

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Benjamin H. Culbertson, Circuit Court Judge

S.C. SUPREME COURT

S.C. Sup. Ct. Case No. 2016-001300
S.C. Ct. App. Case No. 2014-000156
Lower Court Case No. 2012-CP-22-00558

David M. Repko, Respondent,

v.

County of Georgetown, Petitioner.

**RESPONDENT'S BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF
OF THE SOUTH CAROLINA ASSOCIATION OF COUNTIES**

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ATTORNEYS FOR RESPONDENT

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ARGUMENT

Respondent David M. Repko (“Repko”) files this Reply Brief in response to the Amicus Curiae Brief submitted by the South Carolina Association of Counties (“Association”).

The Association’s sole argument is premised entirely on facts and materials unquestionably not present in the record on appeal, never presented below to the Court of Appeals or the Circuit Court, and not properly before this Court for review of the Court of Appeals’ decision. Otherwise, the Association’s amicus brief is a classic “me, too” brief, parroting or adopting wholesale portions of the County’s briefs. In return, Repko responds to the Association’s above-referenced sole argument, but will not repeat here his arguments already presented by his earlier briefs.

For the reasons herein, in Repko’s prior briefs, and any other reason appearing in the record, the Court of Appeals’ decision should be affirmed.

I. The Association’s argument is premised on materials not in the record on appeal, that were never before the Court of Appeals or the Circuit Court, and which directly contradicts the Petitioner’s position.

In its Brief, the Association proclaims that the County’s at-issue ordinance provision—Article V, Section 3-1—is a general public health and safety regulation and does not create a private duty to protect the Plaintiff. (Association Br. 2). The Association premises its claim on its own purported

recitation of a different County ordinance provision—Article 1, Section 4¹—which the Association baldly decrees is the County’s “legislative purpose” or preamble of the at-issue ordinance provision. (Association Br. 3-4). Then, the Association repeatedly relies on its self-proclaimed “legislative purpose” throughout every subsequent page of its amicus brief, seeking this Court’s reversal of the Court of Appeals decision.

Tellingly, the Association does not refer this Court to *any* place in the record on appeal where the Association’s self-proclaimed “legislative purpose” provision may be found. That is because it is not in the record on appeal, and was not before the Circuit Court or the Court of Appeals. (*See* R. 281-286) (containing County’s at-issue ordinance provisions). As a result, this Court should not be swayed by or afford any consideration to the Association’s amicus brief for numerous reasons.

First, it is axiomatic that “the appellate court will not consider any fact which does not appear in the Record on Appeal.” Rule 210(h), SCACR. Because the Association’s self-proclaimed “legislative purpose” provision is not in the Record on Appeal and never has been in the Record on Appeal, it should not be considered by this Court. So, too, the Association’s arguments referencing or relying on this self-proclaimed “legislative purpose” provision should not be considered by this Court.

¹ Association’s purported recitation of another County ordinance provision—Article 1, Section 2—falls prey to the same fatal problems that Repko sets forth below herein. (*See* Association Br. 3).

Second, the Record on Appeal shall not include any matter which was not presented to the lower court. *See* Rule 210(c), SCACR. The Association's self-proclaimed "legislative purpose" provision was never presented to the Circuit Court and, accordingly, never presented to the Court of Appeals. Therefore, not only is that alleged provision not in the Record on Appeal, it could not even properly be included in the Record on Appeal.

Third, this Court, like the Court of Appeals, does not take judicial notice of ordinances. *See In re Nov. 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 638 n.3, 686 S.E.2d 683, 686 (2009); *see also Harkins v. Greenville County*, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) (finding this Court cannot take judicial notice of county ordinance provisions not in record on appeal); *Kincaid v. Landing Dev. Corp.*, 289 S.C. 89, 92-93, 344 S.E.2d 869, 872 (Ct. App. 1986) (finding categorically that ordinances are not subject to judicial notice). "Instead, the ordinance must be proved before the lower court or tribunal." *In re Bluffton Town Council Election*, 385 S.C. at 642 n.5, 686 S.E.2d at 688. Again, the Association's self-proclaimed "legislative purpose" provision was never before, let alone proved before, any of the lower courts. The alleged provision, appearing for the first and only instance within the Association's amicus brief, therefore, should not be considered by this Court. The Association's arguments referencing or relying on the alleged provision should not be considered by this Court.

Even more important still, the parties to this appeal have consistently acknowledged, as the Court of Appeals also recognized, that the County's at-issue ordinance provision—Article V, Section 3-1—did not have a preamble or legislative purpose section. This is significant: Petitioner Georgetown County has repeatedly conceded that its at-issue ordinance provisions do not include a preamble or legislative purpose section. (Petitioner Br. 5; Petitioner Reply for Writ of Cert. 6; Petition for Writ of Cert. 4).

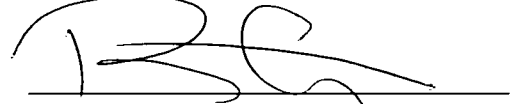
Finally, Repko appreciates that the Association acknowledges that it is partisan. In its amicus brief, the Association explains that it “represents the interests of each of South Carolina’s forty-six counties” and seeks to “provide this court with the unique insight of its members.” (Association Br. 1-2). Of course, the Petitioner in this case is a county in South Carolina. Presumably, the views and “unique insight” of the counties have already been advanced.

CONCLUSION

In sum, the Association’s effort to infuse new facts and materials into this appeal, without any support in the record, is improper and should not be considered by this Court. Further, Repko respectfully asks this Court to dismiss from its consideration the arguments presented to it by the Association’s amicus curiae brief.

For these reasons herein, in Repko’s prior briefs, and for any other appropriate reasons that may be evidenced from the record before this Court, Repko respectfully submits that this Court should affirm the Court of Appeals’ decision.

Respectfully submitted,



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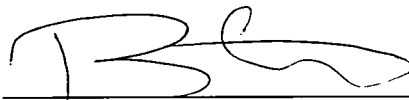
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that **Respondent's Brief in Response to Amicus Curiae Brief of the South Carolina Association of Counties** complies with Rule 211(b), SCACR.



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PROOF OF SERVICE

I, the undersigned employee of Goldfinch Winslow, LLC, certify that on the date indicated below, I served counsel of record with a copy of **Respondent's Brief in Response to Amicus Curiae Brief of the South Carolina Association of Counties** by mailing copies by United States Mail, first class postage prepaid, addressed to:

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