

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED

JUL 11 2017

J. Derham Cole, Circuit Court Judge

SC Court of Appeals

Case No. 2016-CP-42-03288

Elizabeth Earley, John Earley, Lloyd Wilkins, Henry Kerns,
Marie Mills Kerns, Donna Pearson, and Bruce Pearson

Appellants,

v.

The City of Woodruff, SC, and the Terraces at Woodruff, a
South Carolina Limited Liability Company,

Respondents.

MOTION TO DISMISS
APPELLANTS' NOTICE OF APPEAL

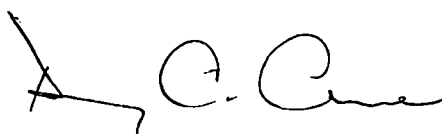
The Respondents move to dismiss the Notice of Appeal filed by Appellants, dated June 23, 2017, and received by mail by the undersigned on June 26, 2017. This motion is made pursuant to Rule 240, SCACR, and Rule 203(b)(1), SCACR, on the ground that the Notice of Appeal is untimely and premature under Rule 203(b)(1), SCACR, inasmuch as the Appellants, as Plaintiffs in the Circuit Court case, have a pending "Motion to Reconsider" under Rule 59(e), SCRCR, which was filed in the Circuit Court on June 2, 2017. (A copy of the Motion to Reconsider is attached to Respondents' Memorandum in Support.) Plaintiffs' Motion to

Reconsider has not been ruled upon below and is scheduled for argument in the Circuit Court on July 31, 2017.

The time for filing of a Notice of Appeal is stayed by the filing of a Rule 59, SCRCR, motion to alter or amend the judgment and runs from receipt of written notice of entry of the order granting or denying such motion. Rule 203(b)(1), SCACR. No such order has been entered and the time for appeal is stayed.

Pursuant to Rule 240(c), SCACR, Respondents also submit the attached Memorandum in Support of their motion.

Respectfully submitted,



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and

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July 11, 2017

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RESPONDENTS' MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS

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Attorneys for Respondent
The City of Woodruff

This Memorandum is submitted in support of Respondents' Motion to Dismiss Appellants' Notice of Appeal.

As stated in the Motion to Dismiss, the ground for the Motion is that the Notice of Appeal in this case is untimely and premature under Rule 203(b)(1), SCACR. Rule 203(b)(1) provides in pertinent part:

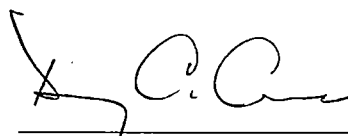
When a timely motion for judgment n.o.v. (Rule 50, SCRCF), motion to alter or amend the judgment (Rules 52 and 59, SCRCF), or a motion for a new trial (Rule 59, SCRCF) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

Appellants, as Plaintiffs below, filed a "Motion to Reconsider, Rule 59(e), S.C.R.C.P." in Circuit Court on June 2, 2017. A copy of the Motion to Reconsider is attached. That Motion requests that the Circuit Court reconsider its Order entered May 24, 2017. That Order is the same Order addressed by Appellants' Notice of Appeal to this Court.

The Motion to Reconsider is pending and has not been ruled upon by the Circuit Court. A hearing on the Motion to Reconsider is scheduled for July 31, 2017.

Since the Motion to Reconsider has not been decided below, the Notice of Appeal was filed prematurely and is untimely, and should be dismissed.

Respectfully submitted,



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Attorney for Respondent Terraces at Woodruff

July 11, 2017

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
)	
ELIZABETH EARLEY, JOHN)	C.A. # 2016-CP-42-3288
EARLEY, et al.,)	
)	
Plaintiffs,)	MOTION TO RECONSIDER
)	Rule 59(e), S.C.R.C.P.
-versus-)	
)	(Jury Trial Demanded)
THE CITY OF WOODRUFF, SC,)	
and THE TERRACES AT)	
WOODRUFF, a South Carolina)	
Limited Liability Company,)	
)	
<u>Defendants.</u>)	

THE PLAINTIFFS in the above-captioned civil action challenging the zoning practices of the City of Woodruff, through counsel, hereby move the Court to alter and amend its ORDER dismissing the Complaint, entered May 24, 2017 (the "Order"), on the basis of the following considerations:

I. Similarly-Situated Plaintiffs Have Been Permitted to Challenge Spot Zoning

The Court granted its motion to dismiss in part on a finding that the Plaintiffs lack standing to challenge any zoning decision made by the City of Woodruff with respect to the property located along Armory Drive which is the subject of the Complaint. In its Order, the Court interpreted the standing limitation of South Carolina Code Section 6-29-760(C) in its narrowest possible sense, as meaning "touching" or "sharing a common boundary" with the property whose zoning designation is being challenged. (Order, p. 7). Although the Plaintiffs alleged that they live directly across the street, their neighborhood is separated from the subject property by Armory Drive, the

existence of an intervening street is found to be a sufficient basis for denying standing to the Plaintiffs. (Order, p. 8).

Moreover, although the Court declined to consider the Plaintiffs' affidavits at the January 5, 2017, hearing, those affidavits clarify that when the Complaint alleged that the Plaintiffs life "in the immediate vicinity" of and "in the neighborhood directly across Armory Drive from" the Defendants' project, in the case of several Plaintiffs there is no other intervening property between the project in question and the Plaintiffs' properties *except* Armory Drive. In other words, several Plaintiffs are separated from the project in question *only* by Armory Drive. The Plaintiffs' affidavits are attached hereto as **Exhibits "A" – "D"** and are incorporated herein by reference.

The Plaintiffs respectfully submit that the Court's interpretation of South Carolina Code Section 6-29-760(C) is significantly narrower than the interpretation placed upon this statute and its predecessors by the courts of this State. For example, in *Bob Jones University, Inc. v. City of Greenville*, 133 S.E.2d 843, 243 S.C. 351 (1963), the South Carolina Supreme Court reached the merits of a spot zoning case despite the fact that the parties' properties were separated by a 50-foot roadway. The subject property was located:

on the southern side of Wade Hampton Boulevard . . . which is a four land divided superhighway between Greenville and Spartanburg. Just east of the Wilson property and also fronting on Wade Hampton Boulevard is the property of the appellant. However, these two properties are separated by a street known as White Oak Drive, of a width of approximately fifty feet.

Bob Jones University, Inc. v. City of Greenville, 133 S.E.2d at 845, 243 S.C. at 356. Despite this finding, the South Carolina Supreme Court proceeded to reach and rule upon the merits of the plaintiff's spot zoning complaint.

In *Knowles v. City of Aiken*, 407 S.E.2d 639, 305 S.C. 219 (1991), the South Carolina Supreme Court addressed the standing issue somewhat less directly. In *Knowles*, the City of Aiken

had “annexed a tract of land *near* the [plaintiff’s] residence” (Italics added). However, the Court did *not* find that the Plaintiff’s lack of adjacency to the tract in question was adequate to deny her standing to challenge the City of Aiken’s zoning decision. Rather, the Court limited itself to questioning the plaintiff’s standing as she had “failed to plead a specific legally cognizable interest that has been directly and adversely affected, has failed to join the owners of the [tract in question], and has failed to exhaust her administrative remedies” *Knowles v. City of Aiken*, 407 S.E.2d 640-41, 305 S.C. 220-21.

Admittedly, both *Bob Jones* and *Knowles* were decided prior to enactment of the Comprehensive Planning Enabling Act of the 1994; however, Plaintiffs are unaware of any legislative history or case law to suggest that the legislature intended to withdraw the right of owners separated from a rezoned property by nothing but a roadway to challenge such rezoning. Apart from *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008), in which the Supreme Court found that a plaintiff “whose sole interest for objecting to [the] zoning board’s action [was] to prevent competition,” and whose property (which hosted a cell tower) was approximately a mile away from the rezoned parcel, no South Carolina appellate court has ruled on the meaning of the word “adjoining” as used in Section 6-29-760(C); and even the *ATC South* court dealt with Section 6-29-760(C) summarily. Thus, as pertains to the right of owners such as the Plaintiffs in the current litigation, whose property is located immediately across a street or roadway from a rezoned parcel, the only extant precedent is favorable to granting the Plaintiffs standing.

II. The Woodruff Zoning Ordinance Recognizes the Rights of Owners of “Surrounding Property” to Protest Zoning Changes

Section 6-26-706(C) should be read in conjunction with the text of the Official Zoning Ordinance of City of Woodruff (the “Ordinance”), excerpts from which are attached as **Exhibit**

“E”. Article XIII of the Ordinance, entitled “Amendments,” recognizes that certain property owners have a special interest in proposed zoning changes. Specifically, in Section III, Paragraph 3, “Notice of Hearing,” the Ordinance provides that the City must, *in addition* to publishing notice of zoning hearings to the general public, post the property concerned or mail “notices to the owners of surrounding property.” Moreover, Paragraph 5 in the same section of the Ordinance extends a special right of protest to owners whose lots are included in a proposed zoning change *and* to “those immediately adjacent to in the rear or on either side extending two hundred and fifty (250) feet from the street frontage of such opposite lots” Some of the Plaintiffs in this action received such letters. The Woodruff Zoning Ordinance itself therefore clearly recognizes that landowners in the Plaintiffs’ situation have an enhanced interest in zoning changes such as the one at issue in the current litigation.

III. S.C. Code Section 6-29-760(D) Does not Preclude the Plaintiffs from Seeking a Declaratory Judgment

On Page 10 of the Order, the Court finds that challenges to the City of Woodruff Zoning Ordinance are time-barred by the provisions of Section 6-29-760(D) of the South Carolina Code. However, the Plaintiffs have not asked the Court to invalidate the 2005 Zoning Ordinance, but rather to declare the substance of that ordinance as it pertains to the zoning designations of the property which is the subject of this dispute and of the Plaintiffs’ own properties. The Plaintiffs contend that all of the properties in question were originally properly zoned R-1A and that the City of Woodruff, through failure to abide by basic procedural formalities, has never effectively changed the zoning designations of any of the impacted properties.

WHEREFORE, the Plaintiffs respectfully request that the Court reconsider and withdraw its May 24, 2017, Order dismissing the Complaint and grant a jury trial on the causes of action alleged therein.

Respectfully submitted,

s/Nathan A. Earle
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ATTORNEY FOR THE PLAINTIFFS

June 2, 2017

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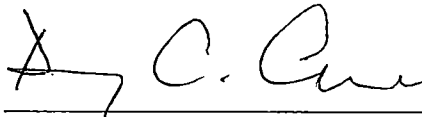
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Respondents.

PROOF OF SERVICE

I certify that I have served the Respondents' Memorandum in Support of Motion to Dismiss on the attorney for Appellants by depositing a copy of it in the United States Mail, postage prepaid, on July 11, 2017, addressed as follows:

Nathan A. Earle, Esquire
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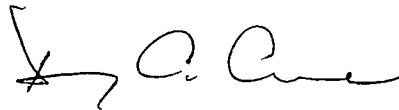
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JUL 11 2017

SC Court of Appeals

July 11, 2017

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

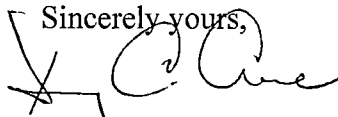
RE: Elizabeth Earley, John Earley, Lloyd Wilkins, Henry Kerns, Marie Mills Kerns,
Donna Pearson, and Bruce Pearson v. The City of Woodruff, SC, and the
Terraces at Woodruff, a South Carolina Limited Liability Company
Case No. 2016-CP-42-03288

Dear Ms. Kitchings:

Please find attached for filing an original and seven copies of the Motion to Dismiss Appellants' Notice of Appeal and Respondents' Memorandum in Support of Motion to Dismiss relative to the above-captioned matter. Also enclosed is a check in the amount of \$25.00 representing the filing fee. Once filing is complete, please return the clocked copies to us in the enclosed self-addressed, stamped envelope.

By copy of this correspondence to the attorney for Appellants, I am hereby serving upon Mr. Earle a copy of the Motion to Dismiss and Memorandum in Support. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely yours,



Danny C. Crowe

DCC/dmb
Enclosures

cc: Nathan A. Earle, Esquire
Terry F. Clark, Esquire (via e-mail)
Michael A. Graham, Esquire (via e-mail)