

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

RECEIVED

J. Derham Cole, Circuit Court Judge

DEC 13 2017

Case No. 2017-002095

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SC Court of Appeals

Elizabeth Earley, John Earley, Lloyd Wilkins,  
Henry Kerns, Margie 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.

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INITIAL BRIEF OF RESPONDENTS

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## STATEMENT OF ISSUES ON APPEAL

- I. HAVE APPELLANTS FAILED TO PRESERVE FOR APPEAL ANY ISSUE RELATED TO THE CIRCUIT COURT'S RULING THAT THE CITY SUBSTANTIALLY COMPLIED WITH THE NOTICE REQUIREMENTS OF S.C. CODE SECTION 6-29-760(A)?
- II. BY FAILING TO PRESERVE FOR APPEAL THE ISSUE OF THE CIRCUIT COURT'S RULING ON SUBSTANTIAL COMPLIANCE, ARE APPELLANTS NOW BARRED BY THE "TWO-ISSUE RULE" FROM ANY CHALLENGE ON APPEAL TO THE CIRCUIT COURT'S RULING ON THEIR LACK OF STANDING TO CONTEST THE 2016 REZONING?
- III. HAVE APPELLANTS FAILED TO PRESERVE FOR APPEAL ANY ISSUE RELATED TO THE CIRCUIT COURT'S RULING THAT APPELLANTS ARE BARRED BY THE TIME LIMITATIONS OF S.C. CODE SECTION 6-29-760(D) FROM CHALLENGING THE CITY'S 2005 OFFICIAL ZONING MAP?
- IV. HAVE APPELLANTS FAILED TO PRESERVE FOR APPEAL ANY ISSUE RELATED TO THE CIRCUIT COURT'S DISMISSAL OF THE TERRACES AS A PARTY DEFENDANT?
- V. DID THE CIRCUIT COURT PROPERLY INTERPRET S.C. CODE SECTION 6-29-760 IN RULING THAT APPELLANTS LACKED STATUTORY STANDING ON BOTH THEIR CAUSES OF ACTION BECAUSE THE COMPLAINT DID NOT ALLEGE THAT THEIR PROPERTIES ADJOINED THE CHALLENGED PROPERTY?
- VI. DID THE CIRCUIT COURT PROPERLY EXCLUDE FROM ITS CONSIDERATION THE AFFIDAVITS SUBMITTED BY APPELLANTS IN OPPOSITION TO RESPONDENT'S RULE 12(b) MOTION TO DISMISS?
- VII. DID THE CIRCUIT COURT PROPERLY RULE THAT APPELLANTS FAILED TO ALLEGE FACTS SUFFICIENT TO SHOW CONSTITUTIONAL STANDING, STANDING UNDER THE PUBLIC IMPORTANCE DOCTRINE, OR STANDING THROUGH THE DECLARATORY JUDGMENT ACT?

## **STATEMENT OF THE CASE**

### **Procedural History**

In their Complaint filed on September 1, 2016, the Appellants complained of the City's rezoning in August 2016 of a 4.26 acre parcel of land "abutting Chamblin Street, Armory Drive, and North Pearson Street" in the City (Complaint p. 2) and the construction on the property of duplex apartments owned by the Terraces. The seven plaintiffs are described in the Complaint as City residents who each "owns and occupies residential property located in the immediate vicinity of Armory Drive in the City of Woodruff" (Complaint p. 1) and "in the neighborhood located immediately across Armory Drive from the Property." (Complaint p. 2).

Following thirteen paragraphs of "General Allegations and Factual Background," the Complaint's first cause of action requested a declaratory judgment that the City's rezoning of the property in 2016 was void because, it alleged, the City failed to follow the publication and posting provisions of S.C. Code section 6-29-760 and the City Zoning Ordinance. (Complaint pp. 1-7). The second cause of action requested an injunction to prohibit the City from implementing the zoning change as alleged "illegal spot zoning." (Complaint pp. 7-9). The Complaint alleged no violations of procedure or law by the Terraces. (Complaint).

In response to the Complaint, the City, on October 4, 2016, filed an Answer and a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP. The Terraces filed an Answer on October 6, 2016. The City's Motion to Dismiss was made on three grounds specified in the body of the Motion. The first ground addressed plaintiffs' failure to allege a factual basis for statutory standing under S.C. Code section 6-29-760(C) or any other status

sufficient to confer standing and plaintiffs' failure to allege any injury in fact. The second ground for the Motion was that any allegations in the Complaint as to zoning or rezoning of properties in 2005 were time-barred pursuant to S.C. Code section 6-29-760(D). The third ground was that the allegations of the Complaint established that at least four of the seven plaintiffs had actual prior notice of the Planning Commission or City Council meetings concerning the rezoning, and, therefore, the allegations of the Complaint itself also established substantial compliance by the City with any statutory notice requirements. (City's Motion to Dismiss).

A hearing on the City's Motion to Dismiss was held before the Honorable J. Derham Cole, Circuit Court Judge, on January 5, 2017 (1/5/17 Hearing Transcript), and the City's Motion was taken under advisement. Judge Cole issued a Form 4C Order on February 24, 2017, granting the City's Motion to Dismiss (Form 4C Order granting Motion), and issued a formal Order dismissing the Complaint as to both the City and the Terraces on May 24, 2017. (Order).

Appellants filed a Motion to Reconsider on June 2, 2017. (Motion to Reconsider). During the pendency of that Motion, Appellants, on June 23, 2017, filed a Notice of Appeal to this Court. That appeal later was dismissed due to the pending Motion to Reconsider and the case was remitted to the circuit court on August 21, 2017. A hearing on Appellants' Motion to Reconsider was held on September 25, 2017. (9/25/17 Hearing Transcript). Circuit Court Judge Cole filed a Form 4C Order denying the Motion to Reconsider on October 5, 2017. (Form 4C Order denying Motion to Reconsider). Appellants served a Notice of Appeal dated October 6, 2017.

## **STATEMENT OF THE FACTS**

Because this is an appeal from the grant of a motion to dismiss, the Respondents believe the undisputed facts have not yet been fully developed. The “facts” upon which the parties and the circuit court have proceeded are the facts alleged in the Complaint. Respondents believe those alleged facts are well stated in the “Nature of the Case according to the Complaint” section of the circuit court Order (Order pp. 2-4), which the Respondents adopt. Further discussion of the facts is contained in the arguments below.

## **STANDARD OF REVIEW**

Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its “failure to state facts sufficient to constitute a cause of action.” In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint. Carnival Corporation v. Historic Ansonborough Neighborhood Association, 407 S.C. 67, 74, 753 S.E.2d 846, 850 (2014).

The standard of review under Rule 12(b)(6), SCRCP, “requires the Court to construe the complaint in a light most favorable to the non-movant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.” Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012), citing Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009).

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court. Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010).

## ARGUMENT

I. **APPELLANTS HAVE FAILED TO PRESERVE FOR APPEAL ANY ISSUE RELATED TO THE CIRCUIT COURT'S RULING THAT THE CITY SUBSTANTIALLY COMPLIED WITH THE NOTICE REQUIREMENTS OF S.C. CODE SECTION 6-29-760(A).**

The third enumerated ground of the City's Motion to Dismiss, stated succinctly, was that the Complaint failed to state facts sufficient to state a cause of action challenging the 2016 rezoning ordinance for noncompliance with any notice requirements of S.C. Code section 6-29-760, because the Complaint itself alleged actual notice of (and participation in) the rezoning process by Appellants and the Complaint itself established substantial compliance by the City with any statutory notice requirements. (Motion to Dismiss p. 2). The circuit court discussed these allegations of the Complaint at length in its Order and ruled in favor of the City on this ground. (Order pp. 3-5 and 11-12).

As noted by the circuit court, the Complaint alleged that four of the seven Appellants had actual notice of the rezoning process, attended the Planning Commission meeting, and attended and spoke at the City Council meetings and public hearing. (Complaint pp. 3-6). (Two of these four Appellants have spouses who also are Appellants.) Additionally, four of the Appellants had direct discussions with City officials about the rezoning prior to the rezoning. (Complaint pp. 3-4). Concerning this ground of the Motion to Dismiss, the circuit court concluded:

Clearly, based on the allegations of the Complaint, the notice purpose of §6-29-760 was met and achieved with the attendance of at least four of the seven plaintiffs at the City Council meetings and public hearing. **The allegations of the Complaint, as discussed above, establish substantial compliance by the City with any statutory notice requirements.**

(Emphasis supplied). (Order p. 12).

In their Statement of Issues, and even in their Argument, Appellants set out no specifications of error as to the circuit court's ruling that the City substantially complied with any statutory notice requirements. Appellants also assert no specifications of error as to the circuit court's basis or reasoning for that ruling. Additionally, this ruling by the circuit court is not discussed, or even mentioned, in the Brief of Appellants. Any challenge by Appellants to this ruling on this issue has been abandoned and Appellants have not preserved this issue for appeal.

Pursuant to Rule 208(b)(1)(B), SCACR: "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). "Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." First Union National Bank of South Carolina v. Soden, 333 S.C. 554, 556, 511 S.E.2d 372, 378 (Ct. App. 1998). The ruling by the circuit court that the City substantially complied with the procedural notice requirements of S.C. Code section 6-29-760 is now the law of the case.

**II. BY FAILING TO PRESERVE FOR APPEAL THE ISSUE OF THE CIRCUIT COURT'S RULING ON SUBSTANTIAL COMPLIANCE, APPELLANTS ARE BARRED BY THE "TWO-ISSUE RULE" FROM ANY CHALLENGE ON APPEAL TO THE CIRCUIT COURT'S RULING ON THEIR LACK OF STANDING TO CONTEST THE 2016 REZONING.**

The Order of the circuit court granted all grounds of the City's Motion to Dismiss. In granting the enumerated first and third grounds of the City's Motion to Dismiss, the circuit court, ruled that (1) Appellants lacked standing to challenge the 2016 rezoning

and (2) the City substantially complied with the statutory notice requirements for the 2016 rezoning. (Order pp. 6-10 and 11-12). As discussed above, the circuit court expressly found and ruled that the allegations of the Complaint established that the City substantially complied with the statutory notice requirements of S.C. Code section 6-29-760 for the 2016 rezoning. The circuit court concluded: "The allegations of the Complaint, as discussed above, establish substantial compliance by the City with any statutory notice requirements." (Order p. 12). As also discussed in the Argument above, that unappealed ruling is now the law of the case.

Since the circuit court ruling on substantial compliance is the law of the case, it is unnecessary for this Court to consider the issue, raised in this appeal by Appellants, that they had sufficient standing for their procedural challenge to the 2016 rezoning. The circuit court dismissed the procedural challenge to the 2016 rezoning on two separate and distinct grounds. Appellants have appealed only one of those grounds.

The Order of the circuit court dismissing Appellants' first cause of action related to a procedural challenge to the 2016 rezoning should be affirmed based on the "two issue rule." As explained in Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." See also, Anderson v. Short, 323 S.C 522, 476 S.E.2d 475 (1996); Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 479, 481-482, 722 S.E.2d 213, 214-215 (2011).

Because the law of this case is that the City substantially complied with the procedural notice requirements, the additional arguments of Appellants, that they have

standing to challenge the City's compliance with those procedural notice requirements, are unavailing. For these reasons, this Court should affirm, based on the "two issue rule," the circuit court's dismissal of Appellants' first cause of action.

**III. APPELLANTS HAVE FAILED TO PRESERVE FOR APPEAL ANY ISSUE RELATED TO THE CIRCUIT COURT'S RULING THAT APPELLANTS ARE BARRED BY THE TIME LIMITATIONS OF S.C. CODE SECTION 6-29-760(D) FROM CHALLENGING THE CITY'S 2005 OFFICIAL ZONING MAP.**

The Complaint, in several of its paragraphs preceding the statement of the causes of action, alleged that the City's official zoning map adopted as part of the zoning ordinance in 2005 showed the property owned by Appellants and the property later owned by the Terraces as having an R-1 zoning designation. (Complaint pp. 2-3). The Complaint further alleged that the Appellants were shown a zoning map, prior to the rezoning of the Terraces property in 2016, that indicated the properties as zoned with an R-2A designation. (Complaint pp. 3-5). The Complaint's first enumerated cause of action incorporated all preceding paragraphs, added new allegations of procedural irregularities, and sought a declaration that the City's 2016 ordinance rezoning the Terraces property was illegal and void. (Complaint pp. 6-7). However, the Complaint offered no explanation as to how any prior zoning designation in 2005 (whether R-1 or R-2A) would render a 2016 rezoning to another zoning designation (R-3) illegal and void.

Section 6-29-760(D), in pertinent part, sets a time limit (60 days) for any "challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it." The second ground of the City's Motion to Dismiss, succinctly stated, asserted that the Complaint failed to state facts sufficient to constitute a cause of action challenging any zoning other than the 2016 rezoning of the Terraces property

because “any such challenge is subject to and time-barred by the provisions of State law, including S.C. Code section 6-29-760(D).” (Motion to Dismiss pp. 1-2). The circuit court agreed and concluded that any claims for relief concerning zoning amendments in 2005 or prior to 2016 were time-barred by S.C. Code section 6-29-760(D). See Quail Hill, LLC v. County of Richland, 379 S.C. 314, 320-321, 665 S.E.2d 194, 197 (Ct. App. 2008) (holding section 6-29-760(D) barred appellant from challenging the validity of the enactment of a zoning ordinance years after the ordinance was adopted), affirmed in part, reversed in part, 387 S.C. 223, 692 S.E.2d 499 (2010) (affirming on this issue at 387 S.C. at 241-242, 692 S.E.2d at 509).

In this appeal, Appellants offer a convoluted argument concerning the 2005 zoning ordinance and 2005 zoning map. Appellants do not specify or allege error in this ruling by the circuit court. Rather, they appear to contend that the ruling does not apply. They argue that they do not seek invalidation of the 2005 ordinance or map but merely seek a finding that the map now used by the City is not the map adopted in 2005. (Initial Brief p. 15).

However, this is merely another way of asserting that the map represented by the City as the 2005 zoning map is invalid. In other words, Appellants challenge the validity of the 2005 zoning map. A challenge to the validity of a zoning map is governed by the time limitation for bringing an action set out in section 6-29-760(D) (quoted above). The ruling of the circuit court was that any claims by Appellants related to the 2005 zoning ordinance and 2005 map were time-barred. Since Appellants have specified no error in this appeal as to this ruling of the circuit court, that ruling, like the other unappealed issues discussed above, also is the law of the case.

**IV. APPELLANTS HAVE FAILED TO PRESERVE FOR APPEAL ANY ISSUE RELATED TO THE CIRCUIT COURT'S DISMISSAL OF THE TERRACES AS A PARTY DEFENDANT.**

In its Order Dismissing the Complaint, the circuit court noted that the allegations of the Complaint were directed solely at the City, that the Complaint contained no allegations that the Terraces violated any procedure or law, and that the Complaint sought no relief specific to the Terraces or its property based on alleged wrongs of the Terraces. (Order pp. 2-3). In dismissing both the City and the Terraces (Order p. 12), the circuit court stated: "Further, it is plain and apparent, from the face of the Complaint, that dismissal of the City removes the factual and legal basis for any asserted cause of action against the Terraces." (Order p. 12).

In their Statement of Issues and Argument, Appellants set out no specifications of error as to the circuit court's dismissal of the Terraces and no specifications of error as to the basis for that dismissal. Appellants have not preserved this issue for appeal. In this situation, the Court's dismissal of the Terraces is the law of the case. See Rule 208 (b)(1)(B), SCACR, and the cases cited in Argument I above.

**V. THE CIRCUIT COURT PROPERLY INTERPRETED S.C. CODE SECTION 6-29-760 IN RULING THAT APPELLANTS LACKED STATUTORY STANDING ON BOTH THEIR CAUSES OF ACTION BECAUSE THE COMPLAINT DID NOT ALLEGE THAT THEIR PROPERTIES ADJOINED THE CHALLENGED PROPERTY.**

S.C. Code section 6-29-760(C) provides, in pertinent part, that "An owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment...." The circuit court properly construed this statutory language to conclude that the Complaint, on its face, failed to allege facts sufficient to show statutory standing of the Appellants as the "owner[s] of adjoining land." (Order pp. 6-8).

Appellants admit in their Brief that their Complaint does not allege they are the owners of property “adjoining” the challenged property: “In the Complaint, Appellants do not expressly describe themselves as owners of “adjoining land to the Property.” (Initial Brief p. 8). This admission is also necessarily an admission that the circuit court committed no error in considering the four corners or the face of the Complaint and ruling that Appellants lacked statutory standing. See, for example, Dye v. Gainey, 320 S.C. 65, 67, 463 S.E.2d 97, 98 n.2 (Ct. App. 1995) (“a decision on a Rule 12(b)(6) motion is confined to the four corners of the complaint...”); Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (“In considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations as set forth on the face of the complaint.”).

“Adjoining” property plainly is not established by the Complaint’s descriptions of Appellants’ property as “property located in the immediate vicinity of Armory Drive” (Complaint p. 1) or as “a home in the neighborhood located immediately across Armory Drive from the Property” (Complaint p. 2). Appellants argue that these descriptions are broad enough to include “adjoining” property. (Initial Brief pp. 8-9). However, it also obviously is true that the descriptions are broad enough to include properties that are not “adjoining.” The circuit court noted:

Although artfully pleaded to imply that Plaintiffs’ neighborhood surrounds the subject property, the direct allegation of the last sentence of Paragraph 6 of the Complaint is that Plaintiffs’ neighborhood is located across Armory Drive from the subject property. Armory Drive (per Paragraph 4 of the Complaint) is only one of the three streets Terraces abuts. Prior to the construction of duplex housing complained of in the Complaint, the subject property was a vacant tract of at least 4.26 acres. (Paragraph 8). The

Terraces property was not a small parcel tucked into Plaintiffs' neighborhood. (Order pp. 9-10).

The circuit court correctly interpreted the meaning of "adjoining" in section 6-29-760(C). Since "adjoining" is not defined in section 6-29-760(C), the circuit court determined legislative intent by applying the words in their plain and ordinary meaning, Worthington v. Belcher, 274 S.C. 366, 368, 264 S.E.2d 148, 149 (1980), without resorting to subtle or forced construction to limit or expand the statute's operation. City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997). The circuit court cited Black's Law Dictionary (10th ed. 2014) for common meanings of "adjoining" to include "touching" and "sharing a common boundary." Where a word is not defined in a statute, our Courts have looked to the usual dictionary meaning, including Black's Law Dictionary, to supply its meaning. Lee v. Thermal Engineering Corporation, 352 S.C. 81, 91-92, 572 S.E.2d 298, 303-304 (Ct. App. 2002). The circuit court noted that, "General proximity is not sufficient to establish statutory standing under §6-29-760(C)." The circuit court also determined that, "The Complaint contains no allegations that any of the Plaintiffs own property touching the Terraces property." (Order p. 7).

The circuit court also properly concluded that the standing requirement of "adjoining" property applied to both causes of action in the Complaint. (Order p. 8). Both the first enumerated cause of action challenging the rezoning on procedural grounds (Complaint pp. 6-7) and the second enumerated cause of action challenging the rezoning on a substantive ground as "spot zoning" (Complaint pp. 7-8) clearly are each, in the language of section 6-29-760(C), "an action contesting the ordinance or amendment."

The cases of Bob Jones University, Inc. v. City of Greenville, 243 S.C. 351, 133 S.E. 2d 843 (1963) and Knowles v. City of Aiken, 305 S.C. 219, 407 S.E.2d 639 (1991), provide no precedential or persuasive support for Appellants' contention of standing. (Initial Brief pp. 7-8). As acknowledged by Appellants in their Brief (Initial Brief p. 8), Bob Jones was decided in 1963, prior to the enactment in 1994 of the Local Government Comprehensive Planning Enabling Act, of which section 6-29-760 is a part. Knowles also was decided prior to the 1994 Act. Prior to the 1994 Act, the State statutory schemes authorizing municipal zoning (former Section 5-23-10 et seq. and former Section 6-7-710 et seq.) contained no limitation on standing to challenge rezoning similar to the current section 6-29-760(C). Additionally, the issue of standing was not discussed in Bob Jones and was expressly not reached in Knowles (305 S.C. at 221, 407 S.E.2d at 641). Although Appellants criticize (Initial Brief p. 7) the case of ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008) as sole authority and as limited to its facts, that case is, and remains, good law on the required "adjoining" standing for zoning challenges.

The argument by Appellants concerning excerpted language of the City Zoning Ordinance as showing a basis for standing was first raised in Appellants' Motion to Reconsider, supported by an Ordinance excerpt first introduced as an Exhibit to that Motion. (Motion to Reconsider and its referenced Exhibit E). The City objected to the introduction of this new matter in its Return to the Motion to Reconsider (Return to Motion to Reconsider pp. 1-4) and reiterated its positions at the hearing. (9/25/17 Hearing Transcript pp. 8-10 and 13-15).

Because the Ordinance excerpts were not presented or argued until the reconsideration motion and hearing, they were not properly before the circuit court and are not properly before this Court on appeal. “[A] party cannot use a Rule 59(e) motion to present to the [trial] court an issue the party could have raised prior to judgment but did not.” Gartside v. Gartside, 383 S.C. 35, 43, 677 S.E.2d 621,625 (Ct. App. 2009).

In any event, the Ordinance excerpts, as argued by the City at the hearing (9/25/17 Hearing Transcript pp. 13-14), have no relevance or probative value in this case. The receipt of a mailed notice concerning a proposed rezoning from the City, as provided in Article XIII, Section III (3) of the excerpt, is not an acknowledgement of any standing to challenge a rezoning. The provisions in Article XIII, Section III (5) of the Zoning Ordinance, relate solely to a “protest” petition procedure that triggers a requirement for a positive majority vote of the Council to approve a rezoning. This “protest” petition procedure was not involved in this case.

**VI. THE CIRCUIT COURT PROPERLY EXCLUDED FROM ITS CONSIDERATION THE AFFIDAVITS SUBMITTED BY APPELLANTS IN OPPOSITION TO RESPONDENT’S RULE 12(b) MOTION TO DISMISS.**

The issue of Affidavits submitted by Appellants in opposition to the City’s Motion to Dismiss first was raised at the January 5, 2017, hearing on the Motion. At the outset of the hearing, the City objected on the record to consideration of the Affidavits by the court in connection with the Motion to Dismiss. (1/5/17 Hearing Transcript pp. 3-4). The objection was made on the stated grounds that the motion to dismiss should be ruled on based on the allegations of the Complaint and that consideration of the Affidavits by the court would convert the Motion to Dismiss into a summary judgment motion. Rule 12(b), SCRCPP; Dye v. Gainey, 320 S.C. 65, 67, 463 S.E.2d 97, 98 n.2 (Ct. App. 1995) (“a

decision on a Rule 12(b)(6) motion is confined to the four corners of the complaint...”); Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (“In considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations as set forth on the face of the complaint.”).

At the hearing, the circuit court sustained that objection and ruled that the Affidavits would not be considered in connection with the Motion to Dismiss. (1/5/17 Hearing Transcript p. 4). Even after that ruling, Appellants have continued to argue based on the Affidavits, both at the hearing on the Motion to Dismiss (1/5/17 Hearing Transcript pp. 10-12) and the hearing on the Motion to Reconsider (9/25/17 Hearing Transcript pp. 9-13), and in their Motion to Reconsider. Appellants have filed the Affidavits twice, once prior to the hearing on the Motion to Dismiss and for a second time with the Motion to Reconsider as “Exhibits.” The City objected in writing in its Return to Plaintiffs’ Motion to Reconsider to Appellants continued efforts to bootstrap the excluded Affidavits (and Exhibits) into the record. (Return to Motion to Reconsider pp.1-4). The City also objected at the hearing on the Motion to Reconsider. (9/25/17 Hearing Transcript pp.13-14). The Affidavits were properly excluded by the circuit court and should not be considered by this Court in this appeal.

Contrary to Appellants’ argument in Brief (Initial Brief pp. 9-10), the case of Baird v. Charleston County, 33 S.C. 519, 511 S.E.2d 69 (1999), does not establish error in the circuit court’s exclusion of the Affidavits from consideration. The Supreme Court in Baird determined that “affidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction.” 33 S.C.at 529, 511 S.E.2d at 74. As understood by the City, there is no

indication in the Baird opinion that the evidence could be received to oppose such a motion, and no indication in the Baird opinion that it would be error to exclude such evidence.

**VII. THE CIRCUIT COURT PROPERLY RULED THAT APPELLANTS FAILED TO ALLEGE FACTS SUFFICIENT TO SHOW CONSTITUTIONAL STANDING, STANDING UNDER THE PUBLIC IMPORTANCE DOCTRINE, OR STANDING THROUGH THE DECLARATORY JUDGMENT ACT.**

Contrary to Appellants' jab in their Brief at the court's wording on the necessity for statutory standing (Initial Brief p. 10), it is clear and beyond dispute that the circuit court's analysis of standing in its Order fully recognized and considered statutory standing, constitutional standing, and public importance standing, as well as Appellants' assertion of standing by way of the Declaratory Judgment Act. (Order pp. 6-10). The Respondents adopt the reasoning of the circuit court on these issues of standing and urge its adoption by this Court.

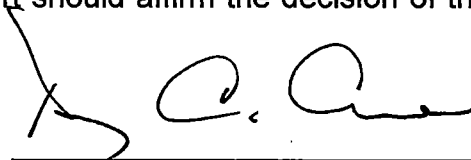
The Complaint of the Appellants simply fails to reveal the type of injury necessary to establish constitutional standing: "an injury-in-fact which is concrete, particularized, and an actual or imminent invasion of a legally protected interest." Carnival Corporation v. Historic Ansonborough Neighborhood Association, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014), also cited by the circuit court in its Order at pages 8-9. (Order pp. 8-9). In order for public importance standing to apply, "the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." ATC South, Inc. v. Charleston County, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008), also cited by the circuit court in its Order at page 7. (Order p. 7). This case lacks that connection.

The Declaratory Judgment Act does not, in itself, supply standing, particularly when, as here, a more specific statute sets out the requirements for standing to challenge a zoning ordinance or map or amendment. As noted by the circuit court in its Order, the ATC South case, in which the Supreme Court found no standing, represented a challenge to a rezoning by the filing of a declaratory judgment action. (Order p. 9).

**CONCLUSION**

For the reasons stated herein, this Court should affirm the decision of the circuit court dismissing the Complaint.

December 13, 2017



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IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2017-002095

RECEIVED  
DEC 13 2017  
SC Court of Appeals

Elizabeth Earley, John Earley, Lloyd Wilkins,  
Henry Kerns, Margie 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.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents and the Designation of Matter to be Included in the Record on Appeal on all parties by causing a copy of it to be deposited in the United States Mail, postage prepaid, on December 13, 2017, addressed to all counsel of record, Nathan A. Earle, Esquire, 1541 Wade Hampton Boulevard, Suite E, Greenville, South Carolina 29609, and Michael A. Graham, Esquire, P.O. Box 433, Columbia, South Carolina 29202.

December 13, 2017



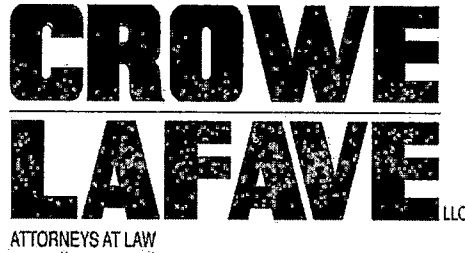
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December 13, 2017

RECEIVED  
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SC Court of Appeals

***Via Hand Delivery***

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

RE: Elizabeth Earley, et al. v. The City of Woodruff, SC, et al.  
Case No. 2017-002095

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Initial Brief of Respondents, the Respondents' Designation of Matter to be Included in the Record on Appeal, and the Respondents' Proof of Service in the above-captioned matter. Once filing is complete, please return the clocked copies to the individual presenting them for filing.

By copy of this correspondence, I am hereby serving a copy of the Initial Brief of Respondents and the Designation of Matter to be Included in the Record on Appeal on all counsel.

With kind regards, I am

Sincerely yours,

Danny C. Crowe

DCC/dmb  
Enclosures

cc: Nathan A. Earle, Esquire  
Michael A. Graham, Esquire  
Terry F. Clark, Esquire