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**THE STATE OF SOUTH CAROLINA**

**In The Court of Appeals**

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

**Hon. DeAndrea Gist Benjamin, Circuit Court Judge**

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**Appellate Case No. 2014-000583**

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**Samuel T. Brick, Appellant**

**v.**

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

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# REPLY BRIEF OF APPELLANT

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Appellant, Pro Se

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## CERTIFICATE OF COUNSEL

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The undersigned certifies that this Reply Brief complies with Rule 211 (b), SCACR.

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## ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in their opening brief, Appellant offers the following points of clarification and reply to the arguments raised by the Respondents.

1. *Failure to Join Development Permittee within Statutory Period for Appealing Being Jurisdictional Defect.* As addressed more fully in Appellant's brief and below, the Intervenor/Respondent is not the development permittee for the Villages project and it was and is not a necessary party under the terms of Spanish Wells Property Owners Assn., Inc. v. Board of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 367 S.E.2d 160 (1988)(hereinafter Spanish Wells). Intervenor/Respondent on Page 5 of its Brief refers to Fairways Development LLC being the "development applicant". As mentioned in Appellant's brief, Article 26-186 of the Richland County land Development Code, *Green Code standards*, has a bifurcated process for implementing development. The Green Code applicant and the Green Code developer have differing roles. Fairways Development LLC is not the development permittee for the project. The public record of the permit (required by Section 6-29-1150 (B)) is to a person other than the owner of the property (R. pp. 49-51). The project permittee, as addressed below, is not an association or body, corporate or unincorporated, capable of suing or being sued in South Carolina. The thirty day General Assembly provision (Section 6-29-1150 (D)(1)) for bringing an appeal to the circuit court relates to an appeal of an administrative decision by a board or commission. The joinder of a third party, in this case a development permittee, is not referred to in the statutory provision other than as a party a mediator may or may not

join.[1] The joinder of a third party in the General Assembly's Section 1150 appeal provisions is not a jurisdictional requirement. None of the court rules regarding joinder make the joinder jurisdictional. In this regard, the respondents refer to Vulcan Materials v. Greenville Cty. Bd., 342 S.C. 480, 536 S.E.2d 892 (Ct.App. 2000) (hereinafter Vulcan) a zoning matter relating in part to an appellant meeting changed statutory periods within which it is necessary to file an appeal. Vulcan does not relate to joinder of necessary parties or what a necessary party must be.

Section 6-29-1150 (D) requires an appeal from a decision of the planning commission to be filed within thirty days after actual notice of a decision. Such filing is the jurisdictional trigger for appellate review. The appeal is of an action of the planning commission. Judicial economy, the basis for Spanish Wells requiring a development permittee to be a party is not a jurisdictional requirement based on regulation or statute but an equitable remedy based on judicial economy. Intervenor/Respondent Fairways Development LLC provided no indication in the record or otherwise that it was prejudiced by not being joined within the thirty day period and it successfully intervened. Appellant provided Intervenor/Respondent notice of the appeal within the thirty day period yet it did nothing until after the thirty days had run when it cried lack of jurisdiction. (R. p. 98).

Spanish Wells limits its findings to whether a permittee is a necessary party in an action that might revoke a development permit. It did not use the term property owner. Equity and judicial economy might demand participation of a party that might or might

[1] See Section 6-29-1155, South Carolina Code. The provision provides a person not the owner may petition to intervene as a party and if the mediator decides the person is of substantial interest the mediator must grant the motion to intervene. The substantial interest guideline in this respect is not limiting and only mandatory should the interest be substantial.

not take exception and wish to participate in the appeal. The appeal however is jurisdictional when brought in accordance with the statutory mandate. Regarding the specific matter of joining a development permittee after the period within which to institute an appeal, Spanish Wells (295 S.C. p. 68), in dicta, stated the circuit court that initially heard the case, after dismissing it for failure to join the necessary party, allowed the Plaintiff fifteen days to accomplish such a joinder. The Plaintiff, in that instance, did not join the permittee and instead appealed. Respondent Richland County in the first note of its Brief suggests the issue is jurisdictional; otherwise the Supreme Court would have remanded the matter to the circuit court. Spanish Wells however, infers that had the Plaintiff/Appellant, while the matter was before the circuit court, joined the permittee Calibogue, the matter would be moot. Spanish Wells saw no jurisdictional issue but answered the Appellant's appeal. The Appellant's decision to appeal rather than to join when a necessary party was indicated by the lower court in Spanish Wells was fatal.

The lower court in the instant case and Intervenor/Respondent's reliance on Friends of McLeod v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008) (hereinafter Friends) that the failure to join the permittee within the thirty day period is fatal are misplaced. Friends relates to a zoning board decision not a land development matter and, as noted before in Appellant's brief, Friends was vacated by Friends of McLeod v. City of Charleston, 384 S.C. 438, 682 S.E.2d 488 (2009). The zoning cases Friends and Vulcan entertained involved Article 5 of the State Enabling Act[2] and are substantially different from Article 7 land development provisions. The permanency of zoning and the political, legislative zoning process, as enabled in Article 5, differ

[2] South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (6-29-310, et seq.)(referred to as Enabling Act in Appellant's Brief and this Reply brief).

substantially from the ministerial administrative requirements and subsequent executive planning commission reviews for land development permits. The permanence of rezoning and its political basis vary substantially from a land development permit matter that is but one initial step in a land development project. Vulcan does not address the jurisdictional issue of the timeliness of joining necessary parties to an already filed appeal. It examines the effective dates of changed statutory schemes and emphasizes, with regard to the instant matter, only that an appeal be brought within a prescribed statutory period.

2. *Collateral Estoppel.* Appellant briefed this issue before the lower court and in his Initial Brief. For application of collateral estopple *the issue* of Fairways Development LLC's joinder must have been litigated and directly determined in the prior action. Nelson v. Coker, 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003). Under South Carolina law, "[c]ollateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." in Sims v. Amisub of South Carolina, Inc., 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014). cites Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009), stating "The party asserting collateral estopple must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment."

The issue of Intervenor/Respondent's interest in the project that would require its participation and joinder in the South Carolina Freedom of Information Act (FOIA) case was litigated in the FOIA case. The circuit court heard the reasons that Plaintiff,

Appellant had in adding Fairways Development LLC to the FOIA action. Plaintiff argued that he joined Fairways Development LLC because the FOIA allows for declaratory relief. Under Section 15-53-80 of the Uniform Declaratory Judgments Act, when any declaratory relief is sought, and it was prayed for in Appellant's FOIA case, all persons must be made parties who have or claim *any interest* which would be affected by the declaration (emphasis added). The Court in the FOIA case granted Fairways Development LLC's motion to dismiss it from the case. The court's dismissal was a direct determination by the court on the issue of any interest that Fairways Development LLC may have had in the project. It's consideration of the matter is enunciated in its Order of dismissal (R. p. 20).[3] That the Court also speaks to FOIA only applying to a public body and there being no private cause of action against Fairways Development LLC, are matters separate from the issue of joinder. In the FOIA case Fairways Development LLC, facing requested relief that the project approval be declared null and void and returned for further staff considerations, moved for its dismissal from the case. In other words, it had no interest in the issue. In the instant matter, after being apprised of Appellant's similar prayers for relief again for alleged failures by Richland County, Fairways Development LLC moved for dismissal of the entire matter because it was a necessary party and not joined.[4] The issue in both cases is Fairways Development LLC's necessary joinder to a proceeding regarding the Villages project. It had its day in court on the issue, was dismissed from that matter in a previous case involving the same parties and similar prayers for relief as in the instant matter, and now appears to be using it to

[3] The Honorable Alison Renee Lee subsequently revised the Order requested to be made a part of the Record by Intervenor/Respondent. The revision was to correct Judge Lee's Dismissal of Richland County on pages 4, 5 of the Order (R. pp. 21,22) to make it comport with its ruling on its first page (R. p. 18).
[4] Initially Appellant added Fairways as a party defendant but subsequently amended his pleading to designate Fairways as a party respondent (R. p. 234).

force a dismissal of the entire proceedings by being declared such a party of interest.[5] The issue was resolved and the lower court in the instant appeal erred in relitigating it.

3. *Argument that Fairways Development LLC is development permittee is not supported by the record.* The Respondents argue that since the Subdivision Review Application and the Sketch Plan submission are both signed by the owner of the property, Fairways Development LLC, the owner is the development permittee. They do not indicate that where both documents provide for naming an applicant for approval of the sketch plan and development plat, a separate entity, Fairways Development Group, is listed. Whereas the owner made application for use of the Green Code provisions, it is not the project developer. The Green Code and the Article 7 provisions of the State Enabling Act recognize that an owner is not always the developer. Both provisions use different terms for different land development functions.

The Respondents continue to ignore that the public permit was issued to a separate entity altogether, an agent of the planner who prepared the sketch/concept plan for a client not otherwise known in the project except for later being a brief owner (three and a half months) of a third of the property on which the development is suggested. (R. p. 226). The county considered the stated applicant on the Subdivision Review Application and the sketch plan submission as a separate entity than the owner because it knew the owner was not the project developer. Intervenor/Respondent, other than in its request to lift the stay and require a supersedeas bond, fails to state that the owner for the first phase of the project, Fairways Development LLC, no longer owns a portion of that property and has no development interest in it.

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[5] The declaratory judgment mandate for joinder of a party with any interest is legally more inclusive than that of Spanish Wells which limits its holding to requiring joinder of development permittees.

The two-step Green Code process noted above clarifies that not every property owner is a developer. In the instant matter, as more fully shown in Appellant's Brief, Fairways Development LLC's role in initiating the Green Code project is that of the owner and not the developer. Fairways Development Group consistently is listed as applicant for the sketch plan approvals. An owner's application for a Richland County green code project is required under its Section 26-186 (c). Section 26-186 (e) is that an applicant or developer prepare and submit an Existing Features Site Analysis Plan. The concept plan required to be filed by a developer is included as part of the sketch plan. The official permit approved by county designated staff and published by Richland County Department of Planning and Development Services, the public document required under Section 6-29-1150 (B) of the South Carolina Code, is addressed to John Champoux with a copy to, among other, John Bakhaus, c/o Fairways Development Group, Applicant (R. pp. 49-51). The county staff treated the permit sketch plan application, the crux of the appeal, as that of the developer and not the owner.[6]

Unless there is a compelling reason to overrule the agency's determination, the circuit court, acting as an appellate body should apply a deferential standard of review to administrative matters such as who is the developer. In a state administrative law matter, the Court of Appeals in Young v. S.C. Department of Health and Environmental Control, 383 S.C. 452, 460, 680 S.E.2d 784 (Ct. App. 2009) applied the application of a deferential standard to an administrative agency when substantial evidence existed in the

[6] Fairways Development LLC and the County Department of Planning and Development Service were sensitive with regard to Green Code applications requirements. On November 5, 2012, just two days before the application described in this paragraph was filed, the Planning Commission granted Appellant's Appeal of a previous permit as being improper because the Green Code application was not signed by the property owner. See further discussion of this sensitivity in who executes what in the Green Code applications in the transcript of the matter before the lower court (R. p. 169, lines 22-25, p. 170).

record in support of its action. In another more recent Court of Appeals decision relating to appellate review fact finding, the Court referred to an older case that addressed the standard of review of administrative factual findings prior to the current statutory requirement for administrative reviews. The prior standard of appellate review was a finding of fact by the administrative Commission was not subject to review if supported by any evidence. Hyman v. S.C. Employment Security Commission, 234 S.C. 369, 108 S.E.2d 554 (1959). See Todd's Ice Cream, Inc. v. S.C. Emp't Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984) as cited in Stubbs v. S.C. Dept. of Employment and Workforce and JSE, LLC, Appellate Case No. 2012-212280, Filed March 5, 2014. The circuit court's finding in the instant matter that the owner is the development permittee (R. pp. 7, 8) fails to defer to the public permit, the product of substantial administrative process and review by the administering agency which permit was not awarded to the property owner. Furthermore, the circuit court's factual determination that, just because Fairways Development LLC is the owner, it is the developer has no basis in fact and fails to recognize the Green Code bifurcated application process. Nothing in the Record shows that Fairways Development LLC has done anything to develop the project. Although the Record shows that others expended funds for the project, there is nothing in the Record or provided by Intervenor/Respondent that Fairways Development LLC expended anything. It is not evident as a participant in the project other than to execute the application for the green code as required of the owner, not the developer. Fairways Development LLC did not pay the application fees. The permit application may be executed by either the owner or the developer. The concept plan (a part of the sketch plan in the instant project) must be

executed by the developer. The applicant of the sketch plan applications is not stated as Fairways Development LLC. To counteract any inference that Fairways Development LLC and Fairways Development Group are the same entity, the Record is clear throughout that the two entities are separate. This is more fully detailed in Appellant's Brief.

On May 28, 2014, just six days after Appellant filed his Initial Brief, the Intervenor/ Respondent moved pursuant to Rule 241, SCACR, that the Richland County Circuit Court lift the automatic stay and require Appellant to post a supersedeas bond. The motion and the exhibits, now part of the record of the proceedings with regard to this appeal, included an affidavit as its Exhibit B 1 (R. pp. 222-224) to the effect that Longcreek Associates, LLC purchased the property, the subject of the action from Fairways Development LLC. An examination of the Richland County Tax Records, a normally indisputable source, filed as Exhibit F to Appellant's return to the Motion, (R. pp. 225-226) indicates that portion of the property which would make up Village #1 has been sold three times since the county permit to authorize its development was issued on December 7, 2012. The deed representing the first sale to Longcreek Associates, LLC, dated December 13, 2012, as filed with the Richland County Registered of Deeds, another indisputable record, was filed as Exhibit E to Appellant's return to the motion to lift the stay, (R. pp. 227-228). Appellant had no reason to believe that Fairways Development LLC sold the property. This issue is not something Appellant has held as a silver bullet; Appellant discovered it with the recent motion to lift the stay filed just after Appellant filed his Initial Appellant Brief. An affidavit as an exhibit to the motion to lift the stay states another person as owner. The last paragraph of Intervenor/ Respondent's

motion to intervene filed on June 14, 2013 (R. p. 86, last para., first two sentences), starts with the statement "In this case, Fairways owns the property which is the subject of Brick's appeal...." That statement appears disingenuous since a third of the project, the portion listed as the first Village to be developed, was sold almost six months before the motion.

After receipt of the affidavit in the motion to lift the stay, Appellant researched the matter and discovered a Sustainable internet display for prospective customers as an example of its projects (R. pp. 229-232). Appellant filed this in his return to the motion to lift the stay. Page 2 of the Sustainable display (R. p. 230) lists the owner of the project property as Longcreek Development, LLC, a South Carolina corporation, otherwise unknown in this matter. It is an incorporated entity that differs from LongCreek Associates, LLC. Respondent Richland County continues to argue that Fairways Development LLC is the owner of the 100.7 acre development.[7] There is no reference in the Record, or otherwise to Appellant's knowledge, that Fairways Development LLC is the development permittee. The current owner of the projected first phase for the project is a foreign corporation not incorporated within South Carolina and otherwise unknown. With regard to introduction of this recently determined matter, a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records. See 31 C.J.S., Evidence, Section 50(1), p. 1018-1021, as adopted in Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325 (Ct. App. 1984). Documents filed with the court are part of its record and a court can take judicial notice of them and reference them. Dept. of Soc, Svcs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463 (Ct. App. 2009). An appellate court can take judicial notice of something that

[7] See page 8 of Respondent Richland County's Brief.

was not before the trial court if it is indisputable. Wise v. Wise, 394 S.C. 591, 600, 716 S.E.2d 117 (Ct. App. 2011). The sale of the property is evidence of Fairways Development LLC's disinterest in its development. It also undercuts the argument the respondents continue to make that just because a party is the owner makes it a development permittee.

4. *Appellant failed to join anyone other than the County in the appeal.* Aside from the determination that Fairways Development LLC was not interested in the matter because he withdrew from the FOIA case, Appellant, as noted in his Brief, was unable to determine a different appropriate party to join. First, the permit was awarded to an individual whose only participation in the matter was as an employee of a planning contractor, not a developer (Sustainable), to a corporation (Long Creek Associates, LLC) that apparently paid for the sketch plan but is not otherwise identified in the project. As stated in Appellant's Brief, upon query by attending neighbors at an early meeting regarding the development, the President of Sustainable, briefing as the planner and not a developer, stated Fairways Development LLC and John Bakhaus were not the developers. They never identified who was. Fairways Development LLC sold the first phase for the project just a few days after its approval.

Fairways Development Group, stated as the applicant for the sketch plan, has no footprint as a developer within South Carolina. There are no public or apparent contractual arrangements binding its membership. There is no indication Fairways Development Group contracted for or paid for anything with regard to this or any development anywhere. It is not an association known to anyone but possibly its members. There is no known concept of a formal or informal Fairways Development

Group association such as a known neighborhood, church, active retail, or business association. Phase one has been sold three times since the Villages sketch permit was approved by Richland County. Phases two and three in which conservation set asides form part of the basis for the relaxed zoning in phase one are indicated online as being owned by a corporate body uninvolved in the project. The corporate body that initially purchased the phase one property was the client of the sketch plan planners but that corporate body sold the property and may no longer be involved. That body, Longcreek Associates, LLC, is unidentified in the sketch plan administrative files other than on the sketch plan itself as the party for whom it was prepared (R. p. 255).

Section 15-5-160 of the South Carolina Code states, "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." This law does not make an unincorporated association a legal entity. See Crocker v. Barr, et alia, 295 S.C. 195, 367 S.E.2d 471 (1988), citing Medlin v. Ebenezer Methodist Church, 132 S.C. 498, 129 S.E. 830 (1925). The provision is designed to provide a convenient procedure by which a plaintiff can bring the members of an association before a court without naming and serving process upon them individually. Once they are before the court, the liability of the members of the association, if any, is determined by the applicable substantive law. The law in the instant case is of no assistance. Section 15-5-160 neither creates nor destroys any substantive liabilities. Graham v. Lloyd's of London, 296 S.C. 249, 255, 371 S.E.2d 801 (1988) citing Medlin v. Ebenezer, supra. The Court of Appeals in Graham referred to the Plaintiff's assertion that Lloyd's is an association or enterprise engaged in the insurance business; that it has members, officers, and a

governing committee; that it issues insurance policies with its seal; that it has a general counsel; and that it maintains bank accounts in the United States. (id., p. 254) Appellant is unable to and Respondents have not made any such assertions regarding Fairways Development Group. The development group is not an association, public or private known in the community and there is no indication it is developing property or otherwise is in the real estate or any other business. It has no signs in the area. As noted in Appellant's Brief and above, there is no record indicating that this group could participate in these proceedings and obtain any judicial economy. The President of Sustainable, the project planner, specifically stated that the President of Fairways Development LLC is not involved in the development. Appellant contends such Section 15-5-160 is inapplicable. No formal or informal association of developers is apparent or available for service of process or with the right to sue or be sued. Should such a party materialize, Appellant would not object to its joinder. There has been no such party.

5. *Appellant lacks Constitutional standing and does not have substantial interest in the matter.* Article 1, Section 22 of the South Carolina Constitution provides that all persons have a right to judicial review of an administrative agency determination affecting private rights other than through a limiting procedure prescribed by the General Assembly. Appellant's private rights are enunciated in the purpose sections of the County's Green Code (Section 26-186 (a)) and in Section 6-29-340 of the Enabling Act. [8]

[8] This section states that local governments must design their plans and programs "to promote public health, safety, morals, convenience, prosperity, or the general welfare as well as the efficiency and economy of its area of jurisdiction." The Land Development Code of Richland County, South Carolina (Section 26-1, et seq.) in its second section states as a purpose, among many other salutary reasons, to assure compatibility between neighboring properties and adjacent zoning districts. The Green Code's stated purpose is, among other things, to preserve and protect environmental resources, scenic vistas, and natural and cultivated landscapes. All these factors are private rights of Appellant for his enjoyment of and benefit from his property. Appellant also has the right to depend on the correct application of the land development laws within the county.

In the instant case, Section 6-29-1150 of the South Carolina Code provides the statutory scheme for administrative and judicial review of planning commission or designated staff approvals and disapprovals of sketch plans[9]. The General Assembly by providing a statutory right to any party in interest broadens the required Constitutional appeal authority. Appellant exhausted his administrative remedies by appealing and making his argument to the planning commission (the General Assembly states that the planning commission is the final administrative action). Within thirty days of actual notice of that decision he appealed the decision to the circuit court in accordance with Paragraph 1150 (D)(1). The General Assembly in adding an authorization for a property owner whose land is subject to a decision of a planning commission split the former Section 1150 (C) by making its last sentence the new Paragraph (D)(1), not changing the language. It then added a new Paragraph (D)(2) to authorize pre-litigation mediation process in an appeal of an involved property owner. The second sentence of Paragraph (D)(2) states when property owners appeal with pre-litigation mediation the appeal must be filed made within thirty days of the mailing of the planning commission decision. It is clear that Paragraphs (D)(1) and (D)(2) apply to different party appellants otherwise the General

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[9] For convenience Sections 6-26-1150 (C) and (D) are set forth following:
(C) Staff action, if authorized, to approve or disapprove a land development plan may be appealed to the planning commission by any party in interest. The planning commission must act on the appeal within sixty days, and the action of the planning commission is final.

(D)(1) An appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision.

(D)(2) A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155.

A notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is mailed.

Assembly would have used the same terms, not "any party in interest" for the one provision and a "property owner whose land is the subject of a decision" for the other. Reference to "the" planning commission decision in Paragraph (D)(1) rather than use of "a planning department decision" further indicates the appeal connection of Paragraph (D)(1) to the planning commission action in Paragraph (C). Your Appellant matter appealed to the circuit court under Paragraph (D)(1). Such Paragraph (D)(1) refers to the appeal authorized in Paragraph (C). In doing so, Paragraph (D)(1) refers to "the" decision of the planning commission rather than stating "a" planning decision indicating a separate concept.

An examination of the other provisions introduced by the General Assembly regarding pre-litigation mediation indicate that the appeal authority in Paragraph (D)(2) with regard to property owners may be precatory rather than mandatory. The use of "may" in Paragraph (d)(2) and what the General Assembly did with regard to zoning appeals in its appeal Section 6-29-820 (B) in specifically providing that a property owner had a choice of filing without the pre-litigation mediation clarifies this.[10] Accordingly, in reading the statute as a whole, property owners are not the only individuals who can be regarded any party in interest.

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[10] For convenience, the relevant portion of the current provision follows:

**SECTION 6-29-820.** Appeal from zoning board of appeals to circuit court; pre-litigation mediation; filing requirements.
(A) A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.
(B) A property owner whose land is the subject of a decision of the board of appeals may appeal either:
(1) as provided in subsection (A); or
(2) by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825.
Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

Section 6-29-1155, also added in 2003, relates to the administration of pre-litigation mediation. The General Assembly authorized "a person who is not the owner of the property" to petition to intervene as a party in the mediation. It provided that the mediator had to grant the petition if the person has a substantial interest in the decision of the planning commission. The mediator would apply the "substantial" benchmark only in the event he or she decides not to grant the intervention. The substantial benchmark has no other application in the Section 6-29-1150 and 1155 Article 7 Land Development appeals provisions. The General Assembly included no limiting period within which such person with substantial interest was required to apply.

The General Assembly in 2003, among some unrelated things, provided for pre-litigation mediation for property owners appealing zoning board decisions, architectural review board decisions, and planning commission decisions.[11] This was the first

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[11] The full title of the bill is as follows:

An Act To Amend Section 1-23-630, Code of Laws of South Carolina, 1976, Relating to the Powers of Administrative Law Judges, so as to Authorize an Administrative Law Judge to Use Mediation in a Manner That Does Not Conflict with Other Provisions of Law and Is Consistent with the Division's Rules of Procedure; To Amend Section 6-29-800, Relating to the Powers of a Zoning Board of Appeals, so as to Provide a Matter May be Remanded to an Administrative Official if the Board Determines the Record is Insufficient for Review; To Amend Section 6-29-820, Relating to Appeal from a Zoning Board of Appeals to a Circuit Court, so as to Provide That a Property Owner may File a Notice of Appeal Accompanied by a Request For Pre-Litigation Mediation; by Adding Section 6-29-825 so as to Provide the Procedure For Pre-Litigation Mediation In an Appeal from a Zoning Board of Appeals Decision; To Amend Section 6-29-830, Relating to the Notice of Appeal from a Zoning Board of Appeals Decision, So as to Provide For the Procedure by Direct Appeal and by Appeal After the Mediation Is Not Successful or Approved; To Amend Section 6-29-840, Relating to Determination of the Appeal, so as to Provide when an Appeal Includes No Issues Triable of Right by Jury or When the Parties Consent, that the Appeal Must be Placed on the Nonjury Docket and to Provide if any Party so Requests, The Appeal must be Given Precedence over other Civil Cases; To Amend Section 6-29-890, Relating to an Appeal to a Board of Architectural Review, so as to Provide a Matter may be Remanded to an Administrative Official If the Board Determines the Record Is Insufficient for Review; To Amend Section 6-29-900, Relating to an Appeal from a Board of Architectural Review to the Circuit Court, so as to Provide that a Property Owner May File a Notice of Appeal Accompanied by a Request for Pre-Litigation Mediation; by adding Section 6-29-915 so as to Provide the Procedure for Pre-Litigation Mediation in an Appeal from a Board of Architectural Review Decision; to Amend Section 6-29-920, Relating to the Notice of Appeal from a Board of Architectural Review Decision, so as to Provide for the Procedure by Direct Appeal and by Appeal after the Mediation is not Successful or Approved; to Amend Section 6-29-930, Relating to Determination of the Appeal, so as to Provide When an Appeal Includes No Issues Triable of Right by Jury or When the Parties Consent, That the Appeal Must be Placed on the Nonjury Docket and to Provide if any Party So Requests,

distinction the General Assembly made that differentiated between property owners and other parties of interest in appeals related to land development issues. The planning commission treated Appellant as a "party in interest" and that determination was respected by the circuit court. As such, Appellant exhausted his administrative remedy and properly appealed for judicial review to the circuit court.

Appellant further contends the matter of Appellant's interest in the matter is moot. As the circuit court determined, the planning commission by acting on Appellant's appeal considered it a party in interest. The planning commission knew that Appellant lived in near proximity to the project. It also knew that under the Richland County Land Development regulations, Appellant's property was adjacent to the project. Under such regulations' definitions section, Section 26-22, describes "Lot adjacent" as a lot contiguous to another lot (R. p. 213). Under Section 26-21(b)(9), its Rules of Construction, the meaning of contiguous as of the time Appellant filed the appeal was "property having a common boundary of ten (10) feet or more." (R. p. 212). Both Appellant's property and the property, the subject of the permit, have a common boundary with Lake Columbia with each property having a boundary of ten feet or more. Appellant's property is less than one-tenth of a mile (175 yards) directly across a lake from the property being developed, an area with a dock and proposed water park. (R. p. 261 (last page of Record). See also the Richland County geological map of the distance

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the Appeal Must be Given Precedence Over Other Civil Cases; to Amend Section 6-29-1150, Relating to an Appeal From a Decision of a Planning Commission, so as to Provide That a Property Owner May File a Notice of Appeal Accompanied by a Request For Pre-Litigation Mediation That, When an Appeal Includes No Issues Triable of Right by Jury or When the Parties Consent, the Appeal Must Be Placed on the Nonjury Docket, and that, If any Party So Requests, the Appeal Must be Given Precedence Over Other Civil Cases; by Adding Section 6-29-1155 So as to Provide the Procedure For Pre-Litigation Mediation in an Appeal From a Planning Commission Decision; and by Adding Article 9 To Chapter 29, Title 6 So as to Provide Educational Requirements for Zoning Officials and Employees and to Create an Advisory Committee to Approve Courses for Orientation and Continuing Education Programs.

between Appellant's property at 124 Runneymede Drive and Intervenor/ Respondent's property, the subject of the permit being appealed, an appendix to Appellant's first Affidavit to Fairways' Motion to Dismiss (R. p. 152). There is no golf course or other property in between Appellant's property and the closest point of the Villages project. The planning commission's decision to considerate it adjacent to and in the near vicinity of the project, a definition for being a party of substantial interest, is reasonable and based on substantial evidence.

Intervenor/Respondent's reference to Appellant's status with the Longcreek Property Owners Association is inapposite. Intervenor/Respondent's property proposed for the project also is not subject to the neighborhood association or it rules and requirements.

Appellant's neighborhood was the first neighborhood developed within the Longcreek community and is at its center. When its initial lots were sold, there was no property owners association. Should a landowner in the Runneymede area now join the Longcreek Property Owners Association, it would be required to execute additional deed restrictions and covenants of title then would run with the property. Not many property owners in this part of Longcreek Plantation opt to do that. These long-term Runneymede property owners continue a strong interest and concern for the community

## CONCLUSION

Intervenor/Respondent Fairways Development LLC is not the permittee developer for the project. The circuit court's finding that being an owner makes it the developer fails to consider the Green Code application provisions. Furthermore, such finding lacks any basis in the record. Fairways Development LLC was joined in a previous case as a

party in interest and sued for dismissal. Fairways had its day in court and the circuit court erred in considering the issue again. There is no apparent entity capable of receiving service of process acting as developer for the Villages project.

Appellant has standing. He exhausted administrative remedies prior to his appeal for a judicial ruling on statutory construction and a return of the project for proper county administration. Appellant contends that not joining a development permittee within the thirty day statutory period to appeal the planning commission action is not a jurisdictional defect. Spanish Wells clearly infers such a joiner is permissible. Judicial economy is not a jurisdictional requirement limiting this right and the Intervenor/ Respondent, while not the permittee, already is joined as a party to the proceeding.

Appellant requests this Honorable Court to exercise collateral estopple and return the matter to the circuit court to address the appeal as requested in the Appeal and Notice of Appeal before the Circuit Court and for such other and further relief as this Honorable Court deems necessary and proper.

Very respectfully submitted,

Samuel T. Brick, Appellant, Pro se