THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
The Honorable Kristi L. Harrington, Circuit Court Judge

Lower Court Case No. 2014-CP-08-1840
Appellate Case No. 2015-000713

BP Amoco Chemical Company..... Appellant,

v.

City of Charleston; Tract 7, LLC; Cainhoy Land & Timber, LLC; and Southern Timber, LLC.....Defendants,

Of whom Cainhoy Land & Timber, LLC and Southern Timber, LLC are the Respondents.

FINAL REPLY BRIEF OF APPELLANT

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I. THE CIRCUIT COURT ERRED IN DISMISSING BP'S CLAIMS CHALLENGING ORDINANCES 2014-25 AND 2014-26 FOR LACK OF STANDING UNDER S.C. CODE ANN. § 6-29-760(C) BECAUSE BP HAS SUFFICIENTLY ALLEGED THAT IT IS AN ADJOINING LANDOWNER TO THE PROPERTIES REZONED UNDER THESE ORDINANCES.

Respondents contend that the lower court properly dismissed BP for lack of standing because it is not an owner of "adjoining land" as that term is used in S.C. Code Ann. § 6-29-760(C). It is undisputed that BP alleges in its complaint that it is an adjoining landowner. Specifically, BP alleges:

> 1. Defendants Tract 7, LLC, Cainhoy Land & Timber, LLC, and Southern Timber, LLC (collectively, the "Owners") are affiliated entities that share common ownership and management. (R. p. 16) (Compl. ¶ 7).
>
> 2. The Owners collectively own three tracts totaling approximately 9,087.22 acres which are located off of Clements Ferry Road and Cainhoy Road in the Cainhoy Community of the City of Charleston, Berkeley County, South Carolina, and which are commonly known as and referred to, collectively, as Cainhoy Plantation. (R. p. 16) (Compl. ¶ 8).
>
> 3. Although the Owners submitted separate PUD master plan applications to the City to rezone Cainhoy Plantation, each master plan stated that they "have identical master plan zoning texts and shall be administered in a coordinated fashion," and as such the PUD master plans were submitted effectively as one master plan to govern the zoning of Cainhoy Plantation. (R. pp. 18, 21) (Compl. ¶¶ 21, 31, 32).
>
> 4. BP is an adjoining landowner to Cainhoy Plantation. (Compl. ¶¶ 12, 63). In fact, BP's complaint expressly alleges that "BP, as an adjoining landowner to Cainhoy Plantation and properties subject to the Zoning Ordinances challenged in this action, has standing to maintain this action pursuant to S.C. Code Ann. § 6-29-760(C)." (R. p. 16) (Compl. ¶ 12).

South Carolina law is equally clear that a "Rule 12(b)(6) motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory." *Baird v. Charleston County*, 333 S.C. 519, 526, 511 S.E.2d 69, 73 (1999). The allegations in the complaint must be construed "in the light most favorable to the

plaintiff, and with every doubt resolved in his behalf." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). More importantly, at the pleading stage, general factual allegations of standing are sufficient to withstand a motion to dismiss. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

The term "adjoining" is not defined in S.C. Code Ann. § 6-29-760(C). The South Carolina Supreme Court has defined "adjoining" as synonymous with the word "contiguous," stating: "In the legal field, [contiguous] has been defined as: '[i]n close proximity; neighboring; **adjoining**; near in succession; in actual close contact; touching at a point or along a boundary; bounded by or traversed by.' Black's Law Dictionary 290 (5th ed. 1979)." *Sonoco Prods. Co. v. S.C. Dep't of Revenue*, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008) (emphasis added); *see also, Eldridge v. S.C. DOT*, 384 S.C. 548, 683 S.E.2d 483 (2009). The South Carolina Supreme Court acknowledged that the term "contiguous" has been broadly interpreted. *Id; see also Kizer v. Clark*, 360 S.C. 86, 90-91, 600 S.E.2d 529, 532 (2004) (recognizing that marshlands and creeks do not defeat town's contiguity for annexation purposes); *Mosteller v. County of Lexington*, 336 S.C. 360, 364-65, 520 S.E.2d 620, 623 (1999) (explaining the term "contiguous" and stating "'[a]but' means to be contiguous . . . [h]owever, abut does not always mean there must be actual contact"). Significantly, the Supreme Court in *Sonoco* and *Eldridge* expressed the view that even when intervening property might be legally titled to another owner, that fact does not necessarily mean that property cannot be deemed "contiguous."

With this proposed development, Respondents' representative, Matt Sloan, submitted an editorial to the local newspaper insisting that the project consisted of one development, not several. (R. p. 112) (See Pl.'s Reply Defs.' Resp. Opp'n Mot. Recons., Ex. 1 - Matt Sloan, "Why Cainhoy Plantation will be Developed on One Master Plan," *Charleston Post & Courier*, Feb. 6, 2014). As the title to that editorial column indicates, Respondents intended to develop all of Cainhoy Plantation under one, comprehensive master plan. In Sloan's own words, Cainhoy Plantation "will be developed as one community and requires one comprehensive master plan, not two." (R. p. 115). Respondents have acknowledged that all of Cainhoy Plantation is one "property," not several, and their argument that BP is not an adjoining landowner to the entire property to be rezoned rings hollow as a result.

Although the statements made by Mr. Sloan, as Respondents' representative, are not part of the complaint, the lower court was entitled to take judicial notice of the statements made in a newspaper article and consider them when considering a motion to dismiss. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 497 fn. 2 (2014) (stating that trial court's reliance on transcripts and courts orders not included in the complaint did not convert a Rule 12(b) motion into a motion for summary judgment); *see also, In re Compuware Secs. Litig.*, 301 F. Supp. 2d 672, 682-83 (E.D. Mich. 2004) ("Courts may also take judicial notice of newspaper articles and other public information when considering a motion to dismiss."). While Respondents complain this information was submitted belatedly in a Motion for Reconsideration, there is nothing inappropriate in presenting this information to the lower court in a motion for reconsideration to reinforce the prior argument that Cainhoy Plantation is being developed as a single, large

property. As our Supreme Court has stated: "There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Elam v. S.C. DOT*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (S.C. 2004).

BP clearly alleges in the complaint that it is "an adjoining landowner to Cainhoy Plantation and properties subject to the Zoning Ordinances challenged in this action" and "has standing to maintain this action pursuant to S.C. Code Ann. § 6-29-760(C)." (R. p. 16) (Compl. ¶ 12). Respondents have publicly acknowledged that they intend to develop Cainhoy Plantation as a single, unified property. BP has further alleged that Respondents are affiliated entities that share common ownership and management. (R. p. 16) (Compl. ¶ 7).. Under the circumstances, the circuit court was in error for conducting its own fact-finding and determining that BP was not "adjoining" to this property and that it lacked standing under S.C. Code Ann. § 6-29-760(C) because, in the circuit court's view, this single, unified property is owned by different (but affiliated) owners.

II. RESPONDENTS' ARGUMENTS AGAINST BP'S STANDING UNDER THE PUBLIC IMPORTANCE EXCEPTION MISCHARACTERIZE THE CONTROLLING LAW AND THE PUBLIC IMPORTANCE OF BP'S CLAIMS.

Respondents unconvincingly argue that BP does not have standing under the public importance exception based on a mischaracterization of the applicable case law and the import of the dispute arising from the rezoning of Cainhoy Plantation under Ordinances 2014-25 and 2014-26. Respondents primarily argue that the case of *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008), controls the issue of whether the public importance exception can be recognized in a zoning dispute. A

close examination of that case, however, reveals that it does not prevent BP from obtaining standing under the public importance exception.

Any suggestion that *ATC South* absolutely precludes a party challenging a rezoning from establishing standing under the public importance exception is belied by the Supreme Court's own language in that decision. The Supreme Court stated that "the very nature of the public importance exception to general standing requirements resists a formulaic approach, as each case must turn on 'the competing policy concerns' as we expressed in *Sloan v. Sanford.*" *ATC South*, 380 S.C. at 199, 669 S.E.2d at 341. In *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004), the Supreme Court explained the competing policy concerns, declaring that "[c]itizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official." Accordingly, BP's claim of standing under the public importance exception must be analyzed under its own facts and legal claims and not pursuant to the formulaic, overly broad generalization that zoning disputes are categorically exempt from the application of the public importance standing exception, as Respondents suggest.

Furthermore, the claims and facts involved in this case are clearly distinguishable from those involved in *ATC South*. First, there is no indication that the plaintiff in *ATC South* alleged statutory and constitutional violations regarding the rezoning as BP has in this case. And while the court in *ATC South* expressly found that the "local government followed proper procedure" in rezoning the property involved in that case, BP expressly alleges that the City violated several of its own procedural ordinances in adopting the

rezoning.[1] In addition, *ATC South* was decided on a summary judgment motion after the facts had been developed; whereas, Respondents seek the dismissal of the claims in question based solely on the allegations in the Complaint, which more than sufficiently allege standing under the public importance exception.

Second, the facts and consequences involved in the rezoning of Cainhoy Plantation are vastly different from the facts involved in *ATC South*. That case, brought by a competitor of the party seeking the rezoning, involved a seven acre parcel on which a single cell phone tower was to be erected. In contrast, the rezoning of Cainhoy Plantation involves the rezoning of over 9,000 acres, which is over 1,200 times larger than the property involved in *ATC South*. More importantly, the rezoning is intended to facilitate what has been called the largest residential development in the City of Charleston's history, with over 18,000 new residential units planned to be developed in a rural community with limited infrastructure next to a chemical manufacturing facility and a national forest. Thus, Respondents' attempt to compare the public importance of the rezoning of Cainhoy Plantation to the rezoning of the property in *ATC South* is absurd.

The size and significance of the development of Cainhoy Plantation facilitated by the adoption of Ordinances 2014-25 and 2014-26 combined with the seriousness of the alleged wrongdoing by the City in adopting the ordinances dictate that BP's claims require resolution for future guidance. *See Baird*, 333 S.C. at 531, 511 S.E.2d at 75 (1999) ("[A] court may confer standing upon a party when an issue is of such public

[1] Respondents claim that the City followed proper procedures to rezone the property in this case. (Resp. Initial Br. p. 11). On a motion to dismiss, the allegations of the complaint must be accepted as true, and there can be no doubt that BP has alleged that the City failed to follow its established procedures. Accordingly, the Court should not rely on Respondents' claim that proper procedures were followed.

importance as to require its resolution for future guidance.") The resolution of this case will likely impact the extent to which Respondents' massive residential development will impact an entire community and how the City addresses major residential developments in the future. Given the importance of these claims, the Court should reject Respondents' arguments that the claims should be dismissed based on one judicial decision involving the rezoning of a small piece of property to erect a single cell phone tower.

Respondents additionally argue that BP should be denied standing under the public importance exception because "there is a strong presumption that zoning ordinances are valid" and that zoning decisions are somehow different than other cases where standing has been recognized under the public importance exception. (Resp. Initial Br. pp. 11-13). This argument is a red herring and should be rejected accordingly. Nothing in the Supreme Court's public importance jurisprudence suggests that the standard for establishing standing under the public importance exception is any different in zoning disputes than in other contexts. Respondents' argument is nothing more than an attack against BP's claims on their merits. However, Respondents did not seek to dismiss BP's claims by challenging their legal sufficiency, and they should not be allowed to do so now under the guise of an alleged lack of standing.

Last, Respondents argue that the circuit court's decision on standing should be upheld because BP can still maintain its claims against the rezoning of Tract 7 under Ordinance 2014-82. This argument is irrelevant to whether BP has adequately alleged standing under the public importance exception in its claims challenging Ordinance 2014-25 and 2014-26. If BP has standing to challenge the unlawful and unconstitutional enactment of these ordinances, it should be allowed to do so, regardless of its claims

challenging Ordinance 2014-82. Furthermore, Respondents' argument, if adopted, could create the absurd result of having one ordinance rezoning Cainhoy Plantation invalidated while the other two remain valid, despite the fact that they were adopted as one PUD, contain identical texts, and were adopted pursuant to the same process. In sum, the three ordinances are inextricably intertwined, and the Court should refuse to artificially sever them in this action, especially when BP has sufficiently alleged it has standing under the public importance exception to challenge all of them.

III. RESPONDENTS UTILIZE AN IMPROPER STANDARD TO ANALYZE BP'S ALLEGATIONS REGARDING THE CITY'S FAILURE TO SUBSTANTIALLY COMPLY WITH THE APPLICABLE NOTICE REQUIREMENTS.

Respondents urge the Court to affirm the circuit court's ruling that BP's claims challenging Ordinances 2014-25 and 2014-26 are barred by the statute of limitations under S.C. Code Ann. § 6-29-760 in derogation of the Rule 12(b)(6) standard that all facts and inferences alleged in the complaint must be construed in the light most favorable to the non-moving party. As argued in BP's Initial Brief, BP alleges in its complaint that the statute of limitations under § 6-29-760 does not apply because the City failed to substantially comply with the applicable notice requirements, and BP includes factual allegations supporting the inference that it was prejudiced by the City's failure to provide adequate notice.

Respondents offer little rebuttal to BP's argument beyond citing the fact that BP was present at the meetings in which Ordinances 2014-25 and 2014-26 were considered by the City's Planning Commission and Council.[2] According to Respondents, BP's mere

[2] Respondents mistakenly claim that the City complied with the applicable notice requirements for adopting Ordinances 2014-25 and 2014-26 based on purported *(continued on next page)*

presence at the hearings proves that the City substantially complied with the applicable notice requirements. This fact, however, does not outweigh the reasonable inference that BP was prejudiced by the defective notice of the meetings because BP was prevented from conducting the studies and evaluation needed to determine the rezoning's impact on BP's facility and thereby prevented from meaningfully participating in the meetings in which the City considered the rezoning ordinances. (R. pp. 23-24) (Compl. ¶¶ 44-45). Rather than have the Court construe these allegations in BP's favor, as it must under the Rule 12(b)(6) standard, Respondents attempt to have BP's attendance at the meetings in question construed in the light most favorable to Respondents. This is impermissible on a motion to dismiss, and the Court should refuse to adopt Respondents' argument.

While BP rejects the circuit court's and Respondents' premise that a plaintiff must allege it was prejudiced to sufficiently allege a lack of substantial compliance under § 6-29-760 for the reasons asserted in its Initial Brief,[3] even if that is the proper standard, the

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allegations in the complaint that the City published notices of the agenda of the proposed amendments in *The Post and Courier* in October 2013, well before the adoption of Ordinances 2014-25 and 2014-26. (Resp. Initial Br. p. 16). This is an incorrect characterization of the allegations in the complaint. The allegations regarding the notice published in October relate to Ordinance 2013-125, not Ordinances 2014-25 and 2014-26. To be clear, BP's complaint expressly alleges that "the City failed to adopt City Ordinances 2014-25 and 2014-26 in accordance with the requirements of the Enabling Act and the City's established procedures." (R. p. 28) (Compl. ¶ 63).

[3] As discussed in BP's Initial Brief, there is no controlling authority supporting Respondents' position that a plaintiff must allege prejudice to adequately support a claim of substantial non-compliance under § 6-29-760. Nevertheless, Respondents attempt to have this novel issue decided on a motion to dismiss, which is improper. *See Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) ("As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial."). If the Court, however, determines that prejudice must be expressly alleged and that it has not been adequately alleged in BP's complaint, then the Court should at least
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issues of substantial compliance and prejudice are so fact intensive that they should not be decided on a motion to dismiss where the complaint contains allegations of substantial non-compliance. Not one of the cases cited by Respondents in support of its definition of "substantial compliance" was decided on a motion to dismiss. Instead, they are cases decided on a motion for summary judgment or at trial. Unlike the courts addressing substantial compliance in the cases on which Respondents rely, the circuit court summarily disposed of the claims based solely on allegations in the pleadings without providing an opportunity to the plaintiff to support its claims of substantial non-compliance and prejudice with evidence disclosed in discovery. This ruling was improper, and the Court should reverse the circuit court's decision that BP's claims are barred by the statute of limitations under § 6-29-760 as a result.

CONCLUSION

For the foregoing reasons, BP respectfully requests that the Court reverse and vacate the circuit court's Order dismissing BP's claims challenging the validity of Ordinances 2014-25 and 2014-26 and reinstate such claims for further proceedings.

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afford BP the opportunity to amend its complaint by finding that the circuit court erroneously dismissed BP's claims with prejudice.

Respectfully submitted,

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CERTIFICATE OF APPELLANT'S COUNSEL

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

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