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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2017-002095

RECEIVED
JAN 04 2018
SC Court of Appeals

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

Appellants,

v.

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

Respondents.

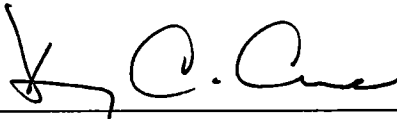
RESPONDENT CITY OF WOODRUFF'S
MOTION TO EXCLUDE MATTER
FROM THE RECORD ON APPEAL

Respondent City of Woodruff moves this Court to exclude from the Record on Appeal certain matters designated in Appellants' Designation of Matter to be Included in the Record on Appeal. This Motion is made pursuant to Rules 210 and 240, SCACR, on the grounds that the matter was excluded from consideration by the circuit court judge at the time of the hearing on the City's Motion to Dismiss, or was not presented until the motion for reconsideration was filed, or was not presented to the circuit court at any time.

Specifically, Respondent City of Woodruff moves to exclude the matters identified in Appellants' Designation as "Other Materials," including City Zoning Ordinance excerpts and minutes, and the Affidavits of the seven Plaintiffs/Appellants.

Pursuant to Rule 240(c), SCACR, Respondent City of Woodruff also submits a Memorandum in Support of this motion.

January 3, 2018



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In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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Woodruff, a South Carolina Limited Liability Company,

Respondents.

RESPONDENT CITY OF WOODRUFF'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO EXCLUDE MATTER
FROM THE RECORD ON APPEAL

This Memorandum is submitted in support of Respondent City's Motion to Exclude Matter from the Record on Appeal.

The designated matter sought by this Motion to be excluded consists of the matter identified in Appellants' Designation as "Other Materials," including the City of Woodruff Zoning Ordinance excerpts and minutes, and the Affidavits of the seven Plaintiffs/Appellants.

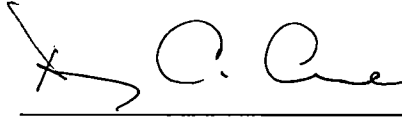
Respondent City's Motion is made on the grounds that:

(1) The Affidavits of the Appellants (also later attached as Exhibits to the Motion to Reconsider) were objected to by Respondent City at the hearing before the circuit court on the City's Motion to Dismiss on January 5, 2017, and the circuit court judge ruled that the Affidavits would not be considered by the circuit court in connection with the Motion to Dismiss. (1/5/17 Hearing Transcript pp. 1, 3-4) (copy attached). This ruling by the circuit court judge was in accord with the principle that, in considering a motion to dismiss under Rule 12(b)(6), SCRCP, a court must base its ruling solely on the allegations set forth in the complaint. Carnival Corporation v. Historic Ansonborough Neighborhood Association, 407 S.C. 67, 74, 753 S.E.2d 846, 850 (2014).

The attempted re-introduction of Affidavits of Plaintiffs as attached Exhibits to the Motion to Reconsider was objected to in the City's Return (copy attached) and at the circuit court hearing on the Motion to Reconsider on September 25, 2017 (9/25/17 Hearing Transcript pp. 1, 13-15) (copy attached). The Affidavit/Exhibit of Plaintiff/Appellant Henry Kerns was first offered in connection with the Motion to Reconsider, and also was objected to in the City's Return and at the hearing. (9/25/17 Hearing Transcript pp. 1, 13-15) (copy attached). New matter introduced at the motion to reconsider stage was not properly before the circuit court and should not be considered by this court.

(2) Insofar as Respondent City can determine, the Zoning Ordinance excerpts of pages 14-15 and 34 and the Use Table were not filed with any Affidavit or Motion and were not presented to the circuit court. Under Rule 210, the Record on Appeal shall not include matter which was not presented to the lower court.

Respectfully submitted,



January 3, 2018

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3 Elizabeth Earley, et al,)
4 Plaintiffs,) TRANSCRIPT OF RECORD
5 -vs-) 2016-CP-42-3288
6 The City of Woodruff, et al,)
7 Defendants.) January 5, 2017
8 Spartanburg, South Carolina
9
10

11 B E F O R E :

12 HONORABLE J. DERHAM COLE, JUDGE
13

14 A P P E A R A N C E S :

15 NATHAN A. EARLE, ESQUIRE
16 Attorney for the Plaintiff

17 DANNY CALVERT CROWE, ESQUIRE
18 TERRY F. CLARK, ESQUIRE
Attorneys for Defendant City of Woodruff

19 MICHAEL ANDREW GRAHAM, ESQUIRE
20 Attorney for Defendant Terraces at Woodruff, LLC
21

22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

1 THE COURT: Earley vs. the City of Woodruff. whose
2 motion -- city?

3 MR. CROWE: Your Honor, I'm Danny Crowe, along with
4 Terry Clark, representing the city. I have a motion to
5 dismiss before Your Honor.

6 THE COURT: Okay.

7 MR. EARLE: Judge, I'm Nathan Earle. I'm the attorney
8 for the plaintiffs, I believe all of whom are in the room
9 today. And in the event that the motion to dismiss is
10 denied, then we would need to consider our motion for
11 temporary injunction.

12 THE COURT: Okay. Mr. Crowe.

13 MR. CROWE: Thank you, Your Honor.

14 Your Honor, e-filed this morning -- and I've a hard
15 copy for your clerk and Your Honor -- is our memorandum in
16 support of our motion to dismiss.

17 Initially, as a procedural matter, we note that on
18 Tuesday plaintiff filed a number of affidavits which were
19 captioned as affidavits in support of plaintiffs' motion
20 for temporary relief and in opposition to defendants'
21 motion to dismiss. These are affidavits of lay witnesses.

22 We would object to those for purposes of our motion to
23 dismiss, which, as we understand it, should be ruled on
24 based on the allegations of the complaint and the Court's
25 considerations of affidavits.

1 Outside materials would then convert this into a
2 summary judgment motion, in which case we would ask for
3 additional time to submit counter affidavits so that we
4 could fully argue on a motion for summary judgment. So at
5 the outset we would object to those affidavits.

6 THE COURT: I will not consider them so far as the
7 motion to dismiss is concerned.

8 MR. CROWE: Thank you, Your Honor.

9 If you'll bear with me just for a brief outline of the
10 facts here -- and this is contained in our memorandum which
11 might provide a good reference point -- there are seven
12 plaintiffs in this case who complain of the rezoning by the
13 city of 4.26 acres of land that abutted three streets --
14 the allegations -- and the construction on that property of
15 low income affordable housing. The construction, as you
16 may hear, is under way and nearly complete.

17 The seven plaintiffs are described in the complaint as
18 city residents who each own and occupy residential property
19 located in the immediate vicinity -- is the word used -- of
20 one of those streets -- Armory Drive -- and in the
21 neighborhood, as it's alleged, located immediately across
22 Armory Drive from the property.

23 This description of the plaintiffs' relation to the
24 property is the basis for our first ground to dismiss,
25 which is a lack of standing.

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

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

Plaintiffs,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Civil Action No. 2016-CP-42-03288

**RETURN OF DEFENDANT CITY OF
WOODRUFF TO PLAINTIFFS'
MOTION TO RECONSIDER**

The Defendant City joins the Defendant Terraces in opposing Plaintiffs' Motion to Reconsider. The City submits this Return to set out reasons for its opposition.

Initially, the City notes that Plaintiffs, by their Motion to Reconsider, attempt to bootstrap evidentiary documents into the Record (and, presumably, the Record on Appeal) by characterizing and attaching them as "Exhibits" to their Motion. Specifically, Plaintiffs, with their Motion, submitted Affidavits from Plaintiffs Donna Pearson, Bruce Pearson, Margie Kerns and Henry Kerns, as well as excerpts from the City's Zoning Ordinance. However, the City also notes that Plaintiffs, in their Motion, did not take exception to, or otherwise challenge or criticize, the ruling of the Court at the hearing on January 5, 2017, that the same Affidavits would not be considered by the Court. The City **OBJECTS** to the Exhibits to Plaintiffs' Motion on several grounds.

First, the three Affidavits marked as Exhibits A, B, and C to Plaintiff's Motion to Reconsider were three of the six Affidavits (each captioned as "Affidavit in Support of Plaintiffs' Motion for Temporary Relief and in Opposition to Defendants' Motion to

Dismiss”) attempted to be offered to the Court at the hearing on January 5. (The Affidavit of Henry Kerns, marked as Exhibit D to Plaintiffs’ Motion, apparently was not among the six received by the undersigned, although, like the others, it also is dated January 3.) At the motion hearing on January 5, the Defendants objected to the Affidavits as (1) inappropriate if intended for consideration with the City’s Rule 12(b) Motion, and (2) untimely if made in support of Plaintiffs’ motion for temporary injunction because they were not filed with the Plaintiffs’ motion for temporary injunction as required by Rule 6(d). This Court sustained Defendants’ objection at the hearing and excluded the Affidavits from consideration.

The Affidavits (as well as the zoning ordinance excerpt) continue to be inappropriate for reconsideration of the Court’s Order granting the City’s Rule 12(b) motion. The Rule 12(b) motion was a motion based on the pleadings of the Complaint, was not an evidentiary motion, and was not converted into a Rule 56 motion. The efforts of Plaintiffs’ attorney to submit the Affidavits again by way of a Motion to Reconsider should not be allowed.

Bob Jones University, Inc. v. City of Greenville, 243 S.C.351, 133 S.E.2d 843 (1963) and Knowles v. City of Aiken, 305 S.C. 219, 407 S.E. 2d 639 (1991) provide no support for Plaintiffs’ contention that they have standing. As noted by Plaintiffs in their Motion (page3), “Admittedly, both *Bob Jones* and *Knowles* were decided prior to enactment of the Comprehensive Planning Enabling Act of 1994...” This admission is significant and fatal to Plaintiffs’ position.

Prior to the Local Government Planning Enabling Act of 1994 (and its specific requirement for standing for rezoning as contained in section 6-29-760(C)), the State statutory schemes authorizing municipal zoning (former Section 5-23-10 et seq. and

former Section 6-7-710 et seq.) contained no limitation on standing to challenge rezoning similar to the current Section 6-29-760(C). Additionally, the issue of standing was not discussed in Bob Jones and was expressly not reached in Knowles (305 S.C. at 221, 407 S.E. 2d at 641). Although Plaintiffs criticize ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008) as sole authority, that case is, and remains, good law on the required standing for zoning challenges.

Plaintiffs' references (at pages 3 and 4 of its Motion) to the "Exhibit E" of City ordinance excerpts are inappropriate as objected to above; the City's motion to dismiss was directed to the pleading of the Complaint. However, even if considered, the zoning ordinance excerpts concerning "protests" are misread by Plaintiffs; the "special interest" urged by Plaintiffs to be revealed by the excerpts refers to a super-majority vote triggered by a petition of 20% or more of lot owners within a specified distance from the area to be rezoned. No such petition is alleged by the Plaintiffs in the Complaint. Moreover, the standing requirement of Section 6-29-760(C), a state statute, prevails over a municipal ordinance and would control regardless of the language of a conflicting municipal ordinance.

Plaintiffs' argument at page 4 of their Motion, that their challenge to rezoning in 2005 is not time-barred, rests on the strained argument that a declaratory judgment action is not, in the language of section 6-29-760(D), "a challenge to the adequacy of notice" or a "challenge to the validity of a regulation or map, or amendment to it." Clearly, a declaratory judgment action is just such a "challenge."

Plaintiff's Motion to Reconsider reveals no errors in the Court's Order filed on May 24 and no basis for alteration or amendment of the Order. The City urges that its objection

to the Exhibits to Plaintiffs' Motion should be sustained and the Exhibits should be stricken. For the reasons set out above and in the Return of Defendant Terraces, the City urges that the Plaintiffs' Motion to Reconsider should be denied.

Respectfully submitted,

s/Danny C. Crowe

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s/Terry F. Clark

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ATTORNEYS FOR DEFENDANT
CITY OF WOODRUFF

June 13, 2017

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT

Elizabeth Earley, et al,)
Plaintiffs,)
-vs-)
The City of woodruff, et al,)
Defendants.)
TRANSCRIPT OF RECORD
2016-CP-42-3288

September 25, 2017
Spartanburg, South Carolina

B E F O R E:

HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S:

NATHAN A. EARLE, ESQUIRE
Attorney for the Plaintiff

DANNY CALVERT CROWE, ESQUIRE
TERRY F. CLARK, ESQUIRE
Attorneys for Defendant City of Woodruff

MICHAEL ANDREW GRAHAM, ESQUIRE
Attorney for Defendant Terraces at Woodruff, LLC

Linda D. Moffitt
Circuit Court Reporter

1 be permitted to establish their physical proximity to this
2 project so that the standing question can be fully and
3 fairly evaluated by the Court.

4 So for those reasons we would ask the Court to
5 reconsider its order dismissing the complaint, to
6 reinstitute the -- both causes of action and allow us to
7 proceed with discovery. Thank you, Judge.

8 THE COURT: Mr. Crowe.

9 MR. CROWE: Your Honor, Danny Crowe for the City of
10 Woodruff. With me is Terry Clark, also representing the
11 City of Woodruff, and Michael Graham representing the
12 corporate defendant Terraces at Woodruff, the apartment
13 complex.

14 Your Honor, both sets of defendants filed written
15 returns to plaintiff's motion to reconsider, which we would
16 urge that the Court consider. And we would each reiterate
17 our grounds in those.

18 Your Honor, the plaintiff's motion to reconsider
19 reveals no errors in the Court's order filed on May 24 and
20 reveals no basis for alteration or amendment of the order.

21 The Court in its order appropriately addressed the
22 matters that were appropriately argued and raised at the
23 hearing and in the memoranda of the parties.

24 Additionally, the plaintiffs by this motion attempt to
25 introduce new matter that was not before the Court at the

1 earlier hearing, first in the form of affidavits that the
2 Court, this Court, ruled would not be considered, and,
3 second, excerpts from an ordinance, a city ordinance, that
4 are not involved in this case.

5 The sections of that ordinance that were read to the
6 Court involve voting requirements if a particular number of
7 citizens present a written protest to the city council
8 prior to the city council's vote.

9 The other provision has to do with notice. So it's
10 not involved in the standing issue in circuit court that's
11 raised in this case. That has -- those sections only have
12 to do with the positive majority.

13 Your Honor, the two cases cited in the motion, Bob
14 Jones and Knowles vs. Aiken did not involve standing
15 issues. And the standing law at the time of those cases
16 before the Comprehensive Planning and Zoning Act of 1994
17 was different and does not read as Section 6-29-760(C) now
18 reads with regard to zoning.

19 The pertinent case is ATC South vs. Charleston County,
20 which Your Honor cited and relied upon in its order. And
21 ATC South is clear. That was a 2008 decision of our state
22 Supreme Court. It was the sole authority. It remains the
23 good authority on -- and controlling authority on the issue
24 of standing for zoning challenges. And it provides that
25 nonadjoining landowners do not have standing to challenge

1 zoning changes by municipalities.

2 Those are the principal bases for our opposition to
3 the motion for reconsideration. I'll be glad to respond to
4 any questions that the Court may have. Or these lawyers
5 may wish to add other points. Thank you, Your Honor.

6 THE COURT: Mr. Clark. Do you have anything?

7 MR. CLARK: No, sir.

8 THE COURT: Mr. Graham.

9 MR. GRAHAM: No, sir. Thank you.

10 THE COURT: All right. Anything else, Mr. Earle?

11 MR. EARLE: Just very briefly, Judge.

12 I would just like to suggest that ATC, with all due
13 respect to Mr. Crowe's theory here, is not dispositive.

14 The ATC court does not anywhere in that opinion define
15 what it means when it says nonadjoining other than to say
16 that this particular plaintiff whose competing cell tower
17 is a mile away from the property they're trying to
18 interfere with is nonadjoining. And I think everyone in
19 the room can agree that that certainly would qualify as a
20 nonadjoining landowner. That's all. Thank you, Judge.

21 THE COURT: All right. I'll issue an order.

22 END OF REQUESTED TRANSCRIPT OF RECORD

23

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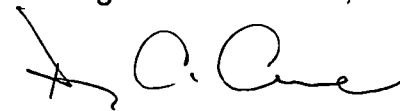
The City of Woodruff, SC, and the Terraces at
Woodruff, a South Carolina Limited Liability Company,

Respondents.

PROOF OF SERVICE

I certify that I have served the Respondent City of Woodruff's Motion to Exclude Matter from the Record on Appeal and Respondent City of Woodruff's Memorandum in Support on all parties by causing a copy of it to be deposited in the United States Mail, postage prepaid, on January 3, 2018, addressed to all counsel of record, Nathan A. Earle, Esquire, 1541 Wade Hampton Boulevard, Suite E, Greenville, South Carolina 29609, Michael A. Graham, Esquire, and George David Crocker, Jr., Esquire, P.O. Box 433, Columbia, South Carolina 29202.

January 3, 2018



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January 3, 2018

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
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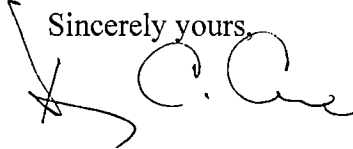
RE: Elizabeth Earley, et al. v. The City of Woodruff, SC, et al.
Case No. 2017-002095

Dear Ms. Kitchings:

Please find enclosed for filing an original and seven copies of Respondent City of Woodruff's Motion to Exclude Matter from the Record on Appeal and Respondent City of Woodruff's Memorandum in Support, and an original and one copy of the Proof of Service in the above-captioned matter. I am also enclosing a check in the amount of \$25.00 representing the filing fee.

Once filing is complete, please return the clocked copies to us in the enclosed self-addressed, stamped envelope. By copy of this correspondence, I am hereby serving a copy of this Motion and Memorandum on all counsel of record.

With kind regards, I am

Sincerely yours,

Danny C. Crowe

DCC/dmb
Enclosures

cc: Nathan A. Earle, Esquire
Michael A. Graham, Esquire
George David Crocker, Jr., Esquire
Terry F. Clark, Esquire



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