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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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JUN 15 2016

SC Court of Appeals

Samuel T. Brick, Appellant

v.

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

Appellate Case No. 2014-000583

Appeal From Richland County Court of Common Pleas DeAndrea Gist Benjamin, Circuit Court Judge Case No. 2013-CP-400-1643

PETITION FOR REHEARING

Appellant, Samuel T. Brick, pro se, pursuant to Rule 221, SCACR, respectfully requests this Honorable Court to rehear and reconsider its determination to affirm the lower court in this matter. The issues noted in this Court's Per Curiam Order are intertwined with the specific reason for the lower court's dismissal being that Appellant did not join the Intervenor, Fairways Development, LLC within thirty (30) days of the Planning Commission's denial of Appellant's appeal. Otherwise, timeliness is not an issue. The lower court specifically found in her Order to allow the Intervenor to join the action, "The motion to intervene was made before any action was taken on the appeal; thus this Court finds that the motion to intervene was timely." (R. p. 14). The lower court stated, "Although the Appellant timely filed his appeal and sent a copy of his appeal to Fairways within thirty days of his receipt of the Planning Commission's Order, he failed to join Fairways to appeal within the time prescribed by statute. This failure was fatal to

his appeal.” S.C. Code 6-29-1150 (D)(1) does not address joinder and states only, “An appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision.” The General Assembly’s statutory construct acknowledges joinder that might be in excess of the period within which an appeal can be taken. In addressing appeals by a property owner in Section (D)(2) it requires a request for pre-litigation mediation in accordance with mediation procedures set forth in S.C. Code 6-29-1155 (A). Those procedures provide, “A person who is not the owner of the property may petition to intervene as a party, and the motion must be granted if the person has a substantial interest in the decision of the planning commission.” Such a petition to intervene obviously will occur more than thirty (30) days after the Planning Commission’s decision and only after the property owner has been provided a mediator to whom the request may be made. This is relevant because it shows the General Assembly is more interested in the inclusion of interested parties in land development matters than having strident and unimportant limitations restrict legitimate issues.

*Spanish Wells Prop. Owners Ass’n. v. Bd. Of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988) (hereinafter, Spanish Wells) is the South Carolina judicial authority that requires joinder of an interested party, specifically a development permittee in appeals from local administrative decisions regarding property development. Spanish Wells bases its decision on judicial economy. Such economy is noted as necessary to bind the developer to the decision in case an appellant is successful. The Supreme Court in Spanish Wells addressed the timeliness issue by affirming the circuit court’s Order which provided leave to the Appellant to join the development permittee within fifteen days of the Order. That limitation obviously was in excess of thirty days from the Planning Commission’s decision.

This appeal specifically is to the Planning Department's approval of the developer's plan to disregard the county Green Code's bonus provisions instead developing the project with no minimum lot sizes and its further approval of the developer's disregard of the Green Code requirement for a specified limitation of impervious surfaces in the developed areas. Both of these matters are development issues and have no relation to the landowner's rights to develop. This matter specifically relates to legal interpretations of local ordinances relating to green development. It does not address the property zoning or the landowner's zoning rights.

Spanish Wells states the sole question in its decision is whether a permittee is a necessary party to an action to revoke a development permit. Among other things, it is so the permittee can be bound by any decision. In the instant case, Intervenor is a participant and would be so bound. Appellant alleges Intervenor Fairways Development, LLC is not the developer. The Planning Commission awarded its development permit to an agent of an engineer company contracted by for Longcreek Associates, LLC, otherwise not referred to in the project application, to plan and develop it. Intervenor, Fairways Development, LLC, was not a part of that plan or otherwise involved in the development. As landowner it may have profited by its success but it was not developing the land. On Appellant's appeal that the permit did not follow the requirements of the Green Code, the Planning Commission's examination of the appeal found a previously unknown participant to be the project developer. That individual, Ron Johnson, testified at the Planning Commission's hearing that he was the developer and had expended substantial funds in that role. The testimony was incorporated in the decision as a factual finding. (R. pps. 66-69; Johnson portion p. 69) Appellant was faced with a number of choices as who should be joined and who might be interested and bound in accordance with judicial economy to the findings of the appellate court. Spanish Wells understood this potential dilemma in land development cases

whose administration is not always open to the public by approving of the circuit court's action in that case in which the court authorized joinder at a later time. The actual developer in the instant matter is a matter of conjecture. Appellant has demonstrated he is not averse to joining a developer as an interested party should one present itself.

Appellant, had a basis that Fairways Development, LLC was not such a party of interest by its previous court representations and argued that before the circuit court. Even if this Honorable Court considers the circuit's court's rejection of the doctrine of collateral estoppel as proper, which decision Appellant requests the Court to reconsider, Appellant still alleges that Fairways' previous conduct in stating disinterest is a proper factor for the circuit court to consider in determining its status as a necessary party. Furthermore, it is a factor that supports the administrative agencies' findings in not treating Fairways Development, LLC as the permittee or developer. Generally, an appellant court must accept such findings unless they are arbitrary, capricious, have no reasonable relation to a lawful purpose, or if the agency abused its discretion. *Restaurant Row Assocs. v. Horry County*, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). See also the arguments below at pages 8-11 regarding findings as to the identity of the developer.

In particular, Appellant alleges the following with regard to the first two issues stated in its affirmation of the lower court's dismissal of the appeal. Appellant considers the third issue as mooted should the Court's rehearing of the matter determine the lower court exceeded its authority by findings in variance to that of the fact finding reviews and administrative action and by applying the thirty (30) period with regard to joinder in this matter.

First Issue: While Appellant was appealing the second Planning Department permit, he complained of secret conduct in the project's administration and filed an action under the Freedom of Information Act (FOIA), S.C. Code Ann. §§ 30-4-10. Appellant sought declaratory relief seeking, among other things, the return of the project to the Planning Department. FOIA Section 30-4-100 authorizes declaratory and injunctive relief. For any action requesting declaratory relief, Section 80 of the Uniform Declaratory Judgments Act (S.C. Code Ann. § 15-53-80) requires that all persons shall be made parties who have or claim an interest which would be affected by the declaration. Appellant assumed Fairways, as landowner of the project, would meet the Declaratory Judgment Act requirement and added it as a party to the FOIA proceedings. Fairways then moved that it was not such a party stating it had no interest in the FOIA matter notwithstanding Appellant's requests in that proceeding, which requests are similar to the instant proceeding, that the project be returned to the Planning Department for revised administrative action. The Richland County Circuit Court heard the motion and, based on Fairways' representations, granted the removal motion. Fairways now declares such an interest and alleges it is such that it requires Fairways to be determined a necessary party to the instant appeal. Appellant argued and briefed this matter before the lower court stating the issue of Fairways' interest in the matter already was litigated and should not be litigated again. Appellant noted the potential inequities of his dependence on a circuit court's decision in collateral ongoing litigation finding Fairway's disinterest in the same project only later to face dismissal for not joining Fairways as an interested party in comparable litigation regarding the same project.

With respect to this Honorable Court's determination that an issue cannot be argued and raised for the first time on appeal, but must have been raised to the trial court and ruled upon to be preserved for appellate review, Appellant points out that the issue was argued before the trial

judge during the hearing on Fairway's Motion to Dismiss (R. pps. 184/185; Transcript pps. 18-19); that it was raised in Appellant's Memorandum of Law and Answer to Fairways' Motion to Intervene (R. p. 89; Page 3 of the Answer) and in Appellant's Affidavit in Response to the Motion to Intervene (R. p. 93; Page 3 of the Affidavit); that it was further argued in Appellant's Motion to Amend (R. p. 101; Page 3 of the Motion); and it was argued in response to Fairways' Motion to Dismiss in a section entitled, "Appellant's Attempted Joinder of Fairways" (R. pps. 116 and 117; Pages 5 and 6 of the Response) and Appellant's Affidavit to Fairways' Motion to Dismiss (R. p. 135; Page 5 of the Affidavit). The arguments before the trial court did not state the issue to be collateral estoppel but the matter was described sufficiently for the lower court to understand the equitable issue and the application of collateral estoppel as its remedy. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731 (1998). The basis behind this remedy is equitable fairness in prosecuting cases as well as judicial economy with a court's disposition of factors regarding the same issue not being litigated again.

As to the lower court's ruling on the matter, the issue of Fairways' interest is paramount to the dismissal. The circuit court's ruling that Fairways had that interest is a specific rejection of the argument that it did not and that the matter had been previously litigated with the court ruling it did not have sufficient interest even with regard to a specific statutory and accordingly, jurisdictional requirement. A trial court's decision expressly in opposition to a party's contention is sufficient to preserve the issue for appellate review. *Wilder Corp. v. Wilke*, id, pps. 77 and 79. The trial court, in ruling on the motions to dismiss, stated that her decisions were made, "After considering the law, the memoranda submitted by the parties, the arguments of counsel, and all matters submitted." (R.pps. 5 and 9). She obviously considered but did not apply collateral estoppel.

Appellant requests this Honorable Court to reexamine this issue and, even if it continues to determine that the circuit court was not required to consider it as determinative of the matter, that this Honorable Court determine it nevertheless should have been considered by the circuit court in its findings that Fairways was developer of the project. Such conduct as not being interested in a project being disapproved or returned with a full reexamination through a declaratory action as was being litigated in the FOIA proceeding is not ordinarily expected of a project developer who has invested heavily in a green code application. Ron Johnson voluntarily appeared and testified that he was the developer. (R. p. 69). No Fairways agent or representative appeared in that action and the Planning Commission found Johnson to be the developer even though there is no other evidence of his connection to the project.

This Honorable Court makes reference regarding Appellant's attempts to amend his appeal. Appellant however never pursued this motion with the lower court or in his appeal of that court's action. The issue was mooted by the lower court joining Intervenor Fairways to the proceedings.

Second. Appellant's appeal was dismissed by the Circuit Court because he did not join Fairways within thirty days. This Honorable Court cites Rule 74, SCRCPP, stating appeals to the circuit court from a judgment of an administrative agency must be in accordance with the statutes providing such appeals and that notice of such appeal must be served on all parties within thirty (30) days after receipt of written notice of the judgment. Notice of the appeal was served on counsel for Fairways (R. p. 98) within thirty (30) days of the administrative final decision<sup>1</sup>. The trial court acknowledged that Appellant sent Fairways a copy of the appeal within

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<sup>1</sup> Rule 5 (b), SCRCPP, states whenever service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney or by mailing it to him. Service was made by email and

the prescribed period (R. p. 8). The trial court's decision is that Appellant did not *join* Fairways within thirty (30) days. Rule 19, SCRCPC has no specific period within which joinder must be accomplished. Rule 74 does not relate to joinder, as addressed in *Spanish Wells* with regard to land development appeals. There is no question Appellant met the jurisdictional requirements of S.C. Code Ann. § 6-29-1150 (D)(1) in perfecting his appeal of the Planning Commission's decision.

Such Section 1150 provides some help with regard to an appeal from a planning commission relating to land development and the record that formulates its basis. Subsection 1150(B) states all actions on land development plans and subdivision plats must be maintained as a public record. The public permit is the public land development record at the center of this appeal and, in the instant matter, is the formal record of the Planning Department's approval<sup>2</sup>. Richland County's Development Review Team's actions on a land development permit requests otherwise are secret (R. p. 25). The Planning Department never determined that Fairways Development LLC, the owner of the property, is its developer and never treated it as such. The Richland County Green Code (R. pps. 202-209), requires a property owner to submit the request for utilization of its green provisions on its land. Section 26-186(e) of the Green Code states the concept plan and existing features site analysis plans for a green code project must be prepared and submitted by the landowner applicant *or* the developer. Appellant appealed the Planning Department's staff action to the Planning Commission under S.C. Code Ann. § 6-29-1150 (C) and its local progeny. As noted above, the Planning Commission, in its denial of the appeal,

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accepted by Fairway's attorney, who after Appellant discussed the matter with him had requested such service. The receipt of that service is evidenced by the return email thanking the Appellant for serving him.

<sup>2</sup> Note the permit is to John D. Champoux without any affiliation to a company or otherwise. Mr. Champoux is the Registered Landscape architect who certified the project sketch plans prepared by Sustainable Design Consultants, Inc. for Longcreek Associates, LLC. Mr. Champoux from Sustainable, (R. p. 43) forwarded the development request to the Planning Department. Longcreek Associates LLC otherwise is an unknown party to the proceedings, the application being on behalf of a developer indicated as Fairways Development Group.

found Mr. Ron Johnson to be the developer, not Fairways. That final fact finding body's denial of Appellant's appeal is what was before the circuit court and now is before this Honorable Court based on an alleged failure by Appellant to provide notice of the appeal to the landowner within thirty (30) days.

A trial court acting as an appellate body must support factual findings of the administrative body acting in an appellate capacity in land development issues if there is any evidence to support the findings and if they are not influenced by an error of law (*Austin v. Bd. Of Zoning Appeals*, 362 S.C. 29, 36, 606 S.E. 2d 209 (Ct. App. 2004)). The Green Code ordinance is clear that when an owner applies for green code application on its property, a developer can utilize its provisions.<sup>3</sup> The administrative findings in the instant matter provide public records that exclude Fairways, as developer in the proceedings. The public records provide three differing choices neither of them clear as to someone who should be joined in the appeal. The stated permittee, John Champoux, is not a developer but a landscape architect. The Planning Department permit makes no indication of his role otherwise as the developer. The importance of this is that Spanish Wells relates specifically to whether a permittee is a necessary party to an action to revoke a development permit. It states that this insures the most vitally interested party's participation in the appellate process. The Supreme Court stated this serves judicial economy. While not addressing the timeliness of the joinder, the Spanish Wells court related that the trial court in its review granted the motion to dismiss stating the developer was a necessary party and allowing the appellant fifteen days leave to join. The appellant instead of conforming to that order and joining the developer appealed the decision. The Supreme Court adopted the lower court approach by affirming its order without further comment. Accordingly,

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<sup>3</sup> See discussion of Section 26-186 (e) above.

the Supreme Court has by inference rejected the harsh result of dismissing an appeal because a necessary party is not joined within 30 days. That especially is relevant in the instant case because it is unclear just who the developer really is. The public record of the administrative action does not identify just who the developer is. It is to an engineer who certified the sketch plans for a company working for another company, neither of whom are related to the Intervenor. The Planning Commission found Mr. Ron Johnson, a stranger to the process, to be the developer. Appellant attempted to amend his appeal, among other things, to join Fairways. Such an amendment however was mooted by the trial court's joinder of Fairway's with Appellant's approval. Appellant disagreed the joinder should be as to a necessary party but had no objection to a joinder otherwise (R. pps. 13-14). Appellant did not pursue an amendment of the appeal. The Spanish Wells adoption of the trial court's leave to the appellant to join a party, obviously well after an initial thirty (30) day period, is specifically relevant in the instant proceedings. Should a party come to the court and demonstrate interest in the appeal, it is clear Appellant would not object.

The circuit court, acting as an appellate judicial body, in a de novo manner, found Fairways Development, LLC to be the development permittee (R. pps. 7-8). It based its decision on the owner signing the application, rejecting that the owner signed it on behalf of another entity, Fairways Development Group. It disregarded the findings of the Planning Department and Planning Commission and that Fairways did not act as the developer in the approval process (R. pps. 7-8). Counsel for Richland County explained the history and need for the owner to sign an application, indicating along the way that someone other than Fairways was the developer (R. pps. 169-171). The circuit court misinterpreted or ignored that argument and that the Green Code has different requirements for landowners and developers. It disregarded that the

applications were signed on behalf of Fairways Development Group and that it was a separate entity and treated as such in the Planning Department and Planning Commission administrative process. The Planning Department and the Planning Commission knew that the Fairways Development Group was not the landowner but possibly the developer. There is no public record, however as to whom that group is or as to what it is. The project Subdivision Review Application, to meet the requirements and not be forced to resubmit the application a third time was signed by Fairways Development, LLC. The Planning Department awarded the development permit to the individual who forwarded the packet the second time. (R. p. 49). There is no indication anywhere that the permittee is an agent of Fairways Development, LLC. The circuit court based its decision solely on the fact that Fairways Development, LLC signed the application. Such a signature made Fairways a property owner applicant but not the project developer. Under Spanish Wells, judicial economy for such a project is not to the owner but to the developer. The owner does not invest in the process. The developer does. The owner does not devise where the lots go, what sizes they are, or how the developer follows the required code provisions. The developer does those things. Should a developer indicate interest in the matter, Applicant would have no objection to its joining the Intervenor as a party to the proceeding. Appellant contends there is no jurisdictional period of limitations within which such joinder is required.

Appellant requests this Honorable Court to reconsider its decision affirming the circuit court's findings, to apply the principles set forth in Spanish Wells and the doctrine of collateral estoppel as to Intervenor's interest in the project, and to return the matter to the Circuit Court for its de novo review of the Richland County Green Code's provisions as they relate to minimum lot size and the requirement for enforcement of a 50% pervious surface in the developed areas;

AND FOR SUCH OTHER RELIEF AS THIS HONORABLE COURT MAY DEEM APPROPRIATE.

Very respectfully submitted,



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Richland County, South Carolina

DATE: June 15, 2016

JUN 15 2016

**SC Court of Appeals**

**CERTIFICATE OF SERVICE**

Appellant, Samuel T. Brick, hereby certifies that the foregoing Motion in the above-captioned appeal was served upon the parties to this action by my depositing a copy of same, enclosed in a First Class postpaid envelope addressed to the attorneys of record in a post office or official postal depository under the exclusive care and custody of the United States Postal Service, on June 15, 2016, addressed in the following manner:

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Samuel T. Brick, Appellant

June 15, 2016

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

HAND DELIVERED: June 15, 2016

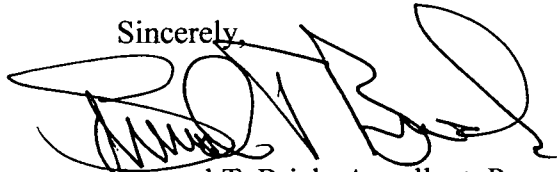
Re: Appellate Case Number 2014-000583, *Samuel T. Brick, Appellant v. Richland County Planning Commission and Fairways Development LLC, Intervenor, Respondents*

Dear Ms. Kitchings:

Enclosed herewith for filing are an original unbound Motion for Rehearing and six (6) copies all signed, the six copies fastened on the left margin. Also enclosed is a check for the filing fee in the amount of \$25.00.

Thank you for your assistance in filing this matter with the Court of Appeals.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. T. Brick', written over a horizontal line.

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Enclosures;  
As Stated.