facts in the record clearly show that Fairways Development Group is the preliminary development permittee for the sketch/concept plan which is the object of the Appellant's appeals." If this is the case, which Fairways denies, then Brick misses the point of the reason for the dismissal of his appeal because Brick made no effort to join "Fairways Development Group" as a party to his appeal,

either when he filed it with Richland County Circuit Court or later in his motion to amend his appeal.

Perhaps this is because Brick was under the mistaken legal belief that he could not sue an alleged unincorporated association in its own name.⁴ On page 36 of his brief, Brick states, "...most vitally interested party in this matter is an unincorporated body with no publically known or evident ability to sue or be sued." And more directly, "Appellant did not include Fairways Development Group because it is not a private or public body capable of service or referred to as a corporate or contractual body in the record of the development proceeding or this matter." (Brick's Brief, p. 39). However, Brick cannot have it both ways, either he knew that he had to add the development permittee but failed to do so because he wrongfully believed it could not be sued or he didn't know that the development permittee had to be named and failed to do so for that reason. In either case, the salient point missed by Brick in his arguments is that he failed to timely join the development permittee regardless of its identity and therefore his dismissal was proper either way.

⁴ All unincorporated associations may be sued and proceeded against under the name and style by which they are usually known without naming the individual members of the association. S.C. Code Ann. § 15-5-160

IV. THE TRIAL COURT'S DISMISSAL OF BRICK'S APPEAL SHOULD BE AFFIRMED FOR THE ADDITIONAL SUSTAINING GROUND THAT BRICK LACKS STANDING TO APPEAL.

BRICK LACKS STATUTORY STANDING BECAUSE HE IS NOT THE PROPERTY OWNER

Brick must have standing to prosecute an appeal from the Planning Commission to the circuit court. S.C. Code Ann. §6-29-1150(d)(1) provides the procedure for an appeal to the circuit court, but does not specify who may appeal. S.C. Code Ann. § 6-29-1150(D)(2) answers this question by providing, "A *property owner* whose land is the subject of the planning commission decision may appeal." Brick is not the property owner and thus does not have statutory standing to appeal.

BRICK LACKS CONSTITUTIONAL STANDING BECAUSE HE DOES NOT HAVE A SUBSTANTIAL INTEREST IN THE DECISION OF THE PLANNING COMMISSION

S.C. Code Ann. §6-29-1155(a) provides that a non-owner may *intervene* in an appeal if the person has a *substantial interest* in the decision of the planning commission. This is consistent with Richland County Ordinances §26-54(c)(3)(b)(4)(b) which provides for an appeal by a person with a *substantial interest* and §26-58(f) *Appeals of Administrative decisions* which also provides for an appeal by a person with a *substantial interest* in the decision. Ironically, as noted by counsel for Richland County Planning Commission in the argument before Judge Benjamin, the statutory scheme was reversed and thwarted in this case with the Fairways as property owner filing the motion to

intervene and Brick, the non-owner filing an appeal. This is further evidence why Brick's appeal should be dismissed.

Brick is not the landowner, and does not have a *substantial interest* in the decision of the Planning Commission. Brick states in his appeal, "Your Appellant, a citizen of Richland County, is a party in interest as well as an adjacent and contiguous property owner to the property that is the object of the subdivision project. (Brick Appeal, p.2) Standing *to intervene* exists for any person with a "substantial interest", defined as "owners of property adjacent to and in the near vicinity of" "The Villages at Longcreek". *Spanish Wells Property Owners Ass'n v. Board of Adjustment of Town of Hilton Head Island*, 292 S.C. 542, 357 S.E.2nd 487 (Ct.App. 1987) However, Brick's property is not adjacent to and in the near vicinity of the property being developed. His property is located across a golf course and a 150 acre lake from the property being developed, so it is not in the near vicinity of "The Villages at Longcreek". Furthermore, Brick's property is not subject to the Longcreek Covenants, Conditions and Restrictions and Brick is not a member of the Longcreek Property Owners Association. Brick and his property are subject to different Covenants, Conditions and Restrictions. In short, Brick does not have a substantial interest in approval of the sketch concept plan for "The Villages at Longcreek" and therefore lacks constitutional standing for his appeal.

Fairways notes that Judge Benjamin in her order concluded that the Planning Commission had waived the standing argument by considering Brick's appeal from the

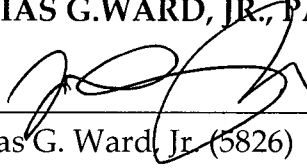
DRT on its merits. Fairways respectfully disagrees with Judge Benjamin on this point: First, standing is jurisdictional and cannot be waived and must be considered by this court, even if it's not raised by the parties. *United States vs. Hays*, 515 U.S. 737 (1995); Second, the standard of appeal from the DRT to the Planning Commission is a lesser, different standard, it states "any party in interest" and it also states that the action of the Planning Commission is "final." S.C. Code Ann. §6-29-1150(c). Third, Fairways is not the Planning Commission and any alleged waiver should not be imputed to Fairways.

For all these reasons the court should address this issue and find that Brick lacked standing to pursue this appeal.

CONCLUSION

The trial court should be affirmed because it is undisputed that Brick failed to join Fairways, the development permittee, as a necessary part to his appeal. Fairways dismissal from Bricks separate FOIA action is unrelated and does not collaterally estop Fairways from arguing Bricks appeal should be dismissed. The FOIA action also shows that Brick knew that Fairways had a vested interest and should have been named and joined as a party to his appeal. Finally, Brick lacks both statutory and constitutional standing to pursue this appeal as he is not the property owner and does not have a substantial interest in the decision of the Planning Commission. For all these reasons, the trial court's order of dismissal should be affirmed and the development allowed to proceed as approved by Richland County.

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**CERTIFICATE OF COUNSEL
PURSUANT TO RULE 211(b) SCACR**

The undersigned certifies that the Respondent Fairways Development, LLC Final Brief is in compliance with Rule 211(b) SCACR.



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CERTIFICATE OF SERVICE

I, J. Derrick Jackson of the law firm of TOBIAS G. WARD, JR., PA, attorney for the Respondent Fairways Development, LLC, do hereby certify that I served a copy of the Final Brief of Respondent Fairways Development, LLC dated January 19, 2015 on all parties by United States Mail, post prepaid, on January 20, 2015, addressed as follows:

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A handwritten signature in black ink, appearing to read 'TGW', is written over a horizontal line.

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