THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
The Honorable Kristi L. Harrington, Circuit Court Judge

Lower Court Case No. 2014-CP-08-1840
Appellate Case No. 2015-000713

BP Amoco Chemical Company.....Plaintiff/Appellant,

v.

City of Charleston; Tract 7, LLC; Cainhoy Land & Timber, LLC; and Southern Timber, LLC.....Defendants,

Of whom Cainhoy Land & Timber, LLC and Southern Timber, LLC are ..... Respondents.

INITIAL BRIEF OF APPELLANT

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II. Did the circuit court err in concluding that the public importance exception to standing doctrine does not apply to Appellant's claims where such claims clearly allege unlawful and unconstitutional governmental action that will dictate the manner in which nine thousands acres and eighteen thousand residential homes will be developed?

III. Did the circuit court err in ruling that the statute of limitations under S.C. Code Ann. § 6-29-760(D) bars Appellant's claims by (A) impermissibly construing the allegations of the complaint against Appellant to infer that Appellant was not prejudiced by the governing authority's failure to comply with the applicable notice and procedural requirements for amending zoning ordinances and (B) incorrectly determining that substantial compliance with a notice requirement for a pending ordinance may be established by a person's mere attendance at a meeting where the pending ordinance is considered?

IV. Did the circuit court err in dismissing Appellant's claims with prejudice where the dismissal is based on purported pleading deficiencies?

STATEMENT OF THE CASE

On August 15, 2014, Appellant BP Amoco Chemical Company ("BP") filed a complaint against City of Charleston (the "City"), Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC, asserting claims challenging the City's adoption of zoning ordinances (Ordinances 2014-25, 2014-26, and 2014-82) which rezoned property in Berkeley County, South Carolina, pursuant to a planned unit development. The property rezoned under the challenged ordinances consists of three contiguous tracts owned respectively by three affiliated entitities, Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC (collectively, the "Owners"). Together, the three tracts comprise Cainhoy Plantation.

BP asserts, among others claims not relevant to this appeal, causes of action against the City and the Owners seeking declaratory judgment that the zoning ordinances, and the planned unit development adopted thereunder, are invalid because they violate the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (S.C. Code Ann. § 6-29-10, *et seq.*), City Ordinance § 54-255, City Ordinance § 54-254, the separation of powers and non-delegation doctrines under the South Carolina Constitution, the due process and equal protection clauses of the South Carolina Constitution, and the South Carolina Tidelands and Wetlands Act (S.C. Code Ann. § 48-39-10, *et seq.*)

Cainhoy Land & Timber, LLC and Southern Timber, LLC (collectively, "Respondents")[1] responded to BP's complaint on September 30, 2014 by filing a motion

[1] Defendants City of Charleston and Tract 7, LLC answered the complaint and did not move to dismiss BP's claims under Rule 12(b)(6).

to dismiss BP's claims challenging the validity of Ordinances 2014-25 and 2014-26, which implements the planned development for Cainhoy Plantation proposed by Respondents, under Rule 12(b)(6), SCRCP, on the grounds that (1) BP lacks standing under S.C. Code Ann. § 6-29-760(C) to challenge Ordinances 2014-25 and 2014-26 because BP is not an adjoining landowner to the tracts owned by Respondents; (2) BP lacks standing under the public importance exception to standing doctrine; and (3) the claims are untimely because they were not filed within the sixty-day statute of limitations under S.C. Code Ann. § 6-29-760(D).

A hearing on Respondents' motion to dismiss was held in the circuit court before Judge Kristi Harrington on October 20, 2014. On November 13, 2014, the circuit court granted Respondents' motion to dismiss, ruling that (1) BP lacks standing because it is not an adjoining landowner to the tracts owned by Respondent; (2) the public importance exception to standing does not apply to BP's claims; and (3) BP's claims are barred by the applicable statute of limitations under § 6-29-760(D).

On November 24, 2014, BP timely filed a motion for reconsideration under Rule 59(e), SCRCP, requesting that the circuit court reconsider its dismissal of BP's claims challenging Ordinances 2014-25 and 2014-26 and deny Respondents' motion to dismiss. In the motion for reconsideration, BP argued that the circuit court had improperly dismissed BP's claims by erroneously concluding that (1) BP is not an adjoining landowner to properties rezoned under Ordinances 2014-25 and 2014-26; (2) the public importance exception standing is inapplicable; and (3) the City substantially complied with applicable notice requirements.

The circuit court denied BP's motion for reconsideration in a final order dated March 3, 2015. BP received written notice of the final order denying the motion for reconsideration on March 5, 2015 and timely filed the notice of appeal on April 1, 2015.

ARGUMENT

FACTS

BP owns and operates a manufacturing facility in the Cainhoy community of Berkeley County, South Carolina. (Compl. ¶ 13.) Defendants Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC (collectively, the "Owners") are affiliated entities that share common ownership and management. (*Id.* at ¶ 7.) The Owners collectively own three contiguous tracts, totaling approximately 9,087.22 acres, which are located off of Clements Ferry Road and Cainhoy Road in the Cainhoy community of the City of Charleston, Berkeley County, South Carolina, and which are commonly known and referred to, collectively, as Cainhoy Plantation. (*Id.* at ¶ 8.) BP is an adjoining landowner to Cainhoy Plantation. (*Id.* at ¶¶ 12, 63.)

On or before 2013, the Owners of Cainhoy Plantation decided to develop it as a mixed-use development that could include over 18,000 residential dwelling units pursuant to a planned unit development ("PUD"). (*Id.* at ¶ 22.) Pursuant to that decision, the Owners submitted three separate PUD master plan applications to the City of Charleston (the "City") to rezone Cainhoy Plantation from the then existing Cainhoy (CY) Zoning Classification to PUD zoning. (*Id.* at ¶¶ 21, 31.) Although the Owners submitted three separate PUD master plan applications for Cainhoy Plantation, each master plan stated that the three master plans "have identical master plan zoning texts and shall be administered in a coordinated fashion." (*Id.* at ¶ 32.) Thus, the three separate

PUD master plans were submitted effectively as one master plan to govern the zoning of Cainhoy Plantation. (*Id.*)[2]

On February 6, 2014, while the applications for the Cainhoy PUD Master Plan were pending before the City, a representative of the Owners wrote an opinion column published in the Charleston *Post & Courier*, which expressed the Owners' intent to develop Cainhoy Plantation under one master plan. The column was entitled, "Why Cainhoy Plantation will be developed on one master plan." (Pl.'s Reply Defs.' Resp. Opp'n Mot. Recons., Ex. 1.)[3] In that column, Respondents' representative explained the purpose of zoning Cainhoy Plantation under a single planned development that governed the entire property:

> We see no rationale to placing well thought out controls on one part of the property and leaving another part unplanned. It is our experience that first-class development requires comprehensive, not piecemeal, planning so that all components of the planned community work harmoniously together and are relevant within a local and regional context. . . In all events, this property will be developed as one community and requires one comprehensive master plan, not two.

(*Id.*)

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[2] Consistent with the manner in which the three PUD master plans for Cainhoy Plantation are referred to collectively in Ordinances 2014-25, 2014-26, and 2014-82, this Initial Brief refers to such master plans and zoning texts collectively as the "Cainhoy PUD Master Plan."

[3] Although the newspaper column written by Respondents' representative was not included in the Complaint, BP submitted the column to the circuit court as part of its motion for reconsideration and requested that the circuit court take judicial notice of the statements made in the newspaper article and consider them in deciding Respondents' motion to dismiss. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 fn. 2 (2014) (stating that trial court's reliance on transcripts and courts orders not included in the complaint did not convert a Rule 12(b) motion into a motion for summary judgment); *In re Compuware Secs. Litig.*, 301 F. Supp. 2d 672, 682-83 (E.D. Mich. 2004) ("Courts may also take judicial notice of newspaper articles and other public information when considering a motion to dismiss."). Accordingly, these statements are properly before the Court in this appeal.

Following the Owners' submission of the Cainhoy PUD Master Plan, the City's Planning Commission and Council held various public hearings and meetings in January and February of 2014, in which they considered the Cainhoy PUD Master Plan. (*Id.* at ¶¶ 32-45.) The City, however, failed to provide adequate notices of the public hearings and meetings or comply with the City's established procedures for adopting a PUD. (*Id.* at ¶¶ 32-45, 68-72, and 80-85.)

City Council gave first reading to the ordinances adopting the Cainhoy PUD Master Plan at a meeting on February 11, 2014. (*Id.* at ¶ 44.) At that meeting, BP requested that consideration of the ordinances be deferred to provide BP more time to study the size of a buffer area needed between the residential development contemplated on Cainhoy Plantation and BP's adjacent property to ensure the safe and compatible co-existence of BP's facility and the development of Cainhoy Plantation. (*Id.*) The request was denied. (*Id.*)

Ultimately, City Council adopted Ordinances 2014-25 and 2014-26, which implemented the Cainhoy PUD Master Plan proposed by Respondents, in its meeting on February 25, 2014. (*Id.* at ¶ 46.) During that meeting, BP again requested that the City defer consideration of Ordinances 2014-25 and 2014-26 based on the need for more time to study the proposed development and negotiate a buffer area and land use options other than residential development of Cainhoy Plantation. (*Id.* at ¶ 45.) Again, that request was denied. (*Id.*)

At the February 25, 2014 meeting, the City did agree to defer its consideration of Ordinance 2014-82, which was the Cainhoy PUD Master Plan proposed by Tract 7, LLC, to provide BP and Tract 7, LLC time to negotiate a buffer in Cainhoy Plantation near

BP's property. (*Id.* at ¶¶ 45-46, 48.) Over the next few months, BP and Tract 7, LLC engaged in negotiations regarding a potential buffer, and on June 10, 2014, BP and Tract 7, LLC entered into a "Letter of Intent to provide BP with an option to purchase property in Cainhoy Plantation to serve as a buffer." (*Id.* at ¶¶ 48-50.) On June 17, 2014, the City adopted Ordinance 2014-82 and enacted the Cainhoy PUD Master Plan proposed by Tract 7, LLC. (*Id.* at ¶ 54.)

In July of 2014, Tract 7, LLC reneged on the terms and conditions of the letter of intent. (*Id.* at ¶¶ 55-58.) Following Tract 7, LLC's breach of the letter of intent, BP commenced this action on August 15, 2014, challenging the validity of the Cainhoy PUD Master Plan, as adopted in Ordinances 2014-25, 2014-26, and 2014-82, and the rezoning of Cainhoy Plantation thereunder. BP's complaint against Defendants allege that the Cainhoy PUD Master Plan should be invalidated because (1) it violates the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. § 6-29-10, *et seq.*, (the "Enabling Act"); (2) it violates City Ordinance § 54-255; (3) it violates the separation of powers and nondelegation doctrines under the South Carolina Constitution; (4) it violates City Ordinance § 54-254; (5) its adoption was based on procedures that violate BP's due process and equal protections rights under the South Carolina Constitution; and (6) it violates the South Carolina Coastal Tidelands and Wetlands Act, S.C. Code Ann. § 48-39-10, *et seq.*[4] (*Id.* at ¶¶ 59-102.)

[4] BP has also asserted claims against Tract 7, LLC associated with the Letter of Intent. Those causes of action are asserted solely against Tract 7, LLC and are not related to the causes of action that are the subject of Respondents' motion to dismiss and this appeal.

STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), SCRCP, "the trial court must base its ruling solely upon allegations set forth on the face of the complaint. The 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory." *Baird v. Charleston County*, 333 S.C. 519, 526, 511 S.E.2d 69, 73 (1999) (*citing Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). The allegations in the complaint must be construed "in the light most favorable to the plaintiff, and with every doubt resolved in his behalf." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). Claims should not be dismissed under Rule 12(b)(6) merely because the court doubts the plaintiff will prevail in the action. *Id.*

Under South Carolina's pleading rules, a plaintiff need only state ultimate facts in the pleadings. "Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts." *Brown v. Investment Mgmt. and Research, Inc.*, 323 S.C. 395, 400, 475 S.E.2d 754, 756 fn. 3 (1996). At the pleading stage, general factual allegations of standing are sufficient to withstand a motion to dismiss. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

I. The circuit court erred in dismissing BP's claims challenging Ordinances 2014-25 and 2014-26 for lack of standing under S.C. Code Ann. § 6-29-760(C) because BP has sufficiently alleged that it is an adjoining landowner to the properties rezoned under Ordinances 2014-25 and 2014-26.

The circuit court improperly dismissed BP's claims challenging Ordinances 2014-25 and 2014-26 on the grounds that BP lacks standing under S.C. Code Ann. § 6-29-760(C), which provides that an "owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment." Specifically, the circuit court ruled that BP lacks standing to assert its claims because "BP fails to allege that it owns property adjoining the properties of" Respondents. (Order p. 7.)

The circuit court erred in dismissing BP's claims challenging Ordinances 2014-25 and 2014-26 because it incorrectly based its decision on whether BP owns land adjoining land owned by Respondents. S.C. Code Ann. § 6-29-760(C) does not confer standing to a plaintiff challenging a zoning ordinance based on whether the plaintiff owns land adjoining property owned by the defendants; instead, it confers standing based on whether the plaintiff owns land adjoining the property subject to the challenged zoning ordinances. This is an important distinction because Ordinances 2014-25 and 2014-26 govern not only property owned by Respondents, but all of Cainhoy Plantation, including land adjacent to BP's land. In other words, to establish standing under § 6-29-760(C) to challenge Ordinances 2014-25 and 2014-26, BP is merely required to plead that its property adjoins property subject to Ordinances 2014-25 and 2014-26 – not property owned by Respondents.

The allegations in BP's complaint meet this requirement. BP alleges that it is an adjoining landowner to Cainhoy Plantation and that the zoning of Cainhoy Plantation is governed by Ordinances 2014-25, 2014-26, and 2014-82, collectively. (Compl. ¶¶ 12,

63.) BP additionally alleges that the collective ordinances implement one master plan zoning text which is referred to collectively by one name, the Cainhoy PUD Master Plan. (Compl. ¶¶ 32, 63.) Based on these factual allegations, BP expressly alleged statutory standing: "BP, as an adjoining landowner to Cainhoy Plantation and properties subject to the Zoning Ordinances challenged in this action, has standing to maintain this action pursuant to S.C. Code Ann. § 6-29-760(C)." Thus, the allegations in BP's complaint are sufficient to establish statutory standing under § 6-29-760(C).

These allegations are supported by the text of Ordinances 2014-25 and 2014-26, which read identically, and provide the following:

> The Cainhoy Land & Timber PUD Master Plan, Cainhoy-ST PUD Master Plan and the Cainhoy-T7 PUD Master Plan have identical master plan zoning texts and shall be administered in a coordinated fashion. For ease of reference, these three master plans are collectively referred to as the 'Cainhoy PUD Master Plan.' The three master plans encompass about 5,653.52 acres in Cainhoy Land & Timber PUD Master Plan, about 1,860.2 acres in the Cainhoy-ST PUD Master Plan and about 1,573.5 acres in the Cainhoy-T7 PUD Master Plan for a combine total of about 9,087 acres as shown on **Exhibit 1 (Aggregated Property).**

(Ordinance 2014-25, p. 2; Ordinance 2014-26, p. 2) (emphasis original). Moreover, the zoning provisions in Ordinances 2014-25 and Ordinances 2014-26 establish certain types of zones, e.g. residential, mixed-use, etc., that apply throughout all of Cainhoy Plantation and are not segregated by tract or property owner. (Ordinance 2014-25, pp. 12-36, Ordinance 2014-26, pp. 12-36.)

Ordinances 2014-25's and 2014-26's application beyond the property owned by Respondents and their control over land adjacent to BP's property is most clearly seen by their establishment of the Church Preservation Zone, which adjoins BP's property. Sections 2.6(e) of Ordinances 2014-25 and 2014-26 create the "Church Preservation Zone," which is a temporary zone allowing only limited uses in an area surrounding a

neighboring historic church. (Ordinance 2014-25, pp. 19, 29; Ordinance 2014-26, pp. 19, 29.) As demonstrated by the illustrative sketch of the Cainhoy PUD Master Plan, which the City adopted as part of Ordinances 2014-25 and 2014-26, the Church Preservation Zone is located on the property owned by Tract 7, LLC and is immediately adjacent to BP's property. (Ordinance 2014-25, Ex. 7; Ordinance 2014-26, Ex. 7) (attached as Appx. A). Although the Church Preservation Zone is not located on property owned by Respondents, it is nevertheless established under Ordinances 2014-25 and 2014-26. (Ordinance 2014-25, p. 19; Ordinance 2014-26, p. 19.) Therefore, the creation of the Church Preservation Zone under Ordinances 2014-25 and 2014-26 makes it clear that BP is an adjoining landowner to property rezoned by those ordinances.

In addition to ignoring the express allegations in the complaint and the obvious application of Ordinances 2014-25 and 2014-26 to all of Cainhoy Plantation, the circuit court disregarded statements from the Owners' representative that Ordinances 2014-25, 2014-26, and 2014-82 effectively serve as one master plan that controls the entirety of Cainhoy Plantation. In its motion for reconsideration, BP submitted an opinion column published in the Charleston *Post & Courier* written by Respondents' representative indicating that Cainhoy Plantation is governed by one master plan. In that column, entitled "Why Cainhoy Plantation will be developed on one master plan," the representative declared that Cainhoy Plantation "will be developed as one community and requires one comprehensive master plan, not two." (Pl.'s Reply Defs.' Resp. Opp'n Mot. Recons., Ex. 1.) These and other statements in the newspaper column corroborate the fact that Ordinances 2014-25 and 2014-26 are to be construed together with

Ordinance 2014-82 as one PUD that governs all of Cainhoy Plantation, which adjoins BP's property.

Instead of analyzing the reach and application of Ordinances 2014-25 and 2014-26, however, the circuit court focused solely on whether BP's property adjoins property owned by Respondents.[5] This is not the proper inquiry. Rather, S.C. Code Ann. § 6-29-760 requires the court to determine whether the party challenging a zoning ordinance or amendment is an adjoining landowner to property subject to the challenged ordinance or amendment. The circuit court failed to conduct this analysis and instead focused on the relationship between BP's property and Respondents' property. As a result, the circuit court's conclusion that BP lacks standing because it is not an adjoining landowner under § 6-29-760 is in error and should be reversed.

II. The circuit court erred in ruling the public importance exception to standing does not apply in this case because BP's claims seek to remedy unlawful and unconstitutional government action.

BP also asserts it has standing to bring its claims challenging Ordinances 2014-25 and 2014-26 under the public importance exception to standing doctrine. The circuit court ruled that the public importance standing exception does not apply to BP's claims because they are "not of such precedential importance that public interest demands waiver of constitutional and statutory standing requirements." (Order p. 8.) In so ruling,

[5] The circuit court's narrow application of § 6-29-760, if adopted, would also invite gamesmanship by future developers who could preclude rezoning challenges by separating small parcels adjoining their neighbors' property from larger parcels that are subject to rezoning. Rather than adopt a narrow definition of standing under § 6-29-760, the Court should apply the statute to effectuate its purpose of ensuring property owners have access to the courts to challenge zoning ordinances.

the circuit court erroneously disregarded the factors used to determine if the public importance standing exception applies.

In addition to granting statutory standing, South Carolina law also recognizes the public importance exception to general standing requirements, which holds that "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007). South Carolina courts have ruled that a plaintiff has standing under the public importance exception when the action challenges the legality or constitutionality of government action. *See, e.g., Sloan v. S.C. Dep't of Transp.*, 379 S.C. 160, 170-71, 666 S.E.2d 236, 241 (2008) (finding that taxpayer had standing under public importance exception to challenge county's alleged illegal use emergency procurement provision); *Davis*, 372 S.C. at 500, 642 S.E.2d at 741-42 (ruling that plaintiffs had standing to challenge constitutionality of act adopted by General Assembly); *Sloan v. Wilkins*, 362 S.C. 430, 436-37, 608 S.E.2d 876, 878-79 (2005) (same); *Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 532 S.E.2d 876 (2000) (ruling that plaintiff had standing to challenge *ultra vires* act of county commission's acquisition of property); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999) (recognizing standing under public importance exception in action challenging county's alleged *ultra vires* issuance of bonds). These cases demonstrate that a matter rises to the level of public importance to warrant standing when the dispute goes beyond the private parties and involves illegal or unconstitutional government action.

In this case, the circuit court erred in finding that the public importance standing exception does not apply because it either disregarded or misconstrued the nature of BP's

claims. Under the applicable law, there can be no doubt that BP's complaint sufficiently asserts claims that justify its standing under the public importance exception. BP has asserted six separate causes of action claiming that the City acted unlawfully or unconstitutionally in adopting Ordinances 2014-25 and 2014-26. The claims go beyond whether BP has a private dispute with Respondents over their land use.

BP's claims go to the essence of whether the rule of law governs the City's actions and whether the City arbitrarily enacted zoning ordinances without following required procedures, making mandatory substantive findings, and complying with constitutional dictates regarding the separation of governmental power. For example, BP alleges City Ordinances 2014-25 and 2014-26 grant the developer of Cainhoy Plantation the authority to unilaterally control future zoning ordinances over the subject property in violation of the non-delegation and separation of power doctrines of the South Carolina Constitution. (Compl. ¶¶ 73-79.) These claims present issues of immense public importance that require future guidance regarding the manner in which over 9,000 acres and 18,000 residential homes will be developed; whether the City or developers will control future zoning decisions for the property; and whether future residential development of Cainhoy Plantation is compatible with neighboring property, including a heavy industrial facility, a national forest, and sensitive and endangered cultural and historical sites.

Instead of relying on judicial precedent involving claims alleging illegal or unconstitutional governmental action, the circuit court supported its conclusion that the public importance standing exception is inapplicable with *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014), a case which

involves no claims of illegal or unconstitutional acts by the government. In *Carnival Corp.*, several citizens groups sued Carnival Corporation, a private company, asserting claims that its operation of a cruise ship at the port in Charleston violated several city ordinances, constituted a private nuisance, and violated the South Carolina Pollution Control Act. The South Carolina Supreme Court dismissed the plaintiffs' claims and specifically rejected their contention that the public importance exception applied. According to the Supreme Court, the public importance exception was inapplicable because:

> the issues in this case are whether zoning ordinances are preempted by federal and state law, the applicability of zoning ordinances to a cruise ship, and tort liability for a public and a private nuisance cause of action. The case presents no issue of constitutionality or legality of government action. Additionally, the claims asserted by Plaintiffs could be brought by other parties who can show the required injury.

Id. at 81, 753 S.E.2d at 853.

A close examination of *Carnival Corp.* demonstrates that the circuit court here mistakenly relied on it to rule that the public importance exception does not apply to BP's challenges to the validity of Ordinances 2014-25 and 2014-26. *Carnival Corp.* is distinguishable because it, unlike this case, involved no claims of illegal or unconstitutional government action. In fact, the Supreme Court ruled that the public importance exception did not apply in *Carnival Corp.* because that case "present[ed] no issue of the constitutionality or legality of government action." *Id.* at 81, 753 S.E.2d at 853. The clear implication of that holding is that the public importance exception applies where a case, such as the present one, presents an issue of constitutionality or legality of government action.

III. The circuit court erred in ruling that BP's claims were time-barred under S.C. Code Ann. § 6-29-760(D) because BP has sufficiently alleged that the City failed to substantially comply with applicable notice and procedural requirements for zoning ordinances and the circuit court failed to construe these allegations in BP's favor.

The circuit court also erroneously dismissed BP's claims challenging the validity of Ordinances 2014-25 and 2014-26 on the grounds that they are untimely under the sixty-day statute of limitations contained in S.C. Code Ann. § 6-29-760(D). S.C. Code Ann. § 6-29-760(D) provides, "No challenge to the adequacy of notice or challenge to the validity of a [zoning] regulation or map, or amendment to it, . . . may be made sixty days after the decision of the governing body *if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.*" (Emphasis added.) Thus, the sixty-day statute of limitations for challenging a zoning ordinance or amendment under § 6-29-760(D) applies only if the governing authority substantially complied with the notice requirements of § 6-29-760 or with the governing authority's established procedures.

Although the circuit court recognized that BP alleges that the City failed to substantially comply with the applicable notice and procedural requirements, it nevertheless dismissed the claims as untimely because it found that BP had actual notice of the pendency of Ordinances 2014-25 and 2014-26 and was not prejudiced by the City's failure to comply with such requirements. The circuit court stated, "Based on BP's and other interested parties' attendance at the public hearings, it is clear that the notice served the objective of informing the public, including Plaintiff BP, of the pendency of the zoning amendments. The essential objectives contemplated by Section 6-29-760(A) and (B) were thus satisfied." (Order p. 9.)

The circuit court's ruling on this issue is in error for two reasons: (1) the circuit court impermissibly construed the allegations of the complaint against BP to conclude that BP was not prejudiced by the City's failure to comply with the applicable notice and procedural requirements; and (2) the circuit court incorrectly concluded that substantial compliance with a notice requirement for a pending ordinance can arise from a person's actual notice of the pending ordinance.

BP's complaint contains numerous factual allegations supporting its claim that the City failed to comply with the applicable notice and procedural requirements for adopting Ordinances 2014-25 and 2014-26. Under the standard of review that must be applied in ruling on a motion to dismiss under Rule 12(b)(6), SCRCP, the circuit court was required to construe these allegations in the light most favorable to BP and find that the complaint states a valid claim for relief that is not barred by the statute of limitations. By disregarding BP's allegations and finding that the City substantially complied with the applicable notice and procedural requirement, the circuit court erroneously failed to construe the allegations in favor of BP, as it was required to do under a Rule 12(b)(6) motion. *See Nelson v. QHG of S.C.,* 354 S.C. 290, 300, 580 S.E.2d 171, 176 (Ct. App. 2003) (stating that under Rule 12(b)(6) the "facts and inferences alleged on the complaint are viewed in the light most favorable to the plaintiff").

In support of its claims that the City failed to substantially comply with its own procedures and the notice requirements of § 6-29-760 in adopting Ordinances 2014-25 and 2014-26, BP expressly alleges that "the City failed to adopt City Ordinances 2014-25 and 2014-26 in accordance with the requirements of the Enabling Act and the City's established procedures." (Compl. ¶ 63.) This allegation sufficiently states the ultimate

fact to support BP's position that the sixty-day statute of limitations does not apply in this case, and BP supports this allegation with several factual allegations:

- The City did not provide it with ten days' notice of the public hearing on the Cainhoy PUD Master Plan as required by § 6-29-760(B). (Compl. ¶ 34.)
- The City did not comply with its own established procedures by adopting the Cainhoy PUD Master Plan without requiring all information that must be included in a PUD application as required by City Ordinance § 54-255. (Compl. ¶¶ 68-72.)
- The City did not comply with its own established procedures by adopting the Cainhoy PUD Master Plan without making any findings as to whether the Cainhoy PUD Master Plan met the necessary criteria for PUD zoning as required by City Ordinance § 54-254. (Compl. ¶¶ 80-85.)
- The City and its Planning Commission "failed to comply with the notice requirements of S.C. Code Ann. §§ 6-29-760 and 6-29-1130(B) and City Ordinance §§ 54-942(a), 54-942(b), and 54-943." (Compl. ¶94.)
- The City failed to provide adequate notice of the public hearings on City Ordinance 2013-125 as required by § 6-29-760, which infected the City's consideration of the Cainhoy PUD Master Plan. (Compl. ¶¶ 88-93.)

As indicated by these allegations, BP has sufficiently pleaded not only ultimate facts about the City's failure to substantially comply with the notice requirements of § 6-29-760 and its established procedures but also evidentiary facts to support its contention that the sixty-day statute of limitations under § 6-29-760(D) does not apply.

Despite these allegations, the circuit court erroneously ruled that BP's claim is time-barred based on the impermissible inference that BP was not prejudiced by the City's failure to comply with the applicable notice and procedural requirements. The complaint, when construed in the light most favorable to BP, clearly alleges that BP was

prejudiced by the lack of timely notice of the public hearings on the zoning amendments challenged in this case. In Paragraph 44 of the complaint, BP alleges that after the February 11, 2014 public hearing held by City Council that it "expressed the need for more time to study the size of a buffer area between the residential development contemplated for Cainhoy Plantation and BP's adjacent property necessary to ensure the safe and compatible co-existence of BP's facility and the development of Cainhoy Plantation." Similarly, in Paragraph 45, BP alleges that it addressed City Council at the February 25, 2014 meeting and expressed the need for more time to study the proposed development.

While BP had knowledge of the pending zoning amendments, the complaint makes clear that it was prejudiced by the City's failure to provide adequate notice because BP did not have sufficient time to study the zoning ordinances and participate meaningfully in the Planning Commission's and City Council's consideration of the rezoning. Therefore, the Court's conclusion that BP was not prejudiced by the City's failure to comply with the notice requirements of § 6-29-760 cannot be reconciled with the allegations in the Complaint, which must be construed in the light most favorable to BP under a Rule 12(b)(6) motion to dismiss.

Instead of construing the numerous allegations regarding the City's procedural deficiencies in adopting Ordinances 2014-25 and 2014-26 in BP's favor, the circuit court ruled that the sixty-day statute of limitations under § 6-29-760(D) nevertheless applied because the City substantially complied with the applicable notice and procedural requirements for adopting zoning amendments based on BP's actual notice of the pending ordinances and BP's failure to allege that it was prejudiced by the City's failure to

comply with such requirements. Existing South Carolina law, however, does not support this conclusion.

South Carolina courts have never held that a governmental entity's substantial compliance with a notice requirement can be established through a plaintiff's knowledge of the challenged ordinance and attendance at the hearing where such ordinance is considered. Instead, it appears that this Court has rejected this premise. Specifically, in *Horry County v. Myrtle Beach*, 288 S.C. 412, 343 S.E.2d 36 (Ct. App. 1986), this Court ruled that the City of Myrtle Beach had not substantially complied with notice requirements for the enactment of a zoning ordinance relating to a city's lease of property despite the plaintiffs' actual notice of the pendency of the ordinances. In that case, an ordinance adopted by the City of Myrtle Beach was challenged by the Horry County Airport Commission on the grounds that the City failed to comply with notice requirements under S.C. Code Ann. § 1-3-23. The Airport Commission's director and members attended the meetings in which the City considered the ordinances, and the Court of Appeals ruled that the ordinances were invalid and void "even though Horry County and the Airport Commission had actual notice that the ordinance was being proposed." *Id.* at 419-20, 343 S.E.2d at 40.

Based on the Court's decision in *Horry County*, the Court should reject the bright-line rule apparently adopted by the circuit court in which the adequacy of notice of a pending ordinance depends on the challenging party's actual knowledge of the pendency of the ordinance challenged. As one court articulated, "Adoption of such a rule would invite disputes over whether a person was present at the meeting where the action was taken; or, if present, whether he or she heard what went on and understood the nature of

the action taken." *Int'l Longshoremen's & Warehousemen's Union v. Bd. of Supervisors of San Bernardino Cnty.*, 116 Cal. App. 3d 265, 274 (Ct. App. 4th Dist. 1981).

Such a rule also fails to fully effect the purposes of having notice requirements. The purpose of a notice requirement is not merely to inform the public of the pendency of the ordinance, but is rather "designed to protect the citizens of the City and other interested parties, to enable them to acquire knowledge of ordinances affecting their interest, and to serve as a restriction upon the actions of the mayor and council." *Horry County*, 288 S.C. at 419, 343 S.E.2d at 40. In other words, notice requirements are intended to provide citizens with sufficient time and information to determine how their interests will be affected by a pending ordinance and to equip themselves with the tools and information needed to effectively serve as a check on government action. *See also, Brown v. County of Charleston*, 303 S.C. 245, 399 S.E.2d 784 (Ct. App. 1990) (invalidating ordinance where notice failed to "reasonably apprise" the plaintiff of the ordinance's effect on his interest despite county's statutory compliance with requirement regarding time and manner of notice).

In this case, if the circuit court's ruling is affirmed, it would impede the purposes of requiring notice of government action. It would effectively penalize citizens who participate in public hearings and meetings on late notice without having time to gather and analyze information relevant to the matters considered in such hearings. Similarly, citizens would be discouraged from attending public meetings if they know their actual attendance at such meetings would insulate the governing body's failure to comply with notice and procedural requirements from future challenge.

The circuit court's reasoning should especially be rejected on a motion to dismiss, which must be considered solely on the allegations in the complaint. The circuit court effectively requires a party asserting that the government failed to comply with notice and procedural requirements under § 6-29-760(D) to allege that it was prejudiced by the purported non-compliance, despite the fact that no such pleading requirement is supported by statute or judicial precedent. In the absence of such a pleading requirement, it is inappropriate to make a determination under a Rule 12(b)(6) motion that the City substantially complied with the applicable notice and procedural requirements based on BP's lack of prejudice, which the circuit court inferred solely from BP's attendance at the meeting where Ordinances 2014-25 and 2014-26 were considered. As a result, the circuit court's conclusion that the City substantially complied with the applicable notice and procedural requirements imposed by § 6-29-760(D) is based on impermissible inferences and an incorrect application of the law, and it should be reversed accordingly.

IV. The Court improperly dismissed BP's claims challenging Ordinances 2014-25 and 2014-26 with prejudice.

The circuit court improperly dismissed BP's "claims that pertain to Cainhoy Land & Timber, LLC, and Southern Timber, LLC, with prejudice." (Order p. 10) (emphasis added). The dismissal of the claims with prejudice was in error because any dismissal of the claims should be without prejudice. "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint." *Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

In this case, the circuit court's dismissal of the claims challenging the validity of Ordinances 2014-25 and 2014-26 deprives BP of its right to assert additional allegations to cure the alleged deficiencies on which the circuit court based its dismissal of the claims. According to the circuit court, it dismissed BP's claims because BP failed to allege sufficient facts to justify standing and because BP did not plead that it was prejudiced by the City's failure to substantially comply with the applicable notice requirements. The circuit court did not, however, rule that such facts cannot be alleged. Accordingly, dismissal with prejudice was improper, and BP should be afforded the opportunity to amend its complaint to support its claims challenging the validity of Ordinances 2014-25 and 2014-26 with further allegations.

CONCLUSION

For the foregoing reasons, BP respectfully requests that the Court reverse and vacate the circuit court's Order dismissing BP's claims challenging the validity of Ordinances 2014-25 and 2014-26 and reinstate such claims for further proceedings.

Respectfully submitted,

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July 13, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
The Honorable Kristi L. Harrington, Circuit Court Judge

Lower Court Case No. 2014-CP-08-1840
Appellate Case No. 2015-000713

BP Amoco Chemical Company.....Plaintiff/Appellant,

v.

City of Charleston; Tract 7, LLC; Cainhoy Land & Timber, LLC; and Southern Timber, LLC.....Defendants,

Of whom Cainhoy Land & Timber, LLC and Southern Timber, LLC are ..... Respondents.

PROOF OF SERVICE

This is to certify that I have this day served counsel of record in the foregoing matter with a copy of the **Initial Brief of Appellant** by depositing same in the United States Mail with proper postage affixed, addressed as follows:

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July 13, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: BP Amoco Chemical Company v. City of Charleston; Tract 7, LLC; Cainhoy Land & Timber, LLC; and Southern Timber, LLC
Appellate Case No. 2015-000713

Dear Ms. Kitchings:

Enclosed for filing, please find an original and one (1) copy of each of the following:

(1) Initial Brief of Appellant;
(2) Appellant's Designation of Matter to be Included in the Record on Appeal; and
(3) Proof of Service.

Please file the originals and return the date-stamped copy of each to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving a copy of the foregoing pleading on counsel of record.

Sincerely,

Moore & Van Allen, PLLC

E. Brandon Gaskins

EBG/ws

Enclosures- as stated

cc: M. Dawes Cooke, Jr., Esquire
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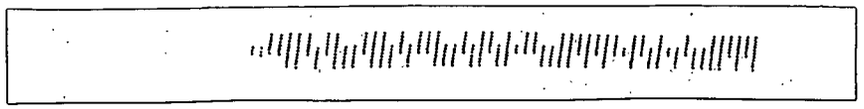

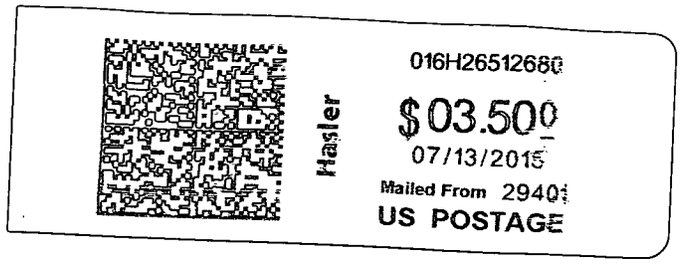

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