THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE DEANDREA GIST BENJAMIN
CIRCUIT COURT JUDGE

CIVIL ACTION NO. 2013-CP-400-1643

Opinion No. 2016-UP-261 (S.C. Ct. App., filed June 8, 2016)

Samuel T. Brick **PETITIONER,**

versus

Richland County Planning Commission and
Fairways Development, LLC, Intervenor **RESPONDENTS.**

PETITION FOR A WRIT OF CERTIORARI

Samuel T. Brick, *Pro Se*
124 Runneymede Drive
Blythewood, South Carolina 29016
(803) 546-4895
sbrick2011@gmail.com
PETITIONER

Other Counsel of Record :

Michael B. Wren, Esq.
Andrew F. Lindemann, Esq.
Davidson & Lindemann, P.A.
Post Office Box 8568
Columbia, SC 29202-8568
(803) 806-8222
Attorneys for Richland County Planning Commission, RESPONDENT

Tobias G. Ward, Jr.
J. Derrick Jackson, Esq.
Tobias G. Ward, PA
Post Office Box 6138
Columbia, South Carolina 29260
(803) 708-4200
Attorneys for Fairways Development, LLC, Intervenor, RESPONDENT

INDEX

PAGE

CERTIFICATION OF PRO SE PETITIONER

Petitioner, Pro Se, certifies that a Petition for Rehearing was timely made and finally ruled on by the Court of Appeals on August 18, 2016 (App. pp. 1-16)

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals fail to apply the correct standard of review regarding the Circuit Court's finding that Fairways Development, LLC was the project developer?

II. Did the Court of Appeals err in requiring a Rule 59(e), SCRCP, motion and a specific lower court determination notwithstanding the lower court's rejection to preserve Appellant's collateral estopple argument?

III. Did the Court of Appeals err by treating Rule 74, SCRCP, as it applies to appeals from local administrative reviews, a jurisdictional matter requiring dismissal of an appeal should notice not be made to any potential party within the thirty-day appellate period?

1. Does the term "all parties" in Rule 74, SCACR, apply to any potential party as suggested by the Circuit Court and the Court of Appeals or just to parties that were of record in the appealed matter?

2. Did the Court of Appeals unnecessarily limit the Spanish Wells equitable requirement for judicial economy by inserting a mandatory jurisdictional limiting period within which an appellant must join potential parties?

OVERVIEW

On December 7, 2012, the Richland County Development Review Team (DRT), a designated staff body, issued a permit approval (App. pp. 74-76) of a sketch plan (App. pp. 293-

299) as a green development of approximately 100 acres in northeast Columbia. (App. pp. 239-246). The plan featured no minimum lot sizes and did not enforce the requirement for a 50% pervious surface for its developed areas. The DRT, disregarding the bonus and requirements sections of the underlying county ordinance, authorized no minimum lot sizes (App. p. 246, para. (i)) and only applied a pervious surface requirement if impervious surfaces were used on sidewalks and driveways. (App. pp. 314-315, lls. 14-23 and lls. 1-12). Appellant appealed to the Planning Commission which denied the appeal. (App. pp. 91-94). Appellant during this process sued citing allegations of violations of the Freedom of Information Act (FOIA) (App. pp. 373-388, amended pp. 271-289). He sought a declaratory judgment and return of the permit to the DRT. He included Fairways Development, LLC, the property owner, whom he thought had the "any interest" declaratory judgment standard for joinder. Fairways sought dismissal and sanctions. The Circuit Courts hearing the FOIA complaint and its amendment dismissed Fairways but denied sanctions. While this was ongoing, Appellant appealed the Planning Commission's denial seeking a legal review of the DRT's interpretations of the county ordinance (App. pp. 49-67). He did not include Fairways in the appeal but notified counsel for Fairways. (App. p. 123). Fairways moved for intervention and dismissal of the appeal because it was not included within the thirty day appeal period (App. p. 129). Judge Benjamin granted the motion and dismissed the appeal. She based her decision on Fairways not being included in the appeal within the thirty day period in which appellant had to bring his action to court. (App. pp. 21-25). Appellant appealed to the Court of Appeals which affirmed Judge Benjamin's dismissal (App. pp. 1-3). Appellant now seeks certiorari with this Court so he can prosecute a judicial interpretation of the local ordinances.

STATEMENT OF THE CASE

This petition presents several questions that would significantly affect appeals of local government administrative decisions in South Carolina. The Circuit Court and Court of Appeals make the assumption that all parties are either a part of the proceedings before the administrative body or are known as a proper body for joinder and thus must be joined within the thirty day statutory period. (App. pp. 23-24 and App. p. 2) It applied a standard of review for appeals in zoning decisions to the application of whether the circuit court while in an appellant status adequately adopted factual determinations by the administrative bodies. Appellant alleges Judge Benjamin failed to make a correct preponderance of the evidence determination regarding an equitable issue by her dismissal of the appeal. The appeal she dismissed was filed pursuant to an authority regarding appeals from land development permits[1] with no statutory standard of review instead of an appeal of zoning determinations by legislative zoning boards as set forth by the General Assembly.[2] App. p. 2.

This petition for certiorari addresses the role of a circuit court acting as an appellate body. It involves a local ordinance that specifies varying responsibilities for land owners and developers in obtaining a green development; i.e. a development designed to, among other things, preserve and protect environmental resources, reduce impervious surfaces, and reward the set-aside of conservation areas by specified zoning bonuses to developers. (App. pp. 239-246). In the local ordinance, an owner must make the initial application. Developers or owners are responsible for sketch and concept plans and, among other things, developers are responsible for

[1] S.C. Code 6-29-1150 (1994, amended 2003).
[2] See S.C. Code App 6-29-840 (1994, amended 2003) in which the General Assembly mandated that in a board of appeals in zoning cases the findings of fact must be treated the same as a finding of fact by a jury. No such standard of review is mandated for appeals from a staff action on a land development permit. The Court of Appeals reliance on the zoning standard is inapposite.

ensuring required set asides are cared for in perpetuity[3]. The circuit court in addressing the appeal determined that since the owner signed the initial application, it is the development permittee. (App. pp. 23-24). The DRT initially reviewed the application, approved the Green Code sketch/concept plan, and provided the public approval document to the landscape architect[4] who prepared the sketch plan. The landscape architect was employed by a design company hired by Longcreek Associates, LLC[5], not the owner, Fairways Development, LLC. (App. pp. 74-76). The Planning Commission's action on the appeal adopted as a finding that Ron Johnson was developer. (App. p. 94). It did not reference Fairways Development, LLC.

In Appellant's FOIA suit, he considered Fairways the only party subject to suit that might be affected. (App. p. 280 Paras. 24 A.and B.) and (App. p 385, Paras. 33 A. and B.). Appellant joined Fairways based on the jurisdictional requirement that parties "who have or claim any interest which would be affected by the declaration" be made parties.[6] (App. pp.118, 126-127, 141-142, and 219-220). The Honorable Alison Renee Lee heard Fairway's motion for dismissal and ruled that "to the extent that any FOIA violation is alleged against Fairways in the original complaint, Fairways' Motion to Dismiss based on the original Complaint is Granted." (App. p. 38). Judge Lee denied the request for sanctions.

The complaint was amended and Fairways was designated a respondent in the amended complaint. (App. pp. 271-290). In a later hearing before the Honorable G. Thomas Cooper, Jr., Fairways again sought dismissal this time from the amended complaint. (App. pp. 271-289).

---

[3]Subsection (c) relates to the owner's requirement to file an application; subsection (e) relates to the owner or developer submitting the concept or existing site analysis plan, (App. pp. 239-241); and subsection (f) relate just to the developer submitting the concept plan that covers perpetual care for the conservation areas, (App. pp. 241-243).

[4] In this regard the landscape architect is the same as a scrivener for a General Assembly bill or an attorney for a contract proposal.

[5] See App. p. 293, the header for the sketch plan approved by the DRT. The permit specifically is to that plan (the dates coincide). The permit is the public document required by S.C. Code Ann. § 1150(B) (1994, amended 2003).

[6] S.C. Code Ann. 15-53-80 (1962). The "any interest" standard is *not* the same as the Spanish Wells requirement for joinder of a development permittee. See discussion below at pages 8 and 13 of this petition.

Judge Cooper granted the request, without sanctions. This was done around the same time Appellant was appealing the Planning Commission's rejection of his appeal[7].

Judge Benjamin in her dismissal of the appeal 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 [the] appeal within the time prescribed by statute. This failure is fatal to his appeal." (App. p. 24, and p. 161, Para 5. Relating to time to appeal.).

Richland County Planning Commission was provided notice of the appeal and joined in the action. It moved to dismiss based on Appellant's standing. (App. pp. 95-96). The parties filed documents relating to the motions; the Appellant specifically pointing out in several pleadings that Fairways was dismissed in a collateral matter seeking the same relief and should not be allowed now to say it was a necessary party—the relief being return of the permit to the DRT to uphold the Green Code zoning and impervious water requirements. (App. pp. 8-9). Judge Benjamin heard the motions on an appellate docket and granted Fairways' motion to intervene, denied a motion by Appellant to amend the appeal, and held the remaining issues to review and take under advisement. See Transcript of Hearing (App. pp. 191-235). Judge Benjamin denied Richland County's motion for lack of standing stating Richland County waived that argument when it accepted and heard Appellant's appeal. (App. pp. 26-28).

Appellant appealed the dismissal to the Court of Appeals which affirmed Judge Benjamin's decision, specifically rejecting the collateral estopple argument as not being fully vetted at the circuit court level. It also inserted Rule 74, SCACR, as applicable and requiring notice to Fairways Development LLC citing such notice must be served on all parties within

[7] Amended FOIA Complaint with Fairways a respondent instead of defendant filed February 26, 2013; Planning Commission Decision was dated March 5, 2013; Appellant appealed that under S.C. Code Ann. 6-29-1150(1994, amended 2003) on March 18, 2013.

thirty days of the receipt of written notice of the judgment. (App. pp. 1-3). Appellant requested a rehearing (App. pp. 4-15) but the Court denied the request stating it could not find anything it had overlooked or disregarded. (App. p. 16).

STANDARD OF REVIEW

In the instant petition, as discussed further below, Appellant suggests several "special and important reasons" to grant certiorari specifically relating to—

(1) the difference between jurisdictional and judicial requirements for the filing of appeals;

(2) what construes a judicial finding so as to qualify as a clear rejection of a position on an issue for purposes of preserving the issue for subsequent appeal without a Rule 59(e), SCRCP motion;

(3) a novel question of law relating to mandatory periods of limitations for judicial economy when jurisdictional filing requirements are met;

(4) the requirement for circuit courts when acting in an appellate manner to accept reasonable administrative findings with relation to necessary parties;

(5) the meaning of the term "parties" in Rule 74, SCRCP, and

(6) the acceptability of email notice to a party for purposes of Rule 74, SCRCP.

In the context of these issues, the opinion of the Court of Appeals in citing both the *Newton v. Zoning Board of Appeals for Beaufort County,* 396 S.C. 112, 116, 719 S.E.2d 282, 284 (Ct. App. 2011) and *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) regarding when an issue is preserved for review begs this Honorable Court's review. (App. p. 2) The Court of Appeals citation of *Newton* 396 S.C. at 116 regarding appeals from zoning decisions being treated the same as in circuit court judgments in law cases is misplaced. It made a factual

determination contrary to that of the administrative bodies that made a finding as to who is the developer. The Planning Commission in reviewing the staff action made yet a different finding as to the developer still in contrast to that of Judge Benjamin. (App. p. 94 and argued elsewhere at App. p 7 and pp. 11-14). Appellant contends that the issue of joinder of the development permittee is an equitable issue based on judicial economy rather an issue relating to a law case.

The Appellate Court's extension of *Spanish Wells Prop. Owners Ass'n, Inc. v. Bd of Adjustment of the Town of Hilton Head,* 296 S.C.67, 367 S.E.2d 160, (1988) (hereinafter referred to as "Spanish Wells") by making Rule 74, SCRCP, a jurisdictional requirement for filing the notice of an appeal to an entity that was not previously a party to the appeal conflicts with the Spanish Wells Court's adoption of the circuit court's equitable disposition of the matter in that case. It also incorrectly applies the meaning of "parties" for purposes of Rule 74. These are novel and important questions of law, especially in the face of the General Assembly expansive as opposed to exclusionary provisions regarding appeals to land development decisions. The Circuit Court cites a vacated Court of Appeals decision (*McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544, (Ct. App. 2008)) in requiring joinder within the thirty day period for filing appeals with failure being fatal to the appeal. (App. p. 23). This Honorable Court accepted certiorari to hear an appeal of that decision but it was rendered moot before consideration because of an agreement between the parties. See *McLeod, Inc. v. City of Charleston* 384 S.C. 438, 682 S.E.2d 488 (2009). Notwithstanding that McLeod is distinguishable as relating to a zoning matter and not a land development permit, Appellant requests this Honorable Court to grant certiorari in this matter to examine the same issue that was before it in the *McLeod* case, a question as to whether required joinder based on judicial economy is an equitable solution rather than a jurisdictional matter.

Email notice as recently addressed in *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, et alia*, 413 S.C. 642, 776 S.E.2d 575 (Ct. App. 2015), is relevant in relation to the notice of appeal provided to Fairways Development, LLC's counsel.

ARGUMENT

I. Did the Court of Appeals fail to apply the correct standard of review regarding the Circuit Court's finding that Fairways Development, LLC was the project developer?

Spanish Wells is the leading South Carolina decision requiring joinder of permittees in appeals of actions regarding development permits. Spanish Wells adopted the majority rule regarding the issue and, in support, cited *Cathcart-Maltby-Clearview Community Council, et al, v. Snohomish County, et al.*, 634 P.2d 853, 96 Wash. 2d 201. In Cathcart, the Washington State Court stated (96 Wash. 2d, p. 206),

"The doctrine of indispensability is not jurisdictional but rather is founded on basic equitable considerations. 3A J. Moore, *Federal Practice* ¶ 19.19, at 19-345 (2d ed. 1979). A financial interest in the subject matter does not by itself make one an indispensable party. *Id.* at 19-129, 19-209."

Spanish Wells adopted the lower court's equitable disposition of the matter by providing the appellant who it required to join the owner-permittee fifteen days to do so, *Spanish Wells*, 295 S.C. at p. 68. (App. p. 13). In the instant appeal, the determination of whether Fairways Development, LLC is the project developer and accordingly a required party is based on such equitable principles. Among other things such joinder is designed to provide for judicial economy. *Spanish Wells* 295 S.C. at p. 69. As the quote above from Cathcart further points out, financial interest by itself does not make one an indispensable party. That the owner has a financial interest is not enough. It must also be involved as the developer.

The Court of Appeals cites *Kurschner v. City of Camden Planning Comm'n,* 376 S.C. 165, 173-174, 656 S.E.2d 3446, 351 (2008) with regard to application of the same standard of

review of a zoning board to an appeal from a planning commission. (App. p. 2). In doing so and affirming the lower court acting as an appellate body, the Court of Appeals adopted Judge Benjamin's finding that Fairways Development, LLC is the project development permittee. (App. pp. 23-24). Judge Benjamin based her decision on the fact the registered agent for Fairways signed the applications. In granting a consecutive motion by Fairways to intervene she stated that as the owner of the property it has an interest in it. (App. p. 31). Just a financial interest is insufficient. (See Cathcart's decision above). The instant development involves more. (App. pp. 12-13). The project application was to approve a green development. (App. pp. 69, 239-253).

Kurschner cites the statutory standard of review for zoning appeals while discussing the legislature's intent in granting a planning board broad discretion. It cites the zoning appellate review requirement (S.C. Code App. 6-29-840 (2005)) related to factual findings in zoning matters by a planning commission. The appeal in this matter relates to land development under Article 7 of the Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. §§ 310, et seq. (1994) (Article 7 at §§ 6-29-1110, et seq.). This appeal is to the review of a staff department public permit approval rather than a planning commission decision as in Kurschner. Notwithstanding, Judge Benjamin did not adopt the local governmental administrative findings as a basis for her legal determination. Kurschner made its ultimate determination based on a review of the county regulations rather than a jury finding review of the commission's or board of appeals' factual findings. Kurschner based its decision mostly on its interpretation of a local ordinance relating to historical values and is distinguishable.

The standard of review for such equitable matters as set forth in *Crowder v. Crowder*, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965), and cited in a divorce action, *Lewis v. Lewis*, 392

S.C. 381, 384, 709 S.E.2d 650 (2011) is a preponderance of the evidence. Lewis states that the Family Court is a court of equity. Lewis still looks to the lower court for broad discretion.

Green Code § 26-186(c), Richland County Code, mandates the property owner to submit the application. (App. p. 239). This is the project's second application, the first not being signed by the land owner but by the project landscape architect. It was returned as incorrect. (App. p. 196, lls. 1-5; id., pp. 198, lls. 1-18). Testimony by Ron Johnson is that his group (unnamed) previously failed to prepare the application properly. He said he is a responsible developer who prepared the plan and worked with staff. (App. p. 316, lls. 1-8). Appellant argues Judge Benjamin disregarded the application process, the Planning Department's administration of the application, and the Planning Commission's findings. The preponderance of the evidence is that Fairways has nothing to do with its development. Judge Benjamin's Order states she considered all matters submitted but her decision is based on only one matter, something required of an owner and not necessarily a developer. She rejected the argument that Fairways did not participate as a developer stating it was "unavailing." (App. p.p. 23-24). Should the Kurschner standard of review as suggested by the Court of Appeals be applied, Judge Benjamin would have had to accept the Planning Department and Planning Commission findings relating to the project developer.[8] The Planning Department did not issue the permit to the agent for Fairways Development, LLC which made the sketch plan review application but to the project landscape architect. (App. p. 49)[9]. Fairways Development, LLC executed the application but did so for Fairways Development Group. A reasonable conclusion is that considering the first

[8] The Court of Appeals suggests the Section 6-29-840 required standard of review as required for appeals from zoning board decisions be applied in the appellate review; i.e. the findings of the zoning board must be treated the same as findings of a jury. App. p. 2 (Para. 1)

[9] John Champoix is an employee of Sustainable Design Consultants, Inc. The project sketch plans state they are prepared by Sustainable for Longcreek Associates, LLC. Mr. Wren refers to Champoix App. p. 198 as a project engineer but in fact he is the landscape architect. App. p. 293. Mr. Champoix' stamp is as a South Carolina Certified Landscape Architect.

application's failure, the owner had to apply to comport with Green Code § 26-186(c). The application process clearly established that Fairways Development LLC and Fairways Development Group are two different entities and that Fairways Development Group is the developer. (App. pp. 11-13). The Subdivision Application designated the property owner as Fairways Development Group (John Bakhaus) and identified the applicant as Fairways Development Group (John Bakhaus). (App. p. 70). The Planning Commission's findings including Ron Johnson's testimony (App. p. 94), even though edited from the actual testimony (App. p. 316), are that Ron Johnson is the developer who worked with staff on the project. Fairways Development LLC or its agent did not participate in the Planning Commission's examination of the appeal. (App. p. 91)[10]

Two other factors relating to the preponderance of the evidence in the determination as to a developer to be joined are that Fairways Development, LLC was in the process of selling the property at the time of the Planning Commission's hearing on Appellant's appeal. See the recusal statement by Planning Commission Member Kathleen McDaniel as read into the record before the hearing by Chairman Palmer. Her recusal is based on her law firm representing the seller of the subject property (Fairways Development, LLC was the owner at the time) and accordingly she could not participate. (App. p. 87, lls. 19-23 and p. 89, l. 8).

Whether this Court determines Appellant's argument regarding collateral estopple is valid as argued below or not, it is undisputed that Fairways excused itself from a collateral matter in which the Plaintiff in that matter asked as relief the return of the project to the DRT for reexamination, basically the same relief he asks for in the current matter. (App. pp. 66-67.) If Fairways declined participation in that matter although invited to do so, its declination is reason to believe it has insufficient interest in the current matter to be considered a necessary party.

[10] Only Appellant and Ron Johnson are listed; the Planning Director also participated but is not listed.

Judge Benjamin's findings and decisions may be based on financial interests and be sufficient for intervention and even the Declaratory Judgment Act joinder requirement, but such financial interests are not sufficient to be determined an indispensable party in land development issues. Her findings are in the face of divergent requirements in the Green Code for the owner and the project developer. They disregard Richland County administrative determinations. That it sold the property quickly after the permit was published was not considered by Judge Benjamin but is a factor this Court can consider. (App. pp. 264-265) Appellant argues Judge Benjamin's dismissal based on Fairways Development LLC being the developer does not reflect the preponderance of the evidence as to Fairways Development, LLC's role in the project or the DRT and Planning Commission's findings and is an abuse of her discretion. (App. pp. 12-13).

The Planning Department and the Planning Commission in their administration of the project and its appeals, knew Fairways Development LLC was not the developer for the Green Code project. Fairways did not participate in the Planning Commission's hearing. There is no evidence it expended any funds for the project. The application fee was waived because the developer paid for it in the first application. (App. pp. 68 and 71). Ron Johnson's testimony, as adopted in the Commission's findings, is that he expended funds for a tree study and had the wetlands surveyed and delineated. The sketch plans were prepared for Longcreek Associates, LLC, not Fairways Development LLC. (App. p. 293). An affidavit by R. Steve McNair, not before Judge Benjamin or the Court of Appeals, but available for this Court's consideration, is that his group is spending $60,000.00 per year on interest expense, $12,000 per year on property taxes, and that they have spent $50,000 in site planning, surveying, and civil design. (App. pp. 259-261, Ct. of Appeals Order, App. pp. 500-501). Fairways is not the designated public permittee as required by S.C. Code Ann. §6-29-1150(B) (1994, amended 2003). The documents

supporting the application for the most part refer to Fairways Development Group as the project developer. Dismissal of Appellant's appeal for failure to join Fairways is not equitable, it does not provide judicial economy, and it is based on an erroneous finding and a disregard of the County's findings. It was an abuse of discretion. The Circuit Court and the Court of Appeals erred in determining Fairways Development LLC was the developer. An ancillary equitable consideration involving the application of judicial economy is that Fairways has been joined through intervention and is bound by any findings in the appeal. It also has had ample opportunity to participate in this action and has done so.

II Did the Court of Appeals err in requiring a Rule 59(e), SCRCP motion and a specific lower court determination notwithstanding a specific court rejection to preserve Appellant's collateral estopple argument?

Appellant joined Fairways Development, LLC initially as a defendant, and later as a respondent, in a suit seeking declaratory judgment. Judges Lee and Cooper acted on the collateral matter around the same time as the instant appeal and dismissed Fairways from those complaints pursuant to its declarations that it was not concerned enough to meet the declaratory judgment threshold. This issue was presented to Judge Benjamin as a reason why Appellant did not join Fairways in the instant matter. Judge Benjamin, in determining Fairways to be such an interested party as to be considered the project development permittee, disregarded Judges Lee and Cooper's decisions. *Newton v. Zoning Board of Appeals for Beaufort County*, 396 S.C. 112, 719 S.E.2d 282 (Ct. App, 2011) establishes a general rule that an issue must specifically be acted upon to preserve it for appellate review. In Newton, the master did not rule on the issue even though it was argued. Accordingly Newton found the issue not preserved for review. The issue in the current matter is whether Fairways should be precluded from stating it has an interest in this appeal after it successfully was dismissed from similar claims in a collateral matter. This

issue applies directly to Fairways' status with regard the project's development. That such status was previously examined in a collateral matter was briefed and argued before the circuit court. See the citations where in the Amended Record Appellant made the arguments in Appellant's Petition for Rehearing. (App. p. 6). It went to the main issue; i.e. whether Fairways Development LLC, as the owner of the property being developed, had or claimed any interest in the matter. That is the standard applied for the joinder requirement in declaratory judgment requests. S.C. Code Ann. § 15-53-80 (2013). Judge Benjamin, in her dismissal stated,

"Although the Subdivision Review Application and Sketch Plan were submitted in the name of 'Fairways Development Group (John Bakhaus),' they were each signed by the registered agent for Fairways Development on behalf of Fairways Development LLC. Thus the Court finds that Fairways is the development permittee in this matter." (App. pp. 23-24).

Aside from the apparent non sequitur, the Court's specific finding on the issue is a rejection of Appellant's argument that Fairways should be precluded from professing its interest in the current matter because of its petition and its lack of interest in the project as enunciated and litigated in a separate matter. Judges Lee and Cooper had already acted on the matter. The Court of Appeals in affirming the Circuit Court in this matter cites *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998). It adopts Wilder that for issue preservation an issue must have been raised to and ruled upon by the trial (court) to be preserved for review. (App. p. 2). The Wilder court (330 S.C. , p. 77) , citing *Hubbard v. Rowe*, 192 S.C. 12, pp. 19-20 ,5 S.E.2d 187 (1939) relating to a matter of law, actually determined that by expressly adopting a result contrary to what was being offered, it was unnecessary for the Appellant to make any post-trial motions for preservation of the issue. Judge Benjamin in dismissing the Appeal in this case said it considered memoranda submitted by the parties, arguments of counsel, and all matters submitted before granting Fairways' Motion to Dismiss. (App. p. 21). The arguments were specific enough for Judge Benjamin to understand the issue. Her disregard of its conclusion is a

specific rejection of Appellant's collateral estopple argument. See Appellant's discussion of the issue more fully in his Reply Brief (App. pp. 484-486) where he lays out his argument regarding the collateral estopple preclusion.

III. Did the Court of Appeals err by treating Rule 74, SCRCP, as it applies to appeals from local administrative actions, a jurisdictional matter requiring dismissal of an appeal should notice not be made to any potential party within the thirty-day appellate period?

Subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." *Skinner v. Westinghouse v. Electric Corp.*, 380 S.C. 91, 93-94, 668 S.E.2d 795, 796 (2008). Skinner also stated "Our jurisprudence confirms that jurisdictional appealability issues are governed by statute, not by the rules of civil procedure." Id. ,380 S.C. at 94, 668 S.E.2d at 797.

The General Assembly in S.C. Code Ann. § 6-29-1150 (C) and (D)(1) (1994, amended 2003), warranted circuit courts to act on appeals from local planning commission decisions regarding local staff actions to approve or disapprove land development plans. Paragraph (D)(1) of such provision requires an appeal to be taken to court within thirty days of actual notice of the decision. Rule 74, SCRCP, states appeals to the circuit court must follow the procedures set forth in the statute that authorizes the appeal. In this regard, Rule 74 is relevant only if no procedures for an appeal are stated. Rule 74 requires that notice of an appeal must be served on all "parties" within thirty days of receipt of the written decision. The appeal in the instant matter is pursuant to S.C. Code Ann. § 6-29-1150 (C) (1994, amended 2003). The General Assembly in S.C. Code Ann. § 6-29-1155(A) (2003) set forth a joinder requirement for property owner appeal mediations that disregarded the thirty-day requirement for taking the appeal to the circuit court. It states if the intervention is by a party of "substantial interest" it must be allowed to intervene. S.C. Code Ann. § 1155(A) (2003) does not limit the intervention of the "any party" in

this regard; it only mandates intervention for a person of substantial interest. Such intervention as anticipated by the General Assembly obviously would occur well after the thirty day period specified in Rule 74, SCRCP. The statutory construct obviously did not anticipate the thirty day requirement for joinder matters. (App. p. 5).

In *State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39 (2004) this court reiterated its holdings that the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction, not the circuit court's subject matter jurisdiction. Once the court has the subject matter jurisdiction, it may regulate joinder and other matters. Rule 20, SCRCP, relating to court procedures has no specific limiting period within which to join persons. The Brown Court examined application of the Rule 74, SCRCP requirements. Brown cited *Witzig v. Witzig*, 325 S.C. 363, 479 S.E.2d 297 (Ct. App 1996) with regard to Rule 74's time constraints. It adopted the Reporter's Note that Rules 74 and 75, SCRCP, are for the uniformity of appeals where there is no other provision by statute. In Brown, the appellant did not serve notice on the State, a party to the action from which he had appealed, citing the statute authorizing the appeal had no such requirement. The court found that notwithstanding the lack of notice, the court still had jurisdiction to hear the matter. See also *Eagle v. South Carolina*, 301 S.C. 402, 406, 392 S.E.2d 187 (Ct. App 1990) where the court found that nothing in Rule 74, SCRCP, requires an appellant to serve a notice of appeal.

Regarding preservation, *Newton v. Zoning Board of Appeals for Beaufort County , supra* 396 S.C. at 117, states gratuitously regarding a procedure for issue identification requirements under S.C. Code Ann. §§ 6-29-850, 820, and 840(A) (2004 and Supp. 2010 re 820 and 840(A)),

"This procedure does not allow for issue identification, or *even party identification*, prior to the filing of a petition with the circuit court. The statute does not require the appellant to

attend a public hearing on the Board's decision or even to communicate his concerns to the Board prior to filing his petition with the circuit court. Thus, the sole preservation requirement for a first-level appeal of a zoning board's decision is that an appellant must set forth his issues on appeal in a written petition and file that petition with the circuit court before the thirty-day filing period expires." (Emphasis added).

While Newton is regarding a zoning appeal, the requirement for statutory jurisdiction and party identification is similar. S.C. Code Ann.§ 6-29-1150 (D) specifies only for an appeal from a staff action, it must first obtain finality by appealing to the planning commission and then take the appeal from that decision to the circuit court within thirty days after notice of the appeal.

Even though Fairways Development, LLC was joined to the appeal as argued above, Appellant does not consider it a necessary party or the project developer. Such joinder came upon Fairways' motion filed two months after Appellant filed his appeal with the circuit court. Fairways knew of the action because Appellant sent it notice within the thirty day period. (App. p. 142, para. 5). Judge Benjamin in her Order found that 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" but that he did not *join* Fairways within that thirty day period. (App. p. 24, last sentence of first full paragraph). Rule 74, SCRCP, does not require or mention joinder. It speaks to notice. Appellant provided the attorney for Fairways notice in the nature of a copy of the appeal by email within the thirty day period.[11] (App. p. 123). Judge Benjamin's requirement that joinder be made within thirty days of receipt of the notice is not required by Rule 19, SCRCP. Appellant notified Fairways through its attorney and accordingly, Fairways was provided sufficient notice. See also Appellant's Request for Rehearing at App. pp. 10-12.

[11] See the discussion of email notifications in South Carolina considering *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, et alia*, 413 S.C. 642, 776 S.E.2d 575 (Ct. App. 2015) with respect to appeals under Rule 203(b)(2), SCACR.

This Court in *Bancohio Nat'l Bank v. Neville*, 310 S.C. 323, 327, 426 S.E.2d 773 (1993) determined there is no limitation on a court's power to add an indispensable party. Judge Benjamin in the instant matter did join Fairways through intervention. (App. p. 29).

The Reporter's Note to Rule 74 is that it supplies omissions to the statutory warrant where no provision is made for the time to file a notice of intention to appeal, the form of the record on appeal, or how it shall be transmitted. The Court of Appeals erred by treating Rule 74, SCRCP, as the basis for Appellant's appeal in the face of the statutory requirements, all of which appellant met.

1. Does the term "all parties" in Rule 74, SCACR, apply to any potential party as suggested by the Circuit Court and the Court of Appeals or just to parties that were of record in the appealed matter?

The term "parties" in Rule 74 is not defined. Respondents would argue that it refers to anyone who might be a required party, currently or otherwise. Judge Benjamin and the Court of Appeals (App. p. 2) agree with this proposition. Appellant contends it refers to parties to or participants in the planning commission appeal, specifically parties of record. The reference to "parties" is to a technical term that relates to an entity that already is a party to the proceeding; a plaintiff, defendant, intervener, or respondent. The Planning Commission is the respondent. No person other than appellant and another person (Ron Johnson) who testified he was the project applicant signed up to speak. (App. pp. 89 (l. 14)-90 (l. 5-7)). Fairways Development LLC did not participate as a party or otherwise to the administration of the staff review or the Planning Commission's hearing on the appeal. See (App. p. 316 lls. 1-13).

The Court of Appeals would have Rule 74, SCRCP, apply to any potential future parties in land development appeals so that an appellant must determine and notify a potential respondent developer even though not clearly designated or face dismissal. A potential party, as

happened in the instant matter, could lurk in the background until after the thirty-day period and then file for dismissal. On the other hand such a party, if served, could move for dismissal and sanctions as Fairways did when Appellant served it in the collateral matter. The South Carolina Rules provide some help in understanding the meaning of the Rule 74 reference to "parties." Rule 17(a), SCRCP, states no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest. It allows a reasonable time for, among other things, joinder of such a party. The Reporter's Note regarding the last sentence of Rule 17(a) states the joinder provision is intended to prevent forfeiture in those cases in which determination of the proper party to sue is difficult or where there has been an honest mistake. The Note specifically addresses the barring of statute of limitations. Rule 19, SCRCP, adopts this philosophy of jurisprudence in not mandating specific limiting periods within which joinder must be made. (App. pp. 10-11). It refers to the objects of the joinder action as persons, not parties. Rule 203(b)(6), SCACR, is more specific in its similar requirement for notice of intent to appeal to parties in appeals to this Court. It refers to "all parties of record." With regard to appeals to the circuit court, Rules 17 and 74, SCRCP, when read together provide the logical conclusion that the "parties" referred to in Rule 74 are entities that actively participated in the matter being appealed to the circuit court, in the most expansive manner, or are parties of record.

Judge Benjamin disregarded that the owner did not participate as a party in the Development Review Team's public hearings on the sketch and concept plan approval or the Planning Commission's hearing on Appellant's appeal of that approval. (App. pp 91-94). Ron Johnson while testifying he was the developer is not mentioned on the permit or otherwise readily apparent as the project developer. Other entities represented as the developer are Longcreek Development, LLC, (App. p. 267), Longcreek Associates, LLC (App. p. 293) and

Fairways Development Group, (App. p. 73). The permit is dated December 7, 2012. On December 13, 2012, Fairways Development, LLC sold a 22 acre parcel, the first part of the project to Longcreek Associates, LLC, (App. pp. 264-265). Longcreek Associates, LLC then sold the same parcel three and a half months later to SPPLA, LLC., (App. p. 263).[12] The Fairways Development Group, as mentioned in the sketch plan sketch plan submittal (App. p. 71) is not incorporated, it has no public persona, its members are not known, it is not an association, and with the various possibilities of a specific developer as mentioned above, it appears to constantly be changing. Any of the parties mentioned above could allege they are the developer and a necessary party. They also could sue for sanctions if joined as Faitways did when it was joined in the FOIA suit. Fairways Development LLC no longer owns a portion of the project. The permit was issued to the plan scrivener rather than an actual named principal. Appellant has no objection to whoever wants to join in the proceedings as developer if it can substantiate such a role. Rule 74, SCRCP, does not mandate dismissal of the appeal if the statutory requirements for appealing are met. The Recorder's Note with regard to the last sentence of Rule 17(a), SCRCP, "the determination of the proper party to sue is difficult" is relevant here. See also App. pp. 6-7.

2. Did the Court of Appeals unnecessarily limit the Spanish Wells equitable requirement for judicial economy by inserting a mandatory jurisdictional limiting period within which an appellant must join potential parties?

[12] The affidavit from R. Steve McNair states he is a member of the corporation that purchased the property from Fairways Development, LLC which bought it immediately after the permit was published (December 13, 2012; App. P. 265, Permit, December 7, 2012, App. P. 74). The affidavit is dated May 14, 2014. At that time, Longcreek Associates, LLC had then sold the property to SPPLA, Inc.(April 3, 2013, App. P. 263). S.C. Code Ann. § 6-29-1190 (1994), prohibits the transfer of title of such a property being developed unless the development plat was recorded with the Registrar of Deeds. There is no record Appellant could find such had occurred during the lower court proceedings. Appellant made reference to these matters in his Reply Brief, App. pp. 489-491. After Respondent's Motion to remove this from the Record, the Court of Appeals issued the Order at App. pp. 500-501. The Order specifically is to the Court of Appeals and does not limit this Court's consideration.

The Circuit Court in Spanish Wells required joinder for judicial economy and, in an equitable disposition, granted its appellant fifteen days to join a known permittee. *Spanish Wells*, 295 S.C. at p. 68. The Spanish Wells lower court determination was that Rule 19, SCRCP, required such a joinder. It did not find it had to be made within any specified period other than the fifteen days it ordered. Those days were well past the thirty day jurisdictional period for taking the appeal to the circuit court. It considered it had jurisdiction to do so and this Court agreed. The Court of Appeals reversed the Circuit Court stating the involved party was a proper but not necessary party and joinder was not required. Spanish Wells in reversing the Court of Appeals stated a permittee is a necessary party to an action to revoke a permit to ensure the most vitally interested party participates in the appellate process. The Court said this insures judicial economy, an equitable matter with the most affected party's interest considered and the developer being bound by the decision. None of these reasons is affected by joinder in the instant case. Judge Benjamin found the motion to intervene was timely because no action had been taken on the appeal. (App. p. 31, 2d para). The Appellant in the instant case does not seek to revoke the permit, but only to require the Richland County Planning Department to enforce certain provisions in the county ordinance upon which the application was based. No parties, not otherwise joined to the proceedings, have presented themselves as interested. If they should, and can establish their involvement, they could be joined. By mandating a dismissal for not determining who the developer is and joining it within the thirty day period, the equitable basis for judicial economy is lost. The jurisprudence suggested by Rule 17, SCRCP, and applied in Spanish Wells would be lost. (App. pp. 12-13).

The respondents argue that notwithstanding the vacation of *Friends of McLeod, Inc. v. City of Charleston,* 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008), its legal analysis is

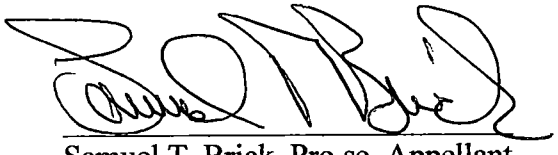
persuasive. That analysis states an amendment is not available to appeals to add parties. No such amendment is relevant in the instant matter. As in Spanish Wells, the issue is joinder. The Court of Appeals McLeod case based its determination in part on *Vulcan Materials Co. v. Greenville County Board of Zoning Appeals*, 342 S.C. 480, 596 S.E.2d 892 (Ct. of App. 2000). That case speaks to the jurisdictional quality of appeals to zoning board decisions. It dealt with a new provision and the county's implementation date. Judge Benjamin acknowledges that Appellant timely filed his appeal and sent Richland County a copy of the matter. Judge Benjamin clearly considered she had jurisdiction to hear the appeal. Vulcan does not address the jurisdictional issue of whether timely subsequent joinder of an entity as a necessary party is restricted by a thirty day limitation. That is a novel issue. Vulcan states that adherence to the statutory requirement for bringing the appeal within a specified period in the first instance is jurisdictional. The statutory requirement for appeals from planning commission decisions is that it "must be taken to the circuit court within thirty days after actual notice of the decision." S.C. Code Ann. § 6-29-1150(D)(1) (1994, amended, 2003). Appellant did that and provided notice to the party of record, the Richland County Planning Commission and later, but still within the thirty day period, to counsel for Fairways Development, LLC.

Making such joinder of an undesignated or unknown developer required within the thirty days an appellant has to bring the appeal to the circuit court, as in the instant case when a party who might be a developer is so joined without harm, is an unneeded expansion of the Spanish Wells decision. It further undercuts the jurisdictional warrant from the General Assembly authorizing appeals "by any party in interest." The circuit court and Court of Appeals have provided no compelling reason for such a strident conclusion in such an equitable disposition.

CONCLUSION

There is no controlling decision that an appellant must join within the thirty-day period within which to bring an appeal whoever might be a development permittee to an appeal from a land development decision or face dismissal. Even if there were, the preponderance of the evidence in the instant matter is that Fairways Development, LLC, while owner, is not the developer. It may have a financial interest in the matter but that is insufficient for it to be considered the developer under Spanish Wells. Fairways already claimed disinterest and a Circuit Court dismissed it in a case seeking similar relief. It sold the first development phase almost immediately after the DRT approved the project. Equity in this matter demands return of this matter for an examination of the county ordinances as interpreted in the instant county green code application. Fairways is a party and is not and has not been jeopardized by not being joined within the statutory period to bring the action. The Court of Appeals in affirming the lower court's dismissal inserted a Rule 74, SCRCP, requirement. Instead of deferring to the statutory warrant for jurisdiction, the Court read Rule 74 with that warrant and by doing so affirmed the lower court's dismissal for failure to timely join. It failed to examine other rules and that substantial authority exists to limit Rule 74 rather than to give it an expansive interpretation. Appellant respectfully requests this Honorable Court to exercise its discretion, grant certiorari, and further hear the arguments presented to the Court of Appeals and herein.

Respectfully submitted,



Samuel T. Brick, Pro se, Appellant
124 Runneymede Drive
Blythewood, South Carolina 29016
sbrick2011@gmail.com
803 546 4895

September 13, 2016

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
SEP 13 2016
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE DEANDREA GIST BENJAMIN
CIRCUIT COURT JUDGE

CIVIL ACTION NO. 2013-CP-400-1643

Opinion No. 2016-UP-261 (S.C. Ct. App., filed June 8, 2016)

Samuel T. Brick

PETITIONER,

versus

Richland County Planning Commission and
Fairways Development, LLC, Intervenor

RESPONDENTS

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for the Respondents with a copy of the Petition for a Writ of Certiorari and Appendix by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Michael B. Wren, Esq.
Andrew F. Lindemann, Esq.
Davidson & Lindemann, P.A.
Post Office Box 8568
Columbia, SC 29202-8568
(803) 806-8222
Attorneys for Richland County Planning Commission, Respondent

Tobias G. Ward, Jr., Esq.
J. Derrick Jackson, Esq.
Tobias G. Ward, PA
Post Office Box 6138
Columbia, SC 29260
(803) 708-4200
Attorneys for Fairways Development LLC, Intervenor, Respondent

Samuel T. Brick, Pro Se, Appellant and Petitioner
124 Runneymede Drive
Columbia, South Carolina 29016
803 546 4895
sbrick2011@gmail.com

September 13, 2016

September 13, 2016

Hand Delivered

The Honorable Daniel E. Shearhouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Samuel T. Brick, Appellant v. Richland County Planning Commission and Fairways Development, LLC, Intervenor, Respondents; Case No. 2013-CP-40-1643; Court of Appeals Case No. 2014-000583; Opinion No. 2016-UP-261 (S.C. Ct. App., filed June 8, 2016)

Dear Mr. Shearhouse:

Enclosed for filing are the original and six copies of my Petition for Writ of Certiorari, with proof of service, along with a check in the amount of $100.00 for the filing fee. Also enclosed are an unbound copy of the Appendix and a bound copy. Note, for scanning purposes, in Volume 1 of the Appendix the Amended Record is included in two-sided fashion. See Appendix pages 17 through 360.

By a copy of this letter, we are serving counsel for the Respondents with a copy of the petition and Appendix (both volumes) and the Clerk of the Court for the South Carolina Court of Appeals the petition without the Appendix.

Sincerely,

Samuel T. Brick, Appellant, Pro Se
124 Runneymede Drive
Blythewood, SC 29016
803 546 4895
sbrick2011@gmail.com

Enclosures

cc: The Honorable Jenny Abbott Kitchings (w/encl)(petition only)
Andrew F. Lindemann and Michael Brian Wren, both of Davidson & Lindemann, PA of Columbia for Respondent Richland County Planning Commission (w/encl)
Tobias Gavin Ward, Jr. and James Derrick Jackson, both of Tobias G. Ward., PA, of Columbia for Respondent Intervenor Fairways development, LLC. (w/encl)

Mr. Samuel T. Brick
124 Runneymede Dr
Blythewood, SC 29016-9469

★★ SUPPORT OUR TROOPS ★★

The Honorable Jenny Abbott Kitchings
1220 Senate Staff
Post Office Box 11629
Columbia, SC 29211