THE STATE OF SOUT CAROLINA
In the Court of Appeals

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SC 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 .... 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 the Respondents.

RECORD ON APPEAL

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Berkeley
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014 CP-08-1840

BP Amoco Chemical Company

PLAINTIFF(S)

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

DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This case came before the Court on October 20, 2014, on Defendants' Cainhoy Land & Timber, LLC, and Southern Timber, LLC, Motions to Dismiss Plaintiff's claims pursuant to SCRCP Rules 8(a) and 12(b)(6). The Court hereby GRANTS Defendants' Cainhoy Land & Timber, LLC, and Southern Timber, LLC's Motions to Dismiss.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

2014 NOV 14

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

2151

11/13/14

Circuit Court Judge | Judge Code | Date

For Clerk of Court Office Use Only

This judgment was entered on the 14 day of NOV, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 14 day of NOV, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Mary P. Brown /BW

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	)))	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2014-CP-08-1840
BP AMOCO CHEMICAL COMPANY, Plaintiff, vs. CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; AND SOUTHERN TIMBER, LLC, Defendants.	)))))))))))))	ORDER

2014 NOV 14 PM 1:51
MARY P. BRAWN
CLERK OF COURT
BERKELEY COUNTY, SC

THIS MATTER CAME BEFORE THE COURT on the Motions to Dismiss filed by Defendants Cainhoy Land & Timber, LLC, and Southern Timber, LLC, (hereinafter referred to as "these Defendants") pursuant to South Carolina Rules of Civil Procedure 8(a) and 12(b)(6).

This is an action challenging the enactment of ordinances re-zoning properties belonging to the three landowner Defendants, Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC. These properties, totaling some nine thousand acres, comprise "Cainhoy Plantation," a Planned Unit Development (PUD) located within the City of Charleston. Two of the landowner Defendants, Cainhoy Land & Timber, LLC, and Southern Timber, LLC, move to dismiss the claims in the Complaint relating to them because their properties do not adjoin Plaintiff's property, and thus, these Defendants allege that Plaintiff BP does not have standing to challenge the re-zoning.

In addition, these Defendants assert that the action against them is untimely because this suit was filed more than sixty days after their re-zoning ordinances were enacted.

For the reasons set forth below, these Defendants' Motions to Dismiss are GRANTED.

FACTUAL BACKGROUND

On August 15, 2014, BP Amoco Chemical Company (hereinafter referred to as "Plaintiff BP") filed the instant action asserting the following four causes of action against the City of Charleston; Tract 7, LLC; Cainhoy Land & Timber, LLC; and Southern Timber, LLC (hereinafter collectively referred to as "Defendants"): (1) declaratory judgment that City Ordinances 2014-25, 2014-26, 2014-82 violate the South Carolina Local Government Comprehensive Planning Enabling Act of 1994; (2) declaratory judgment that City Ordinances 2014-25, 2014-26, and 2014-82 violate City Ordinance § 54-255; (3) declaratory judgment that City Ordinances 2014-25, 2014-26, and 2014-82 violate the Separation of Powers and Nondelegation Doctrines under the South Carolina Constitution; and (4) declaratory judgment that City Ordinances 2014-25, 2014-26, and 2014-82 violate City Ordinance § 54-254. Plaintiff BP is asserting additional causes of action against the City of Charleston and Tract 7, LLC. Plaintiff BP also is seeking injunctive relief against all Defendants.

Specifically, Plaintiff BP brings its claims pursuant to S.C. Code Ann. § 6-29-760(C), which provides that "[a]n owner of adjoining land or his representative has standing to bring an action contesting the [zoning] ordinance or amendment; however, this subsection does not create any new substantive right in any party."

Plaintiff BP alleges that in 2013 the Defendants, owners of Cainhoy Plantation, decided to develop the land as a mixed use development that could include over 18,000 residential dwelling units. According to the Complaint, the owners of Cainhoy Plantation recommended amendments to the PUD Ordinance that were considered by the City Planning Commission and later by City Council. On November 6, 2013, City Council enacted the amendments to the PUD

Ordinance. Tract 7, LLC, Cainhoy Land & Timber, LLC and Southern Timber, LLC submitted three separate Cainhoy PUD Master Plan applications to the City on January 24, 2014.[1] The Planning Commission recommended approval of the master plan on February 6, 2014, and held a public hearing on February 11, 2014. Plaintiff BP spoke with the owners of the proposed development of Cainhoy Plantation following that hearing, expressing the need for more time to study the size of a buffer area between the planned residential development and Plaintiff BP's property to ensure the safe and compatible co-existence of Plaintiff BP's plant and the residential development.

On February 25, 2014, a representative of Plaintiff BP addressed City Council and requested a deferral of all ordinances related to the Cainhoy PUD Master Plan and development of Cainhoy Plantation. After being asked to defer the ordinances, the owners of Cainhoy Plantation agreed to defer action only with respect to the Tract 7 Master Plan. The City of Charleston approved Ordinance 2014-25, which is the Cainhoy Land & Timber PUD Master Plan and Zoning Text, and Ordinance 2014-26, which is the Cainhoy-ST (Southern Timber) PUD Master Plan and Zoning Text.

After City Council deferred second and third reading of the Tract 7 ordinance, Plaintiff BP determined that a buffer area on Tract 7 alone would be sufficient. Plaintiff BP and Tract 7, LLC continued negotiating potential options for a buffer area on Tract 7. On June 10, 2014, they signed a Letter of Intent to negotiate an option agreement for purchase of land, but as of June 17, 2014, they had not reached agreement on the terms of the option. In reliance upon the Letter of Intent, Plaintiff BP did not request City Council to defer adoption of the Tract 7, LLC Master

[1] The Cainhoy T7 PUD Master Plan & Zoning Text, Cainhoy Land & Timber PUD Master Plan & Zoning Text, and the Cainhoy-ST Master Plan & Zoning Text are referred to collectively as the Cainhoy PUD Master Plan.

Plan and Zoning Text at the meeting on June 17, 2014, and the City Council adopted Ordinance 2014-82 relating to the Tract 7 Master Plan.

STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), "the trial court should consider only the allegations set forth on the face of the plaintiff's complaint." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E. 2d 188 (2007), citing *Stiles v. Onorato*, 318 S. C. 297, 300, 457 S.E. 2d 601, 602 (1995). "The question presented is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Plyler*, 373 S.C. at 647, citing *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). If those facts and inferences would entitle the plaintiff to relief on any theory, then a dismissal for failure to state a claim is improper. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). A motion under Rule 12(b)(6) does not admit legal conclusions alleged in the Complaint, and it does not admit inferences that the plaintiff draws from the facts. *Charleston County School District v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425-26, 559 S.E.2d 362, 364-65 (S.C.App. 2001) (*cert. denied 2002).*

ANALYSIS

Defendants Cainhoy Land & Timber, LLC, and Southern Timber, LLC, move to dismiss Plaintiff's Complaint on the ground that Plaintiff BP lacks standing to challenge their re-zoning ordinances.

A party may have standing through: (1) the "rubric of constitutional standing"; (2) by statute; or (3) under the "public importance" exception. *Freemantle v. Preston*, 398 S.C. 186, 192, 728, S.E.2d 40 (S.C. 2012) (citing *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195,

669 S.E.2d 337, 339 (2008)). Plaintiff BP claims to have standing pursuant to S.C. Code § 6-29-760(C) and through the public importance standing doctrine.

To qualify for constitutional standing, a plaintiff must have first suffered an injury in fact which is "concrete and particularized, and actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992) (internal quotations and citations omitted); *Sea Pines Ass'n for Prof. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001); *Davis v. Richland Cnty Council*, 372 S.C. 497, 642 S.E.2d 740 (2007). For an injury to be particularized, it must affect the plaintiff in a personal and individual way. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014) (citations omitted). "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not possess standing." *Id.* at 75; *quoting Lujan*, 504 U.S. at 573-74, 112 S.Ct. 2130 (internal citations omitted). There must also be a causal connection between the injury complained of that is fairly traceable to the conduct of the defendant. *Lujan*, 504 U.S. at 560-61 (internal quotations and citations omitted). Finally, the third element requires that the plaintiff show that he is likely to receive a favorable decision from the courts as to the merits of his claim if he is deemed to have standing in this initial inquiry. *Id.*

Standing to challenge a zoning ordinance is governed by statute. Plaintiff BP asserts that it has statutory standing to pursue its claims in this matter pursuant to S.C. Code Ann. § 6-29-760(C), which provides that "[a]n owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create

any new substantive right in any party." Although the Complaint alleges that the Defendant Tract 7, LLC, owns property that is adjacent to and immediately south of the Plaintiff BP's Property, the Complaint does not allege that the property owned by Defendants Cainhoy Land & Timber, LLC, or Southern Timber, LLC, is adjoining to the Plaintiff BP's property. The Complaint alleges that the three Defendant landowners are "affiliated entities that share common ownership and management and are associated with the Guggenheim and Lawson-Johnson families and certain trusts established thereby" and that the Defendants "collectively own three (3) tracts ... which are commonly known as and referred to, collectively, as Cainhoy Plantation." The Complaint alleges that Plaintiff BP's property adjoins Cainhoy Plantation, but it is clear from that Plaintiff BP's property does not adjoin the properties of the Defendants Cainhoy Land & Timber, LLC, or Southern Timber, LLC. The Complaint alleges that their properties are separate tracts, separately owned, and subject to separate zoning ordinances. These properties are separated from Plaintiff BP's properties by the 1,573.5 acre Tract 7 property and Flagg Creek. Cainhoy Land & Timber, LLC, and Southern Timber, LLC, are not parties to the Letter of Intent between Plaintiff BP and Tract 7, and Plaintiff BP does not seek a buffer on their properties.

S.C. Code Ann. § 6-29-950 provides standing to sue for violations of zoning ordinances, confers standing on owners of "adjacent *or neighboring* property." (emphasis added). S.C. Code Ann. § 6-29-760(C), under which Plaintiff BP claims standing, allows suit to be brought only by owners of adjoining property, not "neighboring" property. The difference in the plain language of the statute reflects legislative intent to narrowly limit standing to challenge zoning ordinances. The properties of Cainhoy Land & Timber, LLC, and Southern Timber, LLC, might be considered neighboring properties of Plaintiff BP because they are part of Cainhoy Plantation; however, they are not adjoining properties.

Plaintiff BP fails to allege that it owns property adjoining the properties of Defendants Cainhoy Land & Timber, LLC, and Southern Timber, LLC. Section 6-29-760(C) is inapplicable and does not provide Plaintiff with standing to assert its zoning claims. *See Carnival Corp., supra,* 407 S.C. at 79 (holding that because plaintiffs failed to allege that they were neighboring or adjacent property owners as set forth in the statutory requirement for standing, that statute was inapplicable and did not provide them with standing to assert their zoning claims).

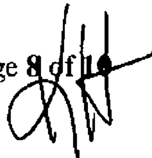
Plaintiff BP also claims to have standing pursuant to the public importance standing doctrine. In South Carolina, "courts recognize an exception to the requirement that a plaintiff possess standing where 'an issue is of such public importance as to require its resolution for future guidance.'" *Carnival Corp.*, 407 S.C. at 853-54 (quoting *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)). "In cases falling within the ambit of important public interest, standing is conferred 'without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.'" *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40 (S.C. 2012) (citing *Davis v. Richland Cnty Council*, 372 S.C. at 500, 642 S.E.2d at 741-42).

In determining whether the public importance exception to standing could apply to Plaintiff BP in this case, the Court must consider whether the issues in this case are of such public importance as to require resolution for future guidance. Fundamentally, the issues in this case are whether the zoning ordinances related to the property owned by Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC, Ordinance 2014-25 and Ordinance 2014-26, are invalid, null, and void, as violative of the South Carolina Local Government Comprehensive Planning Enabling Act; Article 1, Section 8 of the South Carolina Constitution; various City Ordinances; and the South Carolina Coastal Tidelands and Wetlands Act. These claims are generally limited to the facts of this case and the enactment of zoning specific to Cainhoy

Plantation. The resolution of these claims is undoubtedly important to the parties, but it is not of such precedential importance that public interest demands waiver of constitutional and statutory standing requirements. See *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, supra,* 407 S.C. 67, 753 S.E.2d 846 (2014). Further, to the extent that such public importance might exist in the resolution of the issues presented in this case, these issues can be resolved in the claims asserted against the City of Charleston or Tract 7, LLC. No compelling reason exists to waive the standing requirements as to Plaintiff BP's claims against Cainhoy Land & Timber, LLC, and Southern Timber, LLC. The public importance exception to standing does not apply here.

Further, if this Court were to find that Plaintiff BP had standing to challenge the subject zoning ordinances, its claims are untimely as to Defendants Cainhoy Land & Timber, LLC, and Southern Timber, LLC. S.C. Code Ann. § 6-29-760(D) provides, "No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, 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." Ordinances 2014-25 and 2014-26, which pertain to these Defendants, were enacted on February 25, 2014. This lawsuit was not filed until August 15, 2014, which is more than sixty days after the enactment of these ordinances. For this reason, this suit is untimely as to Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC.

Plaintiff BP alleges that the City failed to comply with the notice requirements set forth in S.C. Code. § 6-29-760. South Carolina law does not specifically define substantial compliance in regard to S.C. Code Ann. § 6-29-760(D); however, South Carolina courts have



held that substantial compliance is met if the purpose of a statute is achieved. *See, e.g., Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 164–65, 547 S.E.2d 862, 866 (2001) (looking to the clear language and express purpose of a federal act to determine whether substantial compliance occurred); *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (looking to the purpose of a statute in determining whether substantial compliance occurred). Therefore, the language and purpose of the statute must be considered to determine whether there was substantial compliance. S.C. Code §§ 6-29-760(A) and (B) set forth the notice requirements for amendments to zoning regulations or maps. Section 6-29-760 enumerates the requirements for public hearings. The public hearings must be advertised and in cases involving rezoning, conspicuous notice must be posted on or adjacent to the property affected. *Id.*

The Complaint does not allege that Plaintiff BP was prejudiced by any alleged failure of substantial compliance with the notice requirements. In fact, the Complaint alleges that the City Planning Commission had a public hearing on February 6, 2014, wherein the Planning Commission recommended approval of the Cainhoy PUD Master Plan. Thereafter, on February 11, 2014, the City Council held a public hearing on the Cainhoy PUD Master Plan during which many individuals expressed opinions about the Cainhoy PUD Master Plan, including individuals associated with historical preservation organizations, members of the news media, and residents of the Cainhoy, Huger, and Wando Communities. The Complaint further alleges that following the February 11 hearing, a representative of Plaintiff BP spoke with owners of Cainhoy Plantation following the meeting. Plaintiff BP alleges that on February 25, 2014, a representative of Plaintiff BP addressed City Council and requested that they defer enacting the ordinances. Based on Plaintiff 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 Sections 6-29-760(A) and (B) were thus satisfied.

The short time limit for challenging a zoning ordinance reflects the public policy in favor of certainty and stability of land use regulation. This policy would be disserved by nullification of the time limit because of a governmental entity's technical or insubstantial failure to comply with the notice requirements. The Court finds that Plaintiff BP had prior notice of the approval of the Cainhoy Plantation Master Plan. Plaintiff BP is not left without a remedy by the dismissal of its claims relating to Defendants Cainhoy Land & Timber, LLC, and Southern Timber, LLC.

CONCLUSION

For the foregoing reasons, the Court hereby GRANTS the Motions of Defendants Cainhoy Land & Timber, LLC, and Southern Timber, LLC's to Dismiss pursuant to Rule 12(b)(6) and dismisses the claims that pertain to Cainhoy Land & Timber, LLC, and Southern Timber, LLC, with prejudice.

IT IS SO ORDERED!

The Honorable Kristi L. Harrington

November 13, 2014

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Berkeley
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2014- **CP**-08 1840

BP Amoco Chemical Company — PLAINTIFF(S)

City of Charleston, et al — DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ <u>See Page 2 for additional information.</u>

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: The above matter came before the Court on Plaintiff's Motion to Reconsider. The Court hereby DENIES Plaintiff's Motion to Reconsider.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge — 2151 Judge Code — 3/2/15 Date

For Clerk of Court Office Use Only

This judgment was entered on the 3 day of March, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 3 day of March 2015 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Mary P. Brown [signature] DC

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BERKELEY) CIVIL ACTION NO. ____________

BP AMOCO CHEMICAL COMPANY,

Plaintiff,

vs.

CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; and SOUTHERN TIMBER, LLC,

Defendants.

COMPLAINT

2014 AUG 15 PM 1:22
FILED
BERKELEY COUNTY, SC

Plaintiff BP Amoco Chemical Company, complaining of the Defendants, alleges and says as follows:

PARTIES, JURISDICTION, VENUE AND STANDING

1. This is an action for declaratory relief under the South Carolina Declaratory Judgment Act, S.C. Code §§ 15-53-10, *et seq.*, and other legal, injunctive, and equitable relief as more fully set forth herein.

2. Plaintiff BP Amoco Chemical Company ("Plaintiff" or "BP") is a corporation organized and existing under the laws of the State of Delaware and does business and owns property in Berkeley County, South Carolina.

3. Defendant City of Charleston (the "City") is a municipal corporation incorporated under the laws of the State of South Carolina and whose corporate limits are within Berkeley County, South Carolina.

4. Defendant Tract 7, LLC is a limited liability company organized and existing under the laws of the State of Delaware and does business and owns property in Berkeley County, South Carolina.

5. Defendant Cainhoy Land & Timber, LLC is a limited liability company organized and existing under the laws of the State of Delaware and does business and owns property in Berkeley County, South Carolina.

6. Defendant Southern Timber, LLC is a limited liability company organized and existing under the laws of the State of Delaware and does business and owns property in Berkeley County, South Carolina.

7. Upon information and belief, Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC (collectively, the "Owners") are affiliated entities that share common ownership and management and are associated with the Guggenheim and Lawson-Johnson families and certain trusts established thereby.

8. As set forth more fully herein, the Owners collectively own three (3) tracts totaling approximately 9,087.22 acres which are located off of Clements Ferry Road and Cainhoy Road in the Cainhoy Community of Berkeley County, South Carolina, and which are commonly known as and referred to, collectively, as Cainhoy Plantation ("Cainhoy Plantation").

9. This Court has personal jurisdiction over the parties pursuant to S.C. Code Ann. §§ 36-2-802 and 36-2-803.

10. This Court has subject matter jurisdiction over this action pursuant to S.C. Code Ann. § 15-53-20 and Article 5 of the South Carolina Constitution.

11. Venue for this action in proper in this Court pursuant to S.C. Code Ann. § 15-7-30 and *Friarsgate, Inc. v. Town of Irmo*, 281 S.C. 588, 316 S.E.2d 423 (1984).

12. 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) and the public importance standing doctrine.

FACTS

13. BP owns and operates a manufacturing facility located on several contiguous properties (TMS # 247-00-00-001, 247-00-00-002, 247-00-00-003, 247-00-00-004, 247-00-00-006), which are located off of Cainhoy Road in the Cainhoy Community of Berkeley County ("BP Property").

14. BP has operated its manufacturing facility in Berkeley County since 1978. It employs approximately 230 employees and utilizes the services of an additional 200 contract employees.

15. Tract 7, LLC owns property consisting of approximately 1,573.5 acres (TMS # 262-00-00-009), which are located off of Cainhoy Road in the Cainhoy Community of Berkeley County and which is adjacent to and immediately south of the BP Property ("Tract 7").

16. Cainhoy Land & Timber, LLC owns properties consisting of approximately 5,653.52 acres (TMS# 262-00-00-019, 263-00-02047, 268-00-00-003, 268-00-00-004, 269-00-00-018, and 262-00-00-008), which are located off of Cainhoy Road and Clements Ferry Road in the Cainhoy Community of Berkeley County ("Cainhoy Land & Timber Tract").

17. Southern Timber, LLC owns properties consisting of approximately 1,860.2 acres (TMS # 262-00-00-007, 269-00-00-028, and 272-00-00-002), which are located off of Clements Ferry Road in the Cainhoy Community of Berkeley County ("Southern Timber Tract").

18. The Cainhoy Land & Timber Tract is adjacent to and immediately south of Tract 7.

19. The Southern Timber Tract consists of three non-contiguous properties. One property (TMS # 262-00-00-007) borders Tract 7 and the Cainhoy Land & Timber Tract to the west. Another property (TMS # 269-00-00-028) is bordered by the Wando River to the east and

is surrounded by the Cainhoy Land & Timber Tract to the north, west, and south. The third property (TMS # 272-00-00-002) is bordered by the Wando River to the east and south, the Cainhoy Land & Timber Tract to the north, and Nowell Creek to the west.

20. Tract 7, the Cainhoy Land & Timber Tract, and Southern Timber Tract are contiguous properties that consist of a total of 9,087.22 acres and are commonly known as and referred to, collectively, as Cainhoy Plantation.

21. Pursuant to a development agreement between the predecessors-in-interest of the Owners of Cainhoy Plantation and the City, Cainhoy Plantation was annexed into the City in 1996. Upon annexation into the City, Cainhoy Plantation was subject to the zoning and other ordinances of the City, and it was zoned pursuant to the City's Zoning Ordinance under the Cainhoy (CY) Zoning Classification. The Cainhoy Land & Timber Tract and Southern Timber Tract were zoned in the CY Zoning Classification until February 25, 2014, and Tract 7 was zoned in the CY Zoning Classification until June 17, 2014.

22. Upon information and belief, in 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 development under the South Carolina Local Government Comprehensive Planning Act, S.C. Code §§ 6-29-10, *et seq.*, and Article 2, Part 7 of the City Zoning Ordinance (Planned Unit Development, PUD District), City Ordinance § 54-250, *et seq.* ("PUD Ordinance").

23. Prior to the Owners' formal submission of a planned unit development ("PUD") master plan application as required by City Ordinance § 54-253, attorney(s) and/or representative(s) of the Owners consulted with City staff and attorneys in or around September

2013 regarding amendments to the PUD Ordinance proposed by the Owners specifically for the Cainhoy Plantation planned development.

24. Upon information and belief, City staff and attorneys incorporated the Owners' recommended amendments into a proposed ordinance that was to be considered by the City Planning Commission and, if approved by the Planning Commission, by City Council. The proposed amendments included (1) permitting a planned development to consist of non-contiguous parcels; (2) allowing subdivision concept plans to be submitted after the submission of a PUD master plan; (3) allowing a PUD master plan to delineate the approximate acreage of the plan rather than the actual acreage; (4) allowing a PUD master plan to generally define open spaces and recreational areas for developments containing more than 1,000 acres; and (5) allowing planned developments of 1,000 acres or more to modify the City's tree protection ordinances.

25. On September 18, 2013, the Planning Commission held a meeting in which it considered the proposed ordinance amending the PUD Ordinance. According to the Planning Commission agenda and agenda materials for the September 18, 2013 meeting, there was no indication that the proposed PUD Ordinance amendments were related to Cainhoy Plantation or its prospective planned development application despite the fact that the amendments were drafted solely for the Cainhoy Plantation planned development. In the September 18, 2013 meeting, the Planning Commission recommended that City Council approve the amendments to the PUD Ordinance.

26. Upon information and belief, the City Planning Commission did not provide adequate notice of the proposed amendments to the PUD Ordinance or provide a public hearing as required by S.C. Code § 6-29-760(A) and City Ordinance § 54-942(a).

27. After the Planning Commission recommended approval of the PUD Ordinance amendments, a public hearing was held by City Council in its October 22, 2013 meeting on the PUD Ordinance amendments. The City published notice of the agenda containing the proposed amendments in *The Post and Courier* on October 6, 2013, but failed to identify any connection of the amendments to Cainhoy Plantation.

28. The City's notice of the October 22, 2013 meeting and public hearing on the proposed amendments failed to comply with S.C. Code § 6-29-1130(B), which requires local governments to provide "at least thirty days' notice of the time and place by publication in a newspaper of general circulation" of public hearings regarding amendments to "land development regulations."

29. During the October 22, 2013 City Council meeting, City Council held a public hearing on the amendments to the PUD Ordinance. During the public hearing, City staff and attorney spoke regarding the impetus behind the proposed amendments and the changes resulting therefrom. Despite being posed a direct question by a Council member about why the amendments were being requested at that time, City staff and attorney failed to disclose that the amendments had been requested by the Owners of Cainhoy Plantation. In fact, the prospective Cainhoy Plantation planned development was never mentioned during the hearing. Based on incomplete information provided by City staff and attorney, City Council gave the proposed amendments to the PUD Ordinance first reading in the October 22, 2013 meeting.

30. Ultimately, City Council enacted the amendments to the PUD Ordinance, as proposed by the Owners of Cainhoy Plantation, as City Ordinance No. 2013-125 on November 6, 2013.

31. Following the City's enactment of City Ordinance No. 2013-125 on November 6, 2013, the Owners submitted three separate PUD master plan applications to the City on or around January 24, 2014. Tract 7, LLC submitted the Cainhoy-T7 PUD Master Plan & Zoning Text to govern Tract 7. Cainhoy Land & Timber, LLC submitted the Cainhoy Land & Timber PUD Master Plan & Zoning Text to govern the Cainhoy Land & Timber Tract. Southern Timber, LLC submitted the Cainhoy-ST Master Plan & Zoning Text to govern the Cainhoy-ST Tract.

32. Although the Owners submitted three (3) separate PUD master plan applications for Tract 7, the Cainhoy Land & Timber Tract, and the Cainhoy-ST Tract, respectively, each master plan stated that they "have identical master plan zoning texts and shall be administered in a coordinated fashion." Thus, the three separate PUD master plans were submitted effectively as one master plan to govern the zoning of Cainhoy Plantation. (Consistent with the Cainhoy-T7 PUD Master Plan & Zoning Text, Cainhoy Land & Timber PUD Master Plan & Zoning Text, and the Cainhoy-ST Master Plan & Zoning Text, this Complaint refers to such master plans and zoning texts collectively as the "Cainhoy PUD Master Plan.")

33. The City Planning Commission held a public hearing on the Cainhoy PUD Master Plan in a special meeting on February 6, 2014.

34. S.C. Code § 6-29-760(B) provides that "[i]f a landowner whose land is the subject of a proposed amendment will be allowed to present oral or written comments to the planning commission, at least ten days' notice and an opportunity to comment in the same manner must be given to the other interested members of the public, including owners of adjoining property." Upon information and belief, the Owners and/or their representatives were allowed to present oral and written comments to the Planning Commission at the February 6, 2014 public hearing;

however, the City did not provide BP, which is an adjoining landowner to Cainhoy Plantation, with ten days' notice of this public hearing.

35. City Ordinance § 54-942(a) requires the Planning Commission to provide at least ten days' notice prior to hearing on any enactment of zoning regulations or maps. Upon information and belief, the Planning Commission did not provide proper notice of the public hearing it held on the Cainhoy PUD Master Plan on February 6, 2014.

36. City Ordinance § 54-942(b) provides that "[u]pon the filing of an application for the rezoning or subdivision of property within the corporate limits of the city of Charleston, the property to which such application applies shall be posted with a sign along each public thoroughfare that abuts the property at least six (6) days prior to any public hearing when the application will be considered, and the classification of zoning sought by the application and appropriate city department to contact concerning information regarding the application shall be listed on the sign." Upon information and belief, the Planning Commission failed to provide the notice required under City Ordinance § 54-942(b) with regards to the public hearing held on the Cainhoy PUD Master Plan on February 6, 2014.

37. The Planning Commission recommended approval of the Cainhoy PUD Master Plan on February 6, 2014, and City Council held a public hearing on the Cainhoy PUD Master Plan on February 11, 2014.

38. City Ordinance § 54-943(a) and S.C. Code § 6-29-1130(B) require that the City provide notice of a public hearing at least thirty days prior to the public hearing when an amendment to land development regulations is being considered. Upon information and belief, the City failed to provide proper notice of the public hearing on the Cainhoy PUD Master Plan.

39. During the public hearing, numerous citizens expressed opposition to the rezoning of Cainhoy Plantation under the Cainhoy PUD Master Plan on a variety of grounds.

40. Individuals associated with historical preservation organizations expressed concerns that the large-scale development would threaten historical and cultural resources in the Cainhoy Community.

41. Residents of the Cainhoy, Huger, and Wando Communities voiced fears that the influx of new residents and traffic would transform the rural character of their communities and cause traffic congestion and create health and safety issues.

42. In addition to the citizens who spoke at the public hearing, other citizens and members of the news media have expressed their opposition to the Cainhoy PUD Master Plan and the expedited manner in which the City considered it.

43. After the public hearing on February 11, 2014, City Council gave first reading on the same date to several ordinances related to the Cainhoy PUD Master Plan and development of Cainhoy Plantation, including the Cainhoy Land & Timber PUD Master Plan and Zoning Text, Cainhoy-ST PUD Master Plan and Zoning Text, and Cainhoy-T7 Master Plan and Zoning Text.

44. Following the February 11, 2014 City Council meeting, representatives of BP and representatives of the Owners conferred about the proposed development of Cainhoy Plantation and its potential impact on BP and neighboring area. BP 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. BP requested that the Owners consent to a deferral of all ordinances related to the Cainhoy PUD Master Plan and development of Cainhoy Plantation in order to permit more time to study the impact of the proposed

development. The Owners refused and instead requested that the City Council defer action only with respect to the Cainhoy-T7 PUD Master Plan and Zoning Text to a later time.

45. In the City Council meeting on February 25, 2014, a representative for BP addressed City Council and expressed the need for more time to study the proposed development contemplated for Cainhoy Plantation to ensure the safe and compatible co-existence of BP's facility and Cainhoy Plantation. BP's representative requested that City Council defer second and third reading of all ordinances related to the Cainhoy PUD Master Plan and development of Cainhoy Plantation to a later time to allow BP to adequately study the development of Cainhoy Plantation and negotiate a buffer area and other options besides residential development of Cainhoy Plantation. City Council did not honor BP's request but honored the Owner's request and deferred second and third reading on the Cainhoy-T7 PUD Master Plan and Zoning Text in its February 25, 2014 meeting.

46. Although City Council deferred second and third reading on the Cainhoy-T7 PUD Master Plan and Zoning Text, as mentioned above, it enacted several ordinances related to Cainhoy Plantation, including Ordinance 2014-25, which is the Cainhoy Land & Timber PUD Master Plan and Zoning Text, and Ordinance 2014-26, which is the Cainhoy-ST PUD Master Plan and Zoning Text

47. By enacting City Ordinances 2014-25 and 2014-26, the City adopted the Cainhoy Land & Timber PUD Master Plan and Zoning Text and the Cainhoy-ST PUD Master Plan and Zoning Text and rezoned the Cainhoy Land & Timber Tract and Cainhoy-ST Tract from the existing Cainhoy (CY) Zoning Classification to zoning text provided in the Cainhoy Land & Timber PUD Master Plan and Zoning Text and the Cainhoy-ST PUD Master Plan and Zoning Text, respectively.

48. After City Council deferred second and third reading of the Cainhoy-T7 PUD Master Plan and Zoning Text, BP determined that a buffer area on Tract 7 alone would be sufficient. BP and Tract 7, LLC continued negotiating potential options for a buffer area on Tract 7 to permit the safe and compatible co-existence of BP and Cainhoy Plantation.

49. In May and June 2014, BP's and Tract 7, LLC's negotiations reached a point where the parties agreed in principle to a purchase option that would permit BP to create a buffer area on Tract 7 between the contemplated residential development in Cainhoy Plantation and BP's property, and the parties began negotiating a letter of intent that would memorialize their agreement.

50. On June 10, 2014, BP and Tract 7, LLC entered into a letter of intent that established the basic terms and conditions under which Tract 7, LLC would grant BP an option to purchase property in Tract 7 to serve as a buffer (the "Letter of Intent"). The Letter of Intent provided that Tract 7, LLC would provide BP with an option to purchase at least 150 acres of land in Tract 7, with the exact amount to be set after Tract 7, LLC completed certain land planning, at fair market value to serve as a buffer and that the option would terminate on June 30, 2016. The Letter of Intent established a non-refundable option price of $25,000. The Letter of Intent stated that, as additional consideration of Tract 7, LLC granting the option, BP would agree in the option agreement (the "Definitive Agreement") not to challenge the Tract 7 PUD zoning or any permit issued pursuant to such zoning. The Letter of Intent also provided that it would not prohibit BP from challenging the Tract 7 PUD zoning if the "Definitive Agreement" was not reached.

51. Following the execution of the Letter of Intent, consistent with the basic terms of the Letter of Intent, BP requested that Tract 7, LLC consent to City Council's deferral of second

and third reading on the Cainhoy-T7 PUD Master Plan and Zoning Text to give the parties adequate time to negotiate the Definitive Agreement. BP informed Tract 7, LLC that if Tract 7, LLC did not consent to deferral it would reserve its rights to request City Council to defer second and third reading of the Cainhoy-T7 PUD Master Plan and Zoning Text at City Council's meeting on June 17, 2014.

52. Tract 7, LLC refused to consent to deferral of second and third reading of the Cainhoy-T7 PUD Master Plan and Zoning Text and threatened to refuse to enter into the Definitive Agreement if BP requested that City Council defer adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text. According to Tract 7, LLC, its decision to enter into the Letter of Intent and the Definitive Agreement with BP relating to purchase options and a buffer were expressly conditioned upon BP foregoing its right to request further deferral by City Council.

53. In reliance upon Tract 7, LLC's representations about the Letter of Intent and Tract 7, LLC's purported good faith in negotiating the Definitive Agreement, BP decided not to request City Council to defer adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text in its June 17, 2014 meeting.

54. On June 17, 2014, City Council adopted Ordinance 2014-82, thereby adopting the Cainhoy-T7 PUD Master Plan and Zoning Text.

55. Tract 7, LLC indicated that it wanted its attorney to prepare the first draft of the Definitive Agreement. On July 2, 2014, Tract 7, LLC presented a draft Definitive Agreement which was inconsistent with the terms of the Letter of Intent. Specifically, Tract 7, LLC informed BP that the option price should be increased from $25,000 to $125,000, a mechanism should be added to set a minimum purchase price now with the minimum purchase price to

increase by 5% every 6 months, and a right of repurchase should be added giving Tract 7, LLC the right to repurchase the property at cost over the next 20 years.

56. After Tract 7, LLC presented a draft Definitive Agreement which was inconsistent with the terms of the Letter of Intent, Tract 7, LLC's attorney admitted to BP's attorney that the draft was materially different than the Letter of Intent, and BP responded by proposing a draft Definitive Agreement which was consistent with the Letter of Intent. However, Tract 7, LLC refused to accept that proposal and indicated that it would no longer honor the Letter of Intent, thereby breaching the Letter of Intent and reneging on the terms and conditions set forth therein.

57. Tract 7, LLC's breach of the Letter of Intent and its reneging on the terms and conditions set forth therein demonstrate that Tract 7, LLC never had any intent to enter into a Definitive Agreement which was consistent with the Letter of Intent or to provide BP with an option to purchase property in Tract 7 to serve as a buffer, and further demonstrate that Tract 7, LLC entered into the Letter of Intent as a pretext to induce BP to forego exercising BP's legal rights to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text.

58. As a result of Tract 7, LLC's breach of the Letter of Intent, the parties have not entered into the Definitive Agreement.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment that City Ordinances 2014-25, 2014-26, 2014-82 Violate the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 – Against All Defendants)

59. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

60. Under the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code §§ 6-29-10, *et seq.*, ("Enabling Act"), local governments may establish

"planned development districts" as amendments to their zoning ordinances and official zoning maps.

61. Under S.C. Code § 6-29-760(C)-(D) of the Enabling Act, an owner of land adjoining property which is subject to a zoning ordinance or amendment has standing to bring an action contesting the ordinance or amendment within sixty (60) days of the governing body's adoption of such ordinance or amendment. Additionally, S.C. Code § 6-29-760(D) of the Enabling Act permits an action challenging a zoning ordinance or amendment to be brought outside of the sixty (60) day statute of limitation if the governing body has failed to substantially comply with the notice requirements of the Enabling Act or with its established procedures.

62. BP is an adjoining landowner to the property rezoned under City Ordinance 2014-82, and this action is being commenced within sixty (60) days of City Council's adoption of City Ordinance 2014-82.

63. Alternatively, BP is an adjoining landowner to all property rezoned under City Ordinances 2014-25, 2014-26, and 2014-82, as they were rezoned pursuant to the Cainhoy PUD Master Plan, which states that all three master plans "have identical master plan zoning texts and shall be administered in a coordinated fashion." To the extent that this action is being commenced outside sixty (60) days of the City adopting City Ordinances 2014-25 and 2014-26, 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.

64. S.C. Code § 6-29-740 of the Enabling Act provides: "In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that will result in improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces, the local governing authority may provide

for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts. Planned development districts may provide for variations from other ordinances and the regulations of other established zoning districts concerning use, setbacks, lot size, density, bulk, and other requirements to accommodate flexibility in the arrangement of uses for the general purpose of promoting and protecting the public health, safety, and general welfare. Amendments to a planned development district may be authorized by ordinance of the governing authority after recommendation from the planning commission. These amendments constitute zoning ordinance amendments and must follow prescribed procedures for the amendments. The adopted plan may include a method for minor modifications to the site plan or development provisions."

65. The Enabling Act defines a "planned development district" as "a development project comprised of housing of different types and densities and of compatible commercial uses, or shopping centers, office parks, and mixed-use developments." S.C. Code § 6-29-720(C)(4). The planned development district must be "established by rezoning prior to development and is characterized by a unified site design for a mixed use development." *Id.*

66. City Ordinances 2014-25,2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, violate and fail to comply with the Enabling Act in the following ways:

(a) The respective PUD master plans do not meet the definition of a "planned development district" as defined by S.C. Code § 6-29-

720(C)(4) because they do not contain a "unified site design for a mixed use development," and the developer maintains discretion to develop the project in the absence of any unifying design.

(b) The respective PUD master plans lack a unified design by permitting disjointed and inconsistent uses within the designated zones, and the designation of separate zones is largely meaningless because the requirements and limitations of a particular zone are not uniform within the zones and do not contain definite boundaries.

(c) The respective PUD master plans do not meet the definition of a "planned development district" because they allow incompatible and nearly unlimited uses within the residential and mixed-use zones, and the developer has unbridled discretion to determine uses with no standards to determine compatibility or the opportunity for the City to regulate compatible uses within the districts.

(d) City Ordinances 2014-25, 2014-26, and 2014-82 were not adopted by "prescribed procedures" as required by S.C. Code § 6-29-740. Specifically, the City failed to comply with the notice requirements for public hearings established under S.C. Code § 6-29-760(A), City Ordinances §§ 54-742(a), 54-742(b), and 54-743(a), as described above, and failed to comply with procedures for adopting planned development districts under City Ordinances §§ 54-254 and 54-255, as described below.

67. For the foregoing reasons, Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, violate the Enabling Act, and the Court should issue a declaratory judgment that they are invalid, null, and void.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment that City Ordinances 2014-25, 2014-26, and 2014-82 Violate City Ordinance § 54-255 – Against All Defendants)

68. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

69. Prior to approval of a planned development, the applicant must submit a PUD master plan, which must include certain information.

70. City Ordinance § 54-255(c) sets forth the information that must be included in a master plan. The Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text submitted by the Owners and adopted pursuant to City Ordinances 2014-25, 2014-26, and 2014-82 fail to include all information required by City Ordinance § 54-255(c), including:

(a) A site analysis that includes the location of existing manmade features, including major utility lines, drainage canals, manmade water bodies, and existing structures and general topographical information. § 54-255(c)(2)(a)-(b).

(b) Net acreage of each type of residential, mixed-use, office, commercial, and industrial development pod. § 54-255(c)(4).

(c) Maximum number of residential dwelling units and net density within each residential pod. § 54-255(c)(4).

(d) Types of dwelling units in each residential pod. § 54-255(c)(5)(a)(1).

(e) Minimum setbacks for all residential dwellings except single family detached units. § 54-255(c)(5)(a)(3).

(f) Regulations for neighborhood uses. § 54-255(c)(5)(a)(6).

(g) Minimum front setbacks for mixed-use buildings. § 54-255(c)(5)(b)(1).

(h) Maximum lot occupancy for mixed-use buildings. § 54-255(c)(5)(b)(2).

(i) A general plan for landscape buffers. § 54-255(c)(7).

(j) A traffic impact study. § 54-255(c)(9).

71. By enacting City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, the City adopted master plans that failed to provide information required by City Ordinance § 54-255.

72. The City's failure to require the Owners to comply with the master plan requirements under City Ordinance § 54-255 violates City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, to be invalid, null, and void.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment that City Ordinances 2014-25, 2014-26, and 2014-82 Violate the Separation of Powers and Nondelegation Doctrines under the South Carolina Constitution – Against City of Charleston)

73. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

74. Article 1, Section 8 of the South Carolina Constitution provides that "[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

75. Under the separation of powers doctrine embodied in Article 1, Section 8 of the South Carolina Constitution, "[i]t is well settled that the power to legislate cannot be delegated to a private person or corporations, nor to another body." *State v. Watkins*, 259 S.C. 185, 202, 191 S.E.2d 135, 143 (1972).

76. Under South Carolina law, zoning is a legislative act that can only be amended by ordinance. *Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154,167, 714 S.E.2d 869, 875 (2011). Also, the veto or approval of a legislative act is a legislative power or function. *Doran v. Robertson*, 203 S.C. 434, 443, 27 S.E.2d 714, 717 (1943).

77. Under City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text,

and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, the developer of Cainhoy Plantation has authority to veto future zoning ordinances over Cainhoy Plantation, as Section 2.1 of all three provides that in the event that a conflict exists between the Zoning Ordinance and the zoning texts, then the zoning text applies, and that "[i]n the event the Zoning Ordinance is amended......, such amendments to the Zoning Ordinance shall not apply to this Master Plan Zoning Text unless the Developer gives its written consent."

78. By granting the developer the authority to unilaterally control future zoning ordinances under Section 2.1 of the Cainhoy Land & Timber PUD Master Plan and Zoning Text and the Cainhoy-ST PUD Master Plan and Zoning Text, the City has unlawfully delegated its legislative responsibility over zoning of Cainhoy Plantation to a private person in violation of Article 1, Section 8 of the South Carolina Constitution.

79. For the foregoing reasons, the Court should declare that City Ordinances 2014-25 and 2014-26, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text and the Cainhoy-ST PUD Master Plan and Zoning Text adopted therein, violate the separation of powers and non-delegation doctrines of the South Carolina Constitution and are therefore invalid, null, and void.

FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment that City Ordinances 2014-25, 2014-26, and 2014-82 Violate City Ordinance § 54-254 – Against All Defendants)

80. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

81. Under City Ordinance § 54-254, City Council and the Planning Commission must review a PUD master plan application based on certain criteria and find that the planned development meets those criteria prior to approving a PUD master plan. Under the criteria in

City Ordinance § 54-254, City Council and the Planning Commission must find that the PUD master plan application:

a. is consistent with the City's adopted comprehensive plan and all adopted plans for sub-areas of the City;

b. better achieves the goals of adopted plans than would development under other zoning district regulations;

c. is consistent with the City's adopted master road plan;

d. better protects and preserves natural and cultural resources than would development under other zoning district regulations;

e. is compatible with the density and maximum building height of adjacent developed neighborhoods and the zoning of adjacent undeveloped areas;

f. is compatible with the existing network of public streets in adjacent neighborhoods and areas;

g. provides adequate parking for residents and users of the PUD;

h. can be accommodated by existing and planned public facilities including but not limited to, roads, sewer, water, schools and parks;

i. provides adequate public facilities, open space and recreational amenities;

j. adequately provides for the continued maintenance of common areas, open space, and other public facilities not dedicated to the city;

k. provides for a mixture of uses.

82. Neither the Planning Commission nor City Council reviewed the Cainhoy Land & Timber PUD Master Plan and Zoning Text or the Cainhoy-ST PUD Master Plan and Zoning Text under the criteria listed in City Ordinance § 54-254.

83. Neither the Planning Commission nor City Council made any findings that the Cainhoy Land & Timber PUD Master Plan and Zoning Text or the Cainhoy-ST PUD Master Plan and Zoning Text met the criteria listed in City Ordinance § 54-254.

84. To the extent that the Planning Commission or City Counsel reviewed the Cainhoy Land & Timber PUD Master Plan and Zoning Text or the Cainhoy-ST PUD Master Plan and Zoning Text under the criteria listed in City Ordinance § 54-254 or found that they met such criteria, such findings are arbitrary and capricious in that the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text:

(a) Are not compatible with the zoning of adjacent undeveloped areas, as Cainhoy Plantation is bordered to the north by property zoned as a heavy industrial district by Berkeley County, and to the east by property zoned as a conservation district by the City of Charleston and by part of the Francis Marion National Forest, which is subject to the land management plan of the National Forest Service and which does not contemplate a neighboring large-scale mixed used project.

(b) Do not protect the natural and cultural resources better than development under other zoning district regulations, as the City has conservation district and historical district designations that would more effectively preserve the natural and cultural resources on and around Cainhoy Plantation;

(c) Lack a master traffic study to evaluate whether the project is compatible with existing and planned roads, and the existing network of streets in this rural area is not compatible with a new mixed-use development that will increase the population by tens of thousands of people;

(d) Are not consistent with the City of Charleston's Comprehensive Plan for the Cainhoy area, as (ii) they do not "continue to maintain [the Cainhoy area's] rural heritage and open space...." as the Master Plan creates an expansive mixed-use development that preserves only 20% of Cainhoy Plantation as open space, of which only 25% will be usable; and (ii) such development does not achieve the City's stated goal in the Comprehensive Plan to avoid urban growth that will "consume these areas;"

(e) Provide only general descriptions of the public facilities, open space, and recreational amenities in the planned development, and it is therefore impossible to find that the public facilities, open spaces, and recreational amenities will be adequate.

85. For the foregoing reasons, the Court should declare that City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, violate City Ordinance § 54-254 and are therefore invalid, null, and void.

FOR A FIFTH CAUSE OF ACTION
(Violation of Due Process and Equal Protection under the South Carolina Constitution – Against City of Charleston)

86. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

87. Article I, Section 1 of the South Carolina Constitution provides that no person shall "be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

88. The City's enactment of City Ordinance No. 2013-125 was accomplished pursuant to unconstitutional procedures that concealed the true purpose of amending the City's PUD Ordinance for the benefit of a single development and deprived BP and other interested parties of protecting their property rights through full participation in the democratic process surrounding the adoption of City Ordinance No. 2013-125.

89. The City's staff and attorney engaged in an *ex parte* dialogue with the Owners and their representatives to amend the City's PUD Ordinance and then failed to reveal the motivation behind the amendments. By failing to disclose the efforts of the Owners to amend the PUD Ordinance for their sole benefit, the City's staff and attorney deprived BP and other

landowners neighboring Cainhoy Plantation of necessary information needed to determine whether their property interests would be affected by the PUD Ordinance amendments and without proper disclosure provided benefits to a single group of landowners.

90. In addition, the Planning Commission and City Council failed to provide adequate notice of the public hearings of the amendments in City Ordinance 2013-125 and its true purposes as required by S.C. Code Ann. §§ 6-29-760 and 6-29-1130(B) and City Ordinance § 54-942(a).

91. By failing to provide adequate notice of the public hearings on City Ordinance 2013-125 and failing to identify the proposed amendments' connection to Cainhoy Plantation, the City deprived BP and other interested parties of due process rights and equal protection of the law guaranteed by the South Carolina Constitution.

92. The Court should declare City Ordinance 2013-125 in violation of Article 1, Section 1 of the South Carolina Constitution and therefore invalid, null, and void.

93. The City's unconstitutional enactment of City Ordinance 2013-125 infected the City's subsequent consideration of City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text.

94. The City's enactment of City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, was further accomplished pursuant to unconstitutional procedures arising from the Planning Commission's and City Council's failure 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.

95. The Court should declare City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text in violation of Article 1, Section 1 of the South Carolina Constitution and therefore invalid, null, and void

FOR A SIXTH CAUSE OF ACTION
(Declaratory Judgment that City Ordinances 2014-25 and 2014-26 Violate the South Carolina Coastal Tidelands and Wetlands Act – Against All Defendants)

96. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

97. The South Carolina Coastal Tidelands and Wetlands Act, S.C. Code §§ 48-39-10, *et seq.*, and its implementing regulations define critical areas in the coastal South Carolina region and regulate the permitting of certain developments that could affect these critical areas.

98. Under the South Carolina Coastal Tidelands and Wetlands Act and the federal Coastal Zone Management Act, the South Carolina Department of Health and Environmental Control ("DHEC") must, among other responsibilities, coordinate the development of its Coastal Management Program with local governments, as set forth in S.C. Code § 48-39-100. Pursuant to this requirement, local governments that have zoning ordinances or regulations that apply to critical areas must submit to DHEC for review the elements of such ordinances and regulations applying to critical areas, as set forth in S.C. Code § 48-39-100(B). Any changes or modifications to approved zoning ordinances applying to critical areas shall be disapproved by DHEC if they are not in compliance with the provisions of the Coastal Tidelands and Wetlands Act and its implementing regulations.

99. The Cainhoy Land & Timber and Southern Timber Tracts contain or abut "critical areas" as defined by the South Carolina Coastal Tidelands and Wetlands Act, S.C. Code §§ 48-39-10(F), (G), and (J) and S.C. Regulation 30-10.

100. The Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text contain several provisions that apply to critical areas under the Coastal Tidelands and Wetlands Act, such as provisions governing storm water management plans, storm water ponds, drainage basins, and natural buffers to saltwater marshes and wetland systems.

101. The City has not submitted City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, to DHEC for review for compliance with the South Carolina Coastal Tidelands and Wetlands Act and its implementing regulations.

102. For the foregoing reasons, the Court should declare that City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, violate the South Carolina Coastal Tidelands and Wetlands Act and are therefore invalid, null, and void.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Contract/ Breach of Implied Covenant of Good Faith and Fair Dealing – Against Tract 7, LLC)

103. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

104. BP and Tract 7, LLC entered into a valid contract by executing the Letter of Intent on June 10, 2014.

105. Every contract in South Carolina contains an implied covenant of good faith and fair dealing between contracting parties.

106. The Letter of Intent provided that Tract 7, LLC would provide BP with an option to purchase at least150 acres of land[1] in Tract 7 at fair market value to serve as a buffer and that the option would terminate on June 30, 2016. The Letter of Intent established a non-refundable option price of $25,000. The Letter of Intent stated that, as additional consideration of Tract 7, LLC granting the option, BP would agree in the Definitive Agreement not to challenge the Tract 7 PUD zoning or any permit issued pursuant to such zoning. The Letter of Intent also provided that it would not prohibit BP from challenging the Tract 7 PUD zoning if an option agreement (the "Definitive Agreement") was not reached.

107. The Letter of Intent, which was drafted and presented to BP by Tract 7, LLC's lawyer, also provided that "Tract 7 does not intend to negotiate the terms of this letter of intent. Refinements and related matters can be addressed in the Definitive Agreement," thereby clearly indicating that Tract 7, LLC would not change the basic terms and conditions set forth in the Letter of Intent.

108. The Letter of Intent contained an implied covenant of good faith and fair dealing which required the parties to negotiate the Definitive Agreement in good faith and consistent with the terms and conditions set forth in the Letter of Intent.

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[1] The Letter of Intent contemplated that the exact acreage would be determined after Tract 7, LLC completed certain land planning analysis. The draft Definitive Agreement indicated that the buffer would be 232.48 acres. BP does not take issue with or complain of Tract 7, LLC's increase in the size of the buffer.

109. As alleged more fully above, Tract 7, LLC breached the Letter of Intent by insisting on terms in the Definitive Agreement that were materially inconsistent with the Letter of Intent and refusing to honor its terms.

110. Tract 7, LLC's insistence on terms and conditions that were not consistent with the Letter of Intent and refusal to honor the Letter of Intent was unreasonable, in violation of its implied duty of good faith and fair dealing arising from the Letter of Intent, and made with the knowledge that BP had relied on Tract 7, LLC's purported good faith to forego its legal rights to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text.

111. As a result of Tract 7, LLC's breach of the Letter of Intent, BP has suffered damages, including, but not limited to foregoing its legal rights to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text and incurring unnecessary attorneys' fees and costs associated with BP's attempts to negotiate the Definitive Agreement.

112. As a further result of Tract 7, LLC's breach of the Letter of Intent, BP has been forced to initiate this litigation to challenge the validity of the Cainhoy-T7 PUD Master Plan and Zoning Text and incur attorneys' fees and litigation expenses arising from such litigation.

FOR AN EIGHTH CAUSE OF ACTION
(Fraudulent Inducement – Against Tract 7, LLC)

113. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

114. Tract 7, LLC made a representation that it would provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property based on the terms and conditions negotiated and set forth in the Letter of Intent.

115. This representation was false as Tract 7, LLC never possessed any intent to provide BP with an option on the terms and conditions set forth in the Letter of Intent and entered into the Letter of Intent with no intention of complying with the Letter of Intent.

116. Tract 7, LLC knew that its representation was false and that it had no intent to provide BP with an option on the terms and conditions set forth in the Letter of Intent.

117. Tract 7, LLC intended for BP to act on its representations by foregoing its right to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council.

118. Tract 7, LLC's false representations regarding its intent to provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property based on the terms and conditions set forth in the Letter of Intent was part of a general design or plan to induce BP to agree not to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council, which BP would not have agreed to do but for Tract 7, LLC's fraudulent representations.

119. BP did not know that Tract 7, LLC's representations were false.

120. BP relied on the truth of Tract 7, LLC's representations by agreeing not to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council and negotiating in good faith the Definitive Agreement with Tract 7, LLC.

121. BP had a right to rely on Tract 7, LLC's representations.

122. BP was proximately injured by its reliance on Tract 7, LLC's by relinquishing its legal right to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text

before City Council and incurring attorneys' fees and other expenses related to the negotiation of the Definitive Agreement.

123. As a further result of Tract 7, LLC's fraudulent inducement of BP to enter into the Letter of Intent, BP has been forced to initiate this litigation to challenge the validity of the Cainhoy-T7 PUD Master Plan and Zoning Text and incur attorneys' fees and litigation expenses arising from such litigation.

FOR A NINTH CAUSE OF ACTION
(Negligent Misrepresentation – Against Tract 7, LLC)

124. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

125. Tract 7, LLC made a false representation to BP that it intended to provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property based on the terms and conditions set forth in the Letter of Intent.

126. Tract 7, LLC had a pecuniary interest in making the false representation to induce BP to enter into the Letter of Intent and forego its right to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council, thereby ensuring that City Council would adopt the Cainhoy-T7 PUD Master Plan and Zoning Text and securing its right to develop Tract 7 consistent therewith.

127. Tract 7, LLC had a duty of care to see that it communicated truthful information to BP regarding its intent to provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property.

128. Tract 7, LLC breached that duty by communicating false information to BP regarding its intent to provide BP with an option to purchase property in Tract 7 consistent with the Letter of Intent.

129. BP justifiably relied on Tract 7, LLC's communications regarding its intent to provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property by foregoing its rights to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council.

130. Tract 7, LLC's negligent misrepresentations regarding its intent to provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property based on the terms and conditions set forth in the Letter of Intent was part of a general design or plan to induce BP to agree not to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council, which BP would not have agreed to do but for Tract 7, LLC's negligent misrepresentations.

131. BP suffered losses as the proximate result of its reliance on Tract 7, LLC, including losing its legal right to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council and incurring attorneys' fees and other expenses related to the negotiation of the Definitive Agreement.

132. As a further result of Tract 7, LLC's negligent misrepresentation, BP has been forced to initiate this litigation to challenge the validity of the Cainhoy-T7 PUD Master Plan and Zoning Text and incur attorneys' fees and litigation expenses arising from such litigation.

FOR A TENTH CAUSE OF ACTION
(Promissory Estoppel – Against Tract 7, LLC)

133. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

134. Tract 7, LLC made an unambiguous promise to BP that it intended to provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property based on the terms and conditions set forth in the Letter of Intent.

135. BP reasonably relied on Tract 7, LLC's unambiguous promise by agreeing not to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council and negotiating in good faith the Definitive Agreement with Tract 7, LLC.

136. BP's reliance on Tract 7, LLC's unambiguous promise was expected and foreseeable by BP.

137. BP was injured by its reliance on Tract 7, LLC's unambiguous promise by losing its legal right to challenge the adoption of the Cainhoy-T7 PUD Master Plan and Zoning Text before City Council and incurring attorneys' fees and other expenses related to the negotiation of the Definitive Agreement.

138. As a further result of its reliance on Tract 7, LLC's unambiguous promise, BP has been forced to initiate this litigation to challenge the validity of the Cainhoy-T7 PUD Master Plan and Zoning Text and incur attorneys' fees and litigation expenses arising from such litigation.

FOR AN ELEVENTH CAUSE OF ACTION
(Declaratory Judgment – Against Tract 7, LLC)

139. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

140. As alleged more fully above, Tract 7, LLC refused to provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property in accordance with the terms and conditions set forth in the Letter of Intent.

141. As a result of Tract 7, LLC's breach of the Letter of Intent and its implied covenant of good faith and fair dealing and its fraudulent inducement and negligent misrepresentations related thereto, Tract 7, LLC has wrongfully prevented BP from creating a buffer that will increase safety and reduce potential harm and nuisances for Cainhoy Plantation and the Cainhoy Community.

142. Furthermore, Tract 7, LLC has significantly increased the likelihood that BP will be exposed to future liabilities and costs arising from claims asserted by residents of Cainhoy Plantation.

143. Under the South Carolina Uniform Declaratory Judgments Act, this Court has the power to declare rights, status, and other legal relations between BP and Tract 7, LLC and may grant further relief based on declaratory judgment or decree whenever necessary or proper.

144. Based on Tract 7, LLC's tortious and unlawful refusal to provide BP with an option to purchase property in Tract 7 which would serve as a buffer between the residential development in Cainhoy Plantation and BP's property in accordance with the terms and conditions set forth in the Letter of Intent, the Court should issue a declaratory judgment or decree that Tract 7, LLC and its agents, representatives, successors, and assigns shall be liable

for be responsible for future liabilities, response costs, mitigation measures, and other claims and costs arising from its development of a residential neighborhood next to BP's property in the area which was to serve as a buffer under the Letter of Intent.

FOR A TWELFTH CAUSE OF ACTION
(Injunctive Relief – Against All Defendants)

145. BP realleges and incorporates the allegations contained in the aforementioned paragraphs as if fully and completely set forth herein verbatim.

146. As more fully set forth above, Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC submitted the Cainhoy PUD Master Plan, which did not comply with the requirements of the Enabling Act and City Ordinance § 54-255.

147. As more fully set forth above, the City adopted City Ordinances Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, in violation of the Enabling Act; Article 1, Section 8 of the South Carolina Constitution; City Ordinances §§ 54-254 and 54-255, and the South Carolina Coastal Tidelands and Wetlands Act.

148. BP seeks, pursuant to the equitable powers of this Court, an immediate temporary injunction and/or permanent injunction prohibiting Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC from further residential development until such time as this Court has ruled on the within causes of action.

149. BP seeks, pursuant to the equitable powers of this Court, an immediate temporary injunction and/or permanent injunction prohibiting the City from issuing any permits or otherwise approving any residential development activities by the Owners or their agents,

representatives, successors, or assigns until such time as this Court has ruled on the within causes of action.

150. Unless this Court issues an immediate temporary injunction and/or permanent injunction prohibiting the Defendants from further residential development, BP will suffer immediate and irreparable injury from the development of a massive residential neighborhood next to its manufacturing facility.

151. BP is likely to succeed on the merits of this action, as alleged herein, and be granted judgment in its favor on its causes of action.

152. If not enjoined, the Owners and/or their agents, representatives, successors, or assigns will develop Cainhoy Plantation pursuant to an unlawful and invalid zoning ordinance. No adequate remedy exists at law, and money damages will not compensate BP for its injuries if Cainhoy Plantation is developed for residential housing pursuant to the Cainhoy PUD Master Plan. These damages can be readily avoided upon an award to BP of the requested remedies under the causes of action for declaratory and injunctive relief.

153. The harm that will be suffered by BP if residential development of Cainhoy Plantation is permitted under the Cainhoy PUD Master Plan outweighs the minimal harm to be suffered by the Defendants if a temporary or permanent injunction is issued.

PRAYER FOR RELIEF

WHEREFORE, BP prays for the following relief:

a. That the Court issue a Declaratory Judgment that City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein, are invalid,

null, and void, as violative of the Enabling Act; Article 1, Section 8 of the South Carolina Constitution; City Ordinances §§ 54-254 and 54-255, and the South Carolina Coastal Tidelands and Wetlands Act;

b. That the Court find that the enactment of City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text were in violation of BP's rights of due process and equal protection of the laws guaranteed by Article 1, Section 1 of the South Carolina Constitution;

c. That the Owners be enjoined and prohibited from developing Cainhoy Plantation for residential housing under City Ordinances 2014-25, 2014-26, and 2014-82, and the Cainhoy Land & Timber PUD Master Plan and Zoning Text, the Cainhoy-ST PUD Master Plan and Zoning Text, and the Cainhoy-T7 PUD Master Plan and Zoning Text adopted therein;

d. That the Court order specific performance of the Letter of Intent and require Tract 7, LLC to provide BP with a purchase option on the terms and conditions set forth in the Letter of Intent;

e. That the Court issue a Declaratory Judgment that Tract 7, LLC and its agents, representatives, successors, and assigns be responsible for future liabilities, response costs, mitigation measures, and other claims and costs arising from its development of a residential neighborhood next to BP's property and its refusal to provide BP with a purchase option for a buffer in the area which was to serve as a buffer under the Letter of Intent;

f. That the Court award BP actual and punitive damages on its causes of action against Tract 7, LLC;

g. That the Court award BP its costs and attorneys' fees under S.C. Code § 15-77-300;

h. That the Court award BP its attorneys' fees and legal expenses to be paid by Tract 7, LLC based on its wrongful acts alleged herein; and/or

i. That the Court award all other appropriate relief, including further equitable relief, as is just and proper under the circumstances.

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ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC

August15, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	CASE NO.: 2014-CP-08-1840
BP AMOCO CHEMICAL COMPANY, Plaintiff, vs. CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; AND SOUTHERN TIMBER, LLC, Defendants.	)	MOTION TO DISMISS ON BEHALF OF DEFENDANT CAINHOY LAND & TIMBER, LLC

Please take notice that the Defendant, Cainhoy Land & Timber, LLC, will move before the presiding judge of the Ninth Judicial Circuit, at such time and place may be heard, for an Order dismissing the claims against them pursuant to South Carolina Rules of Civil Procedure 8(a) and 12(b)(6). This Motion is based upon the failure to plead facts sufficient to show that the Plaintiff is entitled to relief. Specifically, the Complaint alleges that Plaintiff brings its claim pursuant to S.C. Code Ann. Sec. 6-29-760(C), which provides, "An owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party." (Complaint, Para. 61). The Complaint alleges that the Defendant Tract 7, LLC owns property "which is adjacent to and immediately south of the BP Property" (Complaint, Para. 15), but the Complaint does not make this allegation as to the Defendant Cainhoy Land & Timber, LLC (Complaint, Paras. 16-20). For this reason, Plaintiff lacks standing to challenge the zoning of this Defendant's property.

In addition, the allegations of the Complaint demonstrate that this suit is untimely as to the claims against this Defendant. S.C. Code Ann. Sec. 6-29-760(D) provides, "No challenge to

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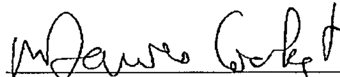
the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission." The Complaint, at Paragraphs 45 and 46, alleges that Ordinances 2014-25 and 2014-26, which pertain to this Defendant, were enacted on February 25, 2014. The Complaint fails to allege facts demonstrating that the City did not substantially comply with the provisions of the foregoing Act or with the established procedures of the governing authority or the planning commission. This suit was filed on August 15, 2014, which is more than sixty days after the enactment of these ordinances. For this reason, this suit is untimely as to this Defendant.

BARNWELL WHALEY
PATTERSON & HELMS, LLC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ATTORNEYS FOR THE DEFENDANTS
TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; AND SOUTHERN TIMBER, LLC

Dated: 9/30/14

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-08-1840

BP AMOCO CHEMICAL COMPANY,)
)
Plaintiff,)
)
vs.)
)
CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; AND SOUTHERN TIMBER, LLC,)
)
Defendants.)

MOTION TO DISMISS ON BEHALF OF DEFENDANT SOUTHERN TIMBER, LLC (now known as POINT HOPE TIMBER, LLC)

Please take notice that the Defendant, Southern Timber, LLC (now known as Point Hope Timber, LLC), will move before the presiding judge of the Ninth Judicial Circuit, at such time and place may be heard, for an Order dismissing the claims against them pursuant to South Carolina Rules of Civil Procedure 8(a) and 12(b)(6). This Motion is based upon the failure to plead facts sufficient to show that the Plaintiff is entitled to relief. Specifically, the Complaint alleges that Plaintiff brings its claim pursuant to S.C. Code Ann. Sec. 6-29-760(C), which provides, "An owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party." (Complaint, Para. 61). The Complaint alleges that the Defendant Tract 7, LLC owns property "which is adjacent to and immediately south of the BP Property" (Complaint, Para. 15), but the Complaint does not make this allegation as to the Defendant Southern Timber, LLC (Complaint, Paras. 16-20). For this reason, Plaintiff lacks standing to challenge the zoning of this Defendant's property.

In addition, the allegations of the Complaint demonstrate that this suit is untimely as to the claims against this Defendant. S.C. Code Ann. Sec. 6-29-760(D) provides, "No challenge to

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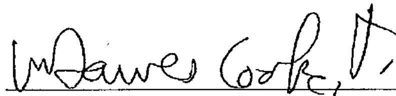
the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission." The Complaint, at Paragraphs 45 and 46, alleges that Ordinances 2014-25 and 2014-26, which pertain to this Defendant, were enacted on February 25, 2014. The Complaint fails to allege facts demonstrating that the City did not substantially comply with the provisions of the foregoing Act or with the established procedures of the governing authority or the planning commission. This suit was filed on August 15, 2014, which is more than sixty days after the enactment of these ordinances. For this reason, this suit is untimely as to this Defendant.

BARNWELL WHALEY
PATTERSON & HELMS, LLC



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ATTORNEYS FOR THE DEFENDANTS
TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; AND SOUTHERN TIMBER, LLC

Dated: 9/30/14

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF BERKELEY) CIVIL ACTION NO. 2014-CP-08-1840

BP AMOCO CHEMICAL COMPANY,

Plaintiff,

vs.

CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; and SOUTHERN TIMBER, LLC,

Defendants.

PLAINTIFF BP AMOCO CHEMICAL COMPANY'S MEMORANDUM IN OPPOSITION TO DEFENDANTS CAINHOY LAND & TIMBER, LLC'S AND SOUTHERN TIMBER, LLC'S MOTIONS TO DISMISS

2014 OCT 16 PM 3:27
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC
FILED

Plaintiff BP Amoco Chemical Company ("BP") submits this Memorandum in Opposition[1] to Defendants Cainhoy Land & Timber, LLC's and Southern Timber, LLC's[2] Motions to Dismiss all claims asserted against them in this action. Defendant Tract 7, LLC has not filed a Motion to Dismiss, but for ease of reference the movants, Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC, will be referred to collectively in this Memorandum as the "Defendants." BP's claims against Defendants should not be dismissed because the Complaint sufficiently alleges that BP has standing to challenge the zoning ordinances subject to this action as an adjoining landowner to Defendants and under the public importance exception. Furthermore, the claims are not barred by the sixty-day statute of limitations under S.C. Code Ann. § 6-29-760(D) because the Complaint alleges numerous ways in which Defendant City of

[1] Cainhoy Land & Timber, LLC's and Southern Timber, LLC's respective Motions to Dismiss are made on exactly the same grounds. For the sake of judicial economy, this memorandum addresses the motions collectively.

[2] As noted in its Motion to Dismiss, Southern Timber, LLC contends that it has changed its name to Point Hope Timber, LLC. The Master Plan and Zoning Text in the ordinance that has been challenged refers to this entity as Southern Timber, LLC. For the sake of consistency, the entity will be referred to in this memorandum as "Southern Timber, LLC."

Charleston (the "City") failed to substantially comply with the applicable notice requirements and procedures for enacting zoning ordinances.

I. BRIEF SUMMARY OF 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 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 as 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 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.*)[3]

[3] Consistent with the manner in which the Owners refer to the three PUD master plans for Cainhoy Plantation, this Memorandum refers to such master plans and zoning texts collectively as the "Cainhoy PUD Master Plan."

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 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. (*Id.*) Ultimately, City Council adopted ordinances implementing the Cainhoy PUD Master Plan zoning text for Defendants' properties on February 25, 2014. (*Id.* at ¶ 46.) The City deferred its consideration of the Cainhoy PUD Master Plan for the property owned by Tract 7, LLC to allow BP and Tract 7, LLC to attempt to negotiate a buffer in Cainhoy Plantation near BP's property to ensure the safe and compatible co-existence of BP's facility and the residential development in Cainhoy Plantation. (*Id.* at ¶¶ 45-46, 48.) 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 ¶ 50.) Thereafter, on June 17, 2014, the City adopted the ordinance enacting the Cainhoy PUD Master Plan for the property owned 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 and its rezoning of Cainhoy Plantation thereunder. BP's claims 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.)

The City and Tract 7, LLC answered BP's Complaint on September 26, 2014, and September 30, 2014, respectively. On September 30, 2014, Defendants filed Motions to Dismiss BP's claims against them based on their arguments that (1) BP does not have standing because it is not an adjoining landowner to Defendants under S.C. Code Ann. § 6-29-760(C) and (2) BP failed to timely commence this action within sixty days of the rezoning of Defendants' properties under § 6-29-760(D). This memorandum serves as BP's response in opposition to Defendants' Motions to Dismiss.

II. STANDARD

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.*

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[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 Defendants' Motions to Dismiss.

III. ARGUMENT

A. Standing

1. At the pleading stage, BP is merely required to allege general facts to support its standing under South Carolina's liberal pleading rules.

Defendants allege that BP lacks standing under S.C. Code Ann. § 6-29-760(C) because the Complaint fails to allege that BP is an adjoining landowner to the properties owned by Defendants, which were rezoned under the Cainhoy PUD Master Plan. Under South Carolina law, standing may be acquired by statute, through the rubric of "constitutional standing," or under the "public importance" exception. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). In this case, BP alleges it has standing by statute under § 6-29-760(C) and under the public importance exception.

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.*, 475 S.E.2d 754, 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)).

2. BP has sufficiently alleged it has standing as an adjacent landowner to challenge the rezoning of Defendants' properties under the Cainhoy PUD Master Plan.

Contrary to Defendants' argument, BP has sufficiently alleged the ultimate fact that it is an adjoining landowner to Defendants' properties, and therefore, BP has standing to challenge their rezoning. S.C. Code Ann. § 6-29-760(C) provides that "[a]n owner of adjoining land or his representative has standing to bring an action contesting the [zoning] ordinance or amendment."

In this case, BP's Complaint expressly alleges that it has standing as an adjoining landowner to both Defendants by virtue of the comprehensive, uniform rezoning of the entire Cainhoy Plantation:

> 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).

(Compl. ¶ 12.) Thus, the Complaint adequately alleges the ultimate fact that BP is an adjoining landowner for the purposes of establishing standing under § 6-29-760(C).

BP's alleged standing as an adjoining landowner to Defendants is further supported by numerous facts alleged in the Complaint. BP alleges that Defendants, along with Defendant Tract 7, LLC, are affiliated entities under common ownership and management and collectively own three contiguous tracts which comprise Cainhoy Plantation. (*Id.* at ¶7.) Prior to the enactment of the zoning ordinances in question, Cainhoy Plantation was zoned collectively under the City's Cainhoy (CY) Zoning Classification. (*Id.* at ¶ 21.) The Owners of Cainhoy Plantation collectively decided to develop all properties as a single, mixed-use development and submitted three planned unit development ("PUD") applications for the property on the same date, which also provided for the uniform rezoning of all of Cainhoy Plantation. (*Id.* at ¶¶ 22, 31.) The PUD applications were submitted effectively as one PUD based on their express statement that the three separate PUD master plan applications "*have identical master plan zoning texts and shall be administered in a coordinated fashion.*" (*Id.* at ¶ 32) (emphasis added). In fact, the three separate PUD master plans submitted for Cainhoy Plantation refer to the three master plans and zoning texts collectively as "Cainhoy PUD Master Plan" and fail to distinguish between Defendants' and Tract 7, LLC's respective properties for the purposes of zoning. (*Id.*) Based on the comprehensive, uniform zoning of all tracts within Cainhoy Plantation under the Cainhoy

PUD Master Plan, BP legitimately alleges that it "is an adjoining landowner to all property rezoned under City Ordinances 2014-25, 2014-26, and 2014-82, as they were rezoned pursuant to the Cainhoy PUD Master Plan, which states that all three master plans 'have identical master plan zoning texts and shall be administered in a coordinated fashion.'" (*Id.* at ¶ 63.)

There can be no doubt these allegations sufficiently allege BP's standing as an adjoining landowner under § 6-29-760(C) under South Carolina's liberal pleading rules. BP alleges on numerous occasions in its Complaint that it is an adjoining landowner to Defendants' properties, which were collectively rezoned under the Cainhoy PUD Master Plan, and it supports those allegations with facts detailing the uniform, comprehensive zoning for all of Cainhoy Plantation, which neighbors BP's property. Therefore, Defendants' Motion to Dismiss based on the purported claim that BP has failed to allege it is an adjoining landowner to Defendants should be denied.

3. *BP has sufficiently alleged standing under the public importance exception by alleging ultra vires acts related to the adoption of the Cainhoy PUD Master Plan and facts relating to the public impact of the development of Cainhoy Plantation under the Cainhoy PUD Master Plan.*

In addition to alleging standing as an adjoining landowner under § 6-29-760(C), BP alleges it has standing to challenge the rezoning of all of Cainhoy Plantation, including Defendants' properties, under the public importance exception. Defendants' Motions to Dismiss do not address the public importance exception alleged in BP's Complaint. As a result, even if the Court adopts Defendants' arguments regarding BP's claimed failure to allege it is an adjoining landowner, BP has standing under the public importance exception to maintain its actions against Defendants and challenge the rezoning of their properties. In the event, though, that Defendants belatedly attack BP's standing under the public importance exception, such attack cannot prevail because BP has sufficiently alleged its standing under that exception.

Statutory standing under § 6-29-760(C) is not the only means of acquiring standing to challenge a zoning ordinance. 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." *ATC South*, 380 S.C. at 198, 699 S.E.2d at 341. The public importance exception resists a formulaic approach and must turn on "competing policy concerns." *Id.* 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., 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).

In this case, BP's Complaint sufficiently alleges facts to justify its standing under the public importance exception. To begin, BP invokes standing under the public importance exception to challenge the rezoning of Defendants' property by expressly alleging in the Complaint that it "has standing to maintain this action pursuant to . . . the public importance standing doctrine." (Compl. ¶ 12.) BP supports its standing under this exception with several allegations of *ultra vires* acts by Defendant City of Charleston, including:

- Defendant City of Charleston committed an *ultra vires* act by adopting the Cainhoy PUD Master Plan in violation of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. §§ 6-29-10, *et seq.*, (the "Enabling Act"). (Compl. ¶¶ 59-67.)

- Defendant City of Charleston committed an *ultra vires* act by adopting the Cainhoy PUD Master Plan in violation of City Ordinances §§ 54-254 and 54-255. (Compl. ¶¶ 68-72, 80-85.)

- The Zoning Ordinances adopted under the Cainhoy PUD Master Plan are unconstitutional because they violate the separation of powers and nondelegation doctrines under the South Carolina Constitution. (Compl. ¶¶ 73-79.)

- Defendant City of Charleston adopted the Cainhoy PUD Master Plan in violation of BP's due process and equal protection rights under the South Carolina Constitution without adequate notice and for the benefit of a single private developer. (Compl. ¶¶ 86-95.)

- The Zoning Ordinances adopted under the Cainhoy PUD Master Plan violate the South Carolina Tidelands and Wetlands Act, S.C. Code Ann. §§ 48-39-10, *et seq.* (Compl. ¶¶ 96-102.)

Additionally, BP's Complaint includes several allegations that go beyond the illegality of the Cainhoy PUD Master Plan and its adoption and relate to the impact that the development of Cainhoy Plantation will have on the surrounding community. For example, BP includes allegations in the Complaint relating to public opposition to the Cainhoy PUD Master Plan arising from concerns of its impact on historical and cultural resources, the rural nature of the surrounding community, traffic, health, and safety. (Compl. ¶¶ 39-42, 44-45.)

In sum, BP's Complaint adequately alleges ultimate and evidentiary facts to support its standing to challenge the rezoning of Defendants' properties under the public importance exception, especially at the early pleading stage when BP must merely allege general factual allegations to support standing. BP alleges numerous ways in which the Cainhoy PUD Master Plan violates the South Carolina Constitution, state statutes, and local ordinances. Moreover, the Complaint includes allegations showing that the Cainhoy PUD Master Plan is a matter of public importance based on public opposition to the plan from numerous citizens and media organizations. Therefore, BP sufficiently alleges facts to support its standing under the public importance exception, and Defendants' Motions to Dismiss based on BP's lack of stacking should be denied. *See Evins*, 341 S.C. at 21, 532 S.E.2d at 879 (ruling that trial court correctly ruled that plaintiff had standing where his complaint alleged *ultra vires* actions); *Baird*, 333 S.C.

at 531, 511 S.E.2d at 75 (refusing to dismiss action where complaint alleged *ultra vires* act and subject of action clearly impacted profound public interest).

B. Statute of Limitations

1. BP's claims are not time-barred because it has sufficiently alleged that the City failed to substantially comply with notice requirements and its established procedures.

Defendants also contend that BP's claims against them should be dismissed because 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.

In this case, the sixty-day statute of limitations under § 6-29-760(D) does not bar BP's claims challenging the rezoning of Defendants' properties under the Cainhoy PUD Master Plan because BP has adequately alleged that the City failed to substantially comply with its own procedures in adopting the Cainhoy PUD Master Plan and with the notice requirements of § 6-29-760. In Paragraph 63 of the Complaint, 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." This allegation sufficiently states the ultimate fact to support BP's position that the sixty-day statute of limitation does not apply in this case, and Defendants' argument to the contrary is belied by the clear allegations in the Complaint.

To the extent that Defendants argue that BP must allege evidentiary facts to support its allegation that the City failed to substantially comply with the notice requirements of § 6-29-760 or its own established procedures, this argument is not supported by the liberal pleading rules under South Carolina law. Regardless, BP's Complaint contains several factual allegations supporting its position that the City did not substantially comply with § 6-29-760 and its own established procedures for adopting zoning amendments, including:

- In Paragraph 34 of the Complaint, BP alleges that 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).
- In Paragraphs 68-72 of the Complaint, BP alleges that 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.
- In Paragraphs 80-85 of the Complaint, BP alleges that 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.
- In Paragraph 94 of the Complaint, BP alleges that in adopting the Cainhoy PUD Master Plan 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."
- In Paragraphs 88-93 of the Complaint, BP alleges that 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.

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

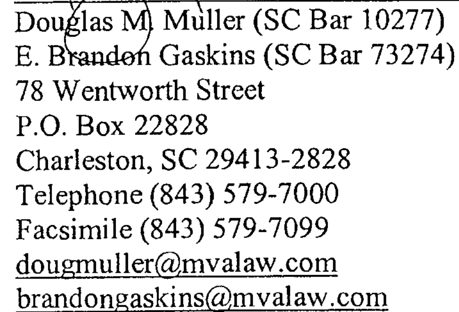
statute of limitations under § 6-29-760(D) does not apply. As a result, Defendants' argument that BP's claims against them are time-barred fails.

IV. CONCLUSION

BP has sufficiently alleged standing as an adjoining landowner under S.C. Code Ann. § 6-29-760(C) and under the public importance exception. Additionally, BP's claims are not time-barred because the sixty-day statute of limitations under § 6-29-760(D) does not apply based on the City's failure to substantially comply with the notice requirements under § 6-29-760 and its established procedures for enacting zoning ordinances. Therefore, Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

MOORE & VAN ALLEN PLLC



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ATTORNEYS FOR PLAINTIFF

October 16, 2014

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) CASE NO.: 2014-CP-08-1840

BP AMOCO CHEMICAL COMPANY,)
)
Plaintiff,)
)
vs.)
)
CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; AND SOUTHERN TIMBER, LLC,)
)
Defendants.)

MEMORANDUM IN SUPPORT OF MOTIONS TO DISMISS ON BEHALF OF DEFENDANTS CAINHOY LAND & TIMBER, LLC AND SOUTHERN TIMBER, LLC

Defendants, Cainhoy Land & Timber, LLC and Southern Timber, LLC, by and through their undersigned counsel, respectfully submit this Memorandum in Support of their Motions to Dismiss Plaintiff's claims against these Defendants pursuant to South Carolina Rules of Civil Procedure 8(a) and 12(b)(6).

Summary

This is an action challenging the enactment of ordinances re-zoning properties belonging to the three landowner Defendants, Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC. These properties, totaling some nine thousand acres, comprise "Cainhoy Plantation", a Planned Unit Development located in the City of Charleston. Two of the landowner Defendants, Cainhoy Land & Timber, LLC and Southern Timber, LLC, move to dismiss the Complaint as to them because their properties are not – and are not alleged to be – adjacent to BP's property, so BP does not have standing to challenge their zoning.

In addition, this action is untimely as to these two Defendants. Their zoning ordinances were enacted earlier than the ordinance relating to Tract 7, more than sixty days before this suit was filed.

Facts Alleged in Plaintiff's Complaint

On August 15, 2014, BP Amoco Chemical Company (hereinafter referred to as "Plaintiff" or "BP") filed the instant action asserting the following four causes of action against the City of Charleston; Tract 7, LLC; Cainhoy Land & Timber, LLC; and Southern Timber, LLC (hereinafter collectively referred to as "Defendants"): (1) declaratory judgment that City Ordinances 2014-25, 2014-26, 2014-82 violate the South Carolina Local Government Comprehensive Planning Enabling Act of 1994; (2) declaratory judgment that City Ordinances 2014-25, 2014-26, and 2014-82 violate City Ordinance § 54-255; (3) declaratory judgment that City Ordinances 2014-25, 2014-26, and 2014-82 violate the Separation of Powers and Nondelegation Doctrines under the South Carolina Constitution; and (4) declaratory judgment that City Ordinances 2014-25, 2014-26, and 2014-82 violate City Ordinance § 54-254. Compl. ¶¶ 59-85. Plaintiff is asserting additional causes of action against the City of Charleston and Tract 7, LLC. Compl. ¶¶ 86-144. Plaintiff also is seeking injunctive relief against all Defendants. Compl. ¶¶ 145-153.

Specifically, the Complaint alleges that Plaintiff brings its claims pursuant to S.C. Code Ann. § 6-29-760(C), which provides that "[a]n owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party." Compl. ¶ 61. The Complaint states that Defendant Tract 7, LLC owns property "which is adjacent to and immediately south of the BP Property." Compl. ¶ 15. According to the Complaint, "Cainhoy Land & Timber, LLC owns properties consisting of approximately 5,653.52 acres . . . , which are located off of Cainhoy Road and Clements Ferry Road in the Cainhoy Community of Berkeley County." Compl. ¶ 16.

The Complaint alleges that "Tract 7, LLC, Cainhoy Land & Timber, LLC and Southern Timber, LLC . . . are affiliated entities that share common ownership and management." Compl. ¶ 7.[1] The Complaint states that these entities collectively own three tracts of land that total approximately 9,087.22 acres, which are located off of Clements Ferry Road and Cainhoy Road in the Cainhoy Community of Berkeley County, South Carolina. These tracts are commonly collectively referred to as Cainhoy Plantation. Compl. ¶¶ 7-8.[2] BP has owned and operated a manufacturing facility located in Berkeley County since 1978, employing 230 employees and utilizing the services of an additional 200 contract employees. Compl. ¶¶ 13-14.

Plaintiff alleges that in 2013 the Defendants, owners of Cainhoy Plantation, decided to develop it as a mixed use development that could include over 18,000 residential dwelling units. Compl. ¶ 22. According to Plaintiff, the owners of Cainhoy Plantation recommended amendments to the PUD Ordinance that were considered by the City Planning Commission and later by City Council. Compl. ¶¶ 24-25. On November 6, 2013, City Council enacted the amendments to the PUD Ordinance. Compl. ¶ 30. Thereafter, Tract 7, LLC, Cainhoy Land & Timber, LLC and Southern Timber, LLC submitted three separate Cainhoy PUD Master Plan applications to the City on January 24, 2014.[3] Compl. ¶ 31. The Planning Commission recommended approval of the master plan on February 6, 2014 and held a public hearing on the Cainhoy PUD Master Plan February 11, 2014. Compl. ¶ 37. BP claims that during the public hearing, many individuals expressed opposition to the master plan, including individuals associated with historical preservation organizations, members of the news media and residents

[1] The owners of Tract 7, Cainhoy Land & Timber, LLC, and Southern Timber, LLC are in fact separate and independent from one another, but this allegation will be taken as true for purposes of the instant Motion to Dismiss.
[2] Attached hereto as Exhibit A is an aerial photograph showing the approximate boundaries of the properties comprising Cainhoy Plantation in relation to the BP property.
[3] The Cainhoy T7 PUD Master Plan & Zoning Text, Cainhoy Land & Timber PUD Master Plan & Zoning Text, and the Cainhoy-ST Master Plan & Zoning Text are referred to collectively as the Cainhoy PUD Master Plan.

of the Cainhoy, Huger, and Wando Communities. Compl. ¶¶ 39-42. BP was in attendance at the public hearing on February 11, 2014 and spoke with the owners of the proposed development of Cainhoy Plantation following the meeting. Compl. ¶ 44.

On February 25, 2014, a representative of BP addressed City Council and requested a deferral of all ordinances related to the Cainhoy PUD Master Plan and development of Cainhoy Plantation. Compl. ¶ 44. After being asked to defer the ordinances, as a courtesy to BP, the owners of Cainhoy Plantation agreed to defer action with respect to the Tract 7 Master Plan. Compl. ¶¶ 44-46. Thereafter, BP and Cainhoy Plantation entered into negotiations for BP to purchase an area on Tract 7 between the contemplated residential development in Cainhoy Plantation and BP's property to provide a buffer. Compl. ¶ 48. As of June 17, 2014, BP and Tract 7, LLC had not reached an agreement about the sale of the land. Compl. ¶¶ 49-52. BP did not request City Council to defer adoption of the Tract 7, LLC Master Plan and Zoning Text at the meeting on June 17, 2014, and the City Council adopted Ordinance 2014-82 relating to the Tract 7 Master Plan. Compl. ¶¶ 53-54. No agreement between BP and Tract 7 has been reached to date. Compl. ¶ 58.

Standard of Review for Rule 12(b)(6) Motion

In order to survive the instant Motion to Dismiss, "the trial court should consider only the allegations set forth on the face of the plaintiff's complaint." *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E. 2d 188 (2007), citing *Stiles v. Onorato*, 318 S. C. 297, 300, 457 S.E. 2d 601, 602 (1995). "The question presented is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Plyler*, 373 S.C. at 647, citing *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). If those facts and inferences would entitle the plaintiff to relief on any theory, then a dismissal for failure to

state a claim is improper. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009).

Important for the purposes of this motion, a motion under Rule 12(b)(6) does not admit legal conclusions alleged in the Complaint:

> The characterization of the activity as "outside the contract" is not an allegation of fact, but is an unsupported conclusion which is contrary to the admitted facts. Therefore, the trial judge properly disregarded it. *See Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct.App.2000) (finding Rule 12(b)(6), SCRCP, replaces the Code Pleading rules regarding demurrers and "retains the Code Pleading standard ... rather than the more lenient notice pleading standard found in the federal rules.") (citation omitted); *Charleston County Sch. Dist. v. S.C. State Ports Auth.*, 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct.App.1984) ("A demurrer admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from the facts, nor does it admit conclusions of law."); *Sease v. City of Spartanburg*, 242 S.C. 520, 527, 131 S.E.2d 683, 687 (1963) (finding allegations in the complaint which merely characterize the facts are mere conclusions which are not admitted by a demurrer).

Charleston County School District v. Laidlaw Transit, Inc., 348 S.C. 420, 425-26, 559 S.E.2d 362, 364-65 (S.C.App. 2001) (*cert. denied 2002).*

Arguments

I. Plaintiff BP Lacks Standing to Assert Claims against Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC

Plaintiff BP lacks standing to assert claims against Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC. A party may have standing through: (1) the "rubric of constitutional standing"; (2) by statute; or (3) under the "public importance" exception. *Freemantle v. Preston*, 398 S.C. 186, 192, 728, S.E.2d 40 (S.C. 2012) (citing *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008)). BP claims to have standing pursuant to S.C. Code § 6-29-760(C) and through the public importance standing doctrine. Compl. ¶ 12. As shown above, a Motion to Dismiss under Rule 12(b)(6) takes as true the factual allegations of the Complaint, but it does not admit the legal conclusions. BP's Complaint fails to

allege facts that could establish standing under constitutional standing, statutory standing, or the public importance exception, which is discussed seriatim below.

A. Constitutional Standing

To qualify for constitutional standing, a plaintiff must have first suffered an injury in fact which is "concrete and particularized, and actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992) (internal quotations and citations omitted); *Sea Pines Ass'n for Prof. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001); *Davis v. Richland Cnty Council,* 372 S.C. 497, 642 S.E.2d 740 (2007). For an injury to be particularized, it must affect the plaintiff in a personal and individual way. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014) (citations omitted). "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not possess standing." *Id.* at 75; *quoting Lujan*, 504 U.S. at 573-74, 112 S.Ct. 2130 (internal citations omitted). There must also be a causal connection between the injury complained of that is fairly traceable to the conduct of the defendant. *Lujan*, 504 U.S. at 560-61 (internal quotations and citations omitted). Finally, the third element requires that the plaintiff show that he is likely to receive a favorable decision from the courts as to the merits of his claim if he is deemed to have standing in this initial inquiry. *Id.*

The Complaint fails to establish any elements to satisfy the constitutional standing requirements. First, BP's complaints about the Cainhoy Land & Timber PUD Master Plan and Zoning Text and the Cainhoy-ST PUD Master Plan and Zoning Text, set forth in Paragraph 84 of

the Complaint, are generalized grievances suffered by the public as a whole. These grievances include that the PUD Master Plans: (1) are not compatible with the zoning of adjacent undeveloped areas; (2) do not protect the natural and cultural resources better than development under other zoning district regulations; and (3) are not consistent with the City of Charleston's Comprehensive Plan for the Cainhoy area. Compl. ¶ 84. In addition, BP claims that there has not been a traffic study to evaluate whether the project is compatible with existing and planned roads. *Id.* The Complaint fails to allege any particularized harm that may allow BP to obtain constitutional standing. In fact, it does not even allege – nor could it allege – that BP's property is adjacent to the subject property. Therefore, Plaintiff fails to establish even the first element of standing that BP suffered a particularized harm to a legally protected interest, which is required to satisfy the constitutional standing requirements.

Second, the Complaint fails to adequately allege that BP will suffer any actual or imminent harm because of the ordinance. Plaintiff alleges that "[u]nless this Court issues an immediate temporary injunction prohibiting the Defendants from further residential development, BP will suffer immediate and irreparable injury from the development of a massive residential neighborhood next to its manufacturing facility." Compl. ¶ 150. Based on these general allegations, it is unclear what "immediate and irreparable injury" BP is referring to. The potential harm alleged in BP's Complaint is not imminent or actual, but rather conjectural or hypothetical. Therefore, the Complaint fails to establish the second element of constitutional standing.

Finally, although the Complaint alleges that Plaintiff is likely to receive a favorable decision from the courts as to the merits of its claim, recent decisions challenging zoning ordinances indicate that Plaintiff's chances of receiving a favorable outcome are not likely. *See*

Carnival Corp., 407 S.C. 67, 753 S.E.2d 846 (2014); *ATC South v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008). Therefore, Plaintiff fails to meet any of the required elements for constitutional standing to apply.

B. Statutory Standing

According to the Complaint, Plaintiff has statutory standing to pursue his claims in this matter pursuant to S.C. Code Ann. § 6-29-760(C), which provides that "[a]n ***owner of adjoining land*** or his representative has standing to bring an action contesting the ordinance or amendment; however, this subsection does not create any new substantive right in any party." (Emphasis added). The Complaint alleges that the Defendant Tract 7, LLC owns property "which is adjacent to and immediately south of the BP Property." Pls. Compl. § 15.

The Complaint fails to allege that BP owns property adjoining the property owned by Defendants Cainhoy Land & Timber, LLC or Southern Timber, LLC. Compl. ¶¶ 16-20. Because Plaintiff fails to allege that it is an adjoining property owner, Section 6-29-760(C) is inapplicable and does not provide Plaintiff with standing to assert its zoning claims. *See Carnival Corp.*, 407 S.C. at 79 (holding that because plaintiffs failed to allege that they were neighboring or adjacent property owners as set forth in the statutory requirement for standing, the statute was inapplicable and did not provide them with standing to assert their zoning claims). Therefore, Plaintiff lacks standing pursuant to S.C. Code Ann. § 6-29-760(C) to challenge the zoning of the property owned by Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC.

C. Public Importance Exception to Standing

Plaintiff asserts that it has standing pursuant to the public importance standing doctrine. Compl. ¶ 12. In South Carolina, "courts recognize an exception to the requirement that a

plaintiff possess standing where 'an issue is of such public importance as to require its resolution for future guidance.'" *Carnival Corp.*, 407 S.C. at 853-54 (quoting *Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)). "In cases falling within the ambit of important public interest, standing is conferred 'without requiring the plaintiff to show he has an interest greater than other potential plaintiffs.'" *Freemantle v. Preston*, 398 S.C. 186, 193, 728 S.E.2d 40 (S.C. 2012) (citing *Davis v. Richland Cnty Council*, 372 S.C. at 500, 642 S.E.2d at 741-42). The South Carolina Supreme Court previously addressed whether zoning is important to the public so as to allow the public importance exception to apply. The case involved a challenged county zoning decision regarding cell-phone towers owned by business competitors. In determining that the public importance exception did not apply to the challenged zoning decision, the Court reasoned that:

> Of course zoning is a matter of public importance, but the same may be said of most legislative and executive actions. For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance. There is nothing *public* about ATC's concern with a competing cell-phone tower. Here a local government followed proper procedure and rezoned a single piece of property for a narrow purpose and the only complaint comes from a nonadjoining landowner which just happens to be a competitor.

ATC South, Inc., 380 S.C. at 199.

When determining whether the public importance exception to standing could apply to BP in this case, the Court must consider whether the issues in this case are of such public importance as to require resolution for future guidance. Fundamentally, the issues in this case are whether the zoning ordinances related to the property owned by Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC, Ordinance 2014-25 and Ordinance 2014-26, are invalid, null, and void, as violative of the South Carolina Local Government Comprehensive

Planning Enabling Act; Article 1, Section 8 of the South Carolina Constitution; various City Ordinances; and the South Carolina Coastal Tidelands and Wetlands Act. Similar to Plaintiff in *ATC South*, there is nothing public about BP's concern with the zoning ordinances 2014-25 and 2014-26, the pieces of property are not even adjoining, and the local government followed proper procedure to rezone the property. *Id.* Hopefully Plaintiff's "efforts to cloak its zoning challenge as a matter of 'public importance' for the purpose of acquiring standing finds no traction in this record." *Id.* BP's challenge to the rezoning of property owned by Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC does not implicate a matter of public importance requiring court resolution for future guidance.

Due to BP's inability to obtain standing through the rubric of constitutional standing, statutory standing, or the exception of the public importance doctrine, BP's Complaint should be dismissed for lack of standing.

II. Plaintiff BP's Claims are Untimely under S.C. Code Ann. § 6-29-760(D)

Plaintiff BP's claims are untimely as to Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC. S.C. Code Ann. § 6-29-760(D) provides, "No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, 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." Compl. ¶ 61 (emphasis added). The Complaint alleges that Ordinances 2014-25 and 2014-26, which pertain to these Defendants, were enacted on February 25, 2014. Compl. ¶¶ 45-46. This lawsuit was not filed until August 15, 2014, which is more than sixty days after the enactment of

these ordinances. For this reason, this suit is untimely as to Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC.

In the Complaint, BP broadly alleges that there were compliance issues with the notice requirements set forth by S.C. Code. § 6-29-760. Regardless of these allegations, the City of Charleston substantially complied with the notice requirements of the statute setting forth the procedure for enactment or amendment of a zoning regulation. South Carolina law does not specifically define substantial compliance in regard to S.C. Code Ann. § 6-29-760(D). However,

> American jurisprudence generally holds substantial compliance is met if the purpose of the statute is achieved. *See James v. County of Kitsap*, 115 P.3d 286, 293 (Wash.2005) (substantial compliance means a court should determine whether a statute has been followed sufficiently so as to carry out the intent for which the statute was adopted); *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 105 (Iowa 2004) (in deciding whether a party has substantially complied with a statutory requirement, the court evaluates whether the asserted compliance assures that the reasonable objectives of the statute will be met); *Rosenblatt v. City of Houston*, 31 S.W.3d 399, 404 (Tex.Ct.App.2000) ("Substantial compliance has been defined to mean performance of the essential requirements of a statute."); *Morrow v. Bobbit*, 943 S.W.2d 384, 389 (Tenn.Ct.App.1996) (substantial compliance is met when it is reasonable to conclude that the objective sought by the statute has been fully attained); *Thrash v. City of Asheville*, 393 S.E.2d 842, 845 (N.C.1990) ("Substantial compliance means compliance with the essential requirements of the statute."); *Sabatini v. Jayhawk Const. Co., Inc.*, 520 P.2d 1230, 1234 (Kan.1974) ("Substantial compliance requires compliance in respect to the essential matters necessary to assure every reasonable objective of the statute."); *Brow v. Sherwin–Williams Co.*, 109 N.E.2d 864, 866–67 (Ohio 1952) (the requirements of a procedural statute are met when the municipality substantially complies with the statute's procedural mandates, which requires the municipality to act in a way to achieve the purpose of the statute).

Responsible Economic Development v. Florence Consolidated Municipal Planning Comm'n, 2005 WL 7084861 (S.C. App.) (unreported). The South Carolina Supreme Court has also followed the same interpretation of substantial compliance. *See, e.g., Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 164–65, 547 S.E.2d 862, 866 (2001) (looking to the clear language and express purpose of a federal act to determine whether substantial compliance

occurred); *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (looking to the purpose of a statute in determining whether substantial compliance occurred). The language and purpose of the statute must be considered to determine whether there was substantial compliance.

S.C. Code §§ 6-29-760(A) and (B) set forth the notice requirements for amendments to zoning regulations or maps. Section 6-29-760 enumerates the requirements for public hearings. *Id.* The public hearings must be advertised and in cases involving rezoning, conspicuous notice must be posted on or adjacent to the property affected. *Id.* Even if, as the Complaint broadly alleges, the City of Charleston failed to comply with any of these procedures, the Complaint does not allege that it was prejudiced by any failure of notice, so as to overcome the substantial compliance standard set forth in the statute. *See Responsible Economic Development,* 2005 WL 7084861, *3 (S.C. App.) (unreported) (technical noncompliance of the signage does not defeat a finding of substantial compliance); *Morrow*, 943 S.W.2d at 389 (Tenn.Ct.App. 1996).

In order to determine whether there was substantial compliance with the notice requirements of S.C. Code Ann. § 6-29-760(B) with regard to the ordinances pertaining to the land owned by Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC, it is necessary to consider whether the objectives sought to be achieved by the notice requirements were met. The purpose of any posting requirement is to put interested parties on notice of a public hearing. Furthermore, S.C. Code § 6-29-760(B) requires "a landowner whose land is the subject of a proposed amendment will be allowed to present oral or written comments to the planning commission, at least ten days' notice and an opportunity to comment in the same manner must be given to other interested members of the public, including owners of adjoining property." The City Planning Commission had a public hearing on February 6, 2014, wherein

the Planning Commission recommended approval of the Cainhoy PUD Master Plan. Compl. ¶¶ 33 and 37. Thereafter, on February 11, 2014, the City Council held a public hearing on the Cainhoy PUD Master Plan during which many individuals expressed opinions about the Cainhoy PUD Master Plan, including individuals associated with historical preservation organizations, members of the news media, and residents of the Cainhoy, Huger, and Wando Communities. Compl. ¶¶ 39-42. The Complaint admits that BP was in attendance at the public hearing on February 11, 2014 and spoke with the owners of the proposed development of Cainhoy Plantation following the meeting. Compl. ¶ 44. It further admits that on February 25, 2014, a representative for BP addressed City Council and requested that they defer enacting the ordinances. Compl. ¶ 45. Due to BP's and other interested parties' attendance at the public hearings, it is clear that the notice was adequate to all interested parties, and the objectives contemplated by Sections 6-29-760(A) and (B) were satisfied.

BP's claims are untimely as to these Defendants, Cainhoy Land & Timber, LLC and Southern Timber, LLC, thus BP is barred from challenging these zoning ordinances.

Conclusion

For the reasons stated above, Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC respectfully request this Honorable Court to grant their Motions to Dismiss pursuant to South Carolina Rules of Civil Procedure 12(b)(6) for failure to plead facts sufficient to show that the Plaintiff is entitled to relief.

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October 16, 2014

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	) CIVIL ACTION NO. 2014-CP-08-1840
BP AMOCO CHEMICAL COMPANY, Plaintiff, vs. CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; and SOUTHERN TIMBER, LLC, Defendants.	**PLAINTIFF BP AMOCO CHEMICAL COMPANY'S MOTION FOR RECONSIDERATION OF ORDER GRANTING MOTIONS TO DISMISS OF DEFENDANTS CAINHOY LAND & TIMBER AND SOUTHERN TIMBER**

FILED
2014 NOV 24 PM 3:37
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff BP Amoco Chemical Company ("BP") submits this Motion for Reconsideration of the Court's Order Granting Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC's Motions to Dismiss November 14, 2014 (the "Order"). Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC, will be referred to collectively in this Motion as "Defendants." As explained more fully below, the Court should reconsider the Order and deny Defendants' Motions to Dismiss.

STANDARD OF REVIEW

Under Rule 59, SCRCP, a motion for reconsideration serves the traditional role of asking the trial judge to reconsider any previously raised and decided issue encompassed in the judgment. *See* James F. Flanagan, *South Carolina Civil Procedure* (2d Ed. 1996), at 474 (citing *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992)). As aptly stated by the South Carolina Supreme Court in *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004):

> First, it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment,' but also as

> a vehicle to seek 'reconsideration' of issues and arguments. A motion under Rule 59(e) long has been viewed as 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.

Id. at 21-22, 602 S.E.2d at 778-79 (citations omitted); *accord Home Medical Systems v. S.C. Dept. of Revenue*, 382 S.C. 556, 677 S.E.2d 582 (2009).

South Carolina courts have long "emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam,* 361 S.C. at 23, 602 S.E. 2d at 779 (*citing Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.")). "A party must file such a motion for reconsideration when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Id.* at 24, 602 S.E. 2d at 780.

ARGUMENT

I. The Court's Order contains factual errors and material omissions.

The Court's Order contains factual errors and material omissions which affect its determination of Defendants' Motions to Dismiss and create confusion regarding the scope of the Order dismissing the claims. The errors and omissions are summarized below:

- On Page 2 of the Order, the Court mistakenly states that BP has asserted a claim against Defendants for "a declaratory judgment that City Ordinances 2014-25, 2014-26, and 2014-82 violate the Separation of Powers and

Nondelegation Doctrines under the South Carolina Constitution." In fact, that claim is asserted against the City of Charleston (the "City") only and not Defendants. The City has not moved for the dismissal of this claim. Based on this error, the Court should reconsider its Order and clarify that BP's claim against the City for violation of the Separation of Powers and Nondelegation Doctrines is not dismissed.

- The Court omits from the claims asserted by BP against Defendants listed on Page 2 of the Order the claim for declaratory judgment that Ordinances 2014-25 and 2014-26 violate the South Carolina Coastal Tidelands and Wetlands Act (*see* Compl. ¶¶ 96-102). These claims were not asserted under S.C. Code Ann. § 6-29-760, which is the statute under which the Court dismisses BP's claims. Furthermore, the Order fails to address the substance of those claims and whether they should be dismissed. Nevertheless, the Court dismisses "the claims that pertain to" Defendants "with prejudice." The Order should clarify that BP's claim for a declaratory judgment of a violation of the South Carolina Coastal Tidelands and Wetlands Act is not dismissed.

- The Order omits any reference to BP's allegations that the City failed to comply with the applicable notice requirements for its consideration and adoption of Ordinance 2013-125, which was directly related to its subsequent adoption of Ordinances 2014-25, 2014-26, and 2014-82. BP's lack of knowledge regarding the relationship between Ordinance 2013-125 and the subsequent ordinances rezoning Cainhoy Plantation is material to the Court's consideration of whether BP suffered prejudiced by the City's continuous failure to substantially comply with notice requirements; however, these allegations were omitted and evidently not considered by the Court.

In sum, the Court should reconsider its Order in light of these factual mistakes and material omissions and modify the Order accordingly.

II. The Court improperly dismissed BP's claims against Defendants with prejudice.

In the Conclusion of the Order, the Court 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 Court's Order deprives BP of its right to assert additional allegations to cure the alleged deficiencies on which the Court dismissed the claims. The Order states that the dismissal of BP's claims is based on its failure to allege sufficient facts to justify standing or the City's failure to substantially comply with the applicable notice requirements. It does not 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.

III. The Court incorrectly determined that the City substantially complied with the applicable notice requirements based on BP's actual knowledge of the pendency of Ordinances 2014-25 and 2014-26.

In its Order, the Court ruled that BP's challenge to the zoning ordinances is untimely under S.C. Code Ann. § 6-29-760(D) and that the City substantially complied with the notice requirements under § 6-29-760(A)-(B). According to the Court, "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) (emphasis added). Thus, the Court ruled that the City's notice substantially complied with the requirements of § 6-29-760 based on BP's knowledge of the pendency of Ordinances 2014-25 and 2014-26.

The Court's ruling on this issue erroneously finds that substantial compliance with a notice requirement depends on the challenger's actual knowledge of the pendency of the challenged ordinance for which notice is required. South Carolina courts have rejected that substantial compliance with notice requirements can be established through a plaintiff's

knowledge of the challenged ordinance and attendance of the hearing where such ordinance is considered. Most notably, in *Horry County v. Myrtle Beach*, 288 S.C. 412, 343 S.E.2d 36 (Ct. App. 1986), the South Carolina Court of Appeals 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 leasing 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.

The Court's Order granting Defendants' Motion to Dismiss on the basis of timeliness is also in error because it ruled that BP was not prejudiced by the lack of notice. In ruling that BP was not prejudiced, the Court equates a challenger's lack of prejudice resulting from a governing authority's non-compliance with the challenger's actual notice of the pendency of the ordinance. This is in error because 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." *Id.* 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).

When considered in light of these purposes of notice requirements, the Complaint 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 Defendants' Rule 12(b)(6) motion.

As demonstrated by *Horry County*, a defendant must show more than that the challenger had actual notice of the pendency of an ordinance to prove substantial compliance with a notice requirement. In this case, Defendants' Motions to Dismiss under § 6-29-760(D) are based solely

on the their argument that BP had actual notice of the pendency of the zoning amendments and therefore was not prejudiced by any non-compliance with the applicable notice requirement, and the Court's conclusion as to the timeliness of BP commencing the action is based solely on its adoption of these arguments. South Carolina law, however, does not support this conclusion, and Defendants and the Court have failed to cite any governing law to support it. Since the Court's decision is based on this mistaken application of the law, the Court should reconsider its Order and find that the Complaint sufficiently alleges that the City failed to substantially comply with the applicable notice requirements under § 6-29-760.

IV. The statute of limitations defense does not apply to BP's challenge to the constitutionality of Ordinances 2014-25 and 2014-26.

To the extent that the Court's Order applies to BP's claim against the City for violating the Separation of Powers and Nondelegation Doctrines, the Court also misapplied the statute of limitations under § 6-29-760(D) to BP's challenge to the constitutionality of the zoning ordinances. In BP's Third Cause of Action (Compl. ¶¶ 73-79), BP alleges that Ordinances 2014-25 and 2014-26 unconstitutionally delegate the City's legislative authority regarding future zoning regulation over Defendants' property to the developer of Cainhoy Plantation. Section 2.1 of Ordinances 2014-25 and 2014-26 provides that "[i]n the event the Zoning Ordinance is amended . . ., such amendments to the Zoning Ordinance shall not apply to this Master Plan Zoning Text unless the Developer gives its written consent." BP asserts that this provision violates the separation of powers doctrine under Article 1, Section 8 of the South Carolina Constitution by giving a private person the legislative power to veto a legislative act adopted by City Council. Thus, BP's third cause of action is a facial challenge to the constitutionality of Ordinances 2014-25 and 2014-26.

The Court erred in ruling that BP's action is untimely under § 6-29-760(D) because a statute of limitations defense is not applicable to a facial challenge to the constitutionality of an ordinance. This principle has been routinely recognized when zoning or other land use ordinances have been subject to facial challenges under the First Amendment of the United States Constitution. *See Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999) (collecting cases in which courts have rejected statute of limitations defenses to facial challenges to ordinances under the First Amendment). As explained by *Frye*, this "rule stems from the fact that a facially invalid statute inflicts a continuing injury by chilling protected speech in an on-going fashion." *Id.*

The rule that a statute of limitations defense does not apply to a facial challenge of an ordinance under the First Amendment should apply similarly in this case because the ordinance will deter City Council from attempting to amend the zoning in Cainhoy Plantation unless it has the consent of the developer. Without the consent of the Developer, City Council will be unlikely to consider zoning amendments for Cainhoy Plantation, and the public will be less likely to petition the City's elected representatives to amend the zoning of Cainhoy Plantation. Thus, the zoning ordinances' requirement that all future zoning amendments have the consent of the developer has a continuing chilling effect on the City Council's deliberative process and the public's interaction with its elected officials.

If the Court's ruling that BP's challenge to the constitutionality of Section 2.1 of the zoning ordinances is untimely under § 6-29-760, it could effectively render a constitutionally infirm ordinance permanently enshrined into the City's laws without being subject to judicial challenge. If, as the Court has ruled, that ordinances 2014-25 and 2014-26 cannot be challenged legally in the future because the statute of limitations under § 6-29-760(D) has expired, then the

only way the constitutionality of the ordinances could be challenged is on an as-applied basis when the developer of Cainhoy Plantation formally elects not to consent to a zoning amendment after it has passed. However, as argued above, the developer's veto authority over future zoning amendments serves as a deterrent to a zoning amendment from being pursued by the public and adopted by City Council, which would practically preclude a factual scenario under which an as-applied challenge could be made. Thus, if the Court's reasoning stands, there could be no judicial remedy to an unconstitutional delegation of legislative power.

To avoid this result, the Court should reconsider its Order and rule that the statute of limitations under § 6-29-760(D) does not apply to BP's challenge to the constitutionality of Ordinances 2014-25 and 2014-26.

V. BP has standing under the public importance exception because it challenges the legality and constitutionality of Ordinances 2014-25 and 2014-26.

In its Order, the Court concluded that BP does not have standing under the public importance exception to pursue its challenge to the validity and constitutionality of Ordinance 2014-25 and 2014-26. According to the Court, the "resolution of [BP's] claims is undoubtedly important to the parties, but it is not of such precedential importance that public interest demands waiver of constitutional and statutory standing requirements." (Order p. 8.)

The Court's ruling on the public importance standing doctrine conflicts with governing precedent establishing that the public importance exception applies when a plaintiff is challenging the legality or constitutionality of governmental action. *See, e.g., 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). In

fact, the case cited by the Court to support its conclusion that the public importance standing doctrine applies, *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014), actually supports a finding that the public importance exception applies to BP's claims. In *Carnival Corp.*, the Supreme Court based its ruling that the public importance exception did not apply in that case on the fact that it "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 does apply when a case presents an issue of constitutionality or legality of government action.

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 Defendants over their land use. The claims go to the essence of whether the rule of law governs the City's actions and whether City Council arbitrarily enacted zoning ordinances without following required procedures, making certain substantive findings, and complying with constitutional dictates about the separation of governmental power. The statement that only BP and Defendants – and not the public – have an interest in the resolution of these claims disregards the fundamental tenet recognized under the public importance exception that "[c]itizens must be afforded access to the judicial process to address alleged injustices" perpetrated by their elected officials. *See id.* at 80, 753 S.E.2d at 853. Accordingly, the Court's ruling that BP does not have standing under the public importance exception is not supported by governing law, and should be reconsidered.

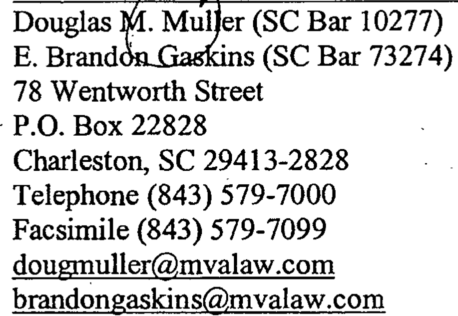
Furthermore, the Court mistakenly ruled that, to the extent that the public importance might exist, those issues can be resolved in BP's claims asserted against the City and Defendant Tract 7, LLC. BP's surviving claims against the City and Tract 7, LLC assert that Ordinance 2014-82 is invalid, unlawful, and unconstitutional for the same reasons that Ordinances 2014-26 and 2014-26 are invalid, unlawful, and unconstitutional. If BP prevails on its claims to invalidate 2014-82, then Ordinances 2014-25 and 2014-26 should be invalid on the exact same grounds. However, the Court's dismissal of the claims against Defendants will have the practical effect of insulating Ordinances 2014-25 and 2014-26 from being invalidated despite their unlawful characteristics. In other words, if BP succeeds in invalidating Ordinance 2014-82, Ordinances 2014-25 and 2014-26, though undoubtedly unlawful, will remain effective. Therefore, BP cannot resolve all issues and achieve all remedies that it seeks in its claims against Defendants if they are dismissed.

CONCLUSION

For the foregoing reasons, BP respectfully requests that the Court grant its Motion for Reconsideration in its entirety, vacate the Order, and deny Defendants' Motions to Dismiss.

Respectfully submitted,

MOORE & VAN ALLEN PLLC



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ATTORNEYS FOR PLAINTIFF

November 24, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CASE NO.: 2014-CP-08-1840
BP AMOCO CHEMICAL COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	RESPONSE OF DEFENDANTS CAINHOY LAND & TIMBER, LLC, AND SOUTHERN TIMBER, LLC IN OPPOSITION TO PLAINTIFF BP AMOCO CHEMICAL COMPANY'S MOTION FOR RECONSIDERATION
CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; AND SOUTHERN TIMBER, LLC,	)	
	)	
Defendants.	)	

Defendants, Cainhoy Land & Timber, LLC and Southern Timber, LLC (hereinafter collectively referred to as "these Defendants") respectfully submit this Memorandum in Response to Plaintiff BP Amoco Chemical Company's ("BP") Motion for Reconsideration of Order Granting Motions to Dismiss of Defendants Cainhoy Land & Timber and Southern Timber. This Court has correctly ruled that BP does not have standing to challenge the zoning ordinances governing the properties of these Defendants, which are separated from BP's property by the fifteen-hundred-acre tract owned by Tract 7, LLC and Flagg Creek. The Court correctly ruled in the alternative that BP's challenge to these zoning ordinances is untimely. BP's motion for reconsideration presents no reason for the Court to change these rulings.

Standard of Review

A party can make a motion under Rule 59(e) to alter or amend an order or. "[A] party must file [a Rule 59(e), SCRCP] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Home Medical Systems, Inc. v. South Carolina Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582 (2009) (internal citations

omitted); *See also Quality Trailer Products, Inc. v. CSL Equipment Co., Inc.*, 349 S.C. 216, 220, 562 S.E.2d 615, 617 (S.C. 2002); *See also Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (S.C.App. 2009) (*citing Dixon v. Dixon,* 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) and noting that "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.")

Argument

I. Claimed Factual Errors and Material Omissions

Plaintiff BP's Motion to Reconsider claims three "factual errors and material omissions" in the Court's Order dated November 13, 2014 (hereinafter referred to as the "Order").

a. The Court's Order Dismissed Plaintiff's Claims to Invalidate City Ordinances 2014-25 and 2014-26, But It Did Not Otherwise Dismiss the Third Cause of Action, Against the City, for Violation of the Separation of Powers and Nondelegation Doctrines

BP first asks the Court to clarify "that BP's claim against the City for violation of the Separation of Powers and Nondelegation Doctrines is not dismissed" because that (Third) cause of action is addressed only to the City of Charleston, which has not moved to dismiss the claims against it. No reason exists to modify the Court's Order on this issue. Even though the Third Cause of Action is nominally directed to the City, the relief sought therein includes declaring that Ordinances 2014-25, 2014-26, and 2014-82 are "invalid, null and void." (Complaint, paragraph 79). Ordinances 2014-25 and 2014-26 relate to the properties owned by these Defendants, Cainhoy Land & Timber, LLC and Southern Timber, LLC. The Court's Order clearly – and correctly – holds that the Plaintiff lacks standing, and that its challenge is untimely, as to these two ordinances. The Order does not address, and therefore does not purport to dismiss, any of

Plaintiff's claims relating to City Ordinance 2014-82, which relates to the property owned by Tract 7, LLC. BP's motion should be denied on this issue.

b. The South Carolina Coastal Tidelands and Wetlands Act Does Not Confer Standing Upon BP

Second, BP asserts that the Court's Order does not address its claim (Plaintiff's Sixth Cause of Action) that Ordinances 2014-25 and 2014-26 violate the South Carolina Coastal Tidelands and Wetlands Act (hereinafter "CTWA"). The Court's Order did address this claim (*See* Order, p. 7) along with BP's other challenges to the zoning ordinances relating to the properties of these Defendants. The Plaintiff's Complaint does not allege that the CTWA confers an independent basis for standing upon BP. Rather, the Complaint alleges as to *all* of BP's claims that "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) and the public importance standing doctrine." (Complaint, paragraph 12). The Court's analysis of BP's standing thus applies equally to all of its challenges to the zoning ordinances, including the claim that the ordinances violate the CTWA.

Even if the Court were to look beyond the issue of BP's standing, it would be clear that the CTWA provides BP no basis for relief. BP's Complaint alleges that the City should have submitted the zoning ordinances to DHEC to review for compliance with the CTWA, because the Defendants' property contains or abuts "critical areas" as defined in Sections 48-39-10(F), (G), and (J) and in S.C. Regulation 30-10. (Complaint, paragraphs 99 and 101). In support of its argument, Plaintiff cites Section 48-39-100(B) of the CTWA (Complaint, paragraph 98), which provides that "Any city or county that is currently enforcing a zoning ordinance, subdivision regulation or building code, a part of which applies to critical areas, shall submit the elements of such ordinances and regulations applying to critical areas to the department for review."

Nothing in the CTWA requires that zoning ordinances be submitted for approval prior to their enactment, and nothing purports to invalidate zoning ordinances under any circumstances. Rather, the CTWA gives DHEC permitting authority over any proposed development that will alter any critical area in the coastal zone. S.C. Code Ann. §48-39-10, *et seq.*

> [DHEC] has direct control through a permit program over critical areas, which are defined as coastal waters, tidelands, beaches and primary ocean-front sand dunes. Direct permitting authority is specifically limited to these critical areas. Indirect management authority of coastal resources is granted to [DHEC] in counties containing one or more of the critical areas . . . .

Spectre, LLC v. South Carolina Dept. of Health and Environmental Control, 386 S.C. 357, 688 S.E.2d 844, 847-848 (2010); *See* S.C. Code Ann. §48-39-80(11). "This area is called the coastal zone" and includes Charleston County. *Id.* Although DHEC has permitting authority over any proposed development that will alter critical areas in the coastal zone, as set forth in Section §48-39-80(11), DHEC does not have authority to trump local zoning and development agreements. *See Kiawah Development Partners, II v. South Carolina Department of Health and Environmental Control*, 2014 WL 6992119 (S.C. Dec. 10, 2014) (not reported). The CTWA does not purport to abrogate the City of Charleston's zoning authority.[1]

---

[1] Section 6-29-740 provides in relevant part:

> In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that will result in improved design, character, and quality of new mixed use developments and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property.

DHEC's Synthesis Report titled *The Role of "Planned Unit Developments" in South Carolina's Coastal Zone* is instructive as to how the CTWA works in conjunction with a zoning ordinance. The Synthesis Report states in pertinent part:

> A number of coastal jurisdictions have adopted provisions for "planned unit developments" (PUDs) in their zoning ordinances. PUDs are authorized, with minimum site standards, under the zoning ordinances of local governments. PUDs allow developers to deviate from standard zoning and development regulations on large properties in exchange for site-specific open space

The CTWA does not require that DHEC pre-approve municipal zoning ordinances, it does not invalidate zoning ordinances, and it affords BP no role in the regulatory process. Therefore, the Court sufficiently addressed BP's claims against Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC based upon the CTWA.

c. The City Substantially Complied with the Applicable Notice Requirements for its Consideration and Adoption of Ordinance 2013-125

Third, BP argues that the Order does not address its allegations that the City failed to comply with the applicable notice requirements for its consideration and adoption of Ordinance 2013-125, which amended the zoning ordinances governing PUDs, pursuant to which Ordinances 2014-25, 2014-26, and 2014-82 were enacted. BP cites S.C. Code §6-29-1130(B), which requires at least thirty days notice of the time and place of public hearings regarding amendments to "land development regulations." (Complaint, paragraph 28). Section 6-29-1130(B) applies to land development regulations, whereas Section 6-29-760(A) applies specifically to enactment or amendment of zoning regulations or maps. This statute requires "*fifteen days'* notice of the time and place of the public hearing . . . given in a newspaper of general circulation." S.C. Code Ann. §6-29-760(A) (emphasis added). BP's Complaint alleges that the City published notice of the agenda containing the proposed amendments in *The Post and Courier* on October 6, 2013, and a public hearing was held by City Council ***sixteen days***

> conservation . . . . ***The town or city council makes the ultimate decision regarding approval or rejection of the development***; this usually results in a more politically oriented process than is the case for traditional subdivision developments.

See South Carolina Dept. of Health and Environmental Control, Office of Ocean and Coastal Resource Management, *The Role of "Planned Unit Developments" in South Carolina's Coastal Zone: Synthesis Report*, 2006, http://www.scdhec.gov/HomeAndEnvironment/Docs/OCRM_PUD.pdf (emphasis added). The Synthesis Report lists Charleston County as one of the jurisdictions that has adopted provisions for PUDs. It is thus clear that DHEC allows the municipalities in these coastal jurisdictions to enact zoning ordinances without its prior approval. *Id.* Plaintiff BP has not alleged and cannot identify any ongoing procedures whereby DHEC reviews any municipal and county zoning regulations prior to enactment.

later in its October 22, 2013 meeting (Complaint, paragraphs 27, 28, and 90). Therefore, the City complied with the notice requirement of S.C. Code § 6-29-760(A).

BP also claims that the notice should have identified the relationship between Ordinance 2013-125 and the subsequent ordinances rezoning Cainhoy Plantation. BP cites no authority for this proposition, and the statute does not say that the notice must explain the import of the proposed amendment to future zoning regulations. Moreover, Ordinance 2013-125 applies to all PUDs in the City of Charleston, not just to Cainhoy Plantation. BP, a sophisticated landowner, offers no reason why it could not have understood that the ordinance would apply to PUD's in Cainhoy.

Furthermore, this purported omission does not change the analysis necessary for the Court to conclude that the City substantially complied with the notice requirements during the enactment of the subsequent ordinances. The issues of substantial compliance and lack of prejudice to BP are discussed in Section III below.

II. Dismissal of the Claims with Prejudice was Proper

BP contends that the Court should have dismissed its claims against these Defendants without prejudice. The Court properly dismissed these claims with prejudice because BP does not have standing, statutory or otherwise, to assert its claims against these Defendants and because BP's challenge to their zoning ordinances is untimely as a matter of law. The Court's rulings were based upon the applicable law, not upon defective pleading. BP does not say how it would plead differently to avoid the legal inadequacies of its claims against the Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC. BP is correct that it should be given an opportunity to re-plead if this could cure the defects in its claims, but such is not the case here.

III. The City of Charleston Substantially Complied with Notice Requirements

BP argues that the Court erroneously found that the City substantially complied with the notice requirement because of BP's concession in its Complaint that it not only knew about the public hearings on the subject zoning ordinances, but actually participated in those hearings. S.C. Code Ann. §6-29-760(D) does not define substantial compliance. However, "American jurisprudence generally holds substantial compliance is met if the purpose of the statute is achieved." *Responsible Economic Development v. Florence Consolidated Municipal Planning Comm'n*, 2005 WL 7084861 (S.C. App. Dec. 16, 2005) (unreported) (internal citations omitted); *See Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (looking to the purpose of a statute in determining whether substantial compliance occurred); *James v. County of Kitsap*, 115 P.3d 286, 296 (Wash. 2005) (substantial compliance means a court should determine whether a statute has been followed sufficiently so as to carry out the intent for which the statute was adopted). The South Carolina Supreme Court followed this approach to substantial compliance with other statutes in *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 164-65, 547 S.E.2d 862, 866 (2001) (looking to the clear language and express purpose of a federal act to determine whether substantial compliance occurred) and *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (looking to the purpose of a statute in determining whether substantial compliance occurred).

BP cites *Horry County v. Myrtle Beach*, 288 S.C. 412, 343 S.E.2d 36 (Ct. App. 1986) for the proposition that actual notice does not establish substantial compliance. The facts in *Horry County* differ drastically from those alleged here. In *Horry County*, the city was required to publish notice of a proposed lease in three issues of a newspaper of general circulation in the

city, stating the nature of the right sought and the date on which the application was to be presented to council, which had to be at least one week after the last notice. *Id.* at 416. The city did not formally publish the leases at all, but argued that news articles relating to the proposed leases sufficed as the statutorily required notice. The court found that the city had "completely ignored" the notice requirement. In other words, the city did not comply at all with the notice requirement, let alone substantially comply. In contrast, this case BP's Complaint admits that the City published notice of the public hearings and that it both was aware of the proposed ordinances and participated in the hearings. *See Kerr v. City of Columbia*, 232 S.C. 405, 102 S.E.2d 364 (1958) (holding that a zoning ordinance is valid even if there was no public advertisement prior to its passage where it was read three times in open meetings and was passed in the same manner as most other town ordinances). BP alleges only technical defects in the notice that the City published. It admits that it was present at the City Council's public hearing on the Cainhoy PUD Master Plan on February 11, 2014 and that on February 25, 2014, BP was able to address the City Council regarding its concern about the ordinances. (Complaint, paragraphs 44-45). In considering the language and the purpose of the statute, there was clearly substantial compliance with the notice requirements because the complaining party, BP, was fully on notice of the proposed action.

BP's reliance on *Brown v. County of Charleston,* 303 S.C. 245, 399 S.E.2d 784 (Ct. App. 1990), is also misplaced. In *Brown*, the notice published in *The Post and Courier* was "tantamount to no notice at all of an important provision that could adversely affect certain land owners." Such is not the case here, where BP was fully aware of the pendency of the zoning amendments and their potential effect on its interests. *See White Hat Properties v. Town of*

Hilton Head Island, 2008 WL 9832912 (S.C. App. Dec. 10, 2008) (not reported) (distinguishing holding in *Brown* because landowners property rights were not restricted).

BP's attendance and participation at the meetings conclusively demonstrates that the objectives sought to be achieved by the notice requirements of S.C. Code Ann. §6-29-760(B) were met and that interested parties were on notice of the public hearings, including the nature of the proposed action to be taken.

IV. The Statute of Limitations is Applicable to All Challenges, Including a Facial Challenge to the Constitutionality of an Ordinance

BP's third cause of action against the City of Charleston is for a declaratory judgment that Ordinances 2014-25 and 2014-26 violate the Separation of Powers and Nondelegation Doctrines. BP now argues that the statute of limitations is not applicable to a facial challenge to the constitutionality of an ordinance. BP cites a federal case from North Carolina, *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436 (M.D.N.C. 1999), for this proposition. That case involved a First Amendment challenge to a city ordinance, and the court observed that "several courts have suggested or directly held that a facial challenge to a statute on First Amendment grounds is not subject to a statute of limitations defense." This principle is inapplicable here, for at least two reasons. First, this case does not involve a First Amendment challenge to an ordinance, so the policy considerations applicable to those cases do not apply here. Second, the South Carolina statute at issue here does not make an exception for constitutional challenges. It provides, "*No challenge* to ... the validity of a 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...." (emphasis added). BP cites no authority for its broad claim that statutes of limitations do not apply to facial constitutional challenges to ordinances *See Miller v. King George County*, 277 Fed.Appx. 297 (4th Cir. 2008) (rejecting argument that

statute of limitations does not apply to §1983 suits challenging the constitutionality of state ordinance).

The short time limit for challenging a zoning ordinance reflects the public policy in favor of certainty and stability of land use regulation. This policy would be disserved by nullification of the time limit because of technical or insubstantial failure to comply with the notice requirements. Landowners could scarcely afford to develop their property in reliance upon zoning regulations if anyone could challenge the zoning regulations at any time in the future. This Court was correct in ruling that BP's challenge to the validity of Ordinances 2014-25 and 2014-26 is untimely.

V. BP Does Not Have Standing Under Public Importance Exception

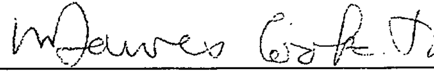
In its order, the Court concluded that "No compelling reason exists to waive the standing requirements as to Plaintiff BP's claims against Cainhoy Land & Timber, LLC and Southern Timber, LLC." Order, p. 8. BP again argues that the public importance exception applies to its claims against these Defendants. Paradoxically, BP cites *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014) for the proposition that the public importance exception applies when a plaintiff's causes of action calls into question the constitutionality or legality of government action. The determination as to whether the public importance exception "applies in a particular case turns on whether resolution of the dispute is needed for future guidance." *Carnival Corp.*, 753 S.E.2d at 846 (*citing ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008)). However, BP has not explained why resolution of its claims against Cainhoy Land & Timber, LLC and Southern Timber, LLC are "of public importance" or how a decision on those claims would be required for "future guidance." *See Davis v. Richland Cnty. Council*, 372 S.C. 497, 500, 642 S.E.2d 740,

741 (2007). The public policy exception to the standing requirement is applied only rarely. As the Supreme Court has most recently explained, "[s]tanding cannot be granted to every individual who has a grievance. . . .Courts are not bodies for the resolution of public policy and generalized grievances. Harms suffered by the public at large, like those Plaintiffs allege here, are to be remedied by the legislative and executive branches. If existing laws and regulations or their enforcement fail to protect the public from harm, it is incumbent upon the public to seek reform through their elected officials or failing that, at the ballot box." *Carnival Corp.*, 753 S.E.2d at 853 (*citing Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). This Court properly ruled that the claims BP asserts relating to these Defendants do not raise such important public issues that constitutional and statutory standing requirements should be ignored. The Court also properly recognized that BP has not raised any public policy issue in its claims against Cainhoy Land & Timber, LLC and Southern Timber, LLC that it has not also raised and intends to litigate in its claims against Tract 7, LLC.

Conclusion

For the reasons stated above, Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC respectfully request this Honorable Court to deny Plaintiff BP Amoco Chemical Company's Motion for Reconsideration.

BARNWELL WHALEY
PATTERSON & HELMS, LLC



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Dated: January 5, 2015

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15 JAN -8 AM 11:47
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) CIVIL ACTION NO. 2014-CP-08-1840

BP AMOCO CHEMICAL COMPANY)

Plaintiff,)

vs.)

CITY OF CHARLESTON; TRACT 7, LLC; CAINHOY LAND & TIMBER, LLC; and SOUTHERN TIMBER, LLC,)

Defendants.)

PLAINTIFF BP AMOCO CHEMICAL COMPANY'S REPLY TO RESPONSE OF DEFENDANTS CAINHOY LAND & TIMBER, LLC AND SOUTHERN TIMBER, LLC IN OPPOSITION TO MOTION FOR RECONSIDERATION

Plaintiff BP Amoco Chemical Company ("BP") submits this Reply to Response of Defendants Cainhoy Land 7 Timber, LLC and Southern Timber, LLC (collectively "Defendants") in Opposition to BP's Motion for Reconsideration of the Court's Order Granting Defendants Cainhoy Land & Timber, LLC and Southern Timber, LLC's Motions to Dismiss November 14, 2014 (the "Order"). As explained more fully below, the Court should reconsider the Order and deny Defendants' Motions to Dismiss.

ARGUMENT

I. Defendants' own statements demonstrate that BP has standing.

In its Motion for Reconsideration, BP argues that the Court's ruling conflicts with governing precedent establishing that the public importance standing exception applies when a plaintiff is challenging the legality or constitutionality of governmental action. *See, e.g., 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). Undoubtedly, BP's claims challenge the legality and constitutionality of government action, and BP explains in its Motion for Reconsideration why its claims are of public importance. Defendants, however, conveniently ignore BP arguments and summarily conclude that BP has not explained how its claims meet the standard for the public importance exception to apply.

As Defendants refuse to engage with BP's arguments, it is necessary to highlight Defendants' own extensive lobbying and public affairs efforts supporting its development of Cainhoy Plantation to illustrate why this is a matter of public importance. For example, in a guest column published in the *Post & Courier*, Defendants' representative, Matt Sloan, addressed numerous ways in which the development of the property through "one comprehensive master plan" impacted the public, including industrial development; traffic; public education; cultural, historic, and environmental preservation; and deforestation. (Ex. 1 – Matt Sloan, "Why Cainhoy Plantation will be Developed on One Master Plan," *Post & Courier*, Feb. 6, 2014). According to Sloan, "The proposed PUD (Planned Unit Development) replacement zoning . . . will give *the city and public* a greater role over the coming decades in implementing the vision expressed in the PUD master plan." (*Id.*) (emphasis added). In that column, Sloan also stated that Defendants "believe that it would be beneficial to both the *public and private interests* to create high quality development under PUD zoning." (*Id.*) (emphasis added). In addition, Sloan referred to Defendants' organization of "numerous public meetings" and receipt of comments from over 600 people regarding the rezoning of Cainhoy Plantation. Thus, Defendants themselves have acknowledged the public importance of the zoning ordinances challenged by this action, and their current arguments to the contrary are disingenuous.

Additionally, Defendants' own statements in the guest column cited above as to why Cainhoy Plantation should be developed through "one comprehensive master plan" indicate that BP has correctly asserted standing as an adjoining landowner under S.C. Code Ann. § 6-29-760.[1] As the title to that column, "Why Cainhoy Plantation will be Developed on One Master Plan," indicates, Defendants intend to develop all of Cainhoy Plantation under one, comprehensive master plan zoning ordinance. In Sloan's own words, Cainhoy Plantation "will be developed as one community and requires one comprehensive master plan, not two." (Ex. 1.) Defendants' have thus acknowledged the comprehensive zoning that applies to all of Cainhoy Plantation, and its argument that BP is not an adjoining landowner to the property comprehensively rezoned rings hollow as a result.

In sum, Defendants' own statements regarding the public importance of zoning Cainhoy Plantation under one, comprehensive master plan cannot be reconciled with its legal position that this is merely a private dispute and that its properties, as a whole, do not adjoin BP's facility.

II. Defendants cannot establish substantial compliance with the applicable notice requirements on actual knowledge alone.

BP also asserts that the Order should be reconsidered because the Court's ruling erroneously finds that the City substantially complied with the applicable notice requirements for

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[1] BP alleges in the Complaint that it is "an adjoining landowner to Cainhoy Plantation and properties subject to the Zoning Ordinances challenged in this action" and "has standing to maintain this action pursuant to S.C. Code Ann. § 6-29-760(C)." The statements made by Defendants, discussed herein, corroborate this allegation. Although the statements made by Defendants are not part of the Complaint, the Court may take judicial notice of the statements made in a newspaper article and consider them when considering a 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.").

the challenged zoning ordinances. Citing *Horry County v. Myrtle Beach*, 288 S.C. 412, 343 S.E.2d 36 (Ct. App. 1986), BP argues that South Carolina courts have rejected the premise adopted in the Order that substantial compliance with notice requirements can be established through a plaintiff's knowledge of the challenged ordinance and attendance of the hearing where such ordinance is considered. Rather than address the legal principals cited by BP, Defendants try to distinguish the facts from the cases relied upon by BP from the facts alleged in the Complaint. Regardless of whether the cases present different facts, Defendants cannot avoid the import of the applicable law dictating that substantial compliance with a notice requirement cannot be based on a party's actual notice of the ordinance in question. As BP's actual notice appears to be the sole basis on which the Court finds that the City substantially complied with the applicable notice requirements under S.C. Code Ann. § 6-29-960, this ruling is in error.

III. Defendants do not have standing to seek dismissal of BP's claims against the City.

In its Motion for Reconsideration, BP argues that the Court should reconsider its Order and clarify that BP's claim against the City for adopting City Ordinances 2014-25, 2014-26, and 2014-82 in violation of the Separation of Powers and Nondelegation doctrines is not dismissed. Defendants do not and cannot deny that this claim was asserted against the City only, but they nevertheless argue that this claim should be dismissed as to City Ordinances 2014-25 and 2014-26 pursuant to the Motions to Dismiss filed by Defendants only. Defendants cannot prevail on this argument as it is generally accepted that parties lack standing to seek dismissal of claims on behalf of other parties. *See Mantin v. Broadcast Music, Inc.*, 248 F.2d 530, 531 (9th Cir. 1957) (stating that district court erred in dismissing claims because moving defendants did not have standing to seek dismissal as to non-moving defendants).

Here, the City has not moved to dismiss any of BP's claims, joined in Defendants' Motions to Dismiss, or filed any response to the instant Motion for Reconsideration. As such, Defendants have no standing to seek dismissal of BP's claim against the City for violations of the Separation of Powers and Nondelegation doctrines arising from its adoption of Ordinances 2014-25, 2014-26, and 2014-82, and the Court should clarify that such claim survives.

IV. Defendants fail to establish why BP should be deprived of the right to amend its complaint if the Order stands.

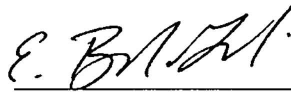
BP also argues in its Motion for Reconsideration that the Court improperly dismissed its claims against Defendants with prejudice, which was in error because a plaintiff "should be given an opportunity to file and serve an amended complaint." *Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). Defendants do not deny the general applicability of this principle but instead argue, without citing legal authority, that it is inapplicable here because BP cannot cure the purported defects in its claims. This argument is without merit because the Order makes it clear that the dismissal of the claims against Defendants is based on the allegations in the Complaint. To the extent that the Order stands, BP can plead additional facts to show how it was prejudiced by the inadequate notice of the rezoning of Cainhoy Plantation and to bolster its claims that the public importance exception is met. As such additional allegations may remedy the purported untimeliness of the claims and BP's alleged lack of standing, BP should not be deprived of its right to amend its Complaint.

CONCLUSION

For the foregoing reasons, BP respectfully requests that the Court grant its Motion for Reconsideration in its entirety, vacate the Order, and deny Defendants' Motions to Dismiss.

Respectfully submitted,

MOORE & VAN ALLEN PLLC



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ATTORNEYS FOR PLAINTIFF

January 7, 2015

EXHIBIT 1

The Post and Courier

Why Cainhoy Plantation will be developed on one master plan

BY MATT SLOAN

Feb 6 2014 12:01 am

I have been fortunate to represent the Guggenheim family and corporate interests on the stewardship of Cainhoy Plantation for many years. I am in the same role as I was in the early 1990s when Daniel Island, then owned by the Guggenheims, was annexed into the City of Charleston and moved from plantation use to the vibrant mixed use community it is today.

When Daniel Island was planned, one of the Guggenheims' goals was to carry over the same principles to the main plantation property in the future. That is the effort at hand. I appreciate the opportunity to provide both background and perspective to the public that has not been represented in extensive media coverage or by special interest groups.

Cainhoy Plantation underwent original planning almost 20 years ago when it was annexed into the City of Charleston. The city initially envisioned a place to locate industry and jobs associated with industry. Upon annexation, the plantation, within the urban growth corridor, was granted very broad, unrestricted zoning entitlements that allow almost all land uses.

The decision now facing the Charleston Planning Commission and City Council, and the trigger for all the recent conversation about Cainhoy Plantation, is whether to rezone the property. The existing "CY zoning" is wide open, allowing the owners to unilaterally change their master vision for the property without city input or approval. The proposed PUD (Planned Unit Development) replacement zoning is restrictive and will give the city and public a greater role over the coming decades in implementing the vision expressed in the PUD master plan. The existing CY zoning can

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be used to create a first class development; however, the owners believe that it would be beneficial to both the public and private interests to create high quality development under PUD zoning, particularly if sales to third parties become part of the program.

The proposed PUD zoning is a refined version of the award winning zoning that the Guggenheim landowners put in place for Daniel Island in 1993. It is quite simple and calls for only two major zones: residential and mixed use. It provides for diverse neighborhoods, affordable housing, required open parks and trails and many other things the Guggenheim ownership interests made sure were integral zoning components of Daniel Island. It preserves over half of the property as open space with an interconnected network of open space and parks weaving through the community. Development will start with much needed school campuses and surrounding neighborhoods.

This has not been a rushed process, as some have said. In 2008, the Berkeley County School District requested a site for a high school, necessitating planning to begin. The time frame for the school became more pressing two years ago, and planning moved into full gear so that these additions could be made in proper context. The public portion of the planning process began last fall and will continue over the next couple of months. This has been a long, deliberate exercise and development of the property will happen over the course of decades.

Over the course of the past several months we have organized numerous public meetings, met extensively with neighboring Cainhoy/Wando/Huger communities, and spent time with special interest groups to gather input. In all, we have heard from well over 600 people throughout the process. The conversations at those forums have centered on topics that are different from what certain media and special interest groups have focused on. We have heard the community's concerns and ideas and, as a result, have adjusted and improved our PUD master plan.

One issue raised was the location of a commerce/light industrial zone on Cainhoy Road with resulting increased truck traffic. As a result, we have eliminated this zone completely.

Similarly, the community talked about the look and feel of Cainhoy Road. In an effort to preserve the conditions, a Greenbelt paralleling the National Forest has been written into our zoning and road access curb cuts will be limited there.

The historic communities of Wando, Huger and Jack Primus have asked for lands where their communities might have a chance to expand. This area would include a broad range of housing types. It's a progressive concept that we have incorporated into our plan.

We also heard about a greatly increased need for public schools. In addition to the initial proposed high school, we have offered to donate land for an elementary school and a middle school. Thousands of families will benefit.

Alternatively, the focus by media and special interest groups has been on completely different concerns. One request has been to break the planning for the property into segments as opposed to comprehensive planning for the whole 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. And it enables us to work closely with the entire community as well as city staff about their aspirations for the property and to refine regulatory processes accordingly.

Much has also been written about longleaf pine trees, which have been grown on this property as a production tree for many years. The property is an active and sustainable silvaculture operation and the trees are planted and not old growth stands such as has been described. Concern has also been expressed that development on Cainhoy Plantation will eliminate controlled burning in the National Forest. We are active foresters and controlled burns are now, and will remain in the future, an essential part of the Cainhoy Plantation land management. Nothing will be done to limit Forest Service operations in any way, and that long-standing cooperative relationship will continue.

Special-interest groups have gone so far as to prepare an aggressive and unrealistic alternative master plan. Done without the owners' knowledge or consent, this plan strips about half of the land of development rights in an unprecedented land grab that tramples on basic property rights. It ignores basic economics by placing affordable housing on the largest lots at 1.5 units per acre and all of the remaining residences on the smallest lots at 7 units per acre to 14 units per acre.

The Cainhoy area of Charleston is a busy and vibrant place. It is a gateway to both the City of Charleston and the Town of Mount Pleasant. It is already a jobs center, and the opportunity to bring residential and employment uses is an attractive challenge.

The Guggenheim ownership has demonstrated best practices for turning plantation land into a vibrant community with its vision for the development of Daniel Island.

The evolution of Cainhoy will begin this year, with schools leading the way. The question before the city is whether to plan and develop the community under existing CY zoning or the proposed PUD zoning based on the Daniel Island code.

In all events, this property will be developed as one community and requires one comprehensive master plan, not two.

Matt Sloan, president of the Daniel Island Company, represents the Guggenheim family in its proposed development of Cainhoy Plantation.

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STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY) CASE NO.: 2014-CP-08-01840

BP AMOCO CHEMICAL COMPANY,)
)
PLAINTIFF,)
)
VS.)
)
CITY OF CHARLESTON;)
TRACT 7, LLC,)
)
DEFENDANT.)
)

MOTIONS HEARING

held before the Honorable Kristi L. Harrington

Mia Perron, Circuit Court Reporter, 9th Judicial Circuit

in the Berkeley County Courthouse

Moncks Corner, South Carolina

on Monday, October 20, 2014, Commencing at 10:59 a.m.

SUSAN "MIA" PERRON, CVR-CM-M
Circuit Court Reporter - 9th Judicial Circuit
Post Office Box 31865
Charleston, South Carolina 29417-1865
1-706-231-6028

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Plaintiff's Exhibit Number 1
[Map]

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1 PROCEEDINGS

2 THE COURT: Counsel, state your name for the
3 record.

4 MR. MULLER: Your Honor, I'm Douglas Muller. I
5 represent the plaintiff, BP Amoco Chemical Company.

6 THE COURT: Could you spell your last name.

7 MR. MULLER: It's M-U-L-L-E-R.

8 And my co-counsel, Brandon Gaskins, is here with
9 me as well.

10 THE COURT: All right. Thank you.

11 MR. COOKE: Your Honor, I'm Dawes Cooke. I'm
12 with the law firm of Barnwell Whaley Patterson and
13 Helms. I represent three defendants, Track 7, LLC,;
14 Cainhoy Land and Timber, LLC,; and Southern Timber,
15 LLC. And the moving parties today are just those last
16 two, Cainhoy Land and Timber, LLC, and Southern
17 Timber, LLC.

18 MS. CANTWELL: Good morning, Your Honor. I'm
19 Frances Cantwell. I represent the City of Charleston.

20 THE COURT: And we're here only on your motion
21 to dismiss, Mr. Cooke; is that correct?

22 MR. COOKE: Yes, Your Honor.

23 THE COURT: Mr. Muller, are you prepared to go
24 forward on that motion?

25 MR. MULLER: Yes, I am, Your Honor.

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1 THE COURT: Mr. Cooke, I'll be happy to hear
2 from you. I have received numerous documents.
3 MR. COOKE: Well, we hope you didn't get it in
4 time to spoil your weekend, but your law clerk
5 probably wasn't so lucky.
6 And in all seriousness, I appreciate Your
7 Honor's willingness to accept these briefs, and so
8 forth, ahead of time.
9 This is an action -- and you're aware of what
10 the different causes of action are. But, essentially,
11 it's an action to challenge the rezoning of a number
12 of tracts of land in Berkeley County that are
13 collectively referred to as Cainhoy Plantation. And
14 across the creek from one of those tracks of land is
15 the BP plant, and so BP has brought this action
16 challenging the rezoning.
17 They also have causes of action again the owner
18 of the property which is closest to them, which is
19 Tract 7, LLC, alleging that they have breached the
20 terms of a letter of intent and that's essentially a
21 breach of contract and negligent misrepresentation and
22 so forth. But that's not before the Court today.
23 We have moved to dismiss on behalf -- or at
24 least two of the property owners who owned property
25 that comprise part of Cainhoy Plantation have moved to

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1 dismiss on two grounds. One is that BP does not have
2 standing to challenge the rezoning of their property
3 and, second, that challenge is untimely. And I'll
4 address those separately, if I may.
5 First of all, standing in most zoning cases is
6 determined by South Carolina Code Section 2-29-760(c),
7 which the pertinent part provides: an owner of
8 adjoining land or his representative has standing to
9 bring an action contesting the ordinance or amendment.
10 However, this section does not create a new
11 substantive right in any part.
12 Your Honor is well aware of the standards for a
13 12(b)(6) motion, but I do want to mention one
14 particular aspect of 12(b)(6), and that is a 12(b)(6)
15 motion admits the well-pleaded facts of the complaint
16 but does not accept the legal conclusions therefrom.
17 And in our brief we've cited Charleston County School
18 District vs. Laidlaw Transit, a Court of Appeals case
19 from 2002. That is very analogous to this situation
20 because as the plaintiffs point out in their brief,
21 they do allege that they have standing. They allege
22 that their property is adjacent to Cainhoy Plantation.
23 But that's very much like the pleading that the Court
24 rejected in the Charleston County School District
25 case. It said the characterization of the activity

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1 is, quote, outside the contract is not an allegation
2 of fact but is an unsupported conclusion which is
3 contrary to the admitted facts. Therefore, the trial
4 judge properly disregarded it.
5 And they go on to say that the old standards
6 that used to apply to demurrers are not incorporated
7 in a 12(b)(6). And the demurrer admits the facts
8 well-pleaded in the complaint but does not admit the
9 inferences drawn by the plaintiff from the facts, nor
10 does it admit conclusions of law.
11 And that's critical in this motion to dismiss.
12 In the complaint in paragraphs 15 through 19, the
13 plaintiffs very carefully described the roles of the
14 various parties here. And it alleges that -- in
15 paragraph 15 that Tract 7, LLC, owns property
16 consisting of approximately 1,573.5 acres which are
17 located off of Cainhoy Road in the Cainhoy community
18 of Berkeley and which is adjacent to and immediately
19 south of the BP property, Tract 7. So there is an
20 allegation, very clear, that the BP property is
21 adjacent. Now, Tract 7 may not agree with that, but
22 that's an allegation of the complaint and Tract 7 has
23 answered the complaint and has not moved to dismiss.
24 We sent with the original brief, and then we
25 substituted, Exhibit A. And both of us actually have

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1 maps very similar to this. And so even though it's a
2 12(b)(6) motion, we're going to ask the Court to take
3 judicial notice of the way the properties are laid
4 out.
5 Could I step just a little bit closer to --
6 THE COURT: You could. Is that for me? Can I
7 have that?
8 MR. COOKE: You can have it. We e-mailed it to
9 you, also, but I'll hand it up.
10 [Whereupon, Mr. Cooke proffers documents to the
11 Court]
12 THE COURT: Thank you.
13 [Whereupon, Plaintiff's Exhibit Number 1 is
14 marked by the court reporter]
15 THE COURT: All right.
16 MR. COOKE: Now, at the very top of that page,
17 outside the shaded area, is the BP property. And you
18 can kind of make it out. It doesn't say BP on your
19 map. But right up here at the very top, beyond the
20 shaded portion, above the shaded portion, is the BP
21 property.
22 The shaded portion on your map is Tract 7. You
23 see that where it says Tract 7, LLC. And according to
24 the complaint, and I think this is right, that's about
25 1500 acres. Then below that and separated from BP by

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1 the Tract 7 property are the properties belonging to
2 Cainhoy Land and Timber and Southern Timber. You'll
3 see that those tracts are sort of sporadically laid
4 out around there. But none of them are within 1500
5 acres of the BP property. In other words, the very
6 closest properties belonging to Southern Timber or
7 Cainhoy Land and Timber are separated by that 1500-
8 acre tract from BP. So BP does not meet the
9 requirement, statutory requirement, of standard.
10 So there is a legal issue for the Court to
11 decide. What does it mean to be adjacent to a piece
12 of property. And the plaintiffs have very artfully
13 tried to interpret these properties as being one
14 property. That's why they call it Cainhoy Plantation.
15 And they refer in the complaint to there having been a
16 coordinated set of PUDs that were submitted. But the
17 complaint in paragraph 16, 17, 18, 19 very clearly
18 admit that these properties are owned by different
19 owners, that their PUDs were separate even though they
20 were coordinated with one another and it does provide
21 for a coherent development of that rezoning of that
22 area. But each of the PUDs was a separate ordinance.
23 There are three separate ordinances enacted that
24 adopted the PUD and text.
25 The Tract 7 PUD was actually adopted at a later

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1 meeting of City Counsel, according to the complaint.
2 These were adopted in February and the Tract 7 was not
3 adopted until August of 2014. So very clearly the
4 complaint alleges that they are separately-owned
5 properties, they're separate ordinances, separate PUDs
6 that are being challenged. And so in the common
7 understanding of the word adjacent, BP is not adjacent
8 to the properties except it alleges that it's adjacent
9 to properties in Tract 7. So we believe for that
10 reason, they do not meet the requirements of statutory
11 standing.
12 Now, the recent case of Carnival Corporation v.
13 Historic Ansonborough discusses a similar statute, and
14 it's section 6-29-950. We've been talking about 6-29-
15 760(c). But there the Court said -- and this, as you
16 may remember, was on the news. It was challenged by
17 Historic Charleston Foundation, Coastal Conversation,
18 a number of public interest organizations, again the
19 cruise lines. They weren't challenging an ordinance
20 there. They were claiming that the cruise line was
21 violating the zoning ordinance.
22 And so there's a different standing statute for
23 a challenged code ordinance verses the challenge to
24 the ordinance itself. And the wording of that is
25 interesting in that if you are proceeding under 6-29-

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1 950 for a violation of the zoning ordinance, it says
2 that an -- you must be adjacent or a neighboring
3 property. And so we leave it for another day whether
4 there's any difference between adjacent and
5 neighboring.
6 But interestingly, and probably significantly,
7 the term neighboring is not included in the statute
8 that we're here before [phonetic] today. It has to be
9 adjacent. So in the philosophy of giving every word
10 in every statute some meaning, neighboring may be --
11 maybe we could say that if this were a violation of
12 the ordinance, you'd have broader standing. But here
13 they have to be adjacent. They're not.
14 And then the Court said, additionally, 6-29-950
15 only permits an adjacent or neighboring property owner
16 to bring suit, emphasis added. Here plaintiffs have
17 made no allegations that they own adjacent or
18 neighboring property. They do allege that the League
19 is a tenant in the nearby property and that the
20 Preservation Society holds a conservation easement on
21 a nearby property. However, those interests do not
22 make the League or the Preservation Society property
23 owners required by the statute to bring suit.
24 Now, why that's significant, even though it's a
25 different statute, is that the Court doesn't allow you

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1 -- doesn't take at face value a conclusory allegation
2 that we have standing because we are adjacent. You do
3 have to look at their specific allegations. And in
4 this case, they don't allege that they're adjacent.
5 So the plaintiffs say also even if we don't meet the
6 statute, we invoke the exception to constitutional
7 standing sometimes referred to as public importance.
8 And the test for that is also described in the
9 Carnival Cruise case. It says, South Carolina Courts,
10 finally plaintiff asserts that the public importance
11 exception should apply to remedy any lack of standing.
12 South Carolina Courts recognize an exception to the
13 requirement that a plaintiff possess standing where an
14 issue is of such public importance as to require its
15 resolution for future guidance.
16 Now, that phrase is critical, and it appears in
17 other cases that apply to public importance, and that
18 is it's not that it's important because we all care a
19 lot or because it's pollution or something like that.
20 It's important only because its resolution for future
21 guidance is required.
22 Now, we could argue on another day whether that
23 might apply to Tract 7, but it can't possibly apply to
24 these defendants because the plaintiff still has the
25 suit pending against the City and against Tract 7,

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1 which is their vehicle if there is some important
2 constitutional or legal issue that has to be resolved
3 in this case, we've already got the vehicle for that
4 to happen.
5 So we would ask the Court to find that as a
6 matter of law, the suit is not required to proceed
7 against Cainhoy Land and Timber or Souther Timber in
8 order to have that important public matter vindicated
9 and clarified for the future.
10 We have also asserted the statute of
11 limitations. As I indicated, the complaint alleges
12 that the ordinances that are involved in this case --
13 and that is, it's ordinance number 2014-25 and
14 ordinance 2014-26, that they were enacted in February,
15 2014, and this suit was not filed within sixty days.
16 There's a very tight sixty-day statute of limitations
17 that's set out in section 6-29-760(d) which says that
18 you must -- if you're going to challenge the zoning
19 ordinance, you must sixty -- sixty days if, quote,
20 there has been substantial compliance with the notice
21 requirement for this section or with established
22 procedures of the governing authority or the Planning
23 Commission.
24 So the plaintiffs will say, well, we think
25 there's a question -- we allege that there's not

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1 substantial compliance. But it's only -- they only
2 have to substantially comply with the notice
3 requirements. And in the complaint, paragraph 44,
4 they allege themselves that BP attended the council
5 meeting on February 11th and had discussions with
6 officials and with the property -- representatives of
7 the property owners. So if, in fact, there was not
8 proper notice given by the City, BP was not prejudiced
9 by that.
10 It also alleges in paragraphs 39 and 41 that the
11 public appeared, members of the public appeared, and
12 spoke in opposition to the rezoning and therefore the
13 public obviously wasn't misled.
14 Now, there's an important public policy
15 consideration here. If, in fact, as the plaintiffs
16 claim, that they could find some sort of a latent
17 failure, that means that they could come back years
18 later, or anybody could come back years later and say,
19 you know, even after this property has been developed
20 -- right now there's a sale pending to the Berkeley
21 County School District. They've bought property to
22 build two schools out there. So what happens if they
23 buy the property, they close, they finance it, and
24 sometime later somebody shows up and says, well, there
25 was a technical defect in the way this ordinance was

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1 passed and so we're not bound by the sixty-days, we're
2 going to bring it. So there's a strong public policy
3 of finality and certainty with regard to land use, and
4 that's the policy that's behind the statute. And so
5 the Court shouldn't reach out and find some technical
6 failure, if there was one, as a way of opening the
7 door for people all down the road to come back.
8 So, Your Honor, you may be sitting there saying,
9 well, why is this so important to these guys; you
10 know, the suit is going to proceed along; why can't
11 they wait for summary judgment or some later time.
12 And the answer is these properties truly are owned by
13 different owners. There are connections between them.
14 They all are descended from the Guggenheim family.
15 But you can imagine, like any family that after
16 several generations the interests have been
17 disseminated, there are trusts involved, there is a
18 foundation involved, there are different generations
19 of family members involved in these different
20 properties. If you could see the number of people
21 that I have to answer to, you would appreciate that
22 this is not all one unit. They deal with each other
23 very much at arm's length.
24 But they would like -- they're marketing
25 properties. When you do a comprehensive development

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1 like this, it doesn't all spring out of the ground at
2 one time. I was sort of naive about those things and
3 didn't appreciate that. But what you do is you get a
4 comprehensive development plan in this master plan and
5 then different developers may come in and say, well, I
6 want to buy 1,000 acres here, or I want to buy 500
7 acres here, or I want to do this and do that. It's
8 not all one developer who builds everything.
9 And so, as we speak, my clients would like to be
10 able to market these properties. We would like to be
11 able to close on the sale of the school properties for
12 the Berkeley County School District, and it's very
13 hard to sell or close on land that's subject to
14 litigation. And so it is very urgent and we do ask
15 the Court to dismiss it, if you agree with us that the
16 plaintiffs have not properly alleged standing and that
17 they have not properly come within the statute of
18 limitations for these two properties. Thank you.
19 MS. CANTWELL: Thank you, Your Honor. I could
20 not improve on a single word he said.
21 THE COURT: All right.
22 MR. MULLER: Your Honor, with the Court's
23 permission, I would like to give you two more maps.
24 THE COURT: Great. Thank you.
25 MR. MULLER: I believe it's without objection.

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1 MR. COOKE: Correct.
2 [Whereupon, Mr. Muller proffers documents to the
3 Court]
4 MR. MULLER: Your Honor, I've just given you
5 these two maps. They're identical. I think I gave
6 you two copies, one for the clerk and one for you.
7 THE COURT: Thanks.
8 MR. MULLER: And this is just sort of to give
9 you a visual overview of what this area looks like.
10 These were documents that were generated by the
11 defendant, LLC's. And they're on the City of
12 Charleston's website.
13 But this gives you sort of a visual overview,
14 the first page does, of Cainhoy Plantation itself. My
15 client's plant is located to the north of it and near
16 it is the Cooper River plant. They are separated.
17 There's a boundary that's separated in part by Flag
18 Creek, which is that squiggly line on the top. But
19 seeing the division between the different LLCs. This
20 is the overview. And then the next page is the actual
21 planned unit development map.
22 The second page is a planned unit development
23 map showing how this thing was to be built out. As
24 you can see, it is not parceled out quite in the way
25 that the ownership is. It's done as a single planned

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1 unit development. And it was submitted to the
2 planning commission and to city council that way.
3 I think that the allegations in the complaint is
4 that when it was submitted, it was submitted as a
5 Cainhoy PUD master plan which has identical master
6 plan zoning text and shall be administered in a
7 coordinated fashion. So it is -- although it is owned
8 by these different LLCs, it is done as one single
9 planned unit development.
10 We're here on motion to dismiss under Rule
11 12(b)(6). And I understand Mr. Cooke's point that the
12 legal conclusions may not necessarily be admitted by
13 the defendants. But what is crystal clear in this
14 posture is that the factual allegations are admitted
15 and all reasonable inferences deduced --
16 When you look at our complaint, we make some
17 very specific allegations. In paragraph 7 of our
18 complaint, we state that these three LLCs,
19 collectively, the owners, are affiliated in these,
20 they share common ownership and management, and are
21 associated with the Guggenheim and Lawson Johnson
22 families and certain trusts established thereby.
23 In paragraph 8, as well as in 12, we establish
24 that these three tract owners are contiguous
25 properties commonly known and referred to as Cainhoy

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1 Plantation. And then in paragraph 12 we say that BP
2 is an adjoining landowner to Cainhoy Plantation and
3 properties subject to the zoning board. And I believe
4 we repeat that again in paragraph 63.
5 So from the standpoint of making factual
6 allegations that comply with the statutory standing
7 requirements, we have alleged that these tracts are
8 under common ownership, they're contiguous properties,
9 they're being developed in one unified manner or
10 method, and that we are an adjoining landowner to
11 these contiguous properties. And for that reason, we
12 would meet the statutory standing requirement under
13 6-29-760.
14 Now, we've -- as Mr. Cooke mentioned, we have
15 alleged, in addition to that, the public importance
16 aspect of this case. And this is in our complaint.
17 I'm going to paraphrase it just for brevity purposes.
18 When this plantation was being conceptualized, the
19 owners, the different owners, but all in one combined
20 way, went to the City and asked for amendments to the
21 planned unit development ordinance, which they
22 received in September. It was not noticed that those
23 amendments were related to Cainhoy Plantation but they
24 were.
25 In January, on January 24th, they submitted an

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1 application to the City Planning Commission of this
2 entire 9,000 acres and from that point it went to --
3 the application was filed January 24. It went to the
4 City Planning Commission on January 6th. It went for
5 first reading -- I'm sorry -- February 6th. It went
6 for first readying February 11. Second and third
7 reading adopted, at least as to these -- two of the
8 defendants on February 24th. So fast-tracking is an
9 understatement. This thing went through more rapidly
10 than you can ever imagine. And what is critical to
11 our argument is that -- and this relates, as well, to
12 the statute of limitations argument -- is that we did
13 not have an adequate opportunity to get involved. Not
14 only was there not substantial compliance, there was
15 no compliance with notice requirements, there was no
16 compliance with their established procedures for doing
17 this. It was fast track, fast track, fast track.
18 We did not attend the City Planning Commission
19 meeting. The two meetings that we did attend, we
20 pointed out that we needed more time to study it and
21 those complaints --
22 And so from the standpoint of both the public
23 importance and the statute of limitations issue, these
24 are matters that need to be heard, that we need to
25 have an opportunity to be heard on.

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1 Mr. Cooke pointed to this Carnival Cruise Line
2 case. And what's interesting about that case is that
3 that case was a public importance case where they
4 found that neighbors complaining generally about soot
5 and things from emissions from cruise ships, that was
6 not a matter of public importance. You know, they
7 went on to say that case -- this case presents no
8 issue of the constitutionality or legality of
9 government action. And that is exactly what we have
10 here. We have failure to follow procedures, fast-
11 tracking. We have all these things. And as we
12 mentioned in the complaint, there are constitutional
13 issues about delegation of power to the developer, for
14 example, to change -- to have to consent to any zoning
15 changes.
16 So it is different from the Carnival Cruise Line
17 Ship [phonetic] in a very real way, and we are a
18 plaintiff that's ideally suited to make these
19 challenges. So we believe we have statutory standing,
20 we believe we have public importance standing. On the
21 statute of limitations argument, what they have not
22 addressed in their argument is the fact that there's
23 not been substantial compliance; that, for example,
24 the City did not provide for a public hearing on the
25 PUD ordinance that were changed, they did not provide

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1 BP with adequate notice of the planning commission
2 meeting on the 10th, they did not provide notice of
3 the City Council public hearing on the PUD master
4 plan, they did not even follow the established
5 procedures in adopting the PUD, that they did not
6 comply with their own requirements in their own city
7 ordinance, and they did not follow established
8 procedures and make specific findings as to the
9 planned unit development itself. All of these are
10 outlined in the complaint -- paragraph.
11 And so while it's nice to say, well, they had
12 notice and they attended, if the objective is to give
13 adequate notice in time to have very real input, that
14 was not provided. In fact, there was not compliance
15 really at all with the things that they needed to do.
16 Instead, it was a fast-track situation where we now
17 had potential 18,000 new homes going to this planned
18 unit development, with no real input because it was
19 done in a month.
20 And so our argument is that the statute of
21 limitations does not apply, that there was not
22 substantial compliance in any real way, and that
23 obviously we have statutory standing and we have
24 standing under the public importance doctrine based on
25 the importance of this massive development and its

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1 placement in Berkeley County. Thank you, Your Honor.
2 THE COURT: Do you have anything to add,
3 Mr. Gaskins?
4 MR. GASKINS: No, Your Honor.
5 THE COURT: All right. Thank you. Anything
6 further, Mr. Cooke?
7 MR. COOKE: Just briefly, if I may, Your Honor.
8 Just looking at paragraphs 7, 8 and 12, and I
9 had already called the Court's attention to paragraphs
10 15 through 19, which set out the separate ownership.
11 But what Mr. Muller argues is exactly what I said the
12 legal issue that they were going to ask you to do, and
13 that is to pretend that this is one piece of property
14 because it's all -- they're all related to one
15 another. But that's not what the statute says. It
16 says you have to be contiguous to the property for the
17 zoning for which you're challenging. And the zoning
18 that they can challenge is the property that they
19 claim they're adjacent to, which is Tract 7. And
20 Tract 7 is different than these other two properties.
21 These two properties are separated from BP by 1500
22 acres. They were enacted six months before the Tract
23 7 PUD was enacted. And so -- and as I said earlier,
24 the Carnival Cruise issue is very germane here. If
25 there is some constitutional or important legal issue

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1 that needs to be resolved, it can be resolved because
2 the suit is going to go right ahead against Tract 7
3 and against the City of Charleston. Thank you.
4 THE COURT: Counsel, do you wish to submit
5 proposed orders?
6 MR. COOKE: Be happy to do that.
7 THE COURT: And will you be able to do that by
8 Friday? I would like to have my ruling by Friday.
9 MR. COOKE: Yes. Certainly, Your Honor.
10 THE COURT: And you have my e-mail address, so
11 feel free to e-mail it.
12 And I left you out. Is there anything else you
13 wish to add, Ms. Cantwell?
14 MS. CANTWELL: No, Your Honor.
15 THE COURT: Thank you, counsel. You have --
16 first of all, thank you for getting this information
17 to me before court. It is so helpful. And thank you
18 for your patience and your courtesy. It's always a
19 pleasure to try motions when people are prepared and
20 help me understand what's going on. So thank you so
21 much.
22 [HEARING CONCLUDES AT 11:28 A.M.]
23
24
25

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CERTIFICATE

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

I, the undersigned Mia Perron, Circuit Court Reporter for the 9th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the motions hearing held before the Honorable Kristi L. Harrington, on Monday, October 20, 2014.

I do further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Dated this 20th day of February, 2015.

Mia Perron, CVR-CM-M
Circuit Court Reporter
9th Judicial Circuit

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THE STATE OF SOUT CAROLINA
In the Court of Appeals

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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.. 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 the Respondents.

CERTIFICATE OF APPELLANT'S COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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October 21, 2015
Charleston, South Carolina