THE STATE OF SOUTH CAROLINA
In The Supreme Court

James M. Tennant, Petitioner

vs.

Board of Zoning Appeals for the City of Georgetown, Respondent.

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S.C. Supreme Court

PETITION FOR WRIT OF CERTIORARI
OF
SC Ct. App. Unpublished Opinion No. 2012-UP-462, Filed July 25, 2012

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

APPENDIX – VOLUME 2

CONTAINS BRIEFS, COURT OF APPEALS ORDER, PETITION FOR REHEARING, COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING

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Petitioner *Pro Se*

January 4, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-196

James M. Tennant, Appellant,

vs.

Board of Zoning Appeals for the City of Georgetown, Respondent.

APPELLANT'S FINAL BRIEF

JAMES M. TENNANT
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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

STATEMENT OF ISSUES ON APPEAL 4

STATEMENT OF THE CASE 4

ARGUMENT 12

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

lOlA C.J.S. Zoning & Land Planning 164, p.500 18

83 Am.Jur.2d *Zoning and Planning* § 624 23

Baird v. Charleston County, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) 13

Davis v. Richland County Council, 372 S.C. 497, 500, 642 S.E.2d 740, 741 13

Friends of McLeod, Inc. v. City of Charleston, 376 S.C. 610, 658 S.E.2d 544 15

Heilker v. Zoning Board of Appeals for the City of Beaufort, 346 S.C. 401 18

Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 17

Sea Island Parkway Coalition v. Beaufort County Board of Adjustments and Appeals, 321 S.C.548 17-18

Spanish Wells Property Owners Association, Inc. v. Board of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 69 367 S.E.2d 160, 161 15-16

Town of Sullivans Island v. Byrum, 306 S.C., 539, 413 S.E.2d 325 18

Statutes

S.C. Code of Laws 6-29-840(A) and S.C. Code 6-29-849.......................................17

S.C. Code of Laws 6-29-800(F) 20

City of Georgetown Code

Article X, Sections 1001 v. and 1022 24

Article X, Section 1006 j. 25

STATEMENT OF ISSUES ON APPEAL

1. Does the Appellant have standing to sustain this appeal, and did the lower court have jurisdiction to hear the case?

2. Did the lower court correctly apply the law and facts regarding *grandfathering* and *non-conforming use* to the sign in question?

STATEMENT OF THE CASE

Actions before the City of Georgetown

The underlying action in this case was initiated by the filing of a complaint form at the City of Georgetown Building and Planning Department by the Appellant on July 3, 2008. Any citizen may file a complaint alleging violations of city ordinances. The complaint alleged an illegal home based business sign located on a fence owned by a sitting city council member – Mr. Paige Sawyer. **See R. p. 16, City of Georgetown Building and Planning Complaint Form of July 3, 2008.**

On July 17, 2008, Mr. Sawyer called the City's Zoning Administrator, Ms. Jamie Davis, to discuss the complaint. He advised her that he had no permit for the sign, which he said had been there since 1979. On this same day, Ms. Davis informed her supervisor, Ms. Sabrina Morris, the City Director of Development, that the 1978 city ordinance required a permit and did not allow signs on fences. **See R. p. 145 & p. 148, Emails of July 17, 2008 and August 12, 2008, between Jamie Davis, Sabrina Morris, Marty Tennant and Steve Thomas, and Emails of July 17, 2009 and July 28, 2009, between Jamie Davis, Sabrina Morris, Marty Tennant and Steve Thomas.**

On August 11, 2008, Ms. Morris asked Ms. Davis to please tell her how the sign was grandfathered, and if a sign permit was found. On August 12, 2008, Ms. Davis

advised Ms. Morris that she did not know if it was grandfathered and asked for her direction in the matter. She also told her again that Mr. Sawyer admitted he had no permit and that he would remove the sign if it were necessary. **See R. p. 145 & 147, Emails of July 17, 2008 and August 12, 2008, between Jamie Davis, Sabrina Morris, Marty Tennant and Steve Thomas.**

On August 12, 2008, Ms. Davis hand delivered a formal enforcement letter to Mr. Sawyer, advising him of the results of her research on the complaint. She advised him the sign was not compliant with the previous or current city sign ordinances regarding the mounting location, that he held no permit for the sign, and that it needed to be removed. **See R. p. 3, Letter from Jamie Davis to Paige Sawyer of August 12, 2008.**

On September 8, 2008, Ms. Morris, Ms. Davis' supervisor, sent Mr. Sawyer a second formal enforcement letter confirming the first enforcement letter advising that his sign was illegal and that is needed to be removed. In the alternative, Mr. Sawyer was told to file an appeal to the Zoning Board of Appeals if he disagreed with the staff enforcement decision. **See R. p. 4, Letter from Sabrina Morris to Paige Sawyer of September 8, 2008.**

On September 18, 2008, Mr. Sawyer submitted additional comments to Ms. Morris, where he once again admitted he had no permit for the sign, and never applied for one, but still argued it was not on a fence and was also grandfathered. He stated that he needed to file an appeal by October 8, 2008 to the original August 12 letter, and would appreciate a timely response. **See R. pp. 150-153, Letter from Paige Sawyer to Sabrina Morris of September 18, 2008.**

On September 24, 2008, City Attorney Elise Crosby submitted a legal analysis on the Sawyer sign situation to Ms. Morris. It concluded that the sign had been illegal since the day it was erected due to the admission of Mr. Sawyer, in writing, that he had no permit and never applied for one. It also cited illegality based on its location on a fence or gate, but indicated this was of no consequence due to the fact no permit was sought or issued for it. The city attorney also stated that Mr. Sawyer was essentially asking for reconsideration of the original enforcement decisions – which she saw no basis for overturning – and that reconsideration of these decisions could only be done through an appeal submitted to the Board of Zoning Appeals by Mr. Sawyer.

The city attorney's analysis also ruled out any determination that the sign was eligible for grandfathering, since the sign was not a nonconforming sign as defined in the city sign ordinance due to its current and past illegal status. **See R. pp. 154-158, Memorandum from Elise Crosby to Sabrina Morris of September 24, 2008.**

Notwithstanding the city attorney's legal opinion that the sign was not eligible for grandfathering, and that it was Mr. Sawyer's burden to appeal to the Zoning Board of Appeals to overturn the previous determinations, on October 3, 2008, Stephen Stack, City Deputy Director of Development, wrote a letter to Mr. Sawyer, advising him that the City now considered his sign to be grandfathered and that the City would not continue enforcement on the sign as previously stated in writing by two other enforcement officers. **See R. p. 5, Letter from Stephen Stack to Paige Sawyer of October 3, 2008.**

On October 31, 2008, the Appellant, instead of Mr. Sawyer, submitted an application to the Zoning Board of Appeals, appealing the October 3, 2008

grandfathering decision of Mr. Stack on Mr. Sawyer's sign. **See R. pp. 17-18, Application for the Zoning Board of Appeals of Marty Tennant dated October 31, 2008.**

On December 3, 2008, the Appellant came before the Board of Zoning Appeals and argued for the Board to overturn the grandfathering decision regarding Mr. Sawyer's sign. **See R. pp. 69-70, Minutes of Board of Zoning and Appeals of December 3, 2008.** The Appellant pointed to the August 12, 2008 letter from Ms. Davis to Mr. Sawyer giving him notice that the sign was illegal and needed to be removed. Mr. Sawyer was in attendance at this meeting, along with his wife, but did not speak. Mr. Sawyer received notice of the meeting from the City. **See R. p. 95, lines 11-21 & p. 111, lines 1-13, Transcript of Audiotape of Board of Zoning Appeals Meeting of December 3, 2008.**

Ms. Morris, who had also previously told Mr. Sawyer his sign was illegal and should be removed, now defended the determination of grandfathering; even though she personally advised the board that Mr. Sawyer never had a permit for his sign and that she and the city attorney were of the opinion that Mr. Sawyer was the proper person to file an appeal with the board. **See R. p. 112, line 9 – p. 113, line 3, Transcript of Audiotape of Board of Zoning Appeals Meeting of December 3, 2008. Also See R. p. 4 & R. pp. 154-158, Letter from Sabrina Morris to Paige Sawyer of September 8, 2008, and Memorandum from Elise Crosby to Sabrina Morris of September 24, 2008.**

The city attorney was in attendance at this meeting, but did not defend the decision to grandfather the sign. The board agreed with the City and voted 6-0 to uphold the Zoning Administrator's grandfathering decision. **See R. p. 114, line 14 – p. 115, line**

2, Transcript of Audiotape of Board of Zoning Appeals Meeting of December 3, 2008.

On January 7, 2009, the Appellant was provided a written decision of the Board of Zoning Appeals, advising him of the Board's decision regarding the Sawyer sign. The decision stated "416 Highmarket Street – Paige Sawyer's Home Based Business sign – The board upheld staff's decision regarding this sign noting Section 1022 of the City of Georgetown Zoning Ordinance." **See R. p. 6-7, Letter from Sabrina Morris to Marty Tennant of January 7, 2009.**

<u>**Matters before the Circuit Court**</u>

Initial Filings of the Appellant

On February 5, 2009, Appellant filed a "Notice of Appeal and Petition" appealing the Sawyer sign decision with the Georgetown County Court of Common Pleas.

The Appellant challenged the determination of the Board of Zoning Appeals upholding the grandfathering decision of the Zoning Administrator. The fact that Mr. Sawyer never held a permit for his sign and that the sign was on a fence were the main issues used to challenge this decision. The Appellant claimed that Mr. Sawyer worked behind the scenes in order to obtain special treatment not allowed to ordinary citizens, abusing his power as an elected official in order to obtain a favorable ruling from the city for him and his sign.

The Appellant also brought to the court's attention that he had been prosecuted by the City and found guilty of violating the city sign ordinance, including not having a

permit for a home based business sign, was fined $1,062, given a criminal record, and was detained, booked and fingerprinted in jail.

The Appellant also advised the court that he later brought a federal equal protection lawsuit against the city as a result of this conviction, which claimed selective enforcement of the law. The city paid the Appellant $7,500 to settle the case out of court before trial. The Appellant also claimed that the City of Georgetown continued to give special treatment to certain politically favored individuals and businesses and continues to selectively enforce City ordinances. **See R. pp. 19-23, Appellants Notice of Appeal and Petition, dated February 5, 2009.**

Initial Filings of the Respondent

On March 11, 2009, the Respondent filed a Return to the Appellant's Appeal. The Return claimed that the Respondent Board never had sufficient information to admit or deny if the sign ever had a valid permit, although the enforcement letter of August 12, 2008 that was before the Board clearly stated that Mr. Sawyer did not have a permit for the sign. Without sufficient information to admit or deny the existence of a valid permit, it was argued, the Respondent Board properly declared it grandfathered. The Respondent confirmed that the sign had no permit and was located on a fence, while also raising possible estoppel issues against the City. **See R. pp. 24-29, Respondents Return to Petition on Appeal, dated March 11, 2009.**

Hearing before Judge Culbertson

On May 21, 2009, a hearing on the Appeal was heard before Judge Benjamin H. Culbertson, with the Appellant appearing *pro se* and the Respondent Board represented by city Attorney Elise F. Crosby. There was no jury present.

Arguments of Appellant As an initial matter, the Appellant challenged the sufficiency of the record and moved for a deferral of the proceeding in order to make the record provided by the Respondent complete. This motion was renewed at the end of the hearing and denied by the Judge.

The Appellant directly attacked the Respondent Board's determination that the sign in question was eligible to be grandfathered and pointed to the record to show that there was evidence before them, based on the original August 12, 2008 enforcement letter in the record, and admissions made by Ms. Morris during the Board meeting, that Mr. Sawyer never had a permit for the sign in question and that it was improperly located on a fence.

The Appellant also raised issues regarding special treatment being given to Mr. Sawyer because he was a sitting city council member and the refusal of the City of Georgetown to enforce the law equally. He compared the treatment given Mr. Sawyer to the prosecution the Appellant experienced over his home based business sign and complained that it was apparently acceptable to violate the law if you were a sitting city council member, but anyone else violating the same law (for a lack of permit or inappropriate location) would be vigorously prosecuted.

Arguments of Respondent The Respondent Board's attorney argued two new points not brought up in her original Return – jurisdiction and standing. Jurisdiction was raised because Mr. Sawyer was not a party to the action and it was argued that he or his business was a necessary party. Standing was raised to argue that the Appellant had no substantial interest in whether the sign exists and therefore could not sustain the action. She also argued that there was no evidence before the board to indicate Mr. Sawyer did or did not have permit for his sign, and therefore the decision of the board to uphold the grandfathering decision was appropriate. **See R. pp. 116-144, Transcript of Record of Hearing before Judge Culbertson dated May 21, 2009.**

Order of Dismissal

On May 27, 2009, Judge Culbertson issued his Order of Dismissal. He found in favor of the Respondent Board on the issue of grandfathering due to an inability of the Respondent Board to "dispute the lawful existence of the sign on the effective date of the present ordinance which renders the sign nonconforming". He also ruled the Appellant lacked jurisdiction due to a failure to name the sign owner as a party, and also ruled that the Appellant lacked standing. **See R. pp. 8-12, Order of Dismissal issued by Judge Culbertson dated May 27, 2009.**

Post Order Motions and Final Orders

On June 9, 2009, the Appellant issued a **Rule 59 Motion to Alter or Amend, to Rehear or to Recuse and Grant New Trial. See R. pp. 30-38.** On this same day, the Court issued a scheduling order for Briefs supporting or opposing the Rule 59 Motion.

On June 23, 2009, the Appellant filed his brief supporting his Rule 59 motion. **See R. pp. 39-50.** He also issued a **Motion to Compel or to Remand for Rehearing**, with a supporting **Affidavit** of the Appellant. **See R. pp. 51-57 & p. 60.** On July 3, 2009, the Respondent filed their brief. **See R. pp. 62-67.**

On August 10, 2009, Judge Culbertson issued a form Order, absent any explanation, denying all of the Appellant's post Order motions. This Order was received by the Appellant on August 11, 2009. **See R. p. 15.**

The Notice of Appeal was served on the Attorney for the Respondent on September 9, 2009. There are no monetary amounts on appeal, save for costs. **See R. p. 68.**

ARGUMENT

Introduction

At root, this case is about equal protection under the South Carolina and United States Constitutions. It begs a simple question. **"Should elected officials of a municipal government be treated differently from ordinary citizens"?** In this case, the elected official has been allowed to evade the same sign ordinance provisions that were used earlier to help fine and jail another citizen (in this case, the Appellant). **See R. p. 86, line 2 – p. 89, line 7 and R. p. 120, line 5 – p. 121, line 8.**

Anytime an elected official potentially finds himself on the wrong side of the law, lady justice might be tempted to simply look the other way, rather than be blind. Add small town politics to the mix, and you have precisely the type of mischief that occurred in this case.

__Questions__

Does the Appellant have standing to sustain this appeal, and did the lower court have jurisdiction to hear the case?

__Standing__

Our Courts have long recognized the "public importance" exception to the general standing requirements. "[S]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." ***Davis v. Richland County Council,*** **372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007) (citation omitted);** ***see also Baird v. Charleston County,*** **333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999)** (holding standing existed to challenge an alleged *ultra vires* act of issuing tax-exempt hospital bonds because the act affected profound public interests: public health and public welfare).

In cases which fall within the ambit of important public interest, standing will be conferred "without requiring the plaintiff to show he has an interest greater than other potential plaintiffs." ***Davis,*** **372 S.C. at 500, 642 S.E.2d at 741.**

In this case, the Petitioner/Appellant has claimed *ultra vires* acts and public corruption. Appellant has claimed that Mr. Sawyer "has abused his position of power as a sitting Councilmember by obtaining special treatment not allowed under law to ordinary citizens as a result of his behind the scenes manipulation of the ordinance enforcement process within the City of Georgetown". **See R. p. 22, lines 1-4, Notice of**

Appeal and Petition. Similar allegations were made during the hearing before the Court. **See R. p. 121, line 20 – p. 122, line 19.**

These allegations alone, and the undisputed facts that surround this case, elevates Appellant's standing to that anticipated by the "public importance" exception. It is the utmost public importance that the laws of the City of Georgetown be followed by all, that the law be evenly and fairly enforced, that powerful elected officials not be able to circumvent the enforcement of the law against them by circumventing the proper route of appeal.

Additionally, this case will serve to provide guidance to our Zoning Boards of Appeals and to Boards of all types over the State by clarifying how determinations of nonconforming use and grandfathering are properly applied in the future.

The Appellant also believes that the unique facts in this case may constitute a case of first impression for the Court.

How can the Circuit Court decision regarding standing be squared with the fact that any citizen of the City of Georgetown has standing to bring a complaint to the Building and Planning Department, and then has sufficient standing to bring an appeal to the Board of Zoning Appeals, but cannot challenge the determination of the Board of Zoning Appeals in Circuit Court, as is provided for in state law? **See R. p. 16 and R. pp. 17-18, City of Georgetown Building and Planning Department Complaint Form and Application for the Board of Zoning Appeals dated October 31, 2008.**

This is an absurd conclusion that goes against the law and the concept of "*Ubi jus, ibi remedium*", or "Where there's a right, there must be a remedy".

Jurisdiction

The Court concluded that "this appeal should be dismissed due to the failure of the petitioner/appellant to name the sign owner as a party to this action". **See R. p. 10, lines 11-13, *Order of Dismissal.*** The Court relies upon ***Friends of McLeod, Inc. v. City of Charleston*, 376 S.C. 610, 658 S.E.2d 544 (S.C. App. 2008).**

Reliance on this case by the Court is misplaced and inapplicable as it does not, in any manner, apply to the facts involving the current controversy.

The *Friends of McLeod, Inc. v. City of Charleston* case turns on the fact that an appeal to the circuit court from a local zoning board of appeals decision failed to name the party that originally brought the variance request before the zoning board of appeals.

In the instant case, the Appellant was not challenging any variance or special exception given to Mr. Sawyer in the course of a proper administrative tribunal. In contrast to the case cited by the Court, Mr. Sawyer never did apply for any variance or special exception, or even a sign permit, and was never before the Respondent Board challenging a determination of city staff, even though he was told to do so by the City Director of Development. **See R. p. 4.** In the instant case, it would have been improper for Mr. Sawyer to have been a party to this action, based on the facts and the law, unless granted leave by the court to intervene.

The South Carolina Supreme Court decision in ***Spanish Wells Property Owners Association, Inc. v. Board of Adjustment of the Town of Hilton Head Island*, 295 S.C. 67, 69 367 S.E.2d 160, 161 (1988)** was the basis for the decision in *Friends of McLeod* case that was cited by the Court in its "Order of Dismissal".

The sole question in the *Spanish Wells* case was "whether a permittee is a necessary party to an action to revoke a development permit". ***Id*, 295 S.C. 68**

In the instant case, the sign owner was never a permittee before the Respondent Board and the Appellant was not attempting to revoke his development permit, therefore he was not a necessary party to the instant case. The fact that Mr. Sawyer was not a sign permit holder or challenging a determination of the city staff is one of the core issues before the court, as this lack of permittee status is what renders Mr. Sawyer's sign illegal in the first place.

In citing the *Spanish Wells* case, the lower court is grasping at straws without acknowledging the facts or the law.

Because of the complete and illegal reversal of the city on the grandfathering issue, and the city's vigorous defense of Mr. Sawyer's illegal sign before the Board of Zoning Appeals, the Circuit Court, and now this instant Court, the City of Georgetown has in effect become a *pro bono* attorney and advocate for Mr. Sawyer. This is a most peculiar situation that only makes sense in the context of *ultra vires* acts, behind the scenes manipulation of city enforcement decisions, and public corruption of those that are

expected to enforce the laws equally and without favoritism to those in positions of public trust and power.

In effect, the lower court has said that the Appellant has no rights to challenge the obvious and illegal special treatment afforded Mr. Sawyer, while Mr. Sawyer, who had no permit, not a permittee, and therefore had no rights to a sign of any type, is afforded special treatment at the city, Board of Zoning Appeals, and now, Circuit Court levels. This is absurd and must not stand.

Did the lower court correctly apply the law and facts regarding *grandfathering* and *nonconforming use* to the sign in question?

STANDARD OF REVIEW

On appeal, the Appeals Court applies the same standard of review as the circuit court below: the findings of fact by the Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. **S.C. Code § 6-29-840(A)**. In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. **Id.** Furthermore, "[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision." **Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999).**

"However, a decision of a municipal zoning board will be overturned if it is arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion." **Id. S.C. Code § 6-29-849** states, "the finding of facts by the board of ap-

peals must be treated in the same manner as a finding of fact by a jury ..." and must be affirmed "if they are not arbitrary and clearly erroneous in view of the evidence in the record." **Sea Island Parkway Coalition v. Beaufort County Board of Adjustments and Appeals, 321 S.C. 548 (1996).** "Factual findings of the Board must be affirmed by the circuit court if they are supported by any evidence and not influenced by an error of law." **Heilker v. Zoning Board of Appeals for the City of Beaufort, 346 S.C. 401 (2001)**

A use cannot be a nonconforming use if it was unlawful at the time of the amendment of the ordinance prohibiting the use. **Town of Sullivans Island v. Byrum, 306 S.C., 539, 413 S.E.2d 325 (Ct. App. 1992); lOlA C.J.S. Zoning & Land Planning 164, p.500** ("[a] use which was unlawful at the time the ordinance prohibiting such use was enacted is not ordinarily regarded as a nonconforming use."). The burden of proving a nonconforming use is on the party claiming a prior nonconforming use. **Id. § 154.**

Argument

The evidence before the Respondent Board showed a lack of permit and a location (on a fence) that prompted an enforcement order telling the owner, Mr. Sawyer, that he must remove the sign. **See R. p. 3. Also see R. p. 105, lines 5-9 and R. p. 139, line 23 – p. 141, line 20.**

As the Board Transcript cited above indicates, and as the Respondent Board had before them as evidence, the sign owner and city council member, Mr. Sawyer, personally inquired into the lawfulness of a sign for a home based business that was located in

the yard, as opposed to the being on the side of the building. The response from Sabrina Morris was that a sign for a home based business "cannot be" located in the yard, precisely the location of Mr. Sawyer's sign. **See R. p. 160, City Code Article X, 1012 B.**

These violations of law existed prior to the new ordinance that modified the sign regulations and should have precluded any grandfathering of the sign. This evidence was before the Respondent Board, but was ignored by them. This constitutes an arbitrary decision that was clearly erroneous in view of the evidence in the record, not correct as a matter of law, and an abuse of discretion.

Findings of Fact

As an initial matter, the "Order of Dismissal" of the Circuit Court points to findings of fact that cannot be attributed to the Respondent Board.

The Court states:

> "the respondent contends that it cannot dispute the lawful existence of the sign on the effective date of the present ordinance which renders the sign nonconforming". **See R p. 9, lines 16-18, Order of Dismissal, pg. 2, para. 3.**

A review of the record shows that the Respondent Board never made this factual finding. It cannot be found in the transcript of the hearing held on December 3, 2008 and is not contained in the written order of the Board issued on January 7, 2009. Additionally, this was not the issue that the Respondent Board cites as the factual basis for its determination. **See R. p. 5, Letter from Stephen Stack to Mr. Paige Sawyer dated October 3, 2008.**

South Carolina Code section 6-29-800 requires that "[a]ll final decisions and orders of the board must be in writing" and that "[a]ll findings of fact and conclusions of law must be separately stated . . . ." **S.C. Code Ann. § 6-29-800(F)**

The Respondent Board only stated in writing, as required by law, the following:

> "416 Highmarket Street - Paige Sawyer's Home Based Business sign
> The board upheld staff's decision regarding this sign noting Section 1022 of the City of Georgetown Zoning Ordinance." **See R. p. 6, written order of the Board issued on January 7, 2009.**

The "staff decision" being upheld was the third and last decision made by Mr. Stephen Stack. This decision contradicted the first two decisions made by other city enforcement officers and the legal opinion of the city attorney. **See R. p. 3 and R. p. 4. Also see R. pp. 154-158.**

Mr. Stack's decision, which is the decision the Appellant was appealing to the Respondent Board, stated the following in pertinent part:

> "City staff has reviewed the tape of the sign workshop held on January 31, 2008. After listening to the pertinent information on the tape it was evident that staff did indeed state the existing home based business signs existing prior to the adoption of the new ordinance would be grandfathered. Therefore we will not be continuing enforcement of the sign located at your residence and home based business.
>
> Please consider this the decision of the Zoning Administrator, from which appeal may be taken to the Board of Zoning Appeals within 30 days." **See R. p. 5.**

The Appellant directly attacked this decision by Mr. Stack, and decision of the Respondent Board to uphold it, in his "Notice of Appeal and Petition".

The Appellant declared that

> “(t)he grandfathered status of a home based business sign is not based upon informal pronouncements of City Staff during a workshop to discuss new sign regulations”,

and also stated that

> “(t)he grandfathered status of a home based business in based upon a thorough review of facts and law”. **See R. p. 21, lines 14-18, Notice of Appeal and Petition, paras. 8-9.**

The Appellant also argued before the Circuit Court that the Board of Zoning Appeals was in error by upholding Mr. Stack’s determination of grandfathering. Appellant stated;

> “(d)uring their hearing on this matter, the Board of Zoning Appeals never applied the law . . . to the existing home based occupation sign for Mr. Sawyer. Instead, they took the word of the Director of Development, Sabrina Morris, that her pronouncement during a sign workshop that the sign was grandfathered was a valid determination of fact and law”. **See R. p. 22, lines 5-10, Notice of Appeal and Petition, para. 13. Also see R. p. 102, line 12 – p. 106, line 10, BZA Transcript, pg. 32, 12 thru pg. 36, 10.**

A question regarding the legal basis of Mr. Stack’s grandfathering decision was raised during the hearing before the Respondent Board. The hearing transcript reflects a feeble attempt to dig into the legal basis of the grandfathering decision.

> Mr. Dozier: When y’all answered that it was grandfathered, what were you basing that answer on?
>
> Ms. Morris: Any –
>
> Mr. Dozier: I mean does that end the –
>
> Mr. Clark: Yeah.
>
> Ms. Morris: Yeah.
>
> Mr. Dozier: -- (unintelligible)? All right. **See R. p. 106, line 20 – p. 107, line 1.**

The Appellant then clearly put the Respondent Board on notice that there were legal barriers to grandfathering, by telling them "I've read the ordinance. You can't grandfather something that was illegal prior to the passage of the prior ordinance." **See R. p. 108, lines 17-19.**

The Appellant also pointed to the fact that Mr. Sawyer had already been given notice that his sign was in violation of the prior ordinance.

"Mr. Sawyer was on notice already that – that his sign was a violation of the prior ordinance, and if he wanted to do the right thing, he should have asked y'all to review, and if you denied, then he should have asked for a variance. That is the proper procedure. Thank you." **See R p. 111, line 21 – p. 112, line 1.**

This statement by the Appellant prompted the board to inquire into the two enforcement letters originally written to Mr. Sawyer.

> Mr. Dozier: Question, Sabrina, what were y'all looking at when y'all wrote the letter to Paige saying he was in violation?
>
> Ms. Morris: I will certainly address that, and I'm glad you asked that. This actually came about - -
>
> Mr. Dozier: Jamie did it and you did it.
>
> Ms. Morris: Jamie wrote the letter, as she was the Zoning Administrator, and it was her job to interpret the ordinance. She went to a section that if – I wish I could find that. I think I have that letter. She went to the section of the ordinance that says a home-based business has to be on the wall. That's the section she went to, and that's the section she interpreted.
>
> I contacted [the city attorney] Miss Crosby after she left because Mr. Tennant was asking why nothing was done, what – I will be honest with you. I pulled her letter. We talked about it. Miss Crosby said, send him a letter saying he can appeal that decision.

> Then I met with Mr. – Mr. Sawyer. He brought up the tape. We went back. We listed to the tape with Mr. Stack. We went to the ordinance section that was just read for the record, and in our interpretation because it's in the record, it doesn't say a permit was issued, whatever. ***If you never have a permit, if it's nonconforming, it is grandfathered by the new code".*** (Emphasis added) **See R. p. 112, line 3 – p. 113, line 3.**

While admitting to the board in the last sentence above that Mr. Sawyer never had a permit, Ms. Morris promptly ignores the ordinance provision that a sign without a permit is illegal, and then makes the unfounded statement that it is nonconforming and grandfathered.

This constitutes irrationality at its highest, showing great capacity to reach an affirmative conclusion from a negative premise (which is apparently necessary to be a functioning department head with the City of Georgetown).

The absence of a permit and being on a fence made the sign illegal and therefore not eligible for grandfathering and being designated as nonconforming.

Essentially, "nonconforming use" and "vested right" refer to the same concept---a use of property which ***existed lawfully before the enactment of a zoning ordinance*** may continue afterwards even though the use does not comply with the zoning restriction." ***See* 83 Am.Jur.2d *Zoning and Planning* § 624 (1992).** (emphasis added)

Any determination by the City of Georgetown that an existing sign is illegal forecloses its ability to be considered grandfathered or nonconforming under the existing sign ordinance. Specifically, the sign must have a valid permit and meet other requirements, such as appropriate location.

The City of Georgetown grandfathers nonconforming signs in Section 1022 of the City Code. Nonconforming signs are defined in Section 1001.v.

> Nonconforming Sign: Any sign lawfully existing ***with a valid permit*** on the effective date of any ordinance, or amendment thereto, that renders such sign nonconforming because it does not conform to all the standards and regulations of the adopted or amended ordinance. (Emphasis added) **See R. p. 159 and p. 160, Georgetown Code Sections 1001 v. and 1022.**

The record shows there were two different determinations or submissions of factual evidence of illegality regarding the sign in question before the Respondent Board. None of these determinations and facts was considered by the Respondent Board or the Circuit Court in their findings of fact and decisions of law.

These determinations were, 1) absence of a permit, and 2) located on a fence instead of on the wall of the home. **See R. p. 145, R. p. 3, R. p. 4. Also see R. pp. 150-153 and R. pp. 154-158.**

Taken as a whole, it is clear that the Court never determined whether or not the facts before the Board were correctly applied to the law in question. It is also clear that the sign was not eligible to be deemed nonconforming. In this regard, the Appellant met his burden of proving that it was not a nonconforming sign, and the Respondent and City did not meet their burden of proving that it was nonconforming, and therefore eligible for grandfathering.

Conclusion

It is clear that the lower Court, the City of Georgetown, the Zoning Board of Appeals, and Mr. Sawyer, have bended and twisted the interpretation of the ordinance

regarding grandfathering totally beyond recognition. Adding to this abuse of power and arbitrary and capricious decisions, is the underlying theme of an elected official squirming to get out of trouble in any way he can when confronted with the law he himself helped pass.

It is also evident that the Georgetown City Council, in part or whole, was rooting for Mr. Sawyer and wanted him to prevail, hence the twisted outcome. This is clearly shown in the comments of one of the Board members, Mr. Clark, when he asked, "I have a question. Couldn't Planning Commission do a text amendment and just modify this one sentence to allow the sign? Has that not been discussed ***since Council feels that it should be allowed***?" (Emphasis added) **See R. p. 107, lines 3-6.**

These facts of the case cited above, along with this indication that politics was deeply at play in this case, support the Appellant's contention that this is an example of behind the scenes manipulation of the enforcement process, clearly *ultra vires*, and certainly not in line with the applicable law.

To this day, Mr. Sawyer still has no permit and his sign is still located in a prohibited location that was also illegal prior to the change of ordinance (on a fence) **See City of Georgetown Code of Ordinances, Article X, Section 1006 j,** cited in **R. p. 3.** The decisions of the Respondent Board and lower court should be overturned and this court should find that the sign in question should be removed, as Mr. Sawyer was initially told by the City.

Respectfully submitted,

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DATE: March 24, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-0196

James M. Tennant,..Appellant,

vs.

Board of Zoning Appeals for the City of Georgetown,.......................Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities ii

Issues on Appeal 1

Statement of the Case 1

Statement of Facts 2

Standard of Review 3

Argument 3

I. That Appellant lacked standing and failed to name and serve a necessary party are the law of the case, both are dispositive, And this Court should dismiss this appeal 3

II. The circuit court correctly determined Appellant lacked standing 6

III. The circuit court correctly determined it lacked jurisdiction for Appellant's failure to name and serve a necessary party to his appeal 12

IV. The Zoning Board of Appeals's decision was neither arbitrary nor clearly erroneous, and the circuit court correctly upheld it 14

Conclusion 18

Certificate of Compliance 20

TABLE OF AUTHORITIES

Cases

ATC South, Inc. v. Charleston County, 380 S.C. 191, 669 S.E.2d 337 (2008).......8,9, 10,11

Bailey v. Bailey, 312 S.C. 454, 441 S.E. 2d 325 (1994)..6

Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).................................9

Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 (1985).......................................6,9

Clear Channel Outdoor v. City of Myrtle Beach, 360 S.C. 459, 602 S.E.2d 76, 78 (S.C.App. 2004)..3

Evins v. Richland Co. Historic Preservation Comm'n, 341 S.C. 15, 532 S.E.2d 876 (2000)..9

Ex parte Levitt, 302 U.S. 633, 58 S.Ct. 1 (1937)...7

First Union Nat'l Bank v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct.App. 1998)..6,18

Florence Morning News, Inc. v. Building Comm'n, 265 S.C. 389, 218 S.E.2d 881 (1975)..7

Floyd v. C.B. Askins & Co., 675 S.E.2d 450 (Ct.App. 2009).......................................5

Friends of McLeod, Inc. v. City of Charleston et. al., 376 S.C. 610 658 S.E.2d 544 (Ct.App. 2008), *vacated as moot* 384 S.C. 438, 682 S.E.2d 488 (2009).......12, 13, 14

Heilker v. Zoning Board of Appeals for the City of Beaufort, 346 S.C. 401, 552 S.E.2d 42, 47 (Ct.App. 2001)...3,4

Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910)...14

Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992)...........................9

Newman v. Richland Co. Historic Preservation Comm'n, 325 S.C. 79, 480 S.E.2d 72 (1997)..6,7

Pye v. Fox, 369 S.C. 555, 633 S.E.2d at 511 (2006)..5

Sea Island Parkway Coalition v. Beaufort County Board of Adjustments and Appeals, 321 S.C. 548, 471 S.E.2d 142, 143 (1996)....3

Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470 (2004)....9

Sloan v. School Dist. Of Greenville Co., 342 S.C. 515, 537 S.E.2d 299 (Ct.App. 2000)....6,7

Spanish Wells Property Owners Ass'n v. Bd. of Adjustment of the Town of Hilton Head, 295 S.C. 67, 367 S.E.2d 160 (1988)....13

Stanton v. Town of Pawleys Island, 317 S.C. 498, 455 S.E.2d 171 (1995)....3

Vulcan Materials Co. v. Greenville County Bd. Of Zoning Appeals, 342 S.C. 480, 536 S.E. 2d 892 (Ct. App. 2000)....12

Whaley v. Dorchester Co. Bd. of Zoning Board of Appeals, 337 S.C. 568, 525 S.E. 2d 404 (1999)....16

Statutes

S.C. Code § 6-29-76(C)....8

S.C. Code § 6-29-820....8

S.C. Code § 6-29-840....3,14

§ 1001(v), Article X, City of Georgetown Code of Ordinances....15

§ 1022, Article X, City of Georgetown Code of Ordinances....15

§ 1001.14, Article X, City of Georgetown Code of Ordinances, ord. of 1-18-2001, *replaced* 2-21-08....15

Other Authorities

Rule 201(b) SCACR....7,12

Rule 203(b) SCACR....4, 5, 12

Rule 203(d)(1)(B) SCACR....4

Rule 210(C) SCACR....14

Rule 263(b) SCACR.......5

Rule 74, SCRCP.......12

101A C.J.S. Zoning and Land Planning §154.......16

STATEMENT OF ISSUES ON APPEAL

Mr. Tennant is the Appellant and Respondent Board defers to his right to frame his own issues on appeal. Rule 208(b)(2), SCACR.

STATEMENT OF THE CASE

On July 3, 2008, Appellant filed a Complaint Form with the City of Georgetown Building and Planning Department, complaining about the home-based business sign of "Paige Sawyer Photography." (R. p. 16). On October 3, 2008, the city notified the property owner and Appellant that the city had researched the complaint and was not taking any enforcement action in that matter. (R. p. 5).

On October 31, 2008, Appellant filed a combined appeal to the Board of Zoning Appeals, complaining about various staff enforcement decisions with which he disagreed regarding other people's property. (R. p. 17-18). His appeals were heard December 3, 2008. The Board reversed two of staff's decisions, but unanimously upheld staff's decision regarding the photography business sign. (R. pp. 6-7 - p. 114, lines 16-25 - p. 115, lines 1-2), notice of which was provided to Appellant. (R. pp. 6-7).

On February 5, 2009, Appellant timely filed an appeal of that decision. Appellant's petition on appeal to the circuit court was served February 11, 2009 ®. P. 19-23) and the Return and Transcript of the Record filed March 11, 2009. (R. pp. 24-29 (Board's Return) - pp. 16, 148, 3, 4, 71-117, 5, 17, 161, 69-70, 6-7 (exhibits)). The appeal was heard May 21, 2009, by the Honorable Benjamin H. Culbertson. The court took the matter under advisement and filed its Order of Dismissal May 27,

2009. (R. pp. 8-12).

On June 9, 2009, Appellant timely filed a "Rule 59 Motion to Alter or Amend, to Rehear or to Recuse and Grant New Trial." (R. pp. 30-38). June 9, 2009, the court notified the parties of its intent to decide Mr. Tennant's motion(s) on briefs. (R. p. 13). On June 18, 2009, Appellant emailed the judge "taking issue" with the Clerk of Court and requesting an extension. The court notified the parties it found the transcript contained in the Clerk of Court file to be sufficient. (R. pp. 14). The parties timely submitted and filed the requested briefs. R. pp. 39-50 - pp. 62-67). Also on June 23, 2009, Appellant filed a "Motion to Compel or to Remand for Rehearing." R. pp. 51-55).

The court denied Appellant's motions by Order filed August 10, 2009, served on Appellant August 11, 2009. (R. p. 15). Appellant timely served his Notice of Appeal of the August 10, 2009 Order to the Court of Appeals. (R. p. 68). Appellant has not filed or served a Notice of Appeal of the May 27, 2009 Order.

STATEMENT OF FACTS

The property owner in this case operates a home-based professional photography business at [redacted] Street in Georgetown. Marty Tennant, your appellant, is not an adjoining property owner. (R. pp. 17-18 - pp. 8-12 - p. 132, line 1).

The property owner, Paige Sawyer, is a member of city council. On February 21, 2008, city council enacted a new sign ordinance. Article X, <u>City of Georgetown Code of Ordinances</u>.

STANDARD OF REVIEW

The standard of review of a decision of a Board of Zoning Appeals decision in this Court is the same as that of the circuit court, and is prescribed by statute:

> The findings of fact by the board of appeals must be treated in the same manner as a finding of fact by a jury, and the court may not take additional evidence...In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law. S.C. Code § 6-29-840(a)

Therefore, "... this court should affirm factual findings by a board of zoning appeals if they are not arbitrary and clearly erroneous in view of the evidence in the record." *Sea Island Parkway Coalition v. Beaufort County Board of Adjustments and Appeals,* 321 S.C. 548, 471 S.E.2d 142, 143 (1996.) "The factual findings of the Board must be affirmed by the circuit court if they are supported by any evidence and not influenced by an error of law." *Heilker v. Zoning Board of Appeals for the City of Beaufort,* 346 S.C. 401, 406, 552 S.E.2d 42, 47 (Ct. App. 2001); *Stanton v. Town of Pawleys Island*, 317 S.C. 498, 502, 455 S.E.2d 171 (1995.)

"On appeal from the circuit court, the Zoning Board's decision should not be interfered with unless it is arbitrary or clearly erroneous." *Clear Channel Outdoor v. City of Myrtle Beach*, 360 S.C. 459, 602 S.E.2d 76, 78 (S.C.App. 2004); *Heilker, supra.*, at 44.

ARGUMENT

I. That Appellant lacked standing and failed to name and serve a necessary party are the law of the case, both are dispositive, and this Court should dismiss this appeal.

Appellant cannot appeal what he did not appeal. He *did not appeal* the circuit court's May 27, 2009 Order of Dismissal, which was a five-page Order in which the court addressed both standing and jurisdiction, and including both as reasons for dismissing the appeal. (R. pp. 8-12).

The Notice of Appeal speaks for itself. Appellant appeals the circuit court's August 10, 2009 Order. (R. p. 68 - p. 15). That Order denied his Rule 59 Motion to "Alter or Amend, to Rehear or to Recuse and Grant New Trial" and his "Motion to Compel or Remand for Rehearing."

The Rules are clear on what to file. Rule 203(d)(1)(B), SCACR provides: "[T]he notice filed with the appellate court shall be accompanied by...a copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing." The rule contemplates the quite normal practice of appealing two or more orders: a substantive order and a denial of a post-trial motion which stayed the time for appeal. Respondent submits Rule 203(d)(1)(B)(ii) adds the parenthetical letter "s" ("order(s)" and judgment(s)") for that exact reason.

In his Statement of Issues on Appeal and Initial Brief, Appellant is ascribing error to the May 27, 2009 court order: "Does Appellant have standing to sustain his appeal?" and "Did the lower court have jurisdiction to hear the case?" (Initial Brief of Appellant pp. 4, 11, 13-17.) But, the court did not address either issue in the Order being appealed. Under Rule 203(b)(1), SCACR, the notice of appeal must be served within thirty days of written receipt of the order, stayed by timely filing of a post-trial motion. Appellant was served with the Order denying his post-trial motions

August 11, 2009, (Initial Brief of Appellant p.12), the time for appeal has passed, and it may not be extended. Rules 203(b)(1) and 263(b), SCACR.

Even so, Appellant's failure to appeal the underlying substantive order might not preclude him from appealing Rule 59 issues properly raised: "[A]n exception to this rule exists where an issue *is raised* but *not ruled upon* at a Rule 59(e) hearing." *Pye v. Fox*, 369 S.C. 555, 566, 633 S.E.2d at 511 (2006.) But, although Appellant did talk about standing and jurisdiction in his Rule 59 motion, he *did not seek relief on either issue.* His requests were for the court to: "apply the real facts and law to the case," rehear the case after ordering "completion of the record," "recuse himself [Judge Culbertson] and set the appeal for re-hearing in front of a different judge", (R. p. 38) and "determine that the certified record is insufficient for review...[and] remand the case..." (R. p. 55). Inexplicably, your Appellant claims no error with regard to the court's denial of these requests. Thus, his would-be grounds for appeal were not raised.

The circuit court held "As a matter of law, petitioner/appellant lacks standing to bring this action." (R. p. 12). The court further held "Since the petitioner/appellant failed to include and serve a necessary party to this appeal..., this court is without jurisdiction and, therefore, must dismiss this appeal as a matter of law." (R. p. 11). Appellant's failure to appeal the May order addressing standing and jurisdiction, and his failure to seek relief on those issues in his Rule 59 Motion, means the door has closed on his right to appeal. "Where a decision is based on more than one ground...the unappealed ground will become the law of the case." *Floyd v. C.B.*

Askins & Co., 675 S.E.2d 450 (Ct. App. 2009); *First Union Nat'l Bank of S.C. v. Soden,* 333 S.C.2d 554, 566, 511 S.E.2d 372, 378 (Ct.App.1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Because both the failure of standing and jurisdiction at the circuit court level are the law of the case, and both are independently dispositive, the Court of Appeals should dismiss Appellant's first grounds for appeal and need not reach any other issues. [1]

II. The circuit court correctly determined Appellant lacked standing.

Standing is 'a personal stake in the subject matter of a lawsuit.' *Sloan v. School Dist. Of Greenville Co.*, 342 S.C. 515, 537 S.E.2d 299 (Ct.App. 2000) citing *Newman v. Richland Co. Historic Preserv. Comm'n*, 325 S.C. 79, 82, 480 S.E.2d 72 (1997). Rule 201(b), SCACR, states: "Only a person aggrieved by an order, judgment, sentence, or decision may appeal."

In its (unappealed) May 27, 2009 order, the circuit court stated:

> What the petitioner/appellant is trying to do is enforce a city ordinance that he perceives to have been violated, even though ***he is not an adjoining property owner or otherwise affected by the alleged violation***. A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing." *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (S.C. App. 2000,) citing *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985.) Standing is "a personal stake in the subject matter of a lawsuit.", *Sloan*, ..., *ibid.*, citing *Newman v. Richland County Historical Preserv. Comm'n*, 325 S.C. 79, 82, 480 S.E.2d 72, 74. (1997) and *Bailey v. Bailey*, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994.)

[1]This re-request for dismissal having been expressly permitted by May 28, 2010 Order of this Court, Jasper M. Cureton.

> A private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in danger of sustaining, prejudice therefrom. It is not sufficient that he has merely a general interest common to all members of the public. *Florence Morning News, Inc., v. Building Comm'n*, 265 S.C. 389, 218 S.E.2d 881 (1975), quoting *Ex parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1 (1937.) (Emphasis added.)
>
> In the case at hand, the petitioner/appellant is a member of the public who feels that the owner of the sign in question has violated the city's sign ordinance. Enforcement of the city's sign ordinance is a legislative action authorized to the city and/or its agencies, not individual citizens.

The court also pointed out "petitioner/appellant admits that he is pursuing this appeal, in part, because he has been charged in the past with violation of the city sign ordinance and the owner of the sign in...this case is a member of city council." (R. p. 8 fn.1).

At the appeal to the Board, Appellant said: ""I'm going to tell you right now, this is a nice sign. You know, ***I don't see any problem with this sign*** other than the fact that Mr. Sawyer never complied with the law to begin with. Now, when I was before the municipal court defending myself, I subpoenaed Mr. Sawyer..." (R. p. 109, lines 11-15) (emphasis added.)

Appellant is not an adjoining property owner. He lists his address at 1204 Saville Street and the address of the sign at [redacted] Street. (R. p. 17-18). Appellant has virtually come right out and said his only beef with the sign is that it belongs to Mr. Sawyer, about whom he apparently harbors some animus (*e.g.*, "I subpoenaed Mr. Sawyer") (R. p. 109, line 15.) Any doubt about this is resolved by Appellant himself in his brief:

> "At root, this case is about equal protection under the South Carolina and United States Constitutions...Should elected officials of a municipal government be treated differently from ordinary citizens? In this case the elected official has been allowed to evade the same sign ordinance provisions that were used earlier to help fine and jail...Appellant." Initial Brief of Appellant p.13.

Setting aside for the moment Respondent Board's position that an equal protection claim is unraised, unripe, and cannot be considered by this Court, Appellant's position makes clear that he suffers no "injury in fact" by the presence of the Paige Sawyer Photography sign.

Standing may be acquired: (1) by statute; (2) through the rubric of constitutional standing; or (3) under the "public importance" exception. *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008.)

First, Appellant does not have statutory standing, period. The legislature has specifically addressed who may appeal local Boards of Zoning Appeals: "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..." And, "A **property owner** whose land is the subject of a decision of the board of appeals may appeal..." S.C. Code §6-29-820(a) and (B) (emphasis added.) Similarly, in the zoning context, "[a]n owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment." S.C. Code §6-29-76(C). In *ATC South, Inc. V. Charleston County, ibid.*, the Court held that appellant "is not an adjoining landowner [and] it may not assert statutory standing." *Id.* At 339.

Second, Appellant also lacks constitutional standing. The Supreme Court has established a three-part test to establish constitutional standing:

> First, the plaintiff must have suffered an injury in fact–an invasion of a legally protected interest which is a (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of–the injury has to be fairly traceable to the challenged action... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *ATC South, Inc., infra.* at 339, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130 (1992.)

Appellant did not suffer–and has not claimed–any injury-in-fact whatsoever. Under fairly substantial and long-held South Carolina jurisprudence on standing, some of which was cited by the circuit court in its first order in this case:

> "[a] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger from sustaining, prejudice therefrom." *ATC South, Inc., ibid.*, citing *Evins v. Richland County Historic Pres. Comm'n,* 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000); *Blandon v. Coleman, ibid.*

Finally, Appellant does not have standing under the public importance exception. Our courts have long held there is an exception to the generally inflexible standing requirement upon issues of public importance. For example, in *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), the Court conferred standing on a citizen-plaintiff in a case involving tax-exempt hospital bonds because the act affected "**profound public interests**: public health and public welfare." *Id.* at 531 (emphasis added.) "On the other hand, standing cannot be granted to every individual who has a grievance against a public official." *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004.) The real key,

according to our state Supreme Court, is "whether an issue is of such public importance as to require its resolution for future guidance." *ATC South, Inc. supra*, at 341 (citations omitted.) In the *ATC South* case, the Court was presented with whether a competing cell tower company had standing to challenge an economically adverse zoning decision involving a competitor. The Court concluded it did not. In language that aptly fits the instant case, the Court stated:

> "Of course zoning is a matter of public importance, but the same may be said of most legislative actions. For a court to relax general standing rules, the matter of importance must...be inextricably connected to the public need for court resolution for future guidance...ATC's efforts to cloak its zoning challenge as a matter of "public importance" for the purposes of acquiring standing finds no traction in this record." *Id.* at 341.

Similarly, there is "no traction" in the record in the instant case. Appellant argues "it is of the utmost public importance that the laws of the City of Georgetown be followed by all.." and that "Mr. Sawyer has abused his position of power...as a result of his behind the scenes manipulation of the ordinance enforcement process within the city of Georgetown." Initial Brief of Appellant p.14. He also argues "this case will serve to provide guidance...by clarifying how determinations of nonconforming use and grandfathering are properly applied..." Initial Brief of Appellant p.15.

For starters, Appellant's reference to public corruption and abuse of power should be stricken. This is supposedly an appeal of an adverse circuit court decision upholding a local Board of Zoning Appeals, in reference to property

belonging to a third party.[2] The full Board upheld the city's decision that a sign was grandfathered. The Board heard Appellant's arguments and opinions, but it made zero finding of fact with regard to "abuse of power." Therefore this was simply not a matter for the circuit court's consideration. The evidence before the Board was that Mr. Sawyer contacted the Building and Planning department after Appellant complained to both seek and provide insight on the history of his twenty-plus year old sign, an open-door process open to every single citizen. (R. p.102, lines 2-11 - 106, lines 12-15.) Appellant is aware of the means of bringing an independent claim for an equal protection violation or other perceived wrong, and he has not.[3]

Secondly, is whether or not Paige Sawyer Photography's sign was grandfathered an "issue of such public importance as to require its resolution for future guidance" by this Court? *ATC South, Inc. supra*, at 341. Appellant offers one sentence on the need for this Court's guidance: "[T]his case will serve to provide guidance to our Zoning Boards of Appeals [sic] and to Boards of all types over the State by clarifying how determinations of nonconforming use and grandfathering are properly applied in the future." Initial Brief at 15. All decisions this Court makes serve as "guidance." Many matters on which this Court could provide guidance are never reached. Whether the Zoning Board of Appeals's decision to uphold the Zoning Administrator of the City of Georgetown's decision that a sign was

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[2]Although that decision was not appealed. See Argument I, *supra*.

[3]*See, e.g. James M. Tennant v. City of Georgetown et al*, 2-07-0961-CWH-RSC; *James M. Tennant et.al. v.the County of Georgetown, et.al.*, 2003-CP-22-0075

grandfathered is not such a matter of public import such that this Court's strict requirement of standing should be set aside.

The circuit court was correct in dismissing Appellant's appeal for lack of standing. First, Appellant has no substantial interest in the sign and lacks statutory standing as a matter of law. Second, he has no constitutional standing because he suffered no injury-in-fact. Third, he has raised no issue of public importance to warrant this court's reversal of the circuit court's dismissal for lack of standing. And finally, Appellant is not "aggrieved," which is required to sustain an appeal before this Court. Rule 201(b) SCACR. For these reasons, the circuit court's decision should be affirmed and this court should dismiss this appeal for lack of standing.

III. The circuit court correctly determined it lacked jurisdiction for Appellant's failure to name and serve a necessary party to his appeal.

In an appeal from the Board of Zoning Appeals to the circuit court, "notice of the appeal to the circuit court must be served on all parties within thirty days after receipt of written notice of the judgment, order or decision appealed from." Rule 74, SCRCP. "Timeliness of an appeal from a zoning board's decision is a jurisdictional requirement and, as such, may be raised at any time by either party or *sua sponte* by the court." *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 896 (Ct. App. 2000); (R. p. 10-11) (May 27, 2009 Order), citing *The Friends of McLeod, Inc. v. City of Charleston, et al.*, 376 S.C. 610, 658, S.E.2d 544 (S.C.App. 2008), *vacated as moot* 384 S.C. 438, 682 S.E.2d 488 (2009).

Appellant timely appealed the Board's decision. (R. p. 19-23). But, he failed to name and serve the property owner/sign permittee. (R. p.131, lines 2-7.) In its (unappealed) order, the circuit court held:

> "the sign owner is a necessary party to these proceedings and, as such, should have been named as a party to this appeal and served with the pleadings. Since the petitioner/appellant failed to include and serve a necessary party to this appeal within thirty days...this court is without jurisdiction and...must dismiss this appeal as a matter of law. (R. pp. 10-11).

Appellant asserts "it would have been improper for Mr. Sawyer to have been a party to this action...unless granted leave by the court to intervene." Initial Brief at 16. Appellant is wrong. The law does not make it incumbent upon the permittee to intervene in a case filed by a third party, and about which he has not been given notice. "[P]ermittees are necessary parties to appeals of their respective permits." *Spanish Wells Property Owners Ass'n v. Bd. of Adjustment of theTown of Hilton Head,* 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988.) The obvious reason for such a rule is that one with a vested interest in a decision affecting one's property has a right to notice and a hearing. Similarly to the instant case, in *Friends of McLeod, vacated, supra.*, the circuit court had found the appellant had not timely perfected its appeal because it failed to name the College of Charleston, which had initially requested a variance from the Board. After the variance was granted, the Appellant in that case then requested a reconsideration--without naming the College--and then subsequently appealed the Board's decision to the circuit court. The jurisdictional issue in *Friends of McLeod* was raised either to or by the court for the

first time on appeal, was dispositive for the circuit court, and that decision was upheld by this Court *Friends of McLeod, ibid., vacated.*[4]

Jurisdiction may be raised at any time. "The Supreme Court will not consider any point that was not presented and considered below *unless it involves jurisdiction.*" *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (emphasis added.)

Timeliness is jurisdictional, Appellant concedes he never served the sign owner, and therefore his appeal to the circuit court was untimely filed. That error was fatal to his appeal, the circuit court was correct in dismissing it, and this Court should affirm the circuit court's decision and dismiss the appeal.

IV. The Zoning Board of Appeals's decision was neither arbitrary nor clearly erroneous, and the circuit court correctly upheld it.

Should this Court even reach it, Appellant's second issue on appeal could possibly be coaxed out of the Order he did appeal: the circuit court's denial of his Rule 59 motion in which he sought–among other things-- to have the court "apply the real facts and law to the case." (R. p. 38).

The facts were established at the Board hearing. Neither party is able to supplement them, make them up, or distort them at this point.[5] The record is the record. § 6-29-840(A), S.C. Code; Rule 210(C) SCACR.

[4]As such, Respondent understands the *Friends of McLeod* case is not controlling, but offers it for its persuasive analysis

[5]See Respondent's Motion to Strike. *E.g.* "Mr. Sawyer never did apply for... a sign permit." Initial Brief at 16. Based on information not before the board and thus unuseable by Respondent at bar but made known to Appellant prior to the date of his filing, this is false.

As to the law, the court dismissed the appeal on two independent and dispositive grounds, but heard and ruled against Appellant on the legal merits as well. The court found:

> "Based upon the respondent's factual findings in the case at hand, the respondent's decision that the sign in question is exempt from compliance with the city's sign ordinance is correct as a matter of law." (R. p. 10).

This sign was exempt from compliance because the Board found it was grandfathered. "Grandfathering" is less a legal term than a practical concept, and the word does not appear in the city's sign ordinance. Article X, City of Georgetown Code of Ordinances. However, it is clear from Appellant's Initial Brief and the transcript of the Board's hearing that the parties understand government can allow an existing private property use to continue after a subsequently-passed zoning provision would otherwise prohibit it. Such a use would be "nonconforming," and the government's allowing it to continue is "grandfathering."

Under the 2008 sign ordinance, the city defined "nonconforming use" in two sections: §§ 1001(v) and 1022. Article X, City of Georgetown Zoning Ordinance. The first section is new: "*nonconforming sign: any sign lawfully existing with a valid permit on the effective date of any ordinance, or amendment thereto, that renders such sign nonconforming...*" The second section copies the previous sign ordinance, (§ 1001.14) and includes no reference to a permit.

Appellant appears to have confused the lack of a sign permit in 2008 with the sign not ever having had one. Throughout this process Appellant has repeated

his assertion that the sign had no permit.[6] This is speculation, not fact. Importantly, this was *not* a finding of fact made by the Board. The Board heard no evidence from either the city or the Appellant as to the existence or non-existence of a sign permit at the time the sign was erected. (R. pp._72-115). It is simply unknown. The Board did, however, have uncontested evidence that the sign was erected twenty-something years earlier and that **the city's permit records only go back to 1993.** (R. p. 101, line 25 - p. 106, lines16-17 - and p. 145)(July 17, 2008 email Davis to Morris.) As the circuit court stated:

> "The respondent contends that **it cannot dispute the lawful existence of the sign on the effective date of the present ordinance which renders the sign nonconforming.**" (R. p. 9)

"The burden of proving a nonconforming use is on the party claiming a prior nonconforming use." *Whaley v. Dorchester County Board of Zoning Board of Appeals*, 337 S.C. 568, 525 S.E.2d 404, 410 (1999) (citing 101A C.J.S. Zoning and Land Planning §154.) Normally, that's the government. Our Court applied sound reasoning in the *Whaley* case in burdening the enforcing government with proving a property owner's nonconformity before taking property rights. In this case, the party claiming a nonconforming use is Appellant, but the burden does not shift. The fact is, he did not meet this burden. As a disinterested third party, he would not be in possession of someone else's sign permit. He is in the same position as the

[6]("*Mr. Paige Sawyer...has never applied for or had a valid permit for the sign.*" (R.p. 20) (Notice of Appeal and Petition. October 31, 2008); ("*The sign owner was never a permittee*") (R. p. 48) Appellant's Brief on Rule 59 Motion;"*the fact that Mr. Sawyer never held a permit for the sign...*") Initial Brief at 8.

city would be. The city does not have any sign permits that old, and if the city were enforcing in this case, it would lose.

The only evidence before the Board that no sign permit ever issued was Appellant's argument that "He told me he had gotten a variance. Okay?...He told me he had gotten a variance for this sign but he couldn't find it. Well, you know, I have a variance, and I held on to mine." (R. p. 109, lines 20-25 - p.110, line1.) Appellant is attempting to illegally shift his burden to the property owner to have "held on to his." This is in error, and would have been error for the circuit court to allow.

The city can enforce zoning violations or not.[7] A prerequisite to enforcement of a zoning violation is–not surprisingly--the existence of a zoning violation. The city bore the burden to prove a violation, it could not, and so, after researching the matter, the zoning administrator did not pursue enforcement.

The Board's decision to uphold her was neither arbitrary nor erroneous. The Board reviewed the zoning administrator's decision that the sign was grandfathered. Nonconforming signs are grandfathered by ordinance in the city of Georgetown and enforcement is not sought against those property owners. Prior to the 2008 sign ordinance, there was no requirement for a nonconforming sign to have been "permitted." The Board heard evidence in this case that the city told the sign owner long ago he could put the sign out (*"we could not get in touch with the inspector that*

[7]Although unraised, unappealed, and unframed as an issue, Appellant expresses his consternation that the city began enforcement with regard to the sign and then reversed course, even beginning his argument with this. Appellant's Initial Brief at 19.

told him he could put it out there in the first place. I think he has passed away. But staff does feel that he was told to put it out...") (R. p. 106, lines 12-16.) The Board also heard evidence the sign had been in place for over twenty years. (*"The fact that the sign has been in place for over 20-some years...*") (R. p. 106, lines16-17). And, critically, the Board learned the city had no sign permits prior to 1993, so it could not confirm or deny whether a permit ever existed. (R. p. 145). City staff and Appellant were heard, the Board asked several questions, and reviewed the ordinances. (R. pp. 72-113). The motion was made "in favor of the zoning administrator's decision based on grandfathering. I think it's an appropriate application of it." (R. p. 114, lines 10-13). The Board passed the motion unanimously. (R. p. 114, lines16-25 - p. 115, lines 1-2). Because the Respondent Board's decision was supported by evidence and was neither arbitrary nor clearly erroneous, the circuit court properly affirmed it and should be affirmed by this Court.

CONCLUSION

First, the circuit court should be affirmed and this appeal should be dismissed for Appellant's failure to perfect an appeal on issues upon which his initial appeal was dismissed, making the lower court's findings and its dismissal the law of the case. "[T]he unappealed ground will become the law of the case." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 556, 511 S.E.2d 372, 378 (Ct.App. 1998.)

Second, the circuit court should be affirmed and this appeal should be dismissed because Appellant lacks standing under any theory recognized by this court.

Third, the circuit court should be affirmed and this appeal should be dismissed because Appellant failed to timely name and serve a necessary party to his appeal--the actual property owner of the sign. This requirement is jurisdictional and cannot be cured.

And lastly, additionally, and alternatively, the circuit court should be affirmed because the Respondent Board's decision was supported by evidence and was not arbitrary or clearly erroneous.

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March 15, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-22-196

James M. Tennant, Appellant,

vs.

Board of Zoning Appeals for the City of Georgetown, Respondent.

FINAL REPLY BRIEF OF APPELLANT

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APPELLANT *PRO SE*

The Brief of the Respondent consists solely of weak and pointless arguments against the overwhelming facts and law now before the Court. What is most striking is the complete and total absence of argument against the most damning evidence presented to the Court – evidence that clearly supports the Appellant's contention that official government corruption is at the core of his continuing complaint against the Respondent Board.

This evidence of corruption is now shown to include the attorney for the Respondent, who, by her own writings, condemns herself and her client by failing to perform critical duties required under the S.C. Rules of Professional Conduct. By withholding critical evidence from the Appellant, the lower court and City tribunal in these proceedings, the Attorney for the Respondent has shown the utmost contempt and callous disregard for lawyer ethics and the rule of law.

Taken as a whole, it is most evident that a "culture of corruption" has permeated the City of Georgetown, and that this corruption has now enveloped elected officials, appointed officials, citizens serving on boards, and the city attorney herself. This corruption must not stand, and this Court now has the power to insure that it does not.

ANALYSIS OF THE RESPONDENT'S BRIEF

Statement of Issues on Appeal

Respondent has failed to properly submit to the Court his issues on appeal, which he claims to have framed separately from the Appellant. The rules of the Court are clear, that "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." There are no issues contained on page

1, Statement of Issues on Appeal, in the Respondents brief. See Rule 208(b)(1)(B) and 208(b)(2). For this reason, the Respondent is bound by the matters stated or alleged in Appellant's statement of the case.

The Statement of the Case

Respondent fails to include critical facts in his Statement of the Case. Respondent omits the following critical facts which are included in the Appellant's Statement of the Case and reiterated here.

1. The owner of the sign in question, City Councilmember Sawyer, was told two times, by two different city officials, that his sign was illegal because of its location on a fence and lack of sign permit, and was told both times that it must be removed. The sign still has no permit and is still illegally located on a fence, yet it is now supposedly grandfathered – illegally in the opinion of the Appellant. **See R. p. 3 and p. 4.**

2. Mr. Sawyer was told that if he did not agree with the city determination of illegality, he was the person responsible for appealing these two enforcement letters to the Board of Zoning Appeals. **See R. p. 4.**

3. In spite of being told to appeal to the Board of Zoning Appeals, Mr. Sawyer continued to plead his case before the city officials that had previously advised him of his violation of law, while at the same time admitting he had no sign permit and never applied for one. **See R. pp. 150-153.**

4. The City Attorney also advised City Officials that Mr. Sawyer should appeal the City code violation letters to the Board of Zoning Appeals, that his continued pleadings should be ignored, and that his sign was not eligible for

grandfathering because of its location on a fence and his admission to having never obtained a permit. **See R. pp. 154-158.**

5. Prior to Mr. Sawyer's deadline for appeal to the Board of Zoning Appeals, a third city official, a subordinate of Ms. Morris, issued a third and final letter to Mr. Sawyer granting the sign grandfathered status, in spite of it not qualifying as grandfathered under the city sign ordinances according to the City Attorney. **See R. p. 5.**

6. Despite providing the City with a legal opinion that ruled out grandfathered status for the sign, the City Attorney knowingly allowed Ms. Morris, in her presence and with her prior knowledge, to defend the third and final letter granting grandfathered status before the Board of Zoning Appeals. Rather than explaining to the Respondent Board the strict legal requirements for grandfathering, the City Attorney did nothing to contradict Ms. Morris and her false and unfounded legal argument for upholding the grandfathering determination. **See R. pp. 71-115.**

It is abundantly clear from the facts above that the City Attorney, (who is also the Attorney for the Respondent in this instant appeal), knowingly allowed her client, the City of Georgetown and Ms. Morris, to present false testimony to the Board of Zoning Appeals regarding the eligibility of Mr. Sawyer's sign for grandfathering, and also failed in her duty to disclose to the Board of Zoning Appeals directly adverse authority in the controlling jurisdiction that had not been disclosed by the Appellant. **See R. pp. 71-115.** This is in violation of Rule 3.3, Candor Toward the Tribunal, S.C. Rules of Professional Conduct.

It is also clear from the above facts that Mr. Sawyer, a sitting City Councilmember, was able to manipulate enforcement officers in the City of Georgetown Building and Planning Department to overturn previous enforcement decisions without going through the normal process of appeal to the Board of Zoning Appeals. Mr. Sawyer was able to use his position of authority as a city Councilmember to subvert the legal process, and to silence the City Attorney at the exact time she should have been a beacon of truth to the Board of Zoning Appeals.

Instead of standing true to the position outlined in her well reasoned legal analysis of the facts and law of this case, which is 100% in agreement with the current position of the Appellant, the City Attorney caved-in to the same corruption of power that is shown to have been wielded by Mr. Sawyer and accepted by the corrupted city officials Morris and Stack.

A lawyer must not allow a tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false. Additionally, the attorney has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. This was not done by the City Attorney and Attorney for the Respondent in this case, at the City Board or Circuit Court level. As a result of this ethical failure of the City/Respondent Attorney to uphold her sworn responsibilities as an attorney and officer of the court is this State, our legal system – and this Appellant – have been been subjected to legal proceedings and controversies that were never necessary, if the truth had only been told initially.

As a pro se Appellant, it has been an unwelcomed burden and source of acute stress to be forced to prosecute this case to this level, through three different tribunals - needlessly. I now fervently pray for this Court, under guidance from God, to please end this madness.

Arguments of the Respondent

Because the Respondent has failed to provide his own proper statement of the issues on appeal, as promised and as required by Rule 208, SCRCP, the Appellant is now improperly required to decipher the intent of the Respondent.

Appellant will attempt to respond to the arguments found in the Respondent's brief in an effort to be responsive. However, because a proper statement of issues on appeal are not available, the Appellant cannot be held responsible for any perceived lack of response, as one cannot respond to issues that are not properly framed as required in the Rules.

Is a proper appeal before the Court?

The Respondent resorts to nitpicking the filings of the Appellant at the circuit court level and claims that no proper appeal has been filed, while improperly mixing issues regarding standing and jurisdiction at the same time. **See Respondent's Brief, pgs. 4-6.**

Taken as a whole, the filings of the Appellant at the circuit court and appellate level clearly establish a proper appeal of the issues that are now before the Court. To say otherwise is to place form above substance. If this Court were to give credence to this specious argument, then it must also consider the Respondent's failure to provide the Court with a proper statement of his issues on

appeal as fatal to any arguments presented in the Respondent's brief, rendering the Respondent's Brief a nullity.

The facts show this appeal is proper. The Appellant's Notice of Appeal cites the lower court's Order dated August 10, 2009, which simply denied Appellant's "Rule 59 Motion to Alter or Amend, to Rehear or to Recuse, and Grant New Trial". **See R. p. 68 and R. pp. 30-38.**

The Appellant's Rule 59 motion, dated June 9, 2009, directly references the original Order of Dismissal dated May 27, 2009, and address all issues on appeal that are before the Court at this instant time. By appealing the August 10, 2009 Order, Appellant is also, by reference, directly appealing the content of the Order of Dismissal dated May 27, 2009.

The following issues were raised in the Appellant's Rule 59 motion:

1. Did the facts before the Court and the Respondent Board clearly show the sign to be illegal and not eligible for grandfathering? **See R. p. 30.**

2. Does the Petitioner/Appellant have standing under the "public importance" exception? **See R. p. 33.**

3. Was the sign owner a necessary party to the Petitioner/Appellants Petition? **See R. p. 34.**

These issues are essentially the same issues raised in the Appellant's Brief, as cited below. **See Appellants Initial Brief, Statement of Issues on Appeal, pg. 4.** Although phrased in a slightly different manner, the legal issues before the Court are the same.

1. Does the Appellant have standing to sustain this appeal, and did the lower court have jurisdiction to hear the case?

2. Did the lower court correctly apply the law and facts regarding grandfathering and non-conforming use to the sign in question?

These issues are also the same essential issues that are apparently being raised by the Respondent, albeit without benefit of a proper statement of his issues on appeal. The Respondent is simply grasping at straws and creating a controversy that does not exist. A proper appeal is before this Court.

Standing

It is clear from the facts, that this case warrants a "public importance" exception for standing. Appellant is acting in the role of a public watchdog, attempting to root out government corruption and malfeasance. From the outset, Appellant has insisted that *ultra vires* and public corruption elements were a central part of this case. The fact bear him out.

Evidence of Public Corruption and *ultra vires* acts

It is abundantly clear, from a review of the facts in this case, that illegal behind the scenes manipulation of the code enforcement process occurred. This manipulation can only be attributed to Mr. Sawyer, the City Councilmember who is the non-permitted owner of the sign.

The facts show the following. Mr. Sawyer was told two times, in writing, that his sign was illegal and that it must be removed, or that he must appeal the code enforcement letters to the Board of Zoning appeals. He did neither. Instead, he insisted on abusing his position of power and authority as a sitting city councilmember by continuing to seek a favorable ruling from the city building and planning department, which he ultimately received from a third, lower level official. This third and final ruling designated the sign as grandfathered, even though the city attorney had already advised the head of the building and planning

department that the sign was not eligible for grandfathering under the sign ordinance.

When this same head of the building and planning department defended the third and final grandfathering ruling before the Board of Zoning Appeals, she had already been advised on the facts and law of what constituted grandfathering by the City Attorney, but ignored reality and made up her own convoluted version of facts and law to suit the corrupted situation she found herself in. During this charade, the City Attorney, knowing full well that the head of the building and planning department was not providing the Board of Zoning Appeals with the truth, sat by and did nothing, allowing her client to present false testimony. Knowing in advance of her ethical responsibilities as an officer of the court to bring candor and the true law and facts to the Board of Zoning Appeals, the City Attorney continued to say nothing, allowing the truth and law to be grotesquely perverted.

Additionally, it is apparent that some form of illegal *ex parte* communication took place between the City Council and members of the Board of Zoning Appeals prior to their illegal decision to uphold grandfathering of the sign. Mr. Clark, a member of the Board, stated during their hearing on this matter, "I have a question. Couldn't Planning Commission do a text amendment and just modify this one sentence to allow the sign? Has that not been discussed since Council feels that it should be allowed?" **See R. pp. 3-5, pp. 150-158, and p. 107, lines 3-6.**

For the Respondent to say that the Appellant lacks standing under the "public importance" exception after a review of the facts above shows a continuation of the same corruption that has become abundantly evident.

Additional arguments for standing are contained in the Appellant's Brief. **See Appellant's Brief, pgs. 13-15.** I will address several allegations of the Respondent separately. Appellant has a substantial interest in that seeing justice be done in the City of Georgetown, that the City of Georgetown and the Board of Zoning Appeals understanding the true basis for grandfathering, and in the rooting out of corruption that has been shown to thrive in our City. These are all issues of public importance. For all these reasons, standing is conferred upon the Appellant.

Additionally, it was wrong for the lower court to dismiss for lack of standing, as it makes no sense for the Board of Zoning Appeals to accept the Appellant's complaints and then for the Appellant to have no route for appeal. If the Respondent Board was a proper place for the Appellant to lodge a complaint, as it was, then the circuit court was a proper place for an appeal of that Board decision.

Jurisdiction

Appellant has a few more points to add to his existing argument regarding jurisdiction. **See Appellant's Brief, pgs. 15-17.** The bottom line is that Mr. Sawyer was never a "permittee". He still is not a "permittee", as he still has no "permit" from the City of Georgetown for his illegal sign. When the City illegally grandfathered his sign, it did not instantly make him a "permittee", even

if the grandfathering had been legal. One must still pay for and receive a permit to be given "permittee" status. The record never shows that Mr. Sawyer went to the City and applied for a permit after this illegal grandfathering occurred. No documents have been submitted showing that any permit was ever granted by the city to Mr. Sawyer. If you are not a "permittee", you do not have a place at the table, and the Appellant was correct in not naming him as a party to the circuit court appeal.

Also, during the Board of Zoning Appeals hearing, Mr. Sawyer was never recognized by the Board to speak or to address his side of the issue, although he was in the room and had been given notice of the board meeting. **See R. p. 95, lines 11-21, p. 111, lines 1-13.** The Board therefor apparently did not considered him to be a necessary party to their hearing. In reality, he was not then and is not now. Insistence at the circuit court level that Mr. Sawyer be a party to a hearing he was never a part of makes no sense, and should not be enforced at the appeals court level.

Was the Zoning Board of Appeals's decision arbitrary and capricious, clearly erroneous, an abuse of discretion, and did the circuit court improperly uphold it?

This critical issue has been addressed in detail by the Appellant in his Brief, in his issue on appeal of "Did the lower court correctly apply the law and facts regarding grandfathering and nonconforming use to the sign in question? It will not be addressed in more detail here. **See Brief of Appellant, pgs. 18-26.**

<u>False statements, lack of candor, withholding of documents, and continuing refusals to acknowledge reality, conclusion</u>

A great deal of ink has been spilled on the issue of whether Mr. Sawyer ever applied for a permit or received a permit, and whether the City could ever determine the facts of the matter due to their limited archive of permits on file.

The Respondent is all over the board on this issue, insisting it is simply an unknown – speculation – not fact – and that permit records only go back to 1993. **See Respondent's Brief, pg. 16.**

The depositive answer to the question comes from Mr. Sawyer himself, and the answer is **<u>NO</u>**. The answer was known by the City and the City Attorney before the Board of Zoning Appeals hearing, before the circuit court proceedings, and before the Respondent filed his Brief. It is contained in a document the Respondent has unsuccessfully attempted to have stricken from the record – the same document that was before the circuit court that showed that critical documents had been illegally withheld from the Appellant. It is contained in a document that should have been provided by the City or the City Attorney to the Board of Zoning Appeals, but was not, in violation of lawyer ethics. It is a document that goes to the heart of of the corruption this case exemplifies.

That document is the letter from Mr. Sawyer to Sabrina Morris, Director of Development for the City of Georgetown, dated September 18, 2008. Mr. Sawyer states "At no time did Mr. Johnson or the city require me to apply for a permit". **See R. p. 151, lines 2-3.**

This admission was known by the City Attorney, who referenced it in her legal memorandum of September 24, 2008, where she stated "Because no sign

permit was issued – and this was conceded by Mr. Sawyer – it was not in compliance with the 1978 ordinance, and therefore has been in violation since the time if was erected. The 1978 sign ordinance prohibited signs from being erected on fences. Because it was placed on a gate, it was probably also in violation for this reason. However, this does not necessarily matter, because no permit was sought or issued for it." **See R. p. 155, lines 13-18.**

This depositive and damning letter from Mr. Sawyer to Sabrina Morris, dated September 18, 2008, was in the possession of the City of Georgetown and the City Attorney prior to the issuance of the third and final letter granting the sign grandfathered status. It was never presented to the Board of Zoning Appeals as evidence. It was never given to the Appellant until after the Board of Zoning Appeals hearing, even though he asked for it via the SC Freedom of Information Act after it was in the possession of the City. **See R. pp. 30-38 and p. 60.**

It was before the circuit court, as an attachment to the Appellant's Rule 59 Motion, but it was ignored by the court, as were most of the facts in this case. This damning document, and others like it, have not even been acknowledged by the Respondent in his Brief. Apparently, the Respondent and his Attorney are so embarrassed or shamed by this evidence that they unsuccessfully tried to eliminate, that they won't even acknowledge its existence. (See Order of 12/14/10, Judge Konduros, not part of Record on Appeal) This evidence includes the legal memorandum of the City Attorney, that is in 100% agreement with the Appellant's legal arguments in this case. **See R. pp. 154-158.**

This document is now before this Court, along with other documents that show the City of Georgetown, the Respondent and the Respondent's attorney,

have continued to this day to engage in despicable behavior contrary to the rule of law that cannot be tolerated or rewarded. We will never know what the Board of Zoning Appeals would have done if this document had been before them. We will never know what the Board of Zoning Appeals would have done if the City and the City Attorney had told them the truth about this document and the legal consequences it represented, as contained the the City Attorney's legal memorandum on the subject.

The duty of this Court is clear. Overturn the determinations made by the Board of Zoning Appeals and the circuit court. Please bring the rule of law, good government and attorney ethics back to the City of Georgetown.

Respectfully submitted,

JAMES M. TENNANT
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843 527-4485
Appellant *Pro Se*

March 24, 2011

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

James M. Tennant, Appellant,

v.

Board of Zoning Appeals for the City of Georgetown, Respondent.

Appellate Case No. 2009-139778

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2012-UP-462
Submitted July 2, 2012 – Filed July 25, 2012

AFFIRMED

James Tenant, of Georgetown, pro se.

Elise Freeman Crosby, of Georgetown, for Respondent.

PER CURIAM: James M. Tennant appeals the circuit court's order dismissing his appeal. On appeal, Tennant argues the circuit court erred in (1) finding he lacked standing; (2) finding it lacked jurisdiction; and (3) upholding the decision of the Board of Zoning Appeals for the City of Georgetown (Zoning Board) to

grandfather Paige Sawyer's sign under the non-conforming sign ordinance. We affirm[1] pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. As to whether the circuit court properly dismissed the appeal based on lack of standing: *ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008) ("The Supreme Court has provided a three-part test to establish standing: First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.] Second, there must be a causal connection between the injury and the conduct complained of- the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (quotation marks omitted)); *id.* at 196, 669 S.E.2d at 339 ("'[A] private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.'" (quoting *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000))).

2. As to whether the circuit court erred in finding it lacked jurisdiction: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive).

3. As to whether the circuit court erred in upholding the Zoning Board's decision to grandfather the sign under the non-conforming sign ordinance: *Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (noting an appellate court need not address appellant's remaining issues when its determination of a prior issue is dispositive).

AFFIRMED.

FEW, C.J., and HUFF and SHORT, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Unpublished Opinion No. 2012-UP-462, Filed July 25, 2012
Appellant Case No. 2009-139778

James M. Tennant, Appellant,

vs.

Board of Zoning Appeals for the City of Georgetown, Respondent.

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

PETITION FOR REHEARING EN BANC

Pursuant to Rules 221(a) and 219(b) of the SCACR, Appellant respectfully requests that the Court grant his request for an en banc rehearing of their Opinion cited above.

In support of this request, Appellant contends that consideration by the full Court is necessary to maintain uniformity of its decisions, and that the proceeding involves a question of exceptional importance. Standing is a threshold issue in law and in this case, is of exceptional importance due to the totality of the facts and applicable law present. It is important that the Court maintain uniformity with Supreme Court decisions and in their own decisions regarding standing. Appellant states below facts and law regarding standing that have been overlooked or misapprehended by the Court in this case.

BACKGROUND OF THE CASE

This case involves the following elements that, in their entirety, support the statutory ***and*** public importance standing requirement that this Court seeks to deny the Appellant. These facts and applicable State law and case law regarding standing have been overlooked or misapprehended by the Court.

1. Allegations of multiple illegal *utra vires* acts by government entities.
2. Allegations of repeated abuse and misuse of power by an elected official for personal gain.
3. Allegations of multiple instances of official misconduct by the Respondent's attorney, including lack of candor, knowingly making a false statement of fact to a tribunal, willful concealment of documents in the lower court, and lack of fairness to opposing party and counsel.
4. Allegations of illegal withholding by the Respondent's attorney, of documents sought pursuant to the SC FOIA that were critical to the lower court prosecution of the case.
5. Allegations of illegal *ex parte* contact between a municipal council and board.

Additionally, and most importantly, Appellant was conferred ***statutory standing*** by virtue of his exercise of a standard municipal complaint procedure, including legally prescribed zoning board and circuit court appeals, available statutorily to ***any*** citizen that alleges violations of municipal zoning codes and incorrect interpretations of same by zoning enforcement officers.[1]

[1] In the City of Georgetown, any citizen may bring a complaint to the municipal government alleging a failure to enforce zoning ordinances. Additionally, "any person" may appeal from an adverse determination resulting from such complaint. See S.C. Code Ann. § 6-29-800(B). (Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county.) After establishing standing in this manner before the board (who was more than happy to take his $150 filing fee), it is inconceivable that the Appellant, who had already been through the Zoning Board of Appeals process, could not take the next logical step by bringing a circuit court action pursuant to S.C. Code Ann. § 6-29-820(A). The denial of the Appellant's right to continue his appeal beyond the municipal board level is absurd and is not consistent with the standing rights

ARGUMENT

Apparently the Court has completely overlooked these facts and allegations that support statutory standing and the "flexible and liberal standard about issues of public importance" exception to standing in South Carolina jurisprudence.[2] The Court has incorrectly applied a strict constitutional standing requirement, which is inapplicable to the facts and unique circumstances in this case.[3]

The Appellant in this case is acting as a government watchdog, just as Edward D. Sloan, Jr. has in numerous lawsuits that have helped shape our modern judicial views toward standing in South Carolina. In the same way that public importance exceptions have been made for standing in the litany of Sloan cases, this case cries out for the same exceptions due to the factors outlined above that were before the lower court and before the Court of Appeals.[4]

All elements involving the public importance exception standard exist in this case. It is of immense public importance that zoning boards in South Carolina follow the law and be given future guidance regarding the application of grandfathering rules applicable to cases that are before them. It is of immense public importance that future guidance be given to public officials so that they will be aware of the limits placed on them to avoid being involved in undue influence and abuse of power when dealing with public employees in their jurisdictions. Public

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conferred upon Appellant by S.C. Code Ann. § 6-29-800(B). Resolving this standing issue is of exceptional importance, yet this Court has completely left this issue hanging in the wind, and the Appellant with it.

[2] Quoting Chief Justice Jean H. Toal in oral arguments on Sloan v. Dept. of Transportation, April 6, 2005. See video of oral arguments at http://www.youtube.com/watch?v=ebkdcLaxqdM starting at 4:16. Note: URL is case sensitive.

[3] The case cited to deny Appellant standing, ATC South, Inc. v Charleston Cnty, merely involved a disgruntled commercial competitor, and is not applicable to the case at hand. The Appellant in this case is a citizen concerned with concrete allegations of *ultra vires* acts by elected and appointed officials, as detailed above and in documents before the Court.

[4] See Sloan v. Wilkins, 362 S.C. 430, 608 S.E.2d 579 (2005); Sloan v. Sanford, 357 S.C. 431, 593 S.E.2d 470, 472 (2004) (citizens must be afforded access to the judicial process to address alleged injustices); Baird v. Charleston Cty., 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance).

officials, appointed and elected, must be held to a higher standard in this regard, and citizens must be given the freedom to challenge those that wish to use their public office and power for personal gain or in ways not according to law. Unfortunately, the various elected and appointed public officials in this case have been given a free ride in this regard by the effect of the Opinion of the Court.

Most importantly, statutory standing rights must be acknowledged and respected under State law by this Court. In Sloan v. Friends of the Hunley, Inc., SC Supreme Court Opinion No. 26151, filed May 15, 2006, statutory standing was found to have been conferred by the "any citizen" language used in our FOIA Act found in S.C. Code Ann. § 30-4-100(a) ([a]ny citizen of the State may apply to the circuit court).

Similarly, statutory standing is conferred in this case by the "any person" language found in S.C. Code Ann. § 6-29-800(B). (Appeals to the board may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality or county.) See footnote 1 above.

This Court has overlooked or misapprehended these facts, laws, case law and arguments and has come to the wrong conclusion regarding Appellant's standing in this case.

Rehearing en banc is respectfully requested.

Respectfully submitted,

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The South Carolina Court of Appeals

James M. Tennant, Appellant,

v.

Board of Zoning Appeals for the City of Georgetown, Respondent.

Appellate Case No. 2009-139778

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Few C.J.

Thomas E. Huff J.

Paul E. Short, Jr. J.

Columbia, South Carolina

cc:
Elise Freeman Crosby
James Tennant

FILED
December 5, 2012