

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

S.C. SUPREME COURT

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

APPENDIX VOLUME 2

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2014-000583

Samuel T. Brick, Appellant

v.

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

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err by not applying collateral estoppel regarding Intervenor/Appellee Fairways Development LLC's argument that it should have been joined as a necessary party in the instant case when it successfully argued in a separate matter involving the same parties in the same circuit court regarding a declaratory judgment involving ownership of the same property and development that it was not a necessary party?
2. Did the circuit court, while acting as an appellate body and in response to a motion for reconsideration, err by its interpretation and application of the terms of a local government ordinance as they applied to a determination of indispensability regarding joinder of an intervening party?
3. Did the circuit court, while acting in a similar manner as stated above, err by dismissing the case based on a lack of timely joinder of a litigating intervenor when the statutory filing requirements were met and the intervenor was subject to its jurisdiction?

STATEMENT OF THE CASE

Project Application and its Applicant: On November 7, 2012, John Champoux, a registered architect, on behalf of Sustainable Design Consultants, submitted a Subdivision Review Application accompanied by a proposed sketch/concept plan for approval regarding a 100.7 acre area in Richland County to Tracy Hegler, the county planning director (R. p. 43 (transmittal letter) and R. pp. 255-261 (the sketch/concept plan). The submission included a letter from, Fairways Development LLC, the land owner, to Ms. Hegler stating that "Fairways Development Group is pleased to submit the

required submittals for consideration of the above LID residential project being developed under the Richland County Green Code.” (R. p. 44). The Green Code is Section 26-186 of the Richland County Code (Green Code) (R. pp. 202-209)¹. The Richland County Subdivision Review Application states the Property Owner as “Fairways Development Group (John Bakhaus)” (R. p. 45). The Applicant is designated Fairways Development Group (John Bakhaus). The form is signed by the corporate property owner. The project application includes a checklist form (R. p. 46) required by the county of all subdivision projects. The checklist that forwards the sketch plan and other documents lists Fairways Development Group (John Bakhaus) as the developer and Fairways Development LLC as the property owner and the Green Code property-owner applicant. The application fee was marked not applicable. The sketch/concept plan (R. pp. 255-261) contains a statement on the title page (R. p. 255) that it is prepared by Sustainable Design Consultants, Inc. for its client Longcreek Associates, LLC (the name of the project is “Villages at LongCreek”). The sketch/concept plan includes the initialed stamp of John Champoux as a registered South Carolina architect, the same individual who transmitted the package for its approval. The sketch plan makes no reference to the property owner other than on property designated as existing golf course that reads “now or formerly Fairways Development LLC.” (R. pp. 259, 260). The golf course is not included in the 100.7 acres of the proposed development although the development surrounds the course. It names on each page following the title page various surveying, soils, and wetlands consultants and each page refers to “Longcreek Assocs., LLC” as the

¹ The Green Code as Section 26-186 was repealed by an amendment to read provision known as open space on September 10, 2013. The County Council designation of this action is “045-13HR.” The Green Code in effect before that date is found in the record at Record pp. 202-209. As of the preparation of this initial brief the new provision has not been included in the codified version of the Richland County Code.

client. (Id.). Subsections (e) and (f) of the Green Code (R. pp. 202, 205), relate to an owner or developer submitting an Existing Features Site Analysis Plan, known as the sketch plan, and a developer submitting a concept plan. The application for plan approval combines the site and concept plans and the county development permit accepted and treated it that way (R. pp. 29-51).

Development Review Team Action: Notice of the Richland County Development Review Team (DRT) action on the project was that it would meet on November 29, 2012; that zoning for the project was RS-LD (Residential Single Family, Low Density District) (Section 26-89 of the Richland County Code) (R. p. 210-211); and that the Applicant was Fairways Development Group, c/o John Bakhaus. (R. p. 48). The DRT met on the advertised date, November 29, 2012, and on December 7, 2012, the county Land Development Administrator issued a land development permit to John D. Champoux stating the Sketch/Concept Plan entitled “The Villages at LongCreek”, dated November 12, 2012, is approved (R. p. 49, 1st para. of letter).

Appeal to the Planning Commission: On December 20, 2012, Appellant, as an interested party, appealed the December 7, 2012, DRT permit approval to the Richland County Planning Commission under Section 26-54(c)(3)d.3 of the Richland County Code (R. pp. 215-216), the authority for the Planning Commission to hear his appeal (R. pp. 52-60). Appellant alleged the DRT improperly interpreted and applied various provisions of the Green Code in approving the permit and requested as relief that the project be rejected as improperly submitted, but if considered submitted properly, then that it be returned to the DRT for enforcement of the applicable zoning standards for the Green Code development (R. p. 60).

Planning Commission Action on the Appeal: On February 4, 2013, the Planning Commission met as a tribunal to consider the appeal. Commission Member Kathleen McDaniel recused herself from partaking in the appeal with a letter introduced as part of the hearing minutes stating that her law firm represented the seller of the subject property which could be a potential conflict of interest (R. p. 62, lines. 16-23; p. 64, lines 1-5). The Appellant; the Planning Director, Tracy Hegler; and Mr. Ron Johnson spoke at the hearing. Mr. Johnson spoke as the project developer. He said he had worked with staff and residents of the area about what it is to operate and develop under the Green Code. He said staff knows that his group engaged outside services to have a tree study done, that they had wetlands surveyed and delineated, and that the areas that his group was proposing would be developed with the least damaging impact on the land (R. pp. 66-69). The Planning Commission voted on February 4, 2013, to deny the appeal.

Planning Commission Order on the Appeal: The Planning Commission Order of March 4, 2013, was signed by the Chair (Id., p. 69). Appellant received notice of the Order on March 11, 2013. The Order makes findings of fact that were a close recitation of the testimony of each speaker. Appellant Samuel T. Brick and the Planning Director had conflicting views that the Order did not address other than with conclusions of law. Mr. Johnson's testimony that his group was the developer was not contested or contradicted. The order denied the appeal (Id., p. 69).

Appeal of the Order: On March 18, 2013, Appellant filed a notice of appeal and appeal with the Circuit Court for Richland County naming the Richland County Planning Commission as sole Appellee (R. pp. 32-42). Appellant served the Acting Clerk and filed his return of service with the Clerk of Court on March 20, 2013. Appellant's appeal

to the circuit court alleges that the planning commission erred in its action on Appellant's appeal to that body (A) by failing to enforce zoning standards of Article V of the Richland County Land Development Code (§§ 26-81, et. seq.); (B) by incorrectly interpreting the Green Code by authorizing a new zoning district in which no lot density is applied, no minimum lot widths are enforced, and conservation set asides are rewarded with incorrect bonuses; (C) by not enforcing a correct initial application for the use of the Green Code and by ignoring the appeal to it regarding a 50% pervious surface requirement as a prerequisite for the Green Code relaxed standards and; (D) by failing to provide fair notice of its hearing and procedures; by failing to make specific findings and determinations with regard to the appeal before it; by failing to provide a fair hearing; and by failing to consider Appellant's Memorandum of Law, Statutory Construction, in its decision (R. pp. 3,4). Appellant requested as relief, among other things, that the Order on Administrative Review should be reversed and returned to the Planning Commission for an Order returning the proposed project, the Villages at Longcreek, to the Development Review Team for its application of the Green Code utilizing correct requirements and standards (R. pp. 41, 42).

Respondent's Actions and Motion to Dismiss: Respondent Richland County Planning Commission filed the Record on Appeal on June 5, 2013 (R. pp. 199, 200). On the same date it filed a Return on the Appeal and concurrently moved to dismiss the case for Appellant's lack of standing (R. pp. 70-71).

Fairways Development LLC Actions: On June 17, 2013, Intervenor/Appellee Fairways Development LLC, filed motions to intervene in the matter (R. pp. 85-86), to require Appellant to post a bond or in the alternative that the case be expedited, and to

dismiss the appeal (R. pp. 104-111) . Appellant did not oppose the Motion to Intervene and the Court granted that motion at its hearing on the matter. In an Order published on December 17, 2013 (R. pp. 12-15), the Court reiterated its August 30, 2013, grant of the motion to intervene (R. pp. 186-188). Also on that date, Intervenor/Appellee withdrew its motion to require a bond and for an expedited hearing (R. p. 165-1).

Intervenor/Appellee's June 17, 2013, Motion to Dismiss alleged Appellant failed to join Fairways Development LLC as the development permittee, in a timely manner (R. p. 105). It also opined Appellant lacked standing because he did not have substantial interest in the matter (R. pp. 105-106).

Appellant's Motion to Amend and Notice of Defective File: On June 27, 2013, Appellant filed a Motion to Amend his Appeal and Notice of Defective File (R. pp. 99-103). Appellant stated the proposed amendment, among other things, would add the owner of the property as a respondent to the appeal (R. p. 99). He opined that the owner is not indispensable to the appeal because it is not the applicant for the project and does not propose or intend to develop it (R. p. 99 (last line)-100). Appellant pointed out that the property owner sought to intervene as a respondent in the matter and that he does not object. Appellant stated that the relief requested in the appeal is almost identical to the relief requested in another matter that was pending at the time before the Richland County Circuit Court alleging various violations by Richland County of the South Carolina Freedom of Information Act (FOIA)² and seeking declaratory relief to return the development project to the DRT for further action (R. pp. 101-102). Appellant's Notice of Defective File stated that Appellant was working with Respondent's attorney to clarify

² §§30-4-10, et seq., S.C. Leg. Web, S.C. Code of Laws, (2013).

what was presented to the Planning Commission before its action on appeal because the Record on Appeal, as presented, among other things did not include Appellant's December 20, 2012, appeal. Appellant also mentioned other matters in the Record on Appeal were incorrect for consideration by the Planning Commission yet were part of its record for the appeal (R. pp. 102-103).

Appellant's Memoranda of Law on Motions to Dismiss: On July 31, 2013, Appellant filed a Memorandum of Law responding to Respondent's Motion to Dismiss. In that Memorandum Appellant addressed his standing and his status as an adjacent and contiguous landowner (R. pp. 74-78).

Also on July 31, 2013, Appellant filed a Memorandum of Law in response to Intervenor/Appellee's Motion to Dismiss (R. pp. 112-130). He addressed the manner of the application for a development permit to Richland County and opined that Fairways Development Group was a different entity than Fairways Development LLC (R. pp. 112-113). He alleged the permittee of the project is John D. Champoux and Mr. Champoux has no known connection to Fairways Development LLC (R. p. 113). He referred to the statement of Mr. Ron Johnson as incorporated in the planning commission findings and as to Mr. Johnson's participation in the preparation of the application and his contacts with staff (R. p. 114 top of page to Para. 3). He alleged that Fairways Development LLC did not participate in community meetings and that during the meetings, Mr. Johnson clarified that the project was not being developed by the land owner, Fairways Development LLC (R. p. 114, Para. 3). He alleged that the land owner has developed in the area for years following traditional zoning procedures and opined that there is nothing stopping it from continuing to do so (R. p. 114, (last para. continuing to p. 114)). He

alleged the Villages project does not apply traditional zoning rules. Appellant referred to Spanish Wells Property Owners Ass'n v. Board of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 367 S.E. 2d 160 (1988) and that case stating a permittee is a necessary party to an appeal. He opined Spanish Wells only mentions a property owner as a permittee one time while referring to a Washington state zoning case (R. p. 115 (middle of page)). Appellant contended that Fairways Development LLC is not knowledgeable of the project because it failed to understand the project includes substantial development well beyond the depictions it exhibits in its Motion to Dismiss. Appellant alleged the project boundary is on the shore of a lake directly across and a distance of 175 yards from Appellant's property. He pointed out the proposed village across from his property would have 130 dwelling units, some of which appear on the sketch plan as attached units (R. p. 261, middle of sketch), and that such units are not authorized under the applicable residential single-family low density zoning district (Section 26-89 of the Richland County Land Development Code) (R. pp. 210-122). Appellant reiterated that he attempted to join Fairways Development LLC in a case seeking similar relief only to be faced with sanctions and a successful Motion to Dismiss. Appellant alleged during the pendency of the FOIA case and within the 30 day period for filing the Notice of Appeal to the Circuit Court in the instant case, he provided the attorney for Fairways Development LLC, the attorney for Intervenor/Appellee in this matter, a copy of the Notice of Appeal and Appeal. Appellant alleged that Fairways Development LLC has not experienced any prejudice as a consequence of not being joined as a party and that his motions are the first actions on the matter (R. pp. 116-117). Appellant stated his willingness to join any necessary party and cited 3A James W.

Moore et al., *Moore's Federal Practice* ¶ 19.05[2] (2d ed. 1991) as stating that the concept of indispensability involves a court making an equitable adjudication (R. p. 117, last para. of #5). Appellant also opined that his motion to amend under Rule 15(c), SCRCP, would meet relation back requirements if the claim arose out of the conduct set forth or attempted to be set forth in the original proceeding. It further states an amendment changing a party relates back to be within the period provided by law for commencing the action provided the party to be brought in by amendment received such notice of the institution of the action so that he would not be prejudiced in maintaining his defense on the merits, and such party knew or should have known that, but for a mistake concerning the identity of the proper party, it would have been brought against him (R. pp. 116-119).

Supplemental Record on Appeal: On August 19, 2013, Respondent filed a Supplemental Record of Appeal (R. p. 201).

Appellant's Affidavits: On August 21, 2013, Appellant filed an affidavit and response to Appellee's Motion to Dismiss (R. pp. 79-84). Appellant stated there was no objection made by the Richland County Planning Department or Planning Commission to his authority to make an appeal. Aside from matters related to standing, the Appellant/Affiant contended that with Appellee's August supplemental appeal file and no removal of the initial matter filed with the court in June, the matter provided the planning commission for its action on Appellant's appeal still was improper. Appellant noted that the file certified as being provided the planning commission now contained two DRT actions and two differing appeals (R. pp. 82-83).

Also on August 21, 2013, Appellant filed his affidavit in response to Fairways Development LLC's Motion to Dismiss (R. pp. 131-152). Appellant, as an affiant, identified the permittee John D. Champoux as a registered landscape architect in the employee of Sustainable Design Consultants that prepared the sketch plan on behalf of Longcreek Associates, LLC (R. pp. 132-133). Affiant said he conducted a search of the South Carolina corporate records and that such records contain no corporate entities such as Fairways Development Group or Fairways Development Group (John Bakhaus) (R. p. 132). Appellant swears that during the community meetings, to which Mr. Johnson referred in testimony before the planning commission appeal, Mr. Steve McNair acting as developer of the project responded to a question as to ownership that he and Mr. Johnson were not the owners of the property but were its developers (R. p. 133). Appellant swears that Fairways Development LLC and Mr. Bakhaus did not participate in those meetings (R. pp. 133-134).

Appellant's affidavit further refers to his attempted joinder of Fairways Development LLC as a respondent in a FOIA matter that Appellant was prosecuting at the same time as he instituted this action (R. p. 135). Appellant stated the requested relief was the same as the instant case but as a declaratory relief matter under FOIA. In Appellant's affidavit (R. p. 93) regarding Fairways Development LLC's Motion to Intervene, Appellant further stated that Fairways objected to its joinder and exhibited a lack of interest in whether the case might involve a declaratory judgment affecting Fairways Development LLC's property interests (R. p. 93).

The remainder of the affidavit contains statements Appellant made in his Memorandum of Law mentioned above, but in affidavit form.

August Hearing on the Motions: The Transcript reflects five motions were addressed-- motions to dismiss by Appellee and the Intervenor, the Intervenor's motions to intervene and to require a bond, and Appellant's motion to amend. The motions are related above with the exception that the motion to require a bond was withdrawn for lack of evidence to support the amount of a bond (R. p. 165-1, lines 14-18) and the motion to amend is not part of this appeal. The transcript relating to motions to dismiss for lack of standing and to amend are not included as part of the record. The transcript otherwise relates to the motions to intervene and to dismiss for lack of jurisdiction (R. pp. 31-51). Appellant, pro se, stated he had no objection to Fairways Development LLC's intervention in the matter but contested it was as a necessary party. He pointed out that the same issue was addressed in a FOIA case where he had joined Fairways Development LLC as a respondent because he thought as a property owner it might have been affected by requested FOIA declaratory relief. He stated that you must include a party in interest under the Declaratory Judgment Act and he joined Fairways Development LLC because of that but it moved to dismiss and sought sanctions for him doing it (R. pp. 184 (line 10) to 185 (line 21) referring on lines 19-21 to R. p. 98). Appellant stated he did not mind it intervening but it should not be joined as a necessary party. Fairways Development LLC made no response other than contending they were the permittee for the project and, as such, "it makes all sense in the world that we be allowed to intervene." (R. p. 187, lines. 5-6) The court then granted the intervention under Rule 24 (a)(2), SCRCR (R. p. 187, lines 7-11). Intervenor said it was the development permittee but provided no proof to that effect (R. p. 189, lines 19-23). Intervenor then stated that under the Spanish Wells case it was a necessary party. It stated that since it was not joined within 30 days was

what the Spanish Wells case was all about (R. p. 190, lines 2-3). Intervenor then contended Appellant did not have substantial interest in the project. Appellant responded that Fairways Development LLC was not the permittee stating it did not file the sketch plan and it did not expend any funds for development. He referred the court to the sketch plan that was prepared for Longcreek Associates (R. p. 195, lines 2-6). The court then cut the discussion short and moved on to the motion to amend stating that it would look over the responses. The court finally stated that it would review the documents regarding the case and take the case under advisement (R. p. 198, lines 7-11).

Orders Granting Motions to Dismiss: On December 17, 2013, the circuit court granted Appellee's Motion to Dismiss (R. pp. 9-11). It stated as an issue Fairways Development LLC's allegation that Appellant lacked standing to appeal the decision of the planning commission. The court stated § 6-29-1150(D)(1) (S.C. Leg. Web, S.C. Code of Laws, 2013) does not limit standing to appeal to a property owner. It cited § 6-29-1150 (D)(2) and § 6-29-1155(A) (S.C. Leg. Web, S.C. Code of Laws, 2013) as sections providing standing to appeal to property owners and individuals with a substantial interest in the decision of a planning commission. The court deferred to the planning commission's decision to accept standing on that issue and rejected that ground for dismissal (R. pp. 10-11). The court noted that although Respondent did not address Appellant's failure to join Fairways Development LLC, the matter was raised in a "companion" motion to dismiss made by Fairways Development LLC. It said, "For reasons set forth in that order, this Court has dismissed the Appellant's appeal." (R. p. 11) The Court then granted Respondent's Motion to Dismiss.

On December 17, 2013, the circuit court granted the Intervenor/Appellee's Motion to Dismiss (R. pp. 5 to 8-1). It stated two issues were involved, an issue of standing that the Court reiterated, as noted in the statement above as to its action of Appellee's Motion to Dismiss, and that the planning commission's actions waived any arguments refuting the Appellant's interest in the matter (R, pp. 6-7).

The Court, in addressing Appellant's "Failure to Join Fairways in the Appeal," cites Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. Of Adjustment of Town of Hilton Head Island, 295 S.C. 67, 367 S.E.2d 160 (1988) that a development permittee is a necessary party to an appeal of its permit (R. pp. 7-8). It cites as authority for its decision Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008) while stating it was vacated by Friends of McLeod, Inc. v. City of Charleston, 384 S.C. 438, 682 S.E.2d 488 (2009) (R. p. 7). It says failure to file and serve notice on a necessary party within the statutory period to appeal was fatal to an appeal from a zoning board decision (R. pp. 7-8). The Court, in its order of dismissal, stated the Court of Appeals Friends decision was vacated due to an agreement mooted the case (R. p. 7.). The Court found that although documents were submitted in the name of Fairways Development Group (John Bakhaus), because two documents were signed by Fairways Development LLC, it is the development permittee in the matter (R. pp. 7-8). The Court found that Appellant timely filed his appeal and sent a copy of the appeal to Fairways Development LLC within the thirty days of his receipt of the planning commission order (R. p. 8 (last sentence of first full para. on page)). The Court, citing the Court of Appeals Friends decision, stated that notwithstanding a consent order joining a necessary party to

the appeal, the failure to do it on time was fatal (R. p. 8). It then granted the motion to dismiss.

Motion for Reconsideration The presiding judge's law clerk forwarded electronic copies of the Orders dismissing the appeal at 3:27 P.M. on December 17, 2013 (R. p. 217). Appellant received the notice on December 18, 2013. On December 27, 2013, Appellant filed a Motion for Reconsideration and forwarded copies to the judge and counsel for Respondent and Intervenor/Appellee (R. pp. 153-165).

Appellant's motion was filed under sworn affidavit format (R. p. 12 (orig. only signed)). The record contains no contest or contradiction to any of Appellant's sworn statements. The motion was for reconsideration of the circuit court's order dismissing the appeal. Appellant stated that his requested relief for the appeal to the circuit court was to reject or return the submitted concept/sketch plan to the DRT to enforce the Green Code requirements for the project and applicable zoning standards (R. p. 154). He stated the order made factual findings and conclusions of law and that the factual findings included an uncontroverted statement by Ronald Johnson that his group was developing the project and that he had held open forum meetings and engaged tree and wetlands surveys (R. p. 155). Appellant reiterated the sworn statement that he attended a meeting in which, in response to his question as to whether the persons holding the meeting, who said they were the developers, were the owners of the property, they answered they were not (R. p. 155). Appellant pointed out that Sustainable Design Consultants designed the sketch plan for Longcreek Associates, LLC, for whom Mr. Johnson is the registered agent. He also pointed out that Mr. John Champoux is the registered architect that certified the submitted sketch plan and refers to Sheet # SP-02 that states the names of the client and

the consultant company that prepared the sketch plan for it (R. p. 155) which are not the Intervenor/Appellee.

Appellant cited Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) as providing authority for written documents and records of proceedings being used as formats for final decisions in contested administrative proceedings (R. p. 156). Appellant reserves his right, should this appeal be granted, to argue whether the planning commission record was properly adopted and whether it is sufficiently clear for a reviewing body to examine its decisions on other appeal issues. Appellant limits this notation to Mr. Johnson's uncontroverted statement that the group to which he was a part is the development permittee. Appellant further stated that the DRT in approving the concept/sketch plan, the matter that forms the basis for the appeal, treated Fairways Development Group as the development permittee. Appellant pointed out that Subsection 26-186 (c) of the Richland County Land Development Code requires an owner to make the Green Code application while Subsections 26-186 (e) and (f) of such Code respectively require a developer or owner to prepare and submit a development site plan sealed by a registered architect and, concurrently, a developer to submit a Concept Plan (R. p. 157). Appellant also noted that the public record of the proceedings of the planning commission action on the appeal includes as part of the record a member's recusal statement that the owner is in the process of selling its property (R. p. 156) (See also R. pp. 62-63).

Appellant pointed out that the planning department is in the best position to determine the developer and that the DRT issued a permit not to the owner, Fairways Development LLC, who submitted the green code application but to the developer by

permitting its landscape architect who certified the site plan for Sustainable Design Consultants, Longcreek Associates LLC contractor for the sketch/concept plan (R. p. 159). A copy of the permit was provided the Fairways Development Group, the same entity the owner in its project application identified as the developing party. Appellant argued that the DRT's action, to include its determination of the permittee, is a regulatory function required under § 6-29-1150 (B) (S.C. Leg. Web, S.C. Code of Laws, 2013) and pursuant to that provision is a public record (R. p. 158). Appellant stated there is no public record of Intervenor/Appellee being the developer (R. p. 158). Appellant further stated he filed a FOIA request for a copy of the Development Review Team action taken on the project and was provided John Champoux's permit approval. Appellant cited State v. Sweat, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008) and Savannah Riverkeeper v. S.C. Department of Health and Environmental Control, 400 S.C. 196, 205, 733 S.E.2d 903, 908 (2012) stating that, as a general rule, agencies charged with applying ordinances should be provided deference as to the application of those laws (R. p. 159). Appellant opined that a reviewing court should defer to the agency decision especially when a factual finding is supported by substantial evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.

Appellant's motion argued that Spanish Wells Property Owners Association v. Board of Adjustment of the Town of Hilton Head, 295 S.C. 67, 367 S.E.2d 160 (1988) involved a property development matter and after a property owners association objected and appealed, the local board of adjustment denied the appeal, and the appellants then appealed to the circuit court. He pointed out that the Supreme Court limited its action in Spanish Wells to developers and did not rule that the failure to join such as a necessary

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party within a specified period is fatal to the appeal. He pointed out that the circuit court in that case allowed the appellant fifteen (15) days to join the developer and that the Supreme Court affirmed that order. Appellant stated that since Fairways Development LLC was joined as an Intervenor that matter is moot (R. p. 160 (at the bottom of the page)).

Appellant noted that the Court in dismissing his appeal relies on Friends of McLeod v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008) while stating that since Fairways Development LLC executed the application, it is the developer. Appellant stated that the Supreme Court granted certiorari to examine the Court of Appeals decision in the Friends case and that the Supreme Court order dismissing the appeal was based on an agreement by the parties. It then denied a motion to substitute parties after which it states, "Finally, we vacate the Court of Appeals opinion in Friends of McLeod v. City of Charleston, 376 S.C.610, 658 S.E.2d 544 (Ct. App.2008)." Friends of McLeod v. City of Charleston, 384 S.C. 438, 682 S.E.2d 488 (2009). Appellant further differentiated Friends from the instant matter because Friends involves a zoning issue while the instant matter involves land development (R. p. 161). He argued that zoning relates to elected officials enacting ordinances while land development projects may be modified, revised, resubmitted, etc. Appellant pointed out this flexibility with the first application of the Villages at Longcreek project being returned and revised with new application fees waived (R. p. 161(last line of page)-162 (first five lines)). Furthermore, Appellant noted that in a zoning issue the owner of property is a matter of record and has different interests than a developer in a land

planning matter. Appellant stated that under the applicable Green Code, owners and developers have differing roles.

The Appellant also noted that dismissing the case is akin to granting a Motion for Summary Judgment and that not until well after he filed his appeal was it brought to his attention that the file provided the planning commission for its action on the matter contained matters of which he had no notice (R. p. 162, (last para. at the bottom of the page)). Appellant stated he had alleged other violations of South Carolina Constitutional provisions by improper administration of the hearing. He specified that S.C. Const. Art. I, 22 states that no person shall be subject to the same person for both prosecution and adjudication of his case and the Constitutional necessity for due notice and a fair hearing (R. pp. 162 (bottom of page)-163). Appellant cited Ross v. Medical University of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1997) regarding an attorney acting as counsel for both the adjudicators and the appellee in the same matter (R. p. 163).

Appellant finally states that the circuit court's hearing was truncated due to a heavy docket that involved five motions on this appeal following an appeal of another action and followed by several other appeals (R. p. 163)(See also from the transcript pp. 165-1, lines 2-4; 180, lines 8-10; 195, lines 10-13; and 197, lines 12-21). Appellant states the court cut off the hearing with a statement that the motion to dismiss would be decided on submitted papers (R. p. 151, lines 8-9). Appellant states that his inability to argue the true nature of Green Code development, with its varied submittals by differing parties in the project and the actions of the administrative agencies makes the drastic step of dismissal not only unfair but a violation of S.C. Const. art. I, 22 that provides South

Carolina citizens an opportunity to be heard before being bound by an administrative agency decision affecting private rights (R. p. 163 (middle paragraph)).

Circuit Court Action on the Motion for Reconsideration: On February 5, 2014, the court published a Rule 4 disposition of the case with the Clerk of Court. (R. p. 17). The Rule 4 statement of Judgment by the Court is as follows:

“The Appellant’s motion to alter or amend the Court’s previous order under Rule 59 (e), SCRCF is denied with oral argument. The Court’s previous order ordering dismissal of the appeal still stands.” Order information in the Form 4 is that “this order ends the case.” (R. p. 17). There was no hearing on the Motion for Reconsideration. Appellant received a copy of the Form 4 disposition on February 20, 2014, in the mail.

The record of the action contains no indication of notice that the Court conducted a hearing or heard oral argument on the Motion for Reconsideration (R. pp. 218-221).

Appellant’s Notice of Appeal: On March 11, 2014, Appellant served a Notice of Appeal in the instant action on William H. Davidson and Michael B. Wren of Davidson and Lindemann, P.A. and on Tobias G. Ward, Jr. counsel for the Appellee and the Intervenor/Appellee, respectively. Proof of such service was filed with this Honorable Court on March 19, 2014.

ARGUMENTS

1. ***Overview.*** This appeal involves land development administration and an appeal. It relates to a local agency issuing a development permit (R. pp. 49-51), an appeal to the local planning commission based on alleged errors of interpretation as to the manner the

development evades zoning standards (R. pp. 52-60), the planning commission's denial of the appeal (R. pp. 66-69) and the circuit court's denial of the appeal to it based on Appellant's not joining the property-owner to the appeal within 30 days (R. pp. 8-1 and 11). It does not involve a zoning change. The appeal does involve an application of zoning standards and a green code zoning bonus for conservation set asides. A green code project proposing no minimum lot standards and impervious surfaces are the object of Appellant's requests for the circuit court's interpretations of controlling ordinances (R. pp. 34-35). The primary issues on this appeal are the identity of the permittee, whether lack of joinder under the circumstances is a jurisdictional defect, and whether the indispensability issue was previously decided. Under the applicable local green code ordinance a property owner must apply for its use, affirm no recent tree cutting, and state there are no disparate covenants of title (R. p. 202) . Once application is made, the Green Code has separate application provisions for sketch and concept plan permit approvals (R. pp. 202-204). The administering agency and the appealed to planning commission both regard an unincorporated "group" of developers not the corporate land-owner as the development permittee. The administrators issued a permit to the representative of that group with a copy to the group (R. pp. 49-51). The permit does not mention or copy Intervenor/Appellee. The circuit court gave no deference to the permit administrative determination and the planning commission's factual findings regarding the permittee. Instead, it found the property owner and not the permitted group to be the developer. The circuit court based this on the property owner signing the initial Green Code application (R. pp. 7-8). The circuit court did not indicate its standard of review or comment on the variance between the green code requirements for application of its use and application of

the sketch/concept plans. A permit for purposes of the land development as used in Article 7 (§ 6-29-1145, et seq., S.C. Leg. Web, S.C. Code of Laws, (2013)) is specified as not an authorization to build or to place a structure on a tract or parcel of land. Article 7 is part of Title 6, Chapter 29, South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (Enabling Act). The permit in the instant case involves the submission and approval of a preliminary plan (a sketch/ concept plan), as required under Section 6-29-1150 of the Enabling Act. It is not a statutory change by a legislative body to the zoning standards to authorize nonconforming zoning use. The standard of review for this appeal is *de novo* because it involves an interpretation of the local governing ordinance in its application to the indispensability of a party. Although the circuit court made a finding of fact, it is based on an erroneous interpretation of the Green Code requirements regarding application for a preliminary sketch/concept plan and an interpretation of the Enabling Act that would broaden its intent in regulating preliminary approval of local planning at the sketch/concept plan stages. The circuit court ignored the public notice required for planning permits by Section 1150(C) of the Enabling Act. It also disenfranchised the Appellant's statutory right to appeal a DRT permit approval. Fairways Development LLC is not named in any public notice of the permit and the county in providing information on the project did not mention or refer to it. This appeal seeks a correct interpretation and application of a local ordinance in a decision regarding indispensability and the application of equitable principles, to include equitable estoppel and the equities involved with South Carolina Court Rules and decisions relating to joinder.

2. ***Collateral Estoppel.*** Appellant was in the process of litigating a South Carolina Freedom of Information Act (FOIA)³ case against Richland County in the same circuit court as this case was brought when this case was instituted. Fairways Development LLC was named as a party respondent. The FOIA suit included allegations of the county violating various provisions of the FOIA in administering the same project as is the object of the instant matter. Appellant requested as relief in that matter a declaratory judgment seeking that the project be returned to the Richland County Development Review Team (DRT), relief the same as the requested relief for the county not properly administering its land development permit process in this matter. The sought after FOIA declaratory relief⁴ was, among other things, the return of the project application to the DRT to reconsider its permit approval. The Uniform Declaratory Judgments Act at § 15-53-80 (S.C. Leg. Web, S.C. Code of Laws, 2013) states, “all parties shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.” Fairways Development LLC moved to dismiss in those proceedings with a request for sanctions stating it was not a proper party defendant/respondent. Appellant cited the requirement for declaratory judgment relief and argued that as the reason for his joinder. The Court granted the motion and dismissed Fairways Development LLC from the FOIA case but denied sanctions. Appellant argued this issue to the circuit court in his affidavit and filings in response to Fairways Development LLC’s Motions to Dismiss and Intervene. (R. pp. 135; 116-117; and p. 93 (last para.)). This issue also was brought to the circuit court’s attention during the motions hearings specifically with an offer to fully brief the

³ Fifth Judicial Circuit, In the Court of Common Pleas; Case No. 2-12-CP-400-7337, Samuel T. Brick, Plaintiff v. Richland County, et al. FOIA cited above at Footnote 2.

⁴ § 30-4-100 of the FOIA authorizes application for declaratory judgment for violations of its provisions.

issue (R. p. 184, lines 10-25 and p. 185, lines 1-8). Appellant contends the circuit court erred in not stopping Fairways Development LLC from complaining it is an indispensable party in this matter. The circuit court in limiting argument in the hearing on the appeal stated it would consider the filed papers in making its decision (R. p.195). The circuit court orders make no finding as to this issue. That the FOIA circuit court knew of the issue is evident because it refers to timely notice provided to Fairways Development LLC by notice to its attorney in the FOIA matter (R. p. 20 (last para. of #1)).

Nelson v. Coker, 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003) discusses the South Carolina law with regard to collateral estoppel and res judicata. Collateral estoppel is appropriate in this matter because the claim in the first instance was for an alleged county error relating to county FOIA procedures regarding the same project as the instant case with the same requested relief as the instant appeal. The parties are the same. Intervenor/ Appellee's motion to dismiss in the instant matter is based on Appellant's failure to join it in this case while in the FOIA case when Appellant did join Fairways Development LLC, it requested to be dismissed and for Appellant to be assessed sanctions. In the FOIA case Appellant joined Fairways Development LLC because he considered his failure to do so might affect his rights under the Uniform Declaratory Relief provision, cited above, as to a party who could be affected by the relief. The issue in each case is the same, the indispensability of Fairways Development LLC as a necessary party to a case regarding development of the Villages at Longcreek project. Fairways Development LLC expressed disinterest and sought dismissal with sanctions regarding the declaratory judgment FOIA relief and now requests this matter be dismissed for Appellant's failure to join it stating it has such an interest. Irrespective of

Fairways LLC's lack of financial participation in the development project, the issue in both cases is the same; i.e. the indispensability of Fairways Development LLC as a party to the proceeding and allegations of county errors in both cases. The circuit court in the FOIA matter granted Fairways Development LLC's motion to dismiss to from the proceedings and in doing so determined Fairways was not an indispensable party with regard to the same requested relief as in the instant matter.

3. ***Incorrect determination on indispensability.*** Applicant never objected to Fairways Development LLC developing its property in accordance with relevant zoning standards or to a proper use of the Green Code and its bonus provisions (R. p. 41 (last para., p. 60 (in requested relief)). Appellant's objection consistently has been to the developers' proposition that use of the Green Code provides an overriding exemption to any minimum lot area zoning standards. See the sentence starting with "And it specifically states" in middle of second page of the Planning Commission Order on the Appeal (R. p. 68, middle of page by arrow). The Green Code has varied requirements for developers and property owners. It authorizes varied bonus provisions in the nature of smaller than otherwise required lot size zoning standards depending on the amount of conservation set asides (R. p. 209) and meeting the green code requirements. The developer in the instant case does not use the bonus provisions but instead, for relief from any minimum required lot sizes, relies on a Green Code requirement (R. p. 207). Subsection 26-186 (h)(2)), that says no minimum lot area is required. It interprets that provision to provide relief from otherwise applicable zoning standards and from the

necessity of using the bonus provisions of Subsection 26-186(i) of the Green Code.⁵ The Green Code requires that a property owner “must first submit an application” for Green Code use (R. p. 202, Subsection 26-186 (c)). At time of development, the “applicant or developer” must submit an “Existing Features Site Analysis Plan” (R. p. 202, Subsection 26-186(e)) and, at the same time under Subsection 26-186 (f) of such Green Code, a “developer” must submit a “Concept Plan.” Subsection 26-186(e) of the Green Code requires a registered engineer or landscape architect to seal the site analysis plan. The DRT treats a site analysis plan the same thing as the sketch plan referred to in the second sentence of § 6-29-1150(A) of the Enabling Act (R. p. 49 (first sentence of permit letter)). The sketch plan was submitted for approval and prepared not by or for Fairways Development LLC, the Intervenor/Appellee, but by Sustainable Design Consultants, Inc. for Longcreek Associates, LLC, a South Carolina corporation of Greenville, South Carolina (R. p. 255). The only reference to Fairways Development LLC in the sketch/concept plan is to a golf course, not included in the 100.7 acre project. The reference reads as to an area on the plan, “Now or formerly Fairways Development LLC, TMS#20406-02-01.” (R. pp. 259-260, SA-01-SA-02 of the Sketch/Concept Plan). There is no other reference to the Intervenor/Appellee in the record of administration of the permit approval for the sketch/concept plan, the object of Appellant’s appeal. Intervenor/Appellee is noted in the Sketch Plan application as the Applicant for the Green Code use with the form designating Fairways Development Group as the applicant for the sketch plan *project* (R. p. 46). Such is the manner in which the Richland County

⁵ Appellant contends that the developer did not use the Green Code as intended and that the primary effect of its use is to eliminate lot size zoning standards instead of following the stated purposes of the ordinance and its bonus. He would argue that the developer chose a specific method and did not follow it and the permit should be invalidated for the same reasoning as set forth in Sinkler v. County of Charleston, 387 S.C. 67, 690 S.E.2d 777 (2010) and Mikell v. County of Charleston, 386 S.C. 153, 687 S.E.2d 326 (2009).

Planning Department administered the application (R. pp. 49-51) with the permittee being the Landscape Architect employed by Sustainable Design Consultants on behalf of Longcreek Associates, LLC of Greenville, South Carolina (R. p. 255, title page, initialed landscape architect stamp).

The formal public notice for the DRT's approval of the preliminary development sketch/concept plan stated the applicant of the project is Fairways Development Group (R. p. 48). Section 26-34, of the Richland County Code (R. p. 214) designates the DRT as the designated staff to approve site plans under the provisions of Section 6-29-1150 (A) of the Enabling Act. The Development Review Team (DRT), acting as designated staff, approved the project and granted a permit to the agent of the Fairways Development Group for its sketch and concept plans regarding the Villages at LongCreek project (R. pp. 49-51). There is no permit approval as of this date, to Appellant's knowledge, or in the Record of this action to Fairways Development, LLC.

The Richland County Planning Commission, through its Chairman, published an order that contained an uncontroverted statement by Mr. Ronald Johnson (R. p. 69). Mr. Johnson identifies himself as a responsible developer. He stated he held open neighborhood meetings and referred to his application as low impact development. He mentions that his group engaged outside services to have a tree study done and wetlands surveyed and delineated. His statement, as adopted as a factual finding by the Planning Commission, is that he is the developer of the project. Such uncontroverted findings are a recognized form of administrative tribunal findings. Vulcan Materials v. Greenville City Board, 342 S.C. 480, 536 S.E.2d 892 (2000). Appellant's affidavits (R. pp. 114, 133) state Mr. Johnson and another individual, Mr. McNair, in a community forum said

they were the developers, not the project property owner. The statement is uncontroverted.

The record of this matter lacks any indication that Fairways Development LLC incurred financial expenses in the preliminary development permit process or otherwise participated in its development. The application fee was waived (R. p. 43, third line in "Includes"). The November 7, 2012, letter from Fairways Development LLC noting Fairways Development Group as the party submitting the development application (R. p. 44) does not mention fees. The sketch plan checklist notes the \$500.00 application fee is not applicable (R. p. 46 (second block in first box)). The project plans are prepared by Sustainable Design Consultants, Inc. for Longcreek Associates, LLC (R. p. 255).

The circuit court's grant of Appellee's motion to dismiss is based on its granting the Intervenor/Appellee's motion to dismiss (R. p. 11). That decision is based on the court's finding that Fairways Development LLC is the development permittee in the matter (R. p. 8). The court explains this by stating that since Fairways Development LLC signed the application, it is the developer. The court admits the application was signed in the name of Fairways Development Group. Its order states Appellant attempted to indicate the separate functions of an owner and developer under the Green Code and that Fairways Development LLC did not participate but found that argument unavailing (R. p. 7 near bottom of page). After Appellant sought reconsideration of the dismissal and, in affidavit form, pointed out the varied requirements for developers and owners under the Green Code as well as reiterating the statements by Mr. Johnson that he was the developer of the project (R. pp. 114-115; pp. 156-157) the court in a Form 4 Order states, "The Appellant's Motion to alter or amend the Court's previous order under Rule 59(c),

SCRCP, is denied with oral argument. The Court's previous ordering of dismissal of the appeal still stands." (R. p. 17). There was no notice of oral argument on the motion (R. pp. 218-221) nor did Appellant know of or participate in any such oral argument on his motion for reconsideration. The Form 4 order does not provide clear reasoning that the circuit court considered the varied requirements as pointed out in the motion for reconsideration which makes this Honorable Court's task more difficult to understand the circuit court's reasoning.⁶ Even though Rule 52, SCRCP, while referring to motions presented under Rule 12, SCRCP, to include motions for lack of joinder under Rule 19, SCRCP, Intervenor/Appellee's motion to dismiss is not based on Rule 12 but on a timely joinder of a necessary party. It is not a failure to join because Fairways Development LLC is joined as an intervenor. The dismissal is based on a failure to join within a specified period. The exception of Rule 41, SCRCP, regarding involuntary dismissal notes a special exception regarding failure to join as it relates to an adjudication on the merits. The Form 4 order in this case makes such a statement thereby rendering the dismissal adjudication without the specified findings of fact and conclusions of law required by Rule 52, SCRCP. The other reason a written order is required in the instant proceeding is that the court is not acting as a trial court but as an appellate body and Rule 52 is directed to court findings by a trial level decision-maker.

⁶ This case is akin to a summary judgment but summary judgment cases rely on sufficiency of facts while this case relies on sufficiency of parties to reach a proper resolution. Bowen v. Lee Process Systems Company, 342 S.C. 232, 536 S.E.2d 86 (2000) states a trial court's order on summary judgment must set forth facts and legal analysis sufficient to permit meaningful appellate review. In a recent decision, the S.C. Supreme Court, while stating that it is better practice and beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment, limited Bowen to the extent that it is relied on to vacate and remand orders granting summary judgment. Woodson v. DLI Properties, LLC, et al., Op. No. 27344 (S.C. Sup. Ct. filed January 8, 2014).

The legal framework of Fairways Development Group, if any, is not found in the record of the permit process. The public record contains no indication as to who might be a proper agent for the group, what binds them together such as by laws or agreements, or the nature of its existence. Longcreek Associates, LLC, the corporation named as client for the sketch/concept plan, may be part of the group. Fairways Development LLC also could be a part of the group although it apparently is selling the property since a member of the Planning Commission recused herself from the tribunal based on her law firm representing the owner of the property, the object of the appeal, in the sale of the property (R. pp. 62-63 (pp. 16-17 of Feb. 4, 2013, minutes)). Furthermore, as noted above in the argument relating to equitable estoppel, Fairways Development LLC sought and was provided dismissal from a similar case requesting declaratory relief that might have affected the development. There is no record that Fairways Development LLC participated in the development concept or its sketch plan.

The papers forwarding the project for approval indicate the varied functions of differing parties (R. pp. 43-51). Fairways Development LLC is the Green Code applicant and the Fairways Development Group is the applicant for approval of the sketch/concept plan. The DRT's action was to approve the sketch/concept plan which is the object of Appellant's appeal (R. pp. 47-48). Appellant's objection consistently has been to the sketch/concept plan that proposes interpretations of two Green Code provisions that would negate otherwise applicable zoning standards (R. pp. 35-35-4; R. pp. 57-59; and R. pp. 66-67). Fairways Development Group proposed that plan and invested in it. The property, as noted above is for sale. Also note the designation on the golf courses on the Sketch/Concept plans of the property owner as "Now or formerly Fairways Development

LLC” with the tax number reference (R. pp. 259, 260). It is conjecture as to whom the property is contracted with, if anybody, or what the agreement between Fairways Development Group and Fairways Development LLC is or may be. Spanish Wells v. Board of Adjustment of the Town of Hilton Head Island, 295 S. C. at p. 68 limits its finding to whether a permittee is a necessary party to an action to revoke a development permit. The public record for the project indicates the permittee is an unincorporated group with no known or public footprint that would enable it to sue or be sued. The nature of a developer’s continuing involvement in a Green Code development further is evident with the requirement for its subsequent transfer of control to the new property owners as set forth in Green Code Section 26-186(g)(4)b. f. (R. p. 206 (bottom of page 5)). The property owner is not a part of this function because the developer has a continuing interest in the project while the property owner is divested of interest when he sells the land.

The circuit court in ordering a dismissal provided no deference to the administrative permitting process or the findings of the planning commission. Zoning appeals, handled under the provisions of Article 5 of the Enabling Act include a specific statutory standard for zoning board findings. Such findings must be treated the same as jury findings. In land development cases, Section 6-19-1150(D)(1) of the Enabling Act provides that an appeal from a decision of the Planning Commission must be taken to the circuit court within thirty days of actual notice of its decision but it does not indicate the manner of review. Such reviews otherwise are performed as an appellate body. Rowe v. City of West Columbia, 334 S.C. 400 at 405, 513 S.E.2d 379 (Ct. App.1999). The South Carolina Administrative Procedures Act and its reviewing standards do not apply

because they apply only to State agencies (Id.). The circuit court acting as an appellate body in its review of the decision of the administrative tribunal made an inherently factual determination regarding the identity of the preliminary development permittee where such identity previously was uncontested and administratively determined. The circuit court's finding was that because Fairways Development LLC signed the Green Code application, it was the permittee. It erred in not seeing that more than one application is involved in processing Green Code projects. The first is by the land owner (26-186(c)) to apply for Green Code use and the second is for the developer (26-186(e) and (f)) to provide a preliminary sketch plan for approval. The concept plan by the developer sets forth the details of the lots, setbacks, etc. (See pages SP-01 Through SP-03 of the Sketch Plan; R. pp. 259-261). The failure of the developer to abide by applicable zoning standards and the county to enforce those standards is the basis of Appellant's appeals. The landowner could submit a sketch plan, as the developer, but in this case the public record and the plan itself do not signify it did. The preponderance of the evidence is that the permittee is an unincorporated group. (R. pp. 49-51, and R. pp. 66-69). The standard of review by this Honorable Court of Appeals should be *de novo* because it involves an interpretation of the Green Code as to what is intended by designating varied functions between the owner of property who desires to develop property and the actual developer of the property who lives through the entire development process. The Supreme Court in Bursey v. S.C. Dept. of Health, 369 S.C. 176, 631 S.E.2d 899 (2006), examined a mixed determination of fact and law to determine a correct standard of review. The issue in Bursey was a contested factual situation as to what constituted an excavation. In this matter, the determination of applicant, as it applies to the

sketch/concept plan is governed by an ordinance. The property owner signed a letter to the administrator stating a separate group was providing required submittals for development under the Green Code (R. p. 44). The county interpreted its forms to initiate the sketch plan review in a manner consistent with the bifurcated Green Code application process and issued a permit to the landscape architect for the company hired by a separate corporation, Longcreek Associates, LLC that has no public notice posture in the matter (R. pp. 48-51). See the Sketch/Concept Plan title page (R. p. 255) as to the identity of the named permittee, the landscape architect for Sustainable Design Consultants that was hired not by Fairways Development LLC, the property owner, but by Longcreek Associates, LLC, a corporation from Greenville. The circuit court appears to have made her finding based on an erroneous interpretation of the law. The review of that error is a *de facto* standard. The factual interpretation of who is the developer for purposes of the Green Code permit depends more on the function of the permitting body and the public record of the permit than the factual determination by a reviewing court. In Burse (supra) the majority Court in applying a mix of factual and legal issues leaned to a factual determination because the determination of concern was an administrative interpretation of mining that the court felt was more factual based than legal. In the instant case, the administrative determinations treat an unincorporated group as the permittee, not the landowner. The legal interpretation regarding the permittee in the matter, as applied by the administrators, follows the legal structure of the bifurcated Green Code process. The circuit court's standard of review failed to apply or differentiate the procedural variance in applications and made a finding that ignored the ordinance and the public notice repercussions of the Enabling Act (§ 6-29-1150 (B)). This court can examine the

application of the ordinance under a *de novo* review because the result is determined by the circuit court's error in stating that since Fairways Development LLC signed the application and not Fairways Development Group, it was the developer (R. pp. 7-8). The circuit court ignored that the application being appealed referred to the Fairways Development Group's sketch plan, the required submittals for the development with lot sizes, etc.

When the factual issue before an administrative body involves a jurisdictional or equitable issue a preponderance of the evidence standard is often appropriate. The facts in the record clearly show that the Fairways Development Group is the preliminary development permittee for the sketch/concept plan which is and has been the object of Appellant's appeals. See Porter v. Labor Depot, 372 S.C. 560 at 566 and 567, 643 S.E.2d 96, (2007) discussing varied standards of review of a Workers' Compensation decision and review of jurisdictional issues generally (internal citations omitted)). Porter v. Labor Depot, states questions of subject matter jurisdiction are a question of law. As argued below, indispensability of parties is an equitable matter and the review of equity issues would be under the preponderance of the evidence rules. Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (2011). The property owner has no known financial investment in the development of the property other than ownership. No fees were paid and the record shows other parties paying for the permit process but not Fairways Development LLC (R. pp. 43, 46, and 69 (penultimate sentence of Johnson's statement)).

There is no evidence of an agency connection between the developers and the landowner. The record shows that the preliminary development plan was developed by a separate corporation and that the developers, not the land owner, were active in the

community in explaining the development and stated they were not the owners, and that developers engaged services appropriate for a green code development, and have a continuing relationship with the lot owners after the development is completed. The preponderance of the evidence is that an informal group is attempting to develop the property and the owner has done nothing more than attempt to meet the basic requirements under Section 26-186 (c) of the Green Code that an owner must apply for its use. The public records, the DRT notice, a FOIA response, and the permit itself, point to a developer of the project not the owner or agent of the owner as the preliminary development permittee in this matter as required by the Green Code and its Enabling Act.

4. ***Lack of Joinder as Fatal to Appeal.*** The requirement for joinder, as considered in this appeal is based on indispensability of a party. The party is necessary in order for the court to adjudge matters that may affect a permittee's interests. In this appeal, the Intervenor/Appellee is a party to the proceeding with its intervention under the court's jurisdiction. It has opportunity to provide opposing views to Appellant's arguments and positions. Spanish Wells Owners Ass'n v. Board of Adjustment of Town of Hilton Head Island, 295 S.C. 67, 367 S.E.2d 160 (1988), the leading case on indispensability in South Carolina, in dicta at page 68, states that the circuit court in that case allowed the appellant 15 days to join an indispensable party. The S.C. Supreme Court in that case affirmed the circuit court's order while making no comment about jurisdictional failure. It did say the appellant declined the offer to join the permittee. Spanish Wells (Id. at pages 68 and 69) cites Cathcart v. Snohomish County, 96 Wash. (2d) 201, 634 P. 2d 853 (1981), as leading the majority rule for requiring a development permittee as a necessary party to a land development appeal. It notes the "most vitally interested" party's participation

serves judicial economy and, where the circuit court reverses a permit approval, it insures the permittee will be bound because it is a party to the appeal. Judicial economy, however, is not the purpose of the Enabling Act. An examination of that Act, particularly Article 7 with its 30 day limiting period for appeals, states as a purpose the “harmonious, orderly, and progressive development of land....” (§§ 6-29-1120, et seq. of the Enabling Act). Paragraph 6-29-1145 (C)(2) of such Act states a permit does not mean authority to build or place a structure on a tract or parcel of land. Considering the provision in its entirety and reading it as a whole, Article 7 of the Enabling Act is aimed at the necessity for a governing authority to provide permitting procedures to ensure harmonious land development. See Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005) to consider a statute read in its entirety to interpret its meaning. Such Article 7 provides a specific appeal mechanism for appeals by property owners. (Section 6-29-1150 (C)(2) of the Enabling Act). That varies from the limiting provision for appeals from interested parties and requires pre litigation mediation, not required of interested party appellants (R. pp. 75, 80). To require a joinder for judicial economy may be appropriate but the statutory period within which such joinder must be filed is not driven by the intent or specific language of the Enabling Act thirty day limiting period within which an interested party must appeal from the decision of a planning commission. Whereas, courts may seek judicial economy and require joinder of an indispensable party, the Enabling Act does not require this. Some statutes do, such as the Uniform Declaratory Judgments Act, as noted above regarding collateral estoppel, but the purposes of Article 7 of the Enabling Act do not include joinder for judicial economy as a part of its jurisdictional mandate.

As argued above, the most vitally interested party in this matter is an unincorporated body with no publicly known or evident ability to sue or be sued. Cathcart v. Snohomish County, 96 Wash 2d 201 relies on 3 A. J. Moore, Federal Practice ¶ 19.19, at 19-345 (2d ed. 1979) in its determination that the doctrine of indispensability is not jurisdictional but rather based on equitable circumstances. Cathcart and its progeny are almost exclusively zoning review cases imbued with responsibilities related to ownership. Following Cathcart, Washington State courts apply equitable principles relating to indispensability that look to the nature of the matter and the effect of a dismissal. They apply joinder as an equitable matter and do not treat it as jurisdictional. Crosby v. County of Spokane, 137 Wash.2d 296, 971 P.2d 32, 38-39 (1999), one of such cases, describes its Rule 19(b), two step process to a determination of joinder of persons needed for a just adjudication.⁷ The Washington State court notes the examination of equitable principles in such determination first, in deciding whether the party is needed for a just adjudication and, second by examining the effects of not joining the necessary party. In the instant matter, Fairways Development LLC, the complained of party is joined and participating and has demonstrated no damage should Appellant's requested relief be granted. The requested relief, as stated above, is not to change its ability to develop its property under the law. Spanish Wells, as argued above, referred to the failure of the appellant in that case to join the necessary party after being offered to do so by the circuit court. That failure to join forced the indispensability issue. The issue

⁷ Rule 19, SCRCP is similar, "If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.." In the instant case the first two situations are inapplicable because relief may be obtained without the Intervenor's participation, its interest is the object of the complaint not the subject, and it already is a party.

was not a failure to join within a statutory period. Furthermore, Fairways Development LLC's intervention into this matter is based on Rule 24 (a)(2), SCRCF, that specifically anticipates an intervention to protect the intervenor's interest in the proceedings. The successful intervention moots any argument the Intervenor may have as to not having its rights protected. Furthermore, with the Intervenor having knowledge of the appeal within thirty days of the order being published and participating in the action before anything has occurred in the case, to include the completion of a certified file from the county, is similar to the equitable relation back procedures for amendments under Rule 15 (c), SCRCF. Appellant attempted to amend his pleadings in this regard but the circuit court denied such amendment (R. p. 197, lines 23-25; p. 198, lines 1-6).

A further consideration whether joinder is jurisdictional or not is Section 18-1-100 (S.C. Leg. Web, Code of Laws, 2013) providing that an appellant who omits, "through mistake, to do any other act necessary to perfect the appeal or to stay proceedings the court may permit an amendment on such terms as may be just." Appellant provided notice of the appeal to Intervenor/Appellee but did not join the Intervenor. Section 18-1-100 applies an equitable resolution to perfect an appeal when an appellant or respondent makes a mistake. The General Assembly vested the circuit court acting as an appellate body with discretion in such matters and the court's ruling of dismissal shows no exercise of that discretion (R. pp. 6-8). Appellant followed the permit public notice and its record which showed no involvement by Fairways Development LLC with the sketch/concept plan being appealed. In an equitable determination, the court also should have applied laches with regard to Fairways Development LLC waiting after being provided a copy of the appeal until the appeals

period had expired and then moving for intervention. Appellant brought this issue to the attention of the circuit court in its affidavits and motions (R. pp. 117, 136). The circuit court acknowledged this in its Order Granting Intervenor's Motion to Dismiss (R. p. 8 (last sentence of first full para. on page)). The Order is not based on the notice to Fairways Development LLC but rather on a failure to join Fairways within the prescribed period.⁸ The failure to exercise discretion or to state reasons not to as provided by Section 18-1-100 (Id.) is an abuse of discretion. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 5, 630 S.E.2d 464, 467 (2006), citing Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987).

Article 7 of the Enabling Act relates to land development and land developers. It emphasizes developer rights and responsibilities and provides rights to interested parties.⁹ Zoning standards and changes of zoning to authorize nonconforming or varied development use of property differ from authorized procedures for developers to change land characteristics through development or redevelopment of property and to subdivide property into parcels.¹⁰ The object of this appeal is not the rights of a property owner to its use of property but rather how a preliminary development permittee intends to develop

⁸ The Order reads with regard to this issue (R. p. 8), "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 within the time prescribed by statute."

⁹ Article 7 of the Enabling Act relates to land development and land developers. The use of the property does not have the permanence of zoning laws. Section 6-29-1150 of such Enabling Act speaks to local governing authorities including procedures for developing sketch, preliminary, and final plans for review and approval or disapproval. Sections 6-29-1150 (A) and (B) of the Enabling Act provide rights of developers regarding actions and notifications, respectively, and Section (B) requires that a record of all actions of plans and subdivision plats be maintained as a public record.

¹⁰ Article 5 of the Enabling Act relates exclusively to zoning matters. Zoning districts limit property use and property owners are responsible to know and understand zoning. See Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011) cert den. U.S. Sup.Ct. Order No. 11-1440, Oct. 1, 2012, where the zoning ordinances controlled the use of property to an owner's financial detriment notwithstanding county officials advising and applying incorrect use standards for the area.

the property. Appellant is appealing the developer's interpretation of the Green Code to obtain complete relief from any zoning standards.¹¹ The issues are substantially different from permanent legislative changes to zoning ordinances to obtain different zoning standards for development as examined in the vacated Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008) case upon which the circuit court relies for its dismissal. The Article 7 statutory provision (§ 6-29-1150(D)(1) of the Enabling Act) requiring appeals to be filed within thirty days relates to actions by designated staff (the DRT) and refers to a permit approval of a sketch plan that must be filed as a public document (Id. §§ 1150 (A) and (B), respectively). The relationship between the public document and the appeal is paramount. The public document provides the basis for the appeal, not an application under the Green Code. Appellant, in this regard, met the statutory requirement by filing his appeal of the permit considering the permittee under that public document (see argument above relating to the purposes of such Article 7). Appellant did not include Fairways Development Group because it is not a private or public body capable of service of process or referred to as a corporate or contractual body in the record of the development proceedings or this matter.

The circuit court cites Friends of McLeod, Inc. v. City of Charleston, supra, 376 S.C. 610, as providing direction that failure to file and serve notice on a necessary party within the statutory period to appeal is fatal to an appeal from a zoning board decision.

The circuit court acknowledges the case is vacated and suggests it is due to an agreement

¹¹ The Green Code (Sec. 26-186 (b)) and the applicable zoning standard (Sec. 26-89(c)) require a developer to meet its requirements to obtain a bonus of relaxed zoning with Subsection 26-186 (h)(1) being limited use of impervious surfaces in the developed area, a requirement not enforced with an interpretation that only if a developer uses impervious surfaces on sidewalks and driveways does it otherwise apply (Des. Matter Item #5, App. B-6, p. 3 near bottom of page). The developer also considers a requirements provision that states no minimum lot area (26-186(h)(2)) as being a standard nullifying the bonus provision entirely. (Id.).

mooting the case. Friends of McLeod, Inc. v. City of Charleston, 384 S.C. 438, 682 S.E.2d 488 (2009). The Federal courts, following United States Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 28 (1994) discourage vacatur for purposes of settlement.¹² The Supreme Court in vacating the Appeals Court Friends of McLeod decision does not state it is vacated by settlement. In Friends, the parties mooted the case by agreement. That rendered the appeal moot. The Supreme Court then denied a motion regarding substituting parties and dismissed the appeal. After that, it vacated the lower court decision, a matter it did not have to do. In any event, vacatur is to rescind, annul, or render an act void.¹³ It is not *stare decisis* and should not guide future action, especially action of a differing nature than the zoning action on which it was based. Zoning matters differ from land development issues or matters. For one, the findings of a zoning board must be treated the same as the findings of a jury (§ 6-29-840 (A) of the Enabling Act). Another difference is the first sentence of such Section 6-29-820 (A) that states the petition to the circuit court must set forth “plainly, fully, and distinctly why the decision is contrary to law.” Section 820 (A) limits zoning appeals to “a person who may have a substantial interest in any decision of the board of appeals”. These zoning requirements are not requirements for land development appeals. For an appeal to a staff action on a land development matter as forms the basis in the instant matter, Section 6-29-1150 (C) of the Enabling Act authorizes an appeal by any party in interest. Subsection (D)(1) of such Act relates to an appeal from that planning commission decision to the circuit court.

¹² S. Katrina Starke, *Exceptional Circumstances Justifying Vacatur When Lower Court Decision Mooted by Settlement; Repeat Litigants Slide into Home with Second Circuit Decision-Major League Properties, Inc. v. Pacific Trading Cards, Inc.* 1999 J. Disp. Resol. (1999) (Available at <http://scholarship.law.missouri.edu/jdr/vol99/iss1/9>)

¹³ The Law Dictionary, (thelawdictionary.org) Featuring Black's Law Dictionary Free Online Legal Dictionary 2nd Ed., provides, “What is VACATE? To annul; to cancel or rescind; to render an act void; as, to vacate an entry of record, or a judgment”.

Zoning matters are objects of legislative action relating to permanent changes in the law as opposed to developers interpreting sketch plans for their own purposes. The vacated Friends of McLeod, 376 S.C. at 613 cites Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct App. 2000) with regard to timeliness of an appeal being a jurisdictional matter. Vulcan relates to a variance between statutory limiting appeals periods by a new and former provision of law and not to joinder. Vulcan, quoting from Restaurant Row Assocs. v. Horry County, 327 S.C. 383, 391, 489 S.E.2d 641, 645 (Ct. App. 1997) states that the adoption of a zoning ordinance is a legislative function and a review of the ordinance requires a practical, reasonable, and fair interpretation consonant with the purposes, design, and policy of the lawmakers. The circuit court's ruling treats the matter as an appeal from a zoning board decision to bolster its reliance on Friends. (R. p. 7, in particular, the second sentence of the first paragraph of the Part II ruling). This is an error of law that affects the court's decision and is an abuse of the circuit court's discretion. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). If Friends of McLeod is considered of some guidance in the matter, the limiting period in Article 7 still is inapplicable with regard to a joinder of private parties. Joinder, in the instant case, is an equitable and not a jurisdictional issue. Not only does it denigrate the appeals provision to cure mistakes (§18-1-100, S.C. Leg. Web, S.C. Code of Laws, (2013)) but it has no relation to judicial economy under the circumstances of this matter.

CONCLUSION

Fairways Development LLC owns property upon which designated county staff (the DRT) granted an unincorporated group with an unknown structure a permit to

develop 100 acres under the Green Code, a county density bonus program for conservation set asides. The Green Code has a bifurcated application process requiring a land owner to apply for its use and a developer to submit for approval sketch and development concept plans. The county approved the submitted sketch/concept plan and Appellant appealed alleging erroneous interpretations of county ordinances. The county appellate body affirmed the DRT action and Appellant appealed that to the circuit court. The South Carolina Enabling Act anticipated this scenario in its requirements for local land development and provided interested parties a right to appeal. The circuit court dismissed Appellant's appeal for his failure to join the land owner, alleged as the development permittee, within the period the Enabling Act provided to file the appeal.

Appellant contends the landowner is not the developer and points out the permit was granted to someone else, the sketch plan was prepared for a separate corporate entity, the planning commission factual findings included someone else as the developer, and that the Appellant's uncontroverted affidavit states in a community meeting describing the project two individuals said they were the project developers and the property owner was not. Appellant contends the permit, a public document required by statute, was issued to an unincorporated group and not to the landowner. County applications and public documents related to the development refer to that unincorporated group and not the land owner as the project developer. The Green Code has a bifurcated administration with varied responsibilities of the land owner and the developer. The developer has lasting concerns to the development and in the instant case invested in the project while the land owner stood by awaiting the property sale. Appellant contends the landowner is not an indispensable party to the appeal and since the landowner successfully intervened,

the joinder issue is moot in any event. He refers to a recent FOIA case where he requested similar relief regarding the project and upon the land owner's motion that it be dismissed from that case the circuit court dismissed it as not an indispensable party. The circuit court in the instant matter should have applied equitable estoppel based on the collateral matter and disregarded the property owner's argument that it now is indispensable.

Appellant contends the requirement to join within a statutory period was met in accord with the statutory intent of the controlling Enabling Act and local ordinances. He contends the requirements for joinder are equitable and based on judicial economy and not the purposes set forth in the Enabling Act. He contends it is clear he would have joined the landowner if he had to because he previously did so in the similar case and also he provided a copy of the appeal to the landowner within the required period. He sets forth the state appeals provision authorizing amendments for errors and argues the issue of joinder is an equitable, not a jurisdictional issue. Appellant points out his requested relief does not hamper the landowner's ability to develop the property in accordance with the law and that the issue is land development and not a permanent legislative revision or change such as zoning. Appellant distinguishes the vacated case the circuit court relies on as a zoning case with a different character than land development regulation. He also argues that the Spanish Wells required joinder for judicial economy is based on equity and in that case the Supreme Court referred to the circuit court permitting joinder with the inference that such joinder after the statutory limiting period would have mooted the issue. Appellant argues that even if the landowner

were an indispensable party, his joinder moots the issue because it is not harmed by delays and its interests are protected.

Appellant requests this Honorable Court to determine:

1) Since Fairways Development LLC, in a similar proceeding, stated it was not a proper indispensable party when the relief requested was basically the same as that requested in the instant case and its request for dismissal was granted in that similar proceeding, the circuit court erred in not applying collateral estoppel as regarding Fairways Development LLC's indispensability in the instant matter.

2) The circuit court erred in finding Fairways Development LLC is the preliminary development permittee of the project, the object of Appellant's appeal.

3) Even if the land owner were the preliminary development permittee, Appellant's failure to join it as a necessary party is not a fatal jurisdictional defect and Fairways Development LLC's successful intervention in the matter moots any issue of judicial economy by it not being under the court's jurisdiction.

Finally, Appellant requests this Honorable Court to vacate the circuit court's Order of Dismissal and return his appeal to the circuit court as ripe for a hearing and determination of its appeal of the Richland County Planning Commission's decision to uphold the County Development Review Team's interpretations regarding a proposed sketch/concept plan that would be known as, "The Villages at LongCreek," and for such other relief to include costs and fees as this Honorable Court determines necessary and proper.

Very Respectfully Submitted,

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

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Date:

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge SC Court of Appeals

Case No. 2013-CP-40-1643

Samuel T. Brick, ... Appellant,

v.

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

BRIEF OF RESPONDENT
RICHLAND COUNTY PLANNING COMMISSION

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STATEMENT OF THE CASE

This an appeal of a dismissal by the Circuit Court of an appeal from the Richland County Planning Commission filed by the Appellant Samuel T. Brick ("Brick").

On November 7, 2012, the Respondent Fairways Development, LLC ("Fairways") submitted a Subdivision Review Application and the Sketch Plan to the Richland County Planning and Development Services Department with respect to a proposed development known as "The Villages at Longcreek." (Amended ROA 45-46). The application and submittals were reviewed and approved by the Richland County Development Review Team ("DRT") at its meeting held on November 29, 2012. (Amended ROA 49). The Appellant Brick then filed an appeal of the DRT's decision to the Respondent Richland County Planning Commission ("Commission"). (Amended ROA 52-60).

At its meeting on February 4, 2013, the Planning Commission heard and denied Brick's appeal. A written order was issued by the Commission on March 4, 2013. (Amended ROA 66-69). Brick received a copy of that written order on March 11, 2013, and subsequently filed a Notice of Appeal in the Circuit Court on March 18, 2013. (Amended ROA 32-42). The Planning Commission was the only respondent named in the Notice of Appeal.

On June 5, 2013, the Planning Commission filed a motion to dismiss Brick's appeal contending that Brick "does not have standing to appeal the Respondent's Order because he is not a property owner whose land is the subject of a planning commission decision pursuant to S.C. Code Ann. § 6-29-1150(D)(2)." (Amended ROA 70-71). Fairways Development, LLC also filed a motion to intervene in the appeal and its own motion to dismiss the appeal. Fairways argued in part that Brick failed to timely name or join Fairways, the development permittee, as a necessary party to the appeal. (Amended ROA 85-86). Thereafter, on June 27, 2013, Brick filed a motion to amend the Notice of Appeal to add Fairways as a party. (Amended ROA 99).

A hearing on the various motions was held on August 30, 2013, before Circuit Judge DeAndrea Gist Benjamin. At the hearing, Judge Benjamin granted Fairways' motion to intervene and denied Brick's motion to amend his Notice of Appeal. She took the motions to dismiss under advisement. Later, on December 17, 2013, Judge Benjamin issued two orders granting those motions and dismissing Brick's appeal to the Circuit Court from the Richland County Planning Commission because Brick failed to name Fairways Development, LLC as a necessary party to the appeal. (Amended ROA 5-11). Brick filed a Rule 59(e) motion to reconsider, which was denied by form order filed February 5, 2014. (Amended ROA 17).

Brick subsequently appealed to this Court.

ARGUMENTS

- I. The Circuit Court ruled correctly in dismissing the Appellant's appeal to the Circuit Court based on the failure to timely name the development permittee as a necessary party to the appeal.**

Judge DeAndrea Gist Benjamin dismissed the Appellant Samuel Brick's appeal to the Circuit Court from the Richland County Planning Commission because Brick failed to name the Respondent Fairways Development, LLC as a necessary party to the appeal. Judge Benjamin's decision is premised on the decision of the South Carolina Supreme Court in *Spanish Wells Property Owners Association v. Board of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 367 S.E.2d 160 (1988), in which the Court adopted the majority rule nationally and ruled that a development permittee is a necessary party to an appeal from a planning commission to the Circuit Court. The Supreme Court explained that "[d]esignating the permittee a necessary party insures the most vitally interested party's participation in the appellate process." 367 S.E.2d at 161. "Additionally, the majority rule insures that where a circuit court reverses a permit approval, the permittee will be bound because it is a party to the appeal." *Id.*

On appeal, the Appellant Brick does not appear to challenge the rule announced in *Spanish Wells* that the development permittee, here the owner of the proposed development known as "The Villages at Longcreek," is a necessary party to

the Circuit Court appeal. Brick also does not dispute that he did not name Fairways Development, LLC as a party to the appeal initially or within the thirty day period he was allowed by Section 6-29-1150(D)(1) to commence the appeal. Instead, Brick makes the following arguments: (1) Fairways was made an intervenor in the appeal and thus has the opportunity to be heard; (2) Fairways Development, LLC is not a necessary party because "Fairways Development Group" was identified as the applicant; and (3) Fairways is subject to collateral estoppel because it sought dismissal as a party in a Freedom of Information Act (FOIA) action brought by Brick. Each of these arguments is meritless.

As an initial argument, Brick insists that Fairways was allowed to intervene in the appeal and thus has achieved the status of a party. Brick fails to recognize, however, that the failure to name a necessary party to an appeal is jurisdictional and cannot be corrected after the appeal time has elapsed. Thus, as Judge Benjamin correctly ruled, his failure to make Fairways a party to the appeal within thirty days of the receipt of the decision of the Planning Commission is fatal to his appeal. That ruling is consistent with *Spanish Wells*, where the Supreme Court affirmed the dismissal of a circuit court appeal for the failure of the appealing party to timely join the development permittee to the appeal.¹

¹ Brick points out that the lower court in *Spanish Wells* had given the appellant fifteen days to join the development permittee as a necessary party. Importantly, the Supreme Court affirmed the dismissal of the Circuit Court appeal. The Supreme Court offered no explicit

In *Vulcan Materials Co. v. Greenville County Board of Adjustment*, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), this Court held that "the timeliness of an appeal from a zoning board's decision is a jurisdictional requirement." 536 S.E.2d at 896, n.7. The timeliness of an appeal from a planning commission is no different. Section 6-29-1150(D) governs the filing of appeals from a decision of a planning commission to the Circuit Court. Section 6-29-1150(D)(1) provides that "[a]n appeal from the decision of the planning commission 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). Here, Brick received actual notice of the challenged decision of the Planning Commission on March 11, 2013. Thus, he had thirty days – until April 10, 2013 – to file a appeal naming all necessary parties, including Fairways. However, Fairways was not named in the initial appeal or added by an amended notice of appeal within the thirty-day appeal period provided by Section 6-29-1150(D)(1). Consequently, his appeal was not perfected within the thirty-day appeal period and was correctly dismissed on this basis.

As an excuse for his failure to name Fairways as a necessary party to the appeal, Brick argues that Fairways Development Group rather than Fairways Development, LLC was the "applicant" on the Subdivision Review Application

comment on whether it was proper that the lower court had given the appellant fifteen days to join the development permittee, but it is telling that the Supreme Court did not remand the case for any further proceedings.

and the Sketch Plan submitted to the Richland County Planning and Development Services Department. He contends that Fairways Development Group is an unincorporated entity and cannot be sued. This argument is meritless for several reasons.

First, both the Subdivision Review Application and the Sketch Plan were signed by John T. Bakhaus for "Fairways Development, LLC." (Amended ROA 45-46). Thus, as Judge Benjamin correctly found, the development permittee was Fairways Development, LLC, and that was evident from the documents submitted to the Planning Commission. Brick knew or should have known that Fairways Development, LLC was the appropriate party to join as a necessary party to the appeal.

Second, any confusion about the precise name of the Fairways does not excuse the failure of Brick to name the development permittee as a party to the appeal. If Brick was of the belief that Fairways Development Group was the applicant based on the Subdivision Review Application and the Sketch Plan, that entity, at the very least, should have been named as a party to the appeal. Brick, however, made no attempt to name *any* "Fairways" entity. He simply did not name the development permittee as a party to the appeal, and that is fatal to his appeal.

Finally, Brick contends that he could not name Fairways Development Group as a party to the appeal because it was unincorporated. That is not a valid

basis for failing to name that entity as a party. Section 15-5-160 provides as follows: "All unincorporated associations may be sued and proceeded against under the name and style by which they are usually known without naming the individual members of the association." S.C. Code Ann. § 15-5-160. Thus, Fairways Development Group, even though unincorporated, was subject to being named as the development permittee on appeal.

Finally, Brick's collateral estoppel argument is equally unavailing. He argues that Fairways sought to be dismissed as a party-defendant in a FOIA action brought against Richland County. *See, Brick v. Richland County*, Civil Action Number 2012-CP-40-7337. Collateral estoppel is inapplicable in this context. Fairways was dismissed as a party to the FOIA action because Fairways was not a necessary or even proper party in that litigation. (Amended ROA 20-21). Section 30-4-80 places the responsibilities of compliance with FOIA on the "public body." S.C. Code Ann. § 30-4-80. Therefore, the "public body," in this case Richland County, is the only proper defendant for an enforcement action under FOIA. Fairways, as a private entity, has no responsibilities or duties under FOIA. In that action, Fairways was an improper party. In contrast, in the present appeal, Fairways is a necessary party per the *Spanish Wells* decision. There is no preclusive effect from the FOIA action, and Brick's suggestion to the contrary is legally frivolous.

In fact, Brick's reliance on the FOIA action shows that he, in actuality, had no confusion regarding the identity of Fairways Development, LLC as the development permittee. The Court is urged to take judicial notice of Brick's complaint in the FOIA action, which was filed October 12, 2012, thereby pre-dating the Circuit Court appeal at issue, and which names Fairways Development, LLC as a party-defendant. *See, Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325, 327 (Ct. App. 1984) ("[a] court can take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in its records"). In that complaint, Fairways Development, LLC is identified as the "owner of property in a residential, single family low density district (Section 26-89 of the code) in Richland County, [which] applied to the Richland County Planning and Development Services Department for development of approximately 100.7 acres under section 26-186 of the code." (Supp. ROA 5). Thus, there can be no doubt that Brick was aware in March 2013 that Fairways Development, LLC was the owner of the subject development.

In sum, it is undisputed that Fairways Development, LLC, as the development permittee, was a necessary party to the appeal. It is further undisputed that Fairways was not named as a party to the appeal within the thirty-day appeal period. Consequently, Judge Benjamin was correct in finding a

jurisdictional defect and dismissing the appeal consistent with existing precedent, specifically the *Spanish Wells* decision.²

II. As an additional sustaining ground, the Court should find that the Appellant lacked standing or the required statutory authorization to appeal the Planning Commission decision to the Circuit Court.

As an additional sustaining ground, the Richland County Planning Commission submits that Brick lacked standing or the required statutory authorization to appeal the Planning Commission decision to the Circuit Court. In her order, Judge Benjamin briefly addressed this ground for dismissal and then "declined to address" the issue further. (Amended ROA 11). Instead, she granted the relief sought by the Commission and dismissed the appeal based upon Brick's failure to join Fairways as a party to the appeal. (Amended ROA 11). Nonetheless, this issue of standing remains as an additional sustaining ground that this Court may address to sustain the dismissal of Brick's appeal.

In *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court discussed at length the law governing additional sustaining

² On or about June 27, 2013, the Appellant Brick filed a motion to amend his appeal to name Fairways Development, LLC as a respondent to the appeal. (Amended ROA 99). That motion was denied by Form Order issued September 16, 2013. (Amended ROA 16). The denial of that motion was not challenged in Brick's subsequent Rule 59(e) motion, nor has that Form Order been appealed. *See*, Notice of Appeal, dated March 11, 2014. (Amended ROA 253-1).

grounds. The Supreme Court explained that "in raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." 526 S.E.2d at 722. The Supreme Court further explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* See also, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

As this Court recognized in the recent case of *Sims v. Amisub of South Carolina, Inc.*, 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014), an appellate court may in its discretion consider as additional sustaining grounds even those grounds raised below on which the lower court ruled adversely to the ultimate prevailing party (i.e., normally the respondent on appeal). The *Sims* Court explained that "[a]lthough the circuit court denied the statute of limitations defense, the

Respondents are not precluded from raising this defense as an additional sustaining ground." 758 S.E.2d at 194. In addition to mentioning its authority under Rule 220(c), this Court pointed out that the denial of summary judgment does not decide the merits of the defense and "the defense may be raised again later in the proceedings." *Id.*, citing *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379, 380 (1994).

The same is obviously true with a motion to dismiss. The Supreme Court has recognized that "[l]ike the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *McLendon v. South Carolina Department of Highways and Public Transportation*, 313 S.C. 525, 443 S.E.2d 539, 540, n.2 (1994). *Accord*, *Brown v. County of Berkeley*, 366 S.C. 354, 622 S.E.2d 533 (2005). Consequently, because Judge Benjamin's order denying dismissal on the basis of standing did not decide the merits of the issue, the standing issue is ripe for reconsideration by the lower court. The issue likewise is ripe for consideration by this Court as an additional sustaining ground on appeal.

Turning to the merits of the standing issue, the Commission submits that Section 6-29-1150(D) governs the filing of appeals from a decision of a planning commission to the Circuit Court. Section 6-29-1150(D)(1) provides that "[a]n appeal from the decision of the planning commission 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). That section addresses the timing of an appeal. Section 6-29-1150(D)(2) then addresses who may properly appeal from a decision of the planning commission. That section provides: "A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155." S.C. Code Ann. § 6-29-1150(D)(2). Therefore, only a "property owner whose land is the subject of a decision of the planning commission" has standing or authority to appeal. The Appellant Samuel Brick, however, does not meet that statutory definition of an aggrieved party authorized to appeal to the Circuit Court. The decision of the Commission involved Fairways' land, not Brick's land. On that basis alone, the Circuit Court could have and should have dismissed Brick's appeal.

Judge Benjamin, however, ruled that Section 6-29-1150(D)(1) "does not limit standing to appeal [to] a property owner." (Amended ROA 10). She was mistaken. Section 6-29-1150(D)(1), however, does not establish who may appeal; that is determined by the next subsection, Section 6-29-1150(D)(2), which very clearly gives the right of appeal only to a "property owner whose land is the subject of a decision of the planning commission." S.C. Code Ann. § 6-29-1150(D)(2).

Brick, on the other hand, makes a different argument. He argues that Section 6-29-1150(C) allows for an appeal "by any party in interest." However, Section 6-29-1150(C) governs appeals not *from* the planning commission but rather appeals *to* the planning commission from a staff decision (here the DRT decision). Section 6-29-1150(C) further provides that "the action of the planning commission is final." S.C. Code Ann. § 6-29-1150(C).

To the extent that there is any confusion, a review of legislative changes in 2003 shed light on the proper interpretation of the current version of Section 6-29-1150. Prior to 2003 Act No. 39, Section 6-29-1150 consisted of three subsections; there was no subsection (D). At that time, Section 6-29-1150(C) read as follows:

Staff action, if authorized, to approve or disapprove a land development plan may be appealed to the planning commission by any party in interest. The planning commission shall act on the appeal within sixty days and the action of the planning commission is final. An appeal from the decision of the planning commission may be taken to circuit court within thirty days with actual notice of the decision.

S.C. Code Ann. § 6-29-1150(C) (pre-2003 version). With 2003 Act No. 39, subsection (D) was added, and the General Assembly specified who was statutorily authorized to appeal from the planning commission to the Circuit Court, which was not specified in the pre-2003 version of Section 6-29-1150.

This intent is clear from the title to 2003 Act No. 39, which reads in pertinent part: "to amend Section 6-29-1150, relating to an appeal from a decision

of a planning commission, so as to provide that a property owner may file a notice of appeal..." See, 2003 Act No. 39. It is a well settled rule of statutory construction that a court may "consider the title or caption of an act in determining the intent of the Legislature." *Beaufort County v. South Carolina State Election Commission*, 395 S.C. 366, 718 S.E.2d 432, 436, n.2 (2011). Likewise, the Supreme Court has explained that "it is presumed the Legislature, in adopting an amendment to a statute, intended to make some change in the existing law." *Berkeley County School District v. South Carolina Department of Revenue*, 383 S.C. 334, 679 S.E.2d 913, 920 (2009). Similarly, the Supreme Court explained that a "subsequent statutory amendment may be interpreted as clarifying original legislative intent." *Id.* Thus, in 2003, the General Assembly made a change to Section 6-29-1150 to establish or at least clarify that the only party with the statutory authority to appeal from the planning commission to the Circuit Court is a "property owner whose land is the subject of a decision of the planning commission." S.C. Code Ann. § 6-29-1150(D)(2). It was established or at least clarified that "any party in interest" (except the property owner) does not have the requisite statutory authority to appeal to the Circuit Court.

This intent is further evident by reference to Section 6-29-1155, which was enacted as part of 2003 Act No. 39. Section 6-29-1155 provides for the pre-litigation mediation process that was identified in Section 6-29-1150(D)(2).

Section 6-29-1155(A) begins as follows: "If a *property owner* filed a notice of appeal with a request for pre-litigation mediation ..." S.C. Code Ann. § 6-29-1155(A). (Emphasis added). That clearly shows that only a "property owner" has the right to file a notice of appeal to the Circuit Court. Further, Section 6-29-1155 addresses the rights of interested parties who are not the property owner. The statute provides: "A person who is not the owner of the property may petition to intervene as a party, and this motion must be granted if the person has a substantial interest in the decision of the planning commission." S.C. Code Ann. § 6-29-1155(A). Therefore, a person with a "substantial interest" in the decision of the planning commission – who is not the aggrieved property owner – lacks standing to appeal but is granted the status of an intervenor. Section 6-29-1155 thus demonstrates the intent of the General Assembly that an "interested party" who is not the property owner of the land at issue cannot file the appeal but may participate as an intervenor if an appeal is filed by the property owner.

In applying this statutory framework to the present case, it is clear that Samuel Brick is not the property owner of the land at issue. Thus, he has no standing or authority to file the appeal to the Circuit Court. Only if the aggrieved property owner filed an appeal, which did not happen here, could Brick have sought to intervene, that is, assuming he could demonstrate that he has a "substantial interest" in the decision of the planning commission, which is

disputed. Yet, Brick could not appeal himself, and for that reason, he lacks the requisite standing or authority to have even initiated the Circuit Court appeal at issue. On this additional basis, therefore, this Court should affirm the dismissal of Brick's appeal.³

³ In her order, Judge Benjamin suggests that the Commission "waived" its "arguments refuting the Appellant's interest in the decision of the Planning Commission" because the Commission permitted Brick to appeal the decision of the DRT to the Commission and then ruled on the merits of that appeal. (Amended ROA 11). That ruling is in error for several reasons. First, the right to appeal from the decision of the DRT is governed by Section 6-29-1150(C), which does allow an appeal "by any party in interest" and which, as discussed at length above, is not the standard for appeals to the Circuit Court as established by Section 6-29-1150(D)(2). Second, Judge Benjamin referred to a waiver of any "arguments refuting the Appellant's interest in the decision of the Planning Commission," but the standing issue under Section 6-29-1150(D)(2) does not turn on whether Brick has any "interest" in the decision of the Planning Commission on appeal. Instead, only Brick's status as a potential intervenor per Section 6-29-1155 would be based on a showing of "substantial interest" in the decision of the Planning Commission. Finally, the Commission could not have "waived" the argument that Brick lacks standing or authority to appeal because this issue is jurisdictional, and it is well settled that "issues related to subject matter jurisdiction may be raised at any time" and that "[t]he lack of subject matter jurisdiction may not be waived, even by consent of the parties." *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494, 498 (2005).

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Richland County Planning Commission respectfully requests that this Court affirm the lower court's dismissal of the Appellant Samuel Brick's appeal to the Circuit Court on one or both of the bases argued herein.

Respectfully submitted,

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July 7, 2015

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent Richland County Planning Commission certifies that the Final Brief of Respondent Richland County Planning Commission complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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**APPEAL FROM RICHLAND COUNTY
Court of Common Pleas**

SC Court of Appeals

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2013-CP-400-1643

Samuel T. Brick,

Appellant,

v.

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

Respondents.

**BRIEF OF RESPONDENT
FAIRWAYS DEVELOPMENT, LLC**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT PROPERLY DISMISS BRICK'S APPEAL BECAUSE HE FAILED TO TIMELY JOIN FAIRWAYS, THE DEVELOPMENT PERMITTEE, AS A NECESSARY PARTY TO THE APPEAL?**
- II. SHOULD THE TRIAL COURT'S DISMISSAL OF BRICK'S APPEAL BE AFFIRMED FOR THE ADDITIONAL SUSTAINING GROUND THAT BRICK LACKS STANDING TO APPEAL?**

STATEMENT OF THE CASE

On November 7, 2012, Fairways Development, LLC ("Fairways") submitted an application and sketch concept plan for a project, known as "The Villages at LongCreek," to the Richland County Planning and Development Services Department for review and approval. (R.5, 43-46) After its submission, the application was approved by the Richland County Development Review Team ("DRT") at its meeting, which was held on November 29, 2012. (R. 47-51) The Appellant, Samuel T. Brick ("Brick") appealed the decision of the DRT to the Richland County Planning Commission on December 20, 2012. (R.5, 52-60)

The Planning Commission voted on February 4, 2013 to deny Brick's appeal. (R. 279-280) The Planning Commission issued its order on March 4, 2013. (R. 6, 66-69) Brick filed an appeal with the Richland County Clerk of Court on March 18, 2013. (R. 32-69) The only party named by Brick in the appeal was Richland County Planning

Commission (R. 7-8, 32). On June 5, 2013, the Planning Commission filed a motion to dismiss Brick's appeal because he did not have standing under the statute to appeal. (R. 70) On June 17, 2013, Fairways filed a motion to dismiss Brick's appeal based on Brick's lack of standing and Brick's failure to timely join Fairways, the development permittee, as a necessary party to the appeal. (R. 104) Fairways also filed a motion to intervene in the action because Brick failed to name it as a party to the appeal. (R. 85)

On June 27, 2013, Brick filed a motion to amend his appeal to add Fairways as a party and a "Notice of Defective File." (R. 99)

A hearing was held before the Honorable Judge DeAndrea Gist Benjamin on August 30, 2013. (R. 5, 165-(1)-198) At this hearing, Judge Benjamin granted Fairways' motion to intervene, denied Brick's motion to amend his appeal and took the motions to dismiss under advisement. (R. 187, 198) Subsequently, Judge Benjamin entered orders dated December 17, 2013 granting Fairways and the Planning Commission's motion to dismiss Brick's appeal for failure to join Fairways as a party to the appeal. (R. 5-12) Judge Benjamin denied Fairways and the Planning Commission's argument on standing. (R. 6-7, 10, and 12) Brick filed a motion to reconsider which was denied by form order dated and filed February 5, 2014. (R. 17) Brick timely served his notice of appeal from these order on March 11, 2014, this appeal followed.

ADDITIONAL FACTS

Brick's property is not adjacent or contiguous to the property being developed. His property is located across a golf course and a 150 acre lake from the property being developed, so it is not near "The Villages at Longcreek". (R. 110-111). Furthermore, Brick's property is not subject to the Longcreek Covenants, Conditions and Restrictions, nor is he a member of the Longcreek Property Owners Association. (R. 121-122)

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED BRICK'S APPEAL BECAUSE HE FAILED TO JOIN FAIRWAYS, THE DEVELOPMENT PERMITTEE AS A NECESSARY PARTY TO THE APPEAL.

The outcome of this appeal is governed by the *Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of Town of Hilton Head Island*, 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988) and the reasoning of the South Carolina Court of Appeals in *Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 615, 658 S.E.2d 544, 546 (Ct. App. 2008)¹. In *Spanish Wells*, the South Carolina Supreme Court adopted the majority position that a development permittee is a necessary party to an appeal of its permit. *Id.* at 69, 367 S.E.2d at 161. The court affirmed the circuit court's dismissal of an appeal by the property owners association that failed to join the development permittee. In this case,

¹ The South Carolina Supreme Court granted petitioner's request for a writ of certiorari to review the Court of Appeals decision in *Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544 (Ct.App.2008). Respondents filed a motion to dismiss the appeal based on an agreement that renders the appeal moot. The Supreme Court granted the motion and vacated the opinion. It is not cited by Fairways herein as binding precedent but for its reasoning and to show proper credit for the arguments.

Brick failed to join Fairways as a party to the appeal and therefore his appeal was properly dismissed.

While Fairways sought to intervene and was later added by the court on August 30, 2014, such intervention does not save Brick's defective appeal. As noted by the trial judge in her opinion, "In *Friends of McLeod Inc.*, the parties, by consent order, joined the necessary party to the appeal. However, in that case, the Court still found the appeal to be untimely because the appellant failed to join the necessary party within the statutorily required time to appeal. *Id.* at 613-15, 658 S.E.2d at 545-46." (*Emphasis Added*). (R. 8) "In order for the Appellant to have perfected his appeal to the circuit court, he would have had to join Fairways in the appeal by April 9, 2013². For this reason, the Court finds that Fairways' motion dismiss should be granted." (R. 8) Failure to timely join Fairways was jurisdictional and fatal to Brick's appeal. This court should affirm the trial court on this issue.

II. BRICK'S ARGUMENT ABOUT COLLATERAL ESTOPPEL IS MISPLACED AND HIS FOIA ACTION REFUTES RATHER THAN SUPPORTS HIS ARGUMENT BECAUSE IT SHOWS BRICK KNEW PRIOR TO FILING HIS APPEAL THAT FAIRWAYS SHOULD HAVE BEEN JOINED AS A PARTY.

Brick argues that because Fairways Development, LLC filed a motion to dismiss in a separately filed, FOIA case by Brick against Fairways and Richland County³ (R. 234) that Fairways is collaterally estopped from asserting that Fairways is a necessary

² Fairway was joined by its motion to intervene on August 30, 2013.

³ *Brick vs Richland County et. al.*, 2012-CP-40-7337 ("FOIA action").

party to his appeal from the Planning Commission. (Appellant's Brief, Argument 2)

However, Brick is comparing apples and oranges.

As noted by the Judge Alison Renee Lee in her order granting Fairway's motion to dismiss, the FOIA applies only to a public body, not a person such as Fairways, (2) there is no private cause of action against Fairways under the FOIA and (3) the Plaintiff has not alleged any violation of the FOIA by Fairways. (R. 20-21).

Thus, Fairways dismissal in that action has nothing to do with whether or not it is a necessary party as a development permittee in a separate appeal from the Planning Commission. Indeed, it's surprising that Brick even mentions the FOIA action because it makes clear that, despite all his protestation in his brief to the contrary, Brick always knew Fairways was the development applicant and should have been a party to his appeal.

In paragraph 6 of Brick's complaint (filed in the FOIA act case on October 31, 2012 and prior to his appeal), Brick alleges that Fairways Development, LLC applied to the Richland County Planning and Development Services Department for development of approximately 100.7 acres under section 26-186 of the code. (Emphasis added). (R. 236). In a motion to amend those same pleadings on January 9, 2013 (again prior to his appeal), Brick states, "...Defendant Fairways Development LLC is included as a vested party of interest only." (Appendix to the Record on Appeal, 4)

In his final order granting Richland County an involuntary dismissal after Brick's case in chief on the FOIA case, Judge Roger M. Young, Sr. notes, "...each of the alleged violations of FOIA asserted by the Plaintiff pertain to a development application submitted by Fairways Development, LLC ("Fairways") regarding the proposed development of a parcel of land in Richland County. (R. 24)

This court should find that Brick's argument about collateral estoppel lacks merit, that he is comparing apples and oranges, and that the FOIA action shows that Brick knew prior to his appeal Fairways was the development applicant with a "vested interest".

III. BRICK'S ARGUMENT THAT FAIRWAYS IS NOT THE DEVELOPMENT PERMITTEE MISSES THE POINT THAT HE FAILED TO JOIN ANYONE OTHER THAN THE COUNTY IN HIS APPEAL.

As alluded to in the previous argument, Brick devotes a substantial part of the argument in his brief to argue that Fairways Development Group, an alleged unincorporated entity, was the proper party to be included in his appeal. For example on page 33 of his brief, Brick states, "The facts in the record clearly show that Fairways Development Group is the preliminary development permittee for the sketch/concept plan which is the object of the Appellant's appeals." If this is the case, which Fairways denies, then Brick misses the point of the reason for the dismissal of his appeal because Brick made no effort to join "Fairways Development Group" as a party to his appeal,

either when he filed it with Richland County Circuit Court or later in his motion to amend his appeal.

Perhaps this is because Brick was under the mistaken legal belief that he could not sue an alleged unincorporated association in its own name.⁴ On page 36 of his brief, Brick states, "...most vitally interested party in this matter is an unincorporated body with no publically known or evident ability to sue or be sued." And more directly, "Appellant did not include Fairways Development Group because it is not a private or public body capable of service or referred to as a corporate or contractual body in the record of the development proceeding or this matter." (Brick's Brief, p. 39). However, Brick cannot have it both ways, either he knew that he had to add the development permittee but failed to do so because he wrongfully believed it could not be sued or he didn't know that the development permittee had to be named and failed to do so for that reason. In either case, the salient point missed by Brick in his arguments is that he failed to timely join the development permittee regardless of its identity and therefore his dismissal was proper either way.

⁴ All unincorporated associations may be sued and proceeded against under the name and style by which they are usually known without naming the individual members of the association. S.C. Code Ann. § 15-5-160

IV. THE TRIAL COURT'S DISMISSAL OF BRICK'S APPEAL SHOULD BE AFFIRMED FOR THE ADDITIONAL SUSTAINING GROUND THAT BRICK LACKS STANDING TO APPEAL.

BRICK LACKS STATUTORY STANDING BECAUSE HE IS NOT THE PROPERTY OWNER

Brick must have standing to prosecute an appeal from the Planning Commission to the circuit court. S.C. Code Ann. §6-29-1150(d)(1) provides the procedure for an appeal to the circuit court, but does not specify who may appeal. S.C. Code Ann. § 6-29-1150(D)(2) answers this question by providing, "A *property owner* whose land is the subject of the planning commission decision may appeal." Brick is not the property owner and thus does not have statutory standing to appeal.

BRICK LACKS CONSTITUTIONAL STANDING BECAUSE HE DOES NOT HAVE A SUBSTANTIAL INTEREST IN THE DECISION OF THE PLANNING COMMISSION

S.C. Code Ann. §6-29-1155(a) provides that a non-owner may *intervene* in an appeal if the person has a *substantial interest* in the decision of the planning commission. This is consistent with Richland County Ordinances §26-54(c)(3)(b)(4)(b) which provides for an appeal by a person with a *substantial interest* and §26-58(f) *Appeals of Administrative decisions* which also provides for an appeal by a person with a *substantial interest* in the decision. Ironically, as noted by counsel for Richland County Planning Commission in the argument before Judge Benjamin, the statutory scheme was reversed and thwarted in this case with the Fairways as property owner filing the motion to

intervene and Brick, the non-owner filing an appeal. This is further evidence why Brick's appeal should be dismissed.

Brick is not the landowner, and does not have a *substantial interest* in the decision of the Planning Commission. Brick states in his appeal, "Your Appellant, a citizen of Richland County, is a party in interest as well as an adjacent and contiguous property owner to the property that is the object of the subdivision project. (Brick Appeal, p.2) Standing to *intervene* exists for any person with a "substantial interest", defined as "owners of property adjacent to and in the near vicinity of" "The Villages at Longcreek". *Spanish Wells Property Owners Ass'n v. Board of Adjustment of Town of Hilton Head Island*, 292 S.C. 542, 357 S.E.2nd 487 (Ct.App. 1987) However, Brick's property is not adjacent to and in the near vicinity of the property being developed. His property is located across a golf course and a 150 acre lake from the property being developed, so it is not in the near vicinity of "The Villages at Longcreek". Furthermore, Brick's property is not subject to the Longcreek Covenants, Conditions and Restrictions and Brick is not a member of the Longcreek Property Owners Association. Brick and his property are subject to different Covenants, Conditions and Restrictions. In short, Brick does not have a substantial interest in approval of the sketch concept plan for "The Villages at Longcreek" and therefore lacks constitutional standing for his appeal.

Fairways notes that Judge Benjamin in her order concluded that the Planning Commission had waived the standing argument by considering Brick's appeal from the

DRT on its merits. Fairways respectfully disagrees with Judge Benjamin on this point: First, standing is jurisdictional and cannot be waived and must be considered by this court, even if it's not raised by the parties. *United States vs. Hays*, 515 U.S. 737 (1995); Second, the standard of appeal from the DRT to the Planning Commission is a lesser, different standard, it states "any party in interest" and it also states that the action of the Planning Commission is "final." S.C. Code Ann. §6-29-1150(c). Third, Fairways is not the Planning Commission and any alleged waiver should not be imputed to Fairways.

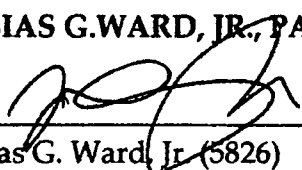
For all these reasons the court should address this issue and find that Brick lacked standing to pursue this appeal.

CONCLUSION

The trial court should be affirmed because it is undisputed that Brick failed to join Fairways, the development permittee, as a necessary part to his appeal. Fairways dismissal from Bricks separate FOIA action is unrelated and does not collaterally estop Fairways from arguing Bricks appeal should be dismissed. The FOIA action also shows that Brick knew that Fairways had a vested interest and should have been named and joined as a party to his appeal. Finally, Brick lacks both statutory and constitutional standing to pursue this appeal as he is not the property owner and does not have a substantial interest in the decision of the Planning Commission. For all these reasons, the trial court's order of dismissal should be affirmed and the development allowed to proceed as approved by Richland County.

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2014-000583

Samuel T. Brick, Appellant

v.

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

REPLY BRIEF OF APPELLANT

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Reply Brief complies with Rule 211 (b),
SCACR.


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ARGUMENT IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in their opening brief, Appellant offers the following points of clarification and reply to the arguments raised by the Respondents.

1. *Failure to Join Development Permittee within Statutory Period for Appealing Being Jurisdictional Defect.* As addressed more fully in Appellant's brief and below, the Intervenor/Respondent is not the development permittee for the Villages project and it was and is not a necessary party under the terms of Spanish Wells Property Owners Assn., Inc. v. Board of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 367 S.E.2d 160 (1988)(hereinafter Spanish Wells). Intervenor/Respondent on Page 5 of its Brief refers to Fairways Development LLC being the "development applicant". As mentioned in Appellant's brief, Article 26-186 of the Richland County land Development Code, *Green Code standards*, has a bifurcated process for implementing development. The Green Code applicant and the Green Code developer have differing roles. Fairways Development LLC is not the development permittee for the project. The public record of the permit (required by Section 6-29-1150 (B)) is to a person other than the owner of the property (R. pp. 49-51). The project permittee, as addressed below, is not an association or body, corporate or unincorporated, capable of suing or being sued in South Carolina. The thirty day General Assembly provision (Section 6-29-1150 (D)(1)) for bringing an appeal to the circuit court relates to an appeal of an administrative decision by a board or commission. The joinder of a third party, in this case a development permittee, is not referred to in the statutory provision other than as a party a mediator may or may not

join.¹ The joinder of a third party in the General Assembly's Section 1150 appeal provisions is not a jurisdictional requirement. None of the court rules regarding joinder make the joinder jurisdictional. In this regard, the respondents refer to Vulcan Materials v. Greenville Cty. Bd., 342 S.C. 480, 536 S.E.2d 892 (Ct.App. 2000) (hereinafter Vulcan) a zoning matter relating in part to an appellant meeting changed statutory periods within which it is necessary to file an appeal. Vulcan does not relate to joinder of necessary parties or what a necessary party must be.

Section 6-29-1150 (D) requires an appeal from a decision of the planning commission to be filed within thirty days after actual notice of a decision. Such filing is the jurisdictional trigger for appellate review. The appeal is of an action of the planning commission. Judicial economy, the basis for Spanish Wells requiring a development permittee to be a party is not a jurisdictional requirement based on regulation or statute but an equitable remedy based on judicial economy. Intervenor/Respondent Fairways Development LLC provided no indication in the record or otherwise that it was prejudiced by not being joined within the thirty day period and it successfully intervened. Appellant provided Intervenor/Respondent notice of the appeal within the thirty day period yet it did nothing until after the thirty days had run when it cried lack of jurisdiction. (R. p. 98).

Spanish Wells limits its findings to whether a permittee is a necessary party in an action that might revoke a development permit. It did not use the term property owner. Equity and judicial economy might demand participation of a party that might or might

¹ See Section 6-29-1155, South Carolina Code. The provision provides a person not the owner may petition to intervene as a party and if the mediator decides the person is of substantial interest the mediator must grant the motion to intervene. The substantial interest guideline in this respect is not limiting and only mandatory should the interest be substantial.

not take exception and wish to participate in the appeal. The appeal however is jurisdictional when brought in accordance with the statutory mandate. Regarding the specific matter of joining a development permittee after the period within which to institute an appeal, *Spanish Wells* (295 S.C. p. 68), in dicta, stated the circuit court that initially heard the case, after dismissing it for failure to join the necessary party, allowed the Plaintiff fifteen days to accomplish such a joinder. The Plaintiff, in that instance, did not join the permittee and instead appealed. Respondent Richland County in the first note of its Brief suggests the issue is jurisdictional; otherwise the Supreme Court would have remanded the matter to the circuit court. *Spanish Wells* however, infers that had the Plaintiff/Appellant, while the matter was before the circuit court, joined the permittee Calibogue, the matter would be moot. *Spanish Wells* saw no jurisdictional issue but answered the Appellant's appeal. The Appellant's decision to appeal rather than to join when a necessary party was indicated by the lower court in *Spanish Wells* was fatal.

The lower court in the instant case and Intervenor/Respondent's reliance on *Friends of McLeod v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544 (Ct. App. 2008) (hereinafter *Friends*) that the failure to join the permittee within the thirty day period is fatal are misplaced. *Friends* relates to a zoning board decision not a land development matter and, as noted before in Appellant's brief, *Friends* was vacated by *Friends of McLeod v. City of Charleston*, 384 S.C. 438, 682 S.E.2d 488 (2009). The zoning cases *Friends* and *Vulcan* entertained involved Article 5 of the State Enabling Act² and are substantially different from Article 7 land development provisions. The permanency of zoning and the political, legislative zoning process, as enabled in Article 5, differ

² South Carolina Local Government Comprehensive Planning Enabling Act of 1994 (6-29-310, et seq.) (referred to as Enabling Act in Appellant's Brief and this Reply brief).

substantially from the ministerial administrative requirements and subsequent executive planning commission reviews for land development permits. The permanence of rezoning and its political basis vary substantially from a land development permit matter that is but one initial step in a land development project. Vulcan does not address the jurisdictional issue of the timeliness of joining necessary parties to an already filed appeal. It examines the effective dates of changed statutory schemes and emphasizes, with regard to the instant matter, only that an appeal be brought within a prescribed statutory period.

2. *Collateral Estoppel.* Appellant briefed this issue before the lower court and in his Initial Brief. For application of collateral estoppel *the issue* of Fairways Development LLC's joinder must have been litigated and directly determined in the prior action. Nelson v. Coker, 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003). Under South Carolina law, "[c]ollateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." in Sims v. Amisub of South Carolina, Inc., 408 S.C. 202, 758 S.E.2d 187 (Ct. App. 2014). cites Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009), stating "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment."

The issue of Intervenor/Respondent's interest in the project that would require its participation and joinder in the South Carolina Freedom of Information Act (FOIA) case was litigated in the FOIA case. The circuit court heard the reasons that Plaintiff,

Appellant had in adding Fairways Development LLC to the FOIA action. Plaintiff argued that he joined Fairways Development LLC because the FOIA allows for declaratory relief. Under Section 15-53-80 of the Uniform Declaratory Judgments Act, when any declaratory relief is sought, and it was prayed for in Appellant's FOIA case, all persons must be made parties who have or claim *any interest* which would be affected by the declaration (emphasis added). The Court in the FOIA case granted Fairways Development LLC's motion to dismiss it from the case. The court's dismissal was a direct determination by the court on the issue of any interest that Fairways Development LLC may have had in the project. It's consideration of the matter is enunciated in its Order of dismissal (R. p. 20).³ That the Court also speaks to FOIA only applying to a public body and there being no private cause of action against Fairways Development LLC, are matters separate from the issue of joinder. In the FOIA case Fairways Development LLC, facing requested relief that the project approval be declared null and void and returned for further staff considerations, moved for its dismissal from the case. In other words, it had no interest in the issue. In the instant matter, after being apprised of Appellant's similar prayers for relief again for alleged failures by Richland County, Fairways Development LLC moved for dismissal of the entire matter because it was a necessary party and not joined.⁴ The issue in both cases is Fairways Development LLC's necessary joinder to a proceeding regarding the Villages project. It had its day in court on the issue, was dismissed from that matter in a previous case involving the same parties and similar prayers for relief as in the instant matter, and now appears to be using it to

³ The Honorable Alison Renee Lee subsequently revised the Order requested to be made a part of the Record by Intervenor/Respondent. The revision was to correct Judge Lee's Dismissal of Richland County on pages 4, 5 of the Order (R. pp. 21,22) to make it comport with its ruling on its first page (R. p. 18).

⁴ Initially Appellant added Fairways as a party defendant but subsequently amended his pleading to designate Fairways as a party respondent (R. p. 234).

force a dismissal of the entire proceedings by being declared such a party of interest.⁵

The issue was resolved and the lower court in the instant appeal erred in relitigating it.

3. *Argument that Fairways Development LLC is development permittee is not supported by the record.* The Respondents argue that since the Subdivision Review Application and the Sketch Plan submission are both signed by the owner of the property, Fairways Development LLC, the owner is the development permittee. They do not indicate that where both documents provide for naming an applicant for approval of the sketch plan and development plat, a separate entity, Fairways Development Group, is listed. Whereas the owner made application for use of the Green Code provisions, it is not the project developer. The Green Code and the Article 7 provisions of the State Enabling Act recognize that an owner is not always the developer. Both provisions use different terms for different land development functions.

The Respondents continue to ignore that the public permit was issued to a separate entity altogether, an agent of the planner who prepared the sketch/concept plan for a client not otherwise known in the project except for later being a brief owner (three and a half months) of a third of the property on which the development is suggested. (R. p. 226). The county considered the stated applicant on the Subdivision Review Application and the sketch plan submission as a separate entity than the owner because it knew the owner was not the project developer. Intervenor/Respondent, other than in its request to lift the stay and require a supersedeas bond, fails to state that the owner for the first phase of the project, Fairways Development LLC, no longer owns a portion of that property and has no development interest in it.

⁵ The declaratory judgment mandate for joinder of a party with any interest is legally more inclusive than that of Spanish Wells which limits its holding to requiring joinder of development permittees.

The two-step Green Code process noted above clarifies that not every property owner is a developer. In the instant matter, as more fully shown in Appellant's Brief, Fairways Development LLC's role in initiating the Green Code project is that of the owner and not the developer. Fairways Development Group consistently is listed as applicant for the sketch plan approvals. An owner's application for a Richland County green code project is required under its Section 26-186 (c). Section 26-186 (e) is that an applicant or developer prepare and submit an Existing Features Site Analysis Plan. The concept plan required to be filed by a developer is included as part of the sketch plan. The official permit approved by county designated staff and published by Richland County Department of Planning and Development Services, the public document required under Section 6-29-1150 (B) of the South Carolina Code, is addressed to John Champoux with a copy to, among other, John Bakhaus, c/o Fairways Development Group, Applicant (R. pp. 49-51). The county staff treated the permit sketch plan application, the crux of the appeal, as that of the developer and not the owner.⁶

Unless there is a compelling reason to overrule the agency's determination, the circuit court, acting as an appellate body should apply a deferential standard of review to administrative matters such as who is the developer. In a state administrative law matter, the Court of Appeals in Young v. S.C. Department of Health and Environmental Control, 383 S.C. 452, 460, 680 S.E.2d 784 (Ct. App. 2009) applied the application of a deferential standard to an administrative agency when substantial evidence existed in the

⁶ Fairways Development LLC and the County Department of Planning and Development Service were sensitive with regard to Green Code applications requirements. On November 5, 2012, just two days before the application described in this paragraph was filed, the Planning Commission granted Appellant's Appeal of a previous permit as being improper because the Green Code application was not signed by the property owner. See further discussion of this sensitivity in who executes what in the Green Code applications in the transcript of the matter before the lower court (R. p. 169, lines 22-25, p. 170).

record in support of its action. In another more recent Court of Appeals decision relating to appellate review fact finding, the Court referred to an older case that addressed the standard of review of administrative factual findings prior to the current statutory requirement for administrative reviews. The prior standard of appellate review was a finding of fact by the administrative Commission was not subject to review if supported by any evidence. Hyman v. S.C. Employment Security Commission, 234 S.C. 369, 108 S.E.2d 554 (1959). See Todd's Ice Cream, Inc. v. S.C. Emp't Sec. Comm'n, 281 S.C. 254, 258, 315 S.E.2d 373, 375 (Ct. App. 1984) as cited in Stubbs v. S.C. Dept. of Employment and Workforce and JSE, LLC, Appellate Case No. 2012-212280, Filed March 5, 2014. The circuit court's finding in the instant matter that the owner is the development permittee (R. pp. 7, 8) fails to defer to the public permit, the product of substantial administrative process and review by the administering agency which permit was not awarded to the property owner. Furthermore, the circuit court's factual determination that, just because Fairways Development LLC is the owner, it is the developer has no basis in fact and fails to recognize the Green Code bifurcated application process. Nothing in the Record shows that Fairways Development LLC has done anything to develop the project. Although the Record shows that others expended funds for the project, there is nothing in the Record or provided by Intervenor/Respondent that Fairways Development LLC expended anything. It is not evident as a participant in the project other than to execute the application for the green code as required of the owner, not the developer. Fairways Development LLC did not pay the application fees. The permit application may be executed by either the owner or the developer. The concept plan (a part of the sketch plan in the instant project) must be

executed by the developer. The applicant of the sketch plan applications is not stated as Fairways Development LLC. To counteract any inference that Fairways Development LLC and Fairways Development Group are the same entity, the Record is clear throughout that the two entities are separate. This is more fully detailed in Appellant's Brief.

On May 28, 2014, just six days after Appellant filed his Initial Brief, the Intervenor/ Respondent moved pursuant to Rule 241, SCACR, that the Richland County Circuit Court lift the automatic stay and require Appellant to post a supersedeas bond. The motion and the exhibits, now part of the record of the proceedings with regard to this appeal, included an affidavit as its Exhibit B 1 (R. pp. 222-224) to the effect that Longcreek Associates, LLC purchased the property, the subject of the action from Fairways Development LLC. An examination of the Richland County Tax Records, a normally indisputable source, filed as Exhibit F to Appellant's return to the Motion, (R. pp. 225-226) indicates that portion of the property which would make up Village #1 has been sold three times since the county permit to authorize its development was issued on December 7, 2012. The deed representing the first sale to Longcreek Associates, LLC, dated December 13, 2012, as filed with the Richland County Registered of Deeds, another indisputable record, was filed as Exhibit E to Appellant's return to the motion to lift the stay, (R. pp. 227-228). Appellant had no reason to believe that Fairways Development LLC sold the property. This issue is not something Appellant has held as a silver bullet; Appellant discovered it with the recent motion to lift the stay filed just after Appellant filed his Initial Appellant Brief. An affidavit as an exhibit to the motion to lift the stay states another person as owner. The last paragraph of Intervenor/ Respondent's

motion to intervene filed on June 14, 2013 (R. p. 86, last para., first two sentences), starts with the statement “In this case, Fairways owns the property which is the subject of Brick’s appeal....” That statement appears disingenuous since a third of the project, the portion listed as the first Village to be developed, was sold almost six months before the motion.

After receipt of the affidavit in the motion to lift the stay, Appellant researched the matter and discovered a Sustainable internet display for prospective customers as an example of its projects (R. pp. 229-232). Appellant filed this in his return to the motion to lift the stay. Page 2 of the Sustainable display (R. p. 230) lists the owner of the project property as Longcreek Development, LLC, a South Carolina corporation, otherwise unknown in this matter. It is an incorporated entity that differs from LongCreek Associates, LLC. Respondent Richland County continues to argue that Fairways Development LLC is the owner of the 100.7 acre development.⁷ There is no reference in the Record, or otherwise to Appellant’s knowledge, that Fairways Development LLC is the development permittee. The current owner of the projected first phase for the project is a foreign corporation not incorporated within South Carolina and otherwise unknown. With regard to introduction of this recently determined matter, a court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records. See 31 C.J.S., Evidence, Section 50(1), p. 1018-1021, as adopted in Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325 (Ct. App. 1984). Documents filed with the court are part of its record and a court can take judicial notice of them and reference them. Dept. of Soc. Svcs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463 (Ct. App. 2009). An appellate court can take judicial notice of something that

⁷ See page 8 of Respondent Richland County’s Brief.

was not before the trial court if it is indisputable. Wise v. Wise, 394 S.C. 591, 600, 716 S.E.2d 117 (Ct. App. 2011). The sale of the property is evidence of Fairways Development LLC's disinterest in its development. It also undercuts the argument the respondents continue to make that just because a party is the owner makes it a development permittee.

4. *Appellant failed to join anyone other than the County in the appeal.* Aside from the determination that Fairways Development LLC was not interested in the matter because he withdrew from the FOIA case, Appellant, as noted in his Brief, was unable to determine a different appropriate party to join. First, the permit was awarded to an individual whose only participation in the matter was as an employee of a planning contractor, not a developer (Sustainable), to a corporation (Long Creek Associates, LLC) that apparently paid for the sketch plan but is not otherwise identified in the project. As stated in Appellant's Brief, upon query by attending neighbors at an early meeting regarding the development, the President of Sustainable, briefing as the planner and not a developer, stated Fairways Development LLC and John Bakhaus were not the developers. They never identified who was. Fairways Development LLC sold the first phase for the project just a few days after its approval.

Fairways Development Group, stated as the applicant for the sketch plan, has no footprint as a developer within South Carolina. There are no public or apparent contractual arrangements binding its membership. There is no indication Fairways Development Group contracted for or paid for anything with regard to this or any development anywhere. It is not an association known to anyone but possibly its members. There is no known concept of a formal or informal Fairways Development

Group association such as a known neighborhood, church, active retail, or business association. Phase one has been sold three times since the Villages sketch permit was approved by Richland County. Phases two and three in which conservation set asides form part of the basis for the relaxed zoning in phase one are indicated online as being owned by a corporate body uninvolved in the project. The corporate body that initially purchased the phase one property was the client of the sketch plan planners but that corporate body sold the property and may no longer be involved. That body, Longcreek Associates, LLC, is unidentified in the sketch plan administrative files other than on the sketch plan itself as the party for whom it was prepared (R. p. 255).

Section 15-5-160 of the South Carolina Code states, "All unincorporated associations may be sued and proceeded against under the name and style by which they are usually known without naming the individual members of the association." This law does not make an unincorporated association a legal entity. See Crocker v. Barr, et alia, 295 S.C. 195, 367 S.E.2d 471 (1988), citing Medlin v. Ebenezer Methodist Church, 132 S.C. 498, 129 S.E. 830 (1925). The provision is designed to provide a convenient procedure by which a plaintiff can bring the members of an association before a court without naming and serving process upon them individually. Once they are before the court, the liability of the members of the association, if any, is determined by the applicable substantive law. The law in the instant case is of no assistance. Section 15-5-160 neither creates nor destroys any substantive liabilities. Graham v. Lloyd's of London, 296 S.C. 249, 255, 371 S.E.2d 801 (1988) citing Medlin v. Ebenezer, supra. The Court of Appeals in Graham referred to the Plaintiff's assertion that Lloyd's is an association or enterprise engaged in the insurance business; that it has members, officers, and a

governing committee; that it issues insurance policies with its seal; that it has a general counsel; and that it maintains bank accounts in the United States. (id., p. 254) Appellant is unable to and Respondents have not made any such assertions regarding Fairways Development Group. The development group is not an association, public or private known in the community and there is no indication it is developing property or otherwise is in the real estate or any other business. It has no signs in the area. As noted in Appellant's Brief and above, there is no record indicating that this group could participate in these proceedings and obtain any judicial economy. The President of Sustainable, the project planner, specifically stated that the President of Fairways Development LLC is not involved in the development. Appellant contends such Section 15-5-160 is inapplicable. No formal or informal association of developers is apparent or available for service of process or with the right to sue or be sued. Should such a party materialize, Appellant would not object to its joinder. There has been no such party.

5. *Appellant lacks Constitutional standing and does not have substantial interest in the matter.* Article 1, Section 22 of the South Carolina Constitution provides that all persons have a right to judicial review of an administrative agency determination affecting private rights other than through a limiting procedure prescribed by the General Assembly. Appellant's private rights are enunciated in the purpose sections of the County's Green Code (Section 26-186 (a)) and in Section 6-29-340 of the Enabling Act.⁸

⁸ This section states that local governments must design their plans and programs "to promote public health, safety, morals, convenience, prosperity, or the general welfare as well as the efficiency and economy of its area of jurisdiction." The Land Development Code of Richland County, South Carolina (Section 26-1, et seq.) in its second section states as a purpose, among many other salutary reasons, to assure compatibility between neighboring properties and adjacent zoning districts. The Green Code's stated purpose is, among other things, to preserve and protect environmental resources, scenic vistas, and natural and cultivated landscapes. All these factors are private rights of Appellant for his enjoyment of and benefit from his property. Appellant also has the right to depend on the correct application of the land development laws within the county.

In the instant case, Section 6-29-1150 of the South Carolina Code provides the statutory scheme for administrative and judicial review of planning commission or designated staff approvals and disapprovals of sketch plans⁹. The General Assembly by providing a statutory right to any party in interest broadens the required Constitutional appeal authority. Appellant exhausted his administrative remedies by appealing and making his argument to the planning commission (the General Assembly states that the planning commission is the final administrative action). Within thirty days of actual notice of that decision he appealed the decision to the circuit court in accordance with Paragraph 1150 (D)(1). The General Assembly in adding an authorization for a property owner whose land is subject to a decision of a planning commission split the former Section 1150 (C) by making its last sentence the new Paragraph (D)(1), not changing the language. It then added a new Paragraph (D)(2) to authorize pre-litigation mediation process in an appeal of an involved property owner. The second sentence of Paragraph (D)(2) states when property owners appeal with pre-litigation mediation the appeal must be filed made within thirty days of the mailing of the planning commission decision. It is clear that Paragraphs (D)(1) and (D)(2) apply to different party appellants otherwise the General

⁹ For convenience Sections 6-26-1150 (C) and (D) are set forth following:

(C) Staff action, if authorized, to approve or disapprove a land development plan may be appealed to the planning commission by any party in interest. The planning commission must act on the appeal within sixty days, and the action of the planning commission is final.

(D)(1) An appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision.

(D)(2) A property owner whose land is the subject of a decision of the planning commission may appeal by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-1155.

A notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is mailed.

Assembly would have used the same terms, not “any party in interest” for the one provision and a “property owner whose land is the subject of a decision” for the other. Reference to “the” planning commission decision in Paragraph (D)(1) rather than use of “a planning department decision” further indicates the appeal connection of Paragraph (D)(1) to the planning commission action in Paragraph (C). Your Appellant matter appealed to the circuit court under Paragraph (D)(1). Such Paragraph (D)(1) refers to the appeal authorized in Paragraph (C). In doing so, Paragraph (D)(1) refers to “the” decision of the planning commission rather than stating “a” planning decision indicating a separate concept.

An examination of the other provisions introduced by the General Assembly regarding pre-litigation mediation indicate that the appeal authority in Paragraph (D)(2) with regard to property owners may be precatory rather than mandatory. The use of “may” in Paragraph (d)(2) and what the General Assembly did with regard to zoning appeals in its appeal Section 6-29-820 (B) in specifically providing that a property owner had a choice of filing without the pre-litigation mediation clarifies this.¹⁰ Accordingly, in reading the statute as a whole, property owners are not the only individuals who can be regarded any party in interest.

¹⁰ For convenience, the relevant portion of the current provision follows:

SECTION 6-29-820. Appeal from zoning board of appeals to circuit court; pre-litigation mediation; filing requirements.

(A) A person who may have a substantial interest in any decision of the board of appeals or an officer or agent of the appropriate governing authority may appeal from a decision of the board to the circuit court in and for the county, by filing with the clerk of the court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the decision of the board is mailed.

(B) A property owner whose land is the subject of a decision of the board of appeals may appeal either:

(1) as provided in subsection (A); or

(2) by filing a notice of appeal with the circuit court accompanied by a request for pre-litigation mediation in accordance with Section 6-29-825.

Any notice of appeal and request for pre-litigation mediation must be filed within thirty days after the decision of the board is postmarked.

Section 6-29-1155, also added in 2003, relates to the administration of pre-litigation mediation. The General Assembly authorized “a person who is not the owner of the property” to petition to intervene as a party in the mediation. It provided that the mediator had to grant the petition if the person has a substantial interest in the decision of the planning commission. The mediator would apply the “substantial” benchmark only in the event he or she decides not to grant the intervention. The substantial benchmark has no other application in the Section 6-29-1150 and 1155 Article 7 Land Development appeals provisions. The General Assembly included no limiting period within which such person with substantial interest was required to apply.

The General Assembly in 2003, among some unrelated things, provided for pre-litigation mediation for property owners appealing zoning board decisions, architectural review board decisions, and planning commission decisions.¹¹ This was the first

¹¹ The full title of the bill is as follows:

An Act To Amend Section 1-23-630, Code of Laws of South Carolina, 1976, Relating to the Powers of Administrative Law Judges, so as to Authorize an Administrative Law Judge to Use Mediation in a Manner That Does Not Conflict with Other Provisions of Law and Is Consistent with the Division's Rules of Procedure; To Amend Section 6-29-800, Relating to the Powers of a Zoning Board of Appeals, so as to Provide a Matter May be Remanded to an Administrative Official if the Board Determines the Record is Insufficient for Review; To Amend Section 6-29-820, Relating to Appeal from a Zoning Board of Appeals to a Circuit Court, so as to Provide That a Property Owner may File a Notice of Appeal Accompanied by a Request For Pre-Litigation Mediation; by Adding Section 6-29-825 so as to Provide the Procedure For Pre-Litigation Mediation In an Appeal from a Zoning Board of Appeals Decision; To Amend Section 6-29-830, Relating to the Notice of Appeal from a Zoning Board of Appeals Decision, So as to Provide For the Procedure by Direct Appeal and by Appeal After the Mediation Is Not Successful or Approved; To Amend Section 6-29-840, Relating to Determination of the Appeal, so as to Provide when an Appeal Includes No Issues Triable of Right by Jury or When the Parties Consent, that the Appeal Must be Placed on the Nonjury Docket and to Provide if any Party so Requests, The Appeal must be Given Precedence over other Civil Cases; To Amend Section 6-29-890, Relating to an Appeal to a Board of Architectural Review, so as to Provide a Matter may be Remanded to an Administrative Official If the Board Determines the Record Is Insufficient for Review; To Amend Section 6-29-900, Relating to an Appeal from a Board of Architectural Review to the Circuit Court, so as to Provide that a Property Owner May File a Notice of Appeal Accompanied by a Request for Pre-Litigation Mediation; by adding Section 6-29-915 so as to Provide the Procedure for Pre-Litigation Mediation in an Appeal from a Board of Architectural Review Decision; to Amend Section 6-29-920, Relating to the Notice of Appeal from a Board of Architectural Review Decision, so as to Provide for the Procedure by Direct Appeal and by Appeal after the Mediation is not Successful or Approved; to Amend Section 6-29-930, Relating to Determination of the Appeal, so as to Provide When an Appeal Includes No Issues Triable of Right by Jury or When the Parties Consent, That the Appeal Must be Placed on the Nonjury Docket and to Provide if any Party So Requests,

distinction the General Assembly made that differentiated between property owners and other parties of interest in appeals related to land development issues. The planning commission treated Appellant as a "party in interest" and that determination was respected by the circuit court. As such, Appellant exhausted his administrative remedy and properly appealed for judicial review to the circuit court.

Appellant further contends the matter of Appellant's interest in the matter is moot. As the circuit court determined, the planning commission by acting on Appellant's appeal considered it a party in interest. The planning commission knew that Appellant lived in near proximity to the project. It also knew that under the Richland County Land Development regulations, Appellant's property was adjacent to the project. Under such regulations' definitions section, Section 26-22, describes "Lot adjacent" as a lot contiguous to another lot (R. p. 213). Under Section 26-21(b)(9), its Rules of Construction, the meaning of contiguous as of the time Appellant filed the appeal was "property having a common boundary of ten (10) feet or more." (R. p. 212). Both Appellant's property and the property, the subject of the permit, have a common boundary with Lake Columbia with each property having a boundary of ten feet or more. Appellant's property is less than one-tenth of a mile (175 yards) directly across a lake from the property being developed, an area with a dock and proposed water park. (R. p. 261 (last page of Record). See also the Richland County geological map of the distance

the Appeal Must be Given Precedence Over Other Civil Cases; to Amend Section 6-29-1150, Relating to an Appeal From a Decision of a Planning Commission, so as to Provide That a Property Owner May File a Notice of Appeal Accompanied by a Request For Pre-Litigation Mediation That, When an Appeal Includes No Issues Triable of Right by Jury or When the Parties Consent, the Appeal Must Be Placed on the Nonjury Docket, and that, If any Party So Requests, the Appeal Must be Given Precedence Over Other Civil Cases; by Adding Section 6-29-1155 So as to Provide the Procedure For Pre-Litigation Mediation in an Appeal From a Planning Commission Decision; and by Adding Article 9 To Chapter 29, Title 6 So as to Provide Educational Requirements for Zoning Officials and Employees and to Create an Advisory Committee to Approve Courses for Orientation and Continuing Education Programs.

between Appellant's property at 124 Runneymede Drive and Intervenor/ Respondent's property, the subject of the permit being appealed, an appendix to Appellant's first Affidavit to Fairways' Motion to Dismiss (R. p. 152). There is no golf course or other property in between Appellant's property and the closest point of the Villages project. The planning commission's decision to considerate it adjacent to and in the near vicinity of the project, a definition for being a party of substantial interest, is reasonable and based on substantial evidence.

Intervenor/Respondent's reference to Appellant's status with the Longcreek Property Owners Association is inapposite. Intervenor/Respondent's property proposed for the project also is not subject to the neighborhood association or it rules and requirements.

Appellant's neighborhood was the first neighborhood developed within the Longcreek community and is at its center. When its initial lots were sold, there was no property owners association. Should a landowner in the Runneymede area now join the Longcreek Property Owners Association, it would be required to execute additional deed restrictions and covenants of title then would run with the property. Not many property owners in this part of Longcreek Plantation opt to do that. These long-term Runneymede property owners continue a strong interest and concern for the community

CONCLUSION

Intervenor/Respondent Fairways Development LLC is not the permittee developer for the project. The circuit court's finding that being an owner makes it the developer fails to consider the Green Code application provisions. Furthermore, such finding lacks any basis in the record. Fairways Development LLC was joined in a previous case as a

party in interest and sued for dismissal. Fairways had its day in court and the circuit court erred in considering the issue again. There is no apparent entity capable of receiving service of process acting as developer for the Villages project.

Appellant has standing. He exhausted administrative remedies prior to his appeal for a judicial ruling on statutory construction and a return of the project for proper county administration. Appellant contends that not joining a development permittee within the thirty day statutory period to appeal the planning commission action is not a jurisdictional defect. Spanish Wells clearly infers such a joiner is permissible. Judicial economy is not a jurisdictional requirement limiting this right and the Intervenor/ Respondent, while not the permittee, already is joined as a party to the proceeding.

Appellant requests this Honorable Court to exercise collateral estoppel and return the matter to the circuit court to address the appeal as requested in the Appeal and Notice of Appeal before the Circuit Court and for such other and further relief as this Honorable Court deems necessary and proper.

Very respectfully submitted,

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

Samuel T. Brick, Appellant, Pro se

The South Carolina Court of Appeals

Samuel T. Brick, Appellant,

v.

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

Appellate Case No. 2014-000583

ORDER

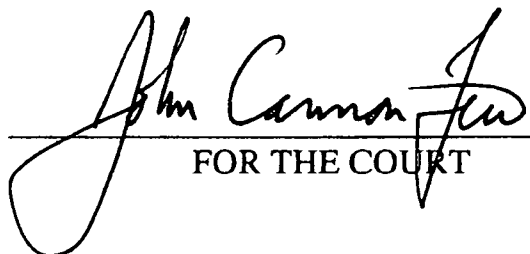
Fairways Development, LLC, has filed a motion to dismiss, a motion to expedite, and a motion to substitute a party. Samuel T. Brick has filed a motion to clarify this court's March 9, 2015 order requiring him to file an amended record on appeal.

After careful consideration, Fairways's motion to dismiss is denied. However, this court will consider the issues raised in the motion once this case is assigned to an appellate panel. Fairways's motions to expedite and substitute a party¹ are also denied.

As to Brick's motion to clarify, this court previously ordered that Appellant shall not include in the record on appeal any matters that were not in existence at the time the appeal was filed. Pages 222 to 233 of the amended record were not in existence before this appeal was filed. However, because Brick and Fairways have filed final briefs citing to the amended record as filed, this court will not consider pages 222 to 233 of the amended record and Brick is not required to remove those pages or otherwise revise the amended record. Brick shall comply with all other provisions of this court's March 9, 2015 order. Accordingly, Brick shall file a supplemental record containing the October 31, 2012 complaint in Civil Action

¹ Given the relief granted by the circuit court, any interest of SPPLA, LLC will not be affected by this appeal unless this court reverses and remands for the circuit court to hear Brick's appeal. In that scenario, SPPLA, LLC could move to intervene in the action before the circuit court.

Number 2012-CP-40-7337 within thirty days. Richland County Planning Commission shall file its final brief within twenty days of service of the supplemental record.

 C.J.
FOR THE COURT

Columbia, South Carolina

cc: Samuel T Brick
Michael Brian Wren, Esquire
Tobias Gavin Ward, Jr., Esquire
James Derrick Jackson, Esquire
Andrew F. Lindemann, Esquire

FILED
5/29/15