THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Mikell R. Scarborough, Master-in-Equity

Case No. 2020-000937

City of Folly Beach, Coastal Conservation League, Save Folly Beach, Inc., John Collins, Matt Napier, Paula Stubblefield, Troy Bode, and Carol Kruer……Appellants,

v.

State of South Carolina, Amy Connelly, Jeffrey H. Morris, Michael Vandaele, Stephen Rawe, Juan Enterprises, LLC, Juanita A. Wright, Debbie's Folly, LLC, and Vernon Staubes,

Of which, State of South Carolina, Jeffrey H. Morris, Stephen Rawe, Juan Enterprises, LLC, Juanita A. Wright, and Vernon Staubes are……Respondents.

JOINT FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Respondents adopt Appellants' statement of the procedural history of the case.

RESPONSE TO SUMMARY OF APPEAL

Appellants have filed this appeal alleging the existence of an "intractable legal void" on Folly Beach. (Appellants' Initial Brief, p. 2). Appellants claim this void is the result of Folly Beach's exclusion from the Beachfront Management Act by the legislature without having any alternative statutory or regulatory controls created for governance of the beach. In short, Appellants ask this Court to believe that Folly Beach has received no support from DHEC's Office of Ocean and Coastal Resource Management as far as beachfront development is concerned, which has resulted in the "dangerous development" of "abnormally tall and thin houses squeezed onto the beach." (Appellants' Br., p. 2).

As the record makes clear, the individual Appellants own properties located behind the properties about which they are complaining. Due to the development of these lots, Appellants have "lost" or will "lose" the beachfront status they once enjoyed.

In an attempt to evade Folly Beach's exclusion from the Act, Appellants initiated this action, seeking a declaration that the State owns at least a portion of Respondents' properties. R. p. 000002. Appellants asked the trial court to create a cause of action that the federally sponsored beach renourishment program—enacted specifically for the protection of Folly Beach's shoreline—constituted an "avulsion" adding land to Respondents' lots. R. p. 000014. Appellants have claimed need of such a cause of action to determine ownership of submerged lots on Folly Beach and to govern

construction activities on reemerged lots in the absence of any state laws addressing it. (Appellants' Br., p. 4).

As recognized by the trial court, Appellants have grossly misstated the facts to serve their own interests. Appellants claim to own beachfront lots, except their lots are landward of other platted lots. And despite acknowledging and conceding that Folly Beach enacted multiple ordinances to minimize disturbance of the beach by prohibiting construction seaward of a clearly identifiable boundary, Appellants misrepresent that there is no "precise or direct answer" to who owns lots that allegedly benefit from the federal renourishment and what can be done with them. (Appellants' Br., p. 4). Appellants' contention is simply not true. Understanding that, the trial court properly dismissed the Complaint. Moreover, the trial court also correctly recognized the lack of any injury in fact to Appellants herein capable of providing standing to Appellants to bring their claims. Most importantly, the trial court properly declined to adopt a legal theory never previously applied in this State to deprive a citizen of this State an interest in real property. Allowing otherwise would have not only contradicted the express purpose of the federal renourishment program – to prevent or mitigate damages to public and privately owned shores – but would have also expanded the doctrine of avulsion inappropriately and in contravention with the common law of this State and other states.

STATEMENT OF FACTS

Appellants have included in their Statement of the Facts allegations that are not contained in the Complaint. As confirmed in the trial court's Order, the trial court cited the facts alleged in the Complaint, and the arguments contained in the Motions to Dismiss filed by Respondents Rawe, Morris, Juan Enterprises, LLC, Wright, Debbie's Folly, LLC, Connelly, and Staubes (and supporting memoranda), the State of South Carolina's Motion for Judgment on the Pleadings (and supporting memoranda), Plaintiffs' Response to Motions to Dismiss ("Plaintiffs' Response"), and Defendant Debbie's Folly, LLC's Memorandum in Support of Motion to Dismiss.[1]

Appellants are the City of Folly Beach, two non-profit entities, and private citizens who reside near one or more of lots owned by one or more of the Respondents. R. p. 000034-000035, ¶¶ 4-9. Respondents each own undeveloped real property on Folly Beach described as "super-beachfront" lots. R. p. 000036, ¶ 11. Folly Beach is subject to erosion naturally and artificially, "caused by the Charleston Harbor jetties." R. p. 000037, ¶ 15. As a result, "frequent beach renourishment is necessary to maintain the beach and protect existing development." Id. "Folly Beach is reliant on a continual, repeating cycle of renourishment." R. p. 000037, ¶ 16.

In 2018, the U.S. Army Corps of Engineers commenced the renourishment that is the subject of this action. R. p. 000037-000038, ¶ 18. This project was funded by public funds used to protect the public beach and private funds used to renourish and protect the private, individual lots. *Id.* at n. 1. At the hearing on the Motions to Dismiss, counsel for Appellants conceded that Respondents paid for renourishment sand to be placed on

[1] Appellants filed several affidavits in support of their Response to the Motions to Dismiss. Pursuant to Rule 12(b)(6), the trial court did not refer to these affidavits. None of the Respondents filed any affidavits.

their individual lots. R. p. 000252, l. 18 – 000255, l. 1. The 2018 renourishment "converted" intertidal beach into sandy ground above the mean high water mark ("MHW"). R. p. 000037-000038, ¶ 18. The renourishment allegedly pushed MHW seaward. R. p. 000038, ¶ 19.

As a result, Appellants seek a declaration that Respondents property lines vis-à-vis the public beach should be set at the MHW as it existed prior to the 2018 renourishment. R. p. 000041-000042, ¶¶ 29, 36-37 (see also Appellants' Br., p. 15). By way of background, MHW is a line that is identifiable on land, subject to the ebb and flow of tides. The City of Folly Beach has defined MHW as the "line established by survey on a series of plats titled *Plat Showing Perpetual Easement for Beach Renourishment*, date June 1, 1992 and as recorded in the RMC Office." Folly Beach Code of Ordinances 151.38 (1995).[2] The South Carolina Code defines MHW as "the line which intersects with the shore in tidal waters representing the average height of high waters over an eighteen and one-half year tidal cycle." S.C. Code Ann. 49-29-20(4). Furthermore, "[b]enchmarks purporting to have established mean high or low water values must be verified by the [Department of Natural Resources] as meeting state and national ocean survey standards." *Id.* By statute, the MHW cannot be changed by one event, but is set by the State based solely on the average height of high waters over an 18.5 year tidal cycle. *Id.*

The gravamen of the Complaint focuses on and seeks to stop development of Respondents' lots. R. pp. 000037 - 000038, ¶¶ 17, 21, 24, pp. 000043, ¶¶ 39, 40, and 45. In this regard, Folly Beach has passed ordinances that severely restrict the

[2] American Legal Publishing Corp., see https://codelibrary.amlegal.com/codes/follybeach/latest/follyb_sc/0-0-0-1, specifically, https://codelibrary.amlegal.com/codes/follybeach/latest/follyb_sc/0-0-0-9765#JD_151.38.

development of beachfront and "super-beachfront" lots. Without reference to the location of the MHW, Folly Beach prohibits development within 40 feet from the Perpetual Easement Line ("PEL") or, where no PEL exists, the OCRM baseline. Folly Beach Ord. 166.04-04(C)(1); R. p. 000004. The PEL is a fixed, known line established by Folly Beach Ord. 151.38, *supra*, and defined by ordinance as "the landward edge of the federal beach renourishment project as defined by the Army Court of Engineers." Folly Beach Ord. 166.04-04(C)(1). As a matter of law, then, Folly Beach prohibits development within 40 feet landward of the federal beach renourishment line. *Id.*

Regarding Respondents' lots, however, Folly Beach also requires Respondents to maintain their private property to the same elevation as that established by the Army Corps of Engineers in the federal renourishment project. One ordinance requires Respondents to raise "any area within the first ten linear feet landward of the PEL" that is below 8 feet above sea level ("ASL") to an elevation of ten feet ASL. Folly Beach Ord. 166.04-04(C)(2)(a). Folly Beach also requires Respondents to maintain their properties in compliance with development ordinances. One such development ordinance requires Respondents to keep the elevation of their property where the "seaward most elevation of the property ***matches the elevation of the renourishment***." Folly Beach Ord. 151.61(B). Failure to keep Respondents' property at the same elevation as the renourishment is a nuisance as a matter of law. *Id.* If the City of Folly Beach pays to bring any of the Respondents' property into elevation compliance by the placement of sand, Respondents (as conceded by the City) are required to reimburse the City. Folly Beach Ord. 151.64(A). In sum, Folly Beach requires Respondents to keep their properties at the same elevation as the renourishment and prohibits development within

40 feet of the renourishment line (a/k/a the PEL). These alleged facts and legal framework for renourishment and elevation maintenance form the circumstances in which this Court can properly assess Appellants' flawed and specious legal claims.

STANDARD OF REVIEW

The appellate court applies the same standard of review as the trial court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure. *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307, 728 S.E.2d 61, 64 (Ct.App.2012) (affirming circuit court's granting of motion to dismiss). "Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its failure to state facts sufficient to constitute a cause of action. In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 74, 753 S.E.2d 846, 850 (2014) (dismissing case for lack of standing).

Similarly, only well-pled allegations are considered true for purposes of the motion to dismiss. However, questions of law are decided *de novo. Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 611, 829 S.E.2d 249, 250–51 (2019) (internal citations omitted).

Appellants argue that this case presents a novel issue, and the Court should not decide a novel issue on a motion to dismiss. (Appellants' Br., pp. 27-28). However, where the parties only dispute the interpretation of the law, and "development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss." *Madison v. Am. Home Prod. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004); *see also, Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001) (same); *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 434, 622 S.E.2d 564, 568 (Ct.App.2005) (same).

In this appeal, development of the record is unnecessary, as the present case presents the purely legal issue of whether Appellants' theory of avulsion exists under South Carolina law.

ARGUMENT

I. NO JUSTICIABLE CONTROVERSY IS PRESENT TO GIVE THIS COURT SUBJECT MATTER JURISDICTION BECAUSE APPELLANTS LACK STANDING.

Appellants do not allege any basis for their standing to sue in this case. As discussed below, because Appellants lack standing, this suit does not present a justiciable case or controversy, and this Court lacks subject matter jurisdiction to consider it.

In their first cause of action, Appellants seek a declaration that the Defendant State owns the property. R. p. 000042, ¶36. Appellants do not have standing to seek that declaration because they do not have or claim an ownership interest in that land. Their second cause of action for injunctive relief against the individual Respondents is also based upon alleged State ownership of the property and similarly fails due to lack of standing.

"South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached. *See Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 (1996); *Crocker v. Barr*, 303 S.C. 1, 397 S.E.2d 665 (Ct.App.1990) (Goolsby, J., concurring), rev'd on other grounds, 305 S.C. 406, 409 S.E.2d 368 (1991)." *Lennon v. South Carolina Coastal Council*, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct.App.1998).[3] Appellants have alleged no justiciable controversy because they lack standing. "The principle of

[3] *See also, Tourism Expenditure Review Committee v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 373 (S.C. 2013) ("'The parties cannot by consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy.' *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 552 (1970).").

standing under the United States Constitution is 'an essential and unchanging part of the case-or-controversy requirement of Article III.' *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)." *ATC S., Inc. v. Charleston Cnty.,* 380 S.C. 191, 195-96, 669 S.E.2d 337, 339 (2008). Because no case or controversy is presented due to the lack of standing, this Court lacks subject matter jurisdiction over this case. *Lennon,* 498 S.E.2d at 907–08.[4]

The South Carolina Supreme Court has stated:

> "Standing to sue is a fundamental requirement in instituting an action." *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). Under our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called "constitutional standing"; and (3) under the public importance exception. *ATC S.*, *supra*.

Bodman v. State, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). Appellants have no "constitutional standing" or standing by statute and did not raise and preserve standing under the public importance exception, and have not statutorily granted standing.

A. Appellants Have No Constitutional Standing

The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As stated in *ATC S.*, 380 S.C. at 195-96, 669 S.E.2d at 339:

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[4] As stated in *Lennon*:

> "[S]tanding acts as an element of the constitutional requirement that there be a 'case or controversy'; when thus applied, *it acts as a limitation on the subject matter jurisdiction of the federal courts.*" * * * 6A Charles A. Wright et al., Federal Practice and Procedure § 1542 (1990) (emphasis added [by the Court of Appeals]) (footnotes omitted). South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached.

330 S.C. at 417-418, 498 S.E.2d at 908 (parallel cites omitted).

> 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." *Lujan*, 504 U.S. at 560–61 (internal citations omitted). .

"Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained." *Commander Health Care Facilities, Inc. v. S. Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). Appellants fail to meet these standards.

Appellants in this action have no "injury in fact" that is "concrete and particularized" and "actual or imminent" as to a "legally protected interest" to establish standing. In fact, according to the allegations in the complaint, Appellants have no interest whatsoever in the property at issue. They contend that the State owns the property, but Appellants have no authority to assert claims of ownership for the State, just as citizens have no standing to assert the property interests of their next-door neighbors.[5] Although Appellants argue that citizens may sue to protect the public trust, they concede that "none of the Appellants can assert that property interest [in public trust property] on behalf of the State." R. p. 000167. They seemingly abandon claims against the State with that concession and by saying the following:

> However, the Appellants are, as a practical matter, apathetic about whether or not the state continues as a party in this case, because the involvement

5 Appellants claim they are suing as beneficiaries of the public trust doctrine citing *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 456 S.E.2d 397 (1995), but that Opinion did not address standing. The case was an appeal from the issuance of a permit for dock construction. The instant case, instead, is not an appeal from a regulatory decision. Although *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 716 (Cal. 1983) allowed suit over a public trust interest, the action was about water rights, not property ownership.

> of the state and its property in this case is certainly secondary. This case is an effort by a municipality and certain private property owners to limit the individual Defendants' development activities to just the property those Defendants actually own, and the reason for such effort has nothing to do with harm to the public trust, but, rather, is intended to prevent harm to the Appellants' personal and property interests.

R. pp. 000168 - 000169.

Apathy does not meet constitutional standards for standing. Having conceded that this case has "nothing to do with harm to the public trust" and having no claim of ownership or possession of the property at issue, Appellants completely lack standing in this case to seek a declaration of ownership as to the State in the first cause of action. They do not seek injunctive relief as to the State in the second cause of action.

Appellants try to shift the focus by arguing that they are the real parties in interest, but being a real party does not create standing. As discussed by *Lennon*:

> In *Bardoon Properties*, "the supreme court … noted, however, that 'there is a difference between the concepts of 'standing,' 'capacity to sue,' and 'real party in interest.' " *Id.* at 169 n. 3, 485 S.E.2d at 373 n. 3 (citing 6A Charles A. Wright et al., Federal Practice and Procedure § 1542 at 328-29 (1990); *Firestone v. Galbreath*, 976 F.2d 279, 283 (6th Cir.1992)). The distinction is important here.
>
> * * *
>
> … plaintiff must both be the real party in interest and have standing …
> One significant context in which the two concepts diverge is when for standing purposes the plaintiff is required to show not only that he has been adversely affected by the governmental conduct that is under attack, but also that he has suffered an injury to a legally protected right…
>
> Another point of departure is that standing acts as an element of the constitutional requirement that there be a "case or controversy"; when thus applied, it acts as a limitation on the subject matter jurisdiction of the federal courts. In this context, objections to standing, unlike Rule 17(a) objections, cannot be waived and may be raised by a federal court *sua sponte*.
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> 6A Charles A. Wright et al., Federal Practice and Procedure § 1542 (1990) (emphasis added) (footnotes omitted).

Lennon, supra, 498 S.E.2d at 907–08.

Appellants snip the following quote from *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, 430 S.C. 200, 215, 845 S.E.2d 481, 489 (2020), *reh'g denied* (Aug. 7, 2020), which is completely inapplicable to the instant case: "[t]he courts below essentially, and erroneously, required Petitioners to prove the existence of an environmental impact on their members and the surrounding neighborhoods as part of establishing standing." Appellants omit the next sentence: "[t]he ALC and the court of appeals failed to consider that the purpose of Petitioners' action is to seek administrative review of whether DHEC engaged in a proper environmental analysis in the first instance …" *Id.* The Court of Appeals found that "the members fall within the scope of any reasonable, ordinary definition of 'affected persons'" under the statute and thereby met the first ground for associational standing. *Id.*, 845 S.E. 2d at 490. The instant case is not an administrative review case nor is it an associational standing case. Therefore, *Preservation Society* does not apply.

Appellants have simply failed to show constitutional standing to seek a declaration of ownership of property that they do not claim. Therefore, they do not have standing to sue the State nor, as discussed *infra*, do they have standing to sue the other parties.

1. Appellants have no standing as to individual lot owners.

Appellants' injuries arising from future development of Respondent Owners are speculative at best. As such, the alleged injury is neither actual nor imminent but is, instead, conjectural and hypothetical. Moreover, Appellants' recreational interests "involve property that is privately owned by a party other than the plaintiff" and "the presence of an injury in fact cannot be assumed." *Town of Arcadia Lakes v. S.C. Dep't*

of Health and Envtl. Control, 404 S. C. 515, 531-32, 745 S. E. 2d 385, 394 (2013). Finally, Appellants' claims of potential injuries from flooding and loss of beach use are merely injuries of a general nature common to all members of the public and not individualized.

The Complaint fails to establish that Appellants have any protectable individual interests at risk of injury. The Complaint rests in part on claims for potential loss of ocean views, should any development occur. However, in this State, a private landowner does not acquire "an easement of unobstructed ocean view, breezes, light or air" over adjoining property. *Schroeder v. O'Neill*, 179 S.C. 310, 315, 184 S.E. 679, 681 (1936); *see also Hill v. The Beach Co.*, 279 S.C. 313, 315, 306 S.E.2d 604, 605 (1983). Thus, no reasonable expectation can exist at the time of purchase that the then existing view will remain unchanged over time. Instead, especially for a view overlooking public trust property, no inherent right to a continued view exists. Rather, OCRM, the agency charged with overseeing the State's coastal public trust property, must balance all of the legitimate uses of the public trust property. In short, loss of view is not an actionable injury in South Carolina, particularly when such loss of view has not even happened. Appellants simply cannot establish any injuries sustained as a result of allegedly pending permits. Respondent owners' lots remain unchanged, since no development of the lots has commenced. Further, Appellants have scant support for the allegation that any development is imminent or to begin immediately on Respondent Owners' properties. The alleged issuance of a septic system permit alone cannot signify this, because other permits, and namely a building permit, are required to begin construction. This conclusion is bolstered by the Complaint itself, whereby Appellants allege several undeveloped lots

have had "permits that were issued … years or even decades in the past." R. p. 000038, ¶ 21.

Moreover, a Folly Beach Ordinance prohibits development within 40 feet of the Perpetual Easement Line and the renourishment project. Appellants have not alleged any Defendant Owner has developed its property within or past this line. Appellants also have not alleged how, other than seeking or obtaining various permits, Respondent Owners have developed their Property in a way that creates an actual or imminent threat of injury to Plaintiffs. For these reasons, Appellants have no constitutional standing to file this action.

2. The City of Folly Beach has no standing.

Appellants primarily rely on public importance standing to support their argument that the City possesses standing (*see infra*). To the limited extent that the City invokes constitutional standing on the basis that it also owns beachfront property (Appellants' Br., p. 23), the City's argument assertion of standing fails for the same reason the individual property owners' assertion fails—the City asserts general interests rather than the actual injury to the municipality as required to establish standing. The City certainly has no standing to seek a declaration of ownership as to the property at issue when it does not claim ownership of that property itself.

B. Appellants Have Not Preserved the Issue of Public Importance Standing and the Doctrine Does Not Apply Here

1. Appellants failed to raise and preserve the issue.

Appellants did not assert public importance standing until they submitted a proposed order. The Court did not discuss the issue, and instead, found that Appellants had failed to raise it. R. p. 000007. Appellants should have moved to alter or amend the

order if they wanted the issue addressed, but they did not do so. Therefore, the issue is not preserved. *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 660, 667 S.E.2d 7, 15 (Ct.App.2008) (finding issue not preserved under similar circumstances. "[A]lthough arguably raised in its proposed order submitted in lieu of a brief to the trial court, Tenant never filed a motion under Rule 59, SCRCP, asking the court to address the issue.") "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004).

2. Appellants do not have public importance standing.

In addition to failing to preserve this issue, Appellants fail to show a need for future guidance required for public importance standing.

> The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted); *Sloan v. Sanford*, 357 S.C. at 434, 593 S.E.2d at 472 ("[U]nder certain circumstances, standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance.") (citations omitted).

ATC S., Inc. v. Charleston Cnty., *supra*, 669 S.E.2d at 341. As the Supreme Court later said, "[h]owever, we 'must be cautious with this exception, lest it swallow the rule.' *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013)." *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 360, 815 S.E.2d 446, 455 (2018).

Appellants claim a need for future guidance yet they have failed to name necessary parties to this case. (*see infra*). They seek to determine an issue in this case involving

only a few Appellants and Respondents that could set precedent for many more lot owners at Folly Beach and possibly elsewhere in the State. Moreover, the State has sought judgment at the pleadings stage only on the basis of standing and has not addressed the merits of the issue of the lot ownership. For purposes of public importance standing, Appellants claim that the State is not taking a position on the merits of the avulsion ownership issue and opposing the City's efforts in this case somehow elevates the importance of the question in this case. The trial court's Order stated that its conclusions related to avulsion and ownership were not binding on the State in this case or future proceedings because of the lack of standing against the State, and the State's reservation of its rights on this issue.[6] Appellants do not challenge this conclusion on appeal, and the Court's statement does not elevate the importance of this issue when Appellants say they are "apathetic about whether or not the state continues as a party in this case". *See, supra,* and R. pp. 000168 - 000169.

Appellants rely on *Adams v. McMaster*, Op. No. 28000, 2020 WL 5939936 (S.C. Sup. Ct filed Oct. 7, 2020).[7] There, a school district, an education association, and other parties were founds to have public importance standing to challenge the Governor's use of CARES Act emergency funding provided to the State for educational grants to the State's schools. Specifically, the Petitioners[8] were attempting to block the State's efforts to direct CARES Act funding to private schools. As the court noted, the COVID-19

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6 The Order states: "Because the Appellants lack standing, the State has not taken a position in this case as to issues regarding avulsion and ownership of the property at issue, but reserves the right to do so and preserves any interest that the State may have in the property at issue should further proceedings occur in this case. Discussions or findings in this Order related to avulsion and ownership are not binding on the State in any future proceedings in this suit or in any future case." R. p. 000008, n. 6.

7 Rehearing was granted December 9, 2020, and the case was re-filed. The Opinion was superseded on rehearing, *Adams v. McMaster*, Op. No. 28000 (S.C. Sup. Ct. filed Dec. 9, 2020) (Shearouse Adv. Sh. No. 48 at 18).

8 The case was heard in the Supreme Court's original jurisdiction.

pandemic triggered a significant need in the State for remote communication technology. *Adams,* 2020 WL 5939936 at *3. Public schools are the intended beneficiary of the public funds, not private schools. *Id.* at *6.

Here, Appellants are concerned about the potential for development of "super-beachfront" lots. They cast this concern as a public interest concern and scold the State for opposing their request that the court answer what they characterize as a simple question – who owns the "new" land created by renourishment. Unlike *Adams v. McMaster*, where Petitioners had no recourse but litigation to prevent the Governor from improper disbursement of the public funds, Appellants do not need this question answered to address their concerns regarding the potential for development. The City of Folly Beach has control over all development within its corporate limits. S.C. Code Ann. 6-29-1120. The City is authorized to adopt and has adopted ordinances targeting and controlling beachfront development. How can the location of the public/private line be of such import when the City has all the tools necessary to control beachfront development? The answer to the question of whether the periodic renourishment of Folly Beach has shifted the public/private property boundary is irrelevant for prevention of the alleged harm to the public as the City is statutorily authorized to control beachfront development. The trial court recognized the City's exercise of its authority through reference to its ordinance prohibiting development within 40 feet of the Perpetual Easement Line. R. p. 000004. In this regard, if any Respondent's property line was or is seaward of the PEL, Respondents cannot develop their lots within forty feet of the PEL. Folly Beach Ord. 166.04-04(C). As such, the declaration sought in the Complaint will not provide any additional relief to Appellants regarding such lot. Similarly, if a Respondent's boundary line is landward of

the PEL, then federal renourishment, as a matter of law, will not affect such Respondent's lot, because the PEL is the landward limit of the federal renourishment. Folly Beach Ord. 166.04-04(C).

The Supreme Court has noted the competing concerns that must be considered when determining whether to afford standing under the public importance exception. "Those competing concerns are that: Citizens 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. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S. C. 67, 80, 753 S. E. 2d 846, 853 (2014), citing *Sloan v Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004).

Here a public body, the City of Folly Beach, and individuals, are at odds with a public body, the State of South Carolina, and individuals. The allegations Appellants raised in their Complaint are that the "State of South Carolina has failed to exert ownership authority or control over the portions of the "super-beachfront" lots that rightfully belong to it under the public trust and avulsion doctrines." R. p. 000041, ¶ 30. Therefore, Appellants seek a legal declaration of the State's alleged ownership interest in certain "super-beachfront" lots on Folly Beach. R. p. 000042, ¶ 37. Appellants also seek, in part, an order enjoining owners of "super-beachfront" lots from developing of those lots. These claims are frivolous and subject to consideration of the competing interests mentioned above. As alleged in paragraph 4 of the Complaint,

> Plaintiff the City of Folly Beach … holds and exercises authority over the super-beachfront lots at issue in this action through its municipal regulatory

> and permitting program, and all property at issue falls within the City's boundaries. The City must ascertain the true owner of the property at issue in this action in order to administer its municipal obligations.

R. p. 000034-000035, ¶ 4 (Complaint, ¶ 4). Yet, the City has administered its municipal obligations and restricted development of the "super-beachfront" lots without the necessity of this legal action. In addition to the ordinances noted in the trial court's Order, the City has repeatedly required the owners of the "super-beachfront" lots to reimburse the City for the renourishment effort. R. pp. 000235, l. 17-18, p. 000251, l. 20-25, p. 000252, l. 1-3, p. 000253, l. 24-25, p. 000254 l. 1-16. Even if the City's lawsuit is not considered frivolous, it is not a necessity, as the City acknowledges in its pleadings and its presentation to the Master-in-Equity that it has exercised its authority over "super-beachfront" lots. There is not any legal basis upon which to conclude that the City of Folly Beach has suffered an injustice from the action or alleged inaction of the State of South Carolina, such as to warrant granting an exception to standing.

C. No Statute Gives Appellants Standing.

Appellants assert, in a footnote, that they also have statutory standing under the Declaratory Judgments Act. (Appellants' Br., p. 29, n.7). In the same footnote, however, they undermine their own assertion, acknowledging that "no appellate court in South Carolina has specifically held that the Declaratory Judgment[] Act creates statutory standing." *Id.*

Appellants rely on the S. C. Supreme Court's recent decision in *Preservation Society of Charleston et al. v. SCDHEC and SPA*, 2020 WL 811729, February 19, 2020 ("*Preservation Society*") to support their assertion of statutory standing in this case. At issue in *Preservation Society* was the standing of parties who challenged the SPA's construction of a new cruise terminal in the S. C. Administrative Law Court. The challenge

was initiated under S. C. Code Ann. § 44-1-60, which establishes procedures for challenging permits issued by the S. C. Department of Health and Environmental Control ("DHEC"). Sec. 44-1-60(E)(1) provides that "[n]otice of a department decision must be sent by certified mail, returned receipt requested to the applicant, permittee, licensee, and affected persons who have requested in writing to be notified." Sec. 44-1-60(E)(2) provides that "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or ***affected person***." (Emphasis added.) The lower courts (Court of Appeals and Administrative Law Court) concluded that an "affected person" under Sec. 44-1-60 was a person with constitutional standing in accordance with *Lujan v. Defenders of Wildlife*, 504 U. S. 555 (1992).

The Supreme Court in *Preservation Society* distinguished between civil actions and actions seeking administrative review of DHEC permits. The Court determined that downtown residents in proximity to cruise ships and the proposed new terminal were "affected persons" with standing despite the fact that the alleged injuries were unproven and considered speculative. Here, Appellants are not seeking administrative relief in accordance with S. C. Code Ann. Sec. 44-1-60(E). Rather, Appellants' filed their claims in the Court of Common Pleas as a civil action under the Declaratory Judgments Act. Appellants have failed to allege a particularized injury either to themselves or their members and instead simply "assert only generalized grievances suffered by the public as a whole which are insufficient to establish standing." *Carnival Corp. v. Historic*

Ansonborough Neighborhood Ass'n, 407 S. C. 67, 753 S. E. 2d 846 (2014). In the absence of a "particularized harm,"[9] Appellants fail to assert an injury.

[9] *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S. C. 67, 76, 753 S. E. 2d 846, 851 (2014).

II. AVULSION IS NOT A VIABLE CAUSE OF ACTION.

In their brief, Appellants urge this Court to adopt a rule of avulsion arising out of beach renourishment and hold that Respondents cannot claim a change in the boundary lines due to the accretion caused by said beach renourishment. Appellants cite three rationales in support of this theory: (1) the legal framework is "firmly rooted" in common law; (2) Appellants' avulsion theory has a firm foundation in South Carolina law; and (3) Appellants' avulsion theory is already borrowed from other jurisdictions. Appellants are wrong on each of these rationales.

A. Common Law Does Not Support Appellants' Theory.

Appellants' claim that the common law of avulsion supports their theory is simply incorrect. While Appellants' general citation of the law of accretion, erosion, and avulsion is accurate, their analysis does not cite any case that expands the avulsion theory to these facts. Moreover, Appellants concede as much: "no South Carolina appellate court has ever been called upon to determine the effect of an artificial renourishment on beachfront property lines…" (Appellants' Br., p. 33). Common law simply does not support Appellants' avulsion theory.[10]

The case of *Estate of Tenney v. S.C. Dep't of Health and Envtl. Control*, 393 S.C. 100, 712 S.E.2d 395 (2011), cited by Appellants, did not decide title to property based on avulsion, accretion, or erosion. Instead, *Estate of Tenney* resolved the ownership of marshland islands in favor of private ownership and against the State of South Carolina. *Id.* at 111, 712 S.E.2d at 400. In doing so, the Supreme Court also warned against "the

[10] As noted above, because Plaintiffs lack standing, the State takes no position on avulsion in this appeal, but reserves its rights on this issue. As found by Judge Scarborough, "[d]iscussions or findings in this Order related to avulsion and ownership are not binding on the State in any future proceedings in this suit or in any future case." See note 6, *supra*.

unprecedented expansion of the public trust doctrine." *Id.* In short, *Estate of Tenney* requires affirming the trial court and rejecting Appellants' expansive avulsion theory.

Similarly, *Hilton Head Property Owners' Ass'n v. Donald*, 375 S.C. 220, 651 S.E.2d 614 (Ct.App.2007) does not support Appellants' avulsion theory. In *Donald*, the property owners' association attempted to claim ownership of tidelands through its predecessor in interest, the original developer. The developer had dredged and filled the tidelands. *Id.* at 223, 651 S.E.2d at 616. Holding that a property owner cannot claim ownership through "artificial accretions which are ***caused solely by the act of the upland owner***," the Court of Appeals ruled the State owned the filled property. *Id.* at 224, 651 S.E.2d at 617 (emphasis added). As a result, *Donald* is inapplicable here because the beach renourishment, as alleged by the Plaintiff, was not "caused solely by the act of the upland owners." Instead, beach renourishment is caused by the act of the Army Corps, the State of South Carolina, and the City of Folly Beach to "maintain the beach and to protect existing development." R. p. 000037, ¶ 15.

Additionally, Appellants' reliance on federal common law is erroneous. The United States Supreme Court has firmly rejected the application of federal common law to state law property cases. In *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the United States Supreme Court held that state law, not federal common law, determines the ownership of lands:

> Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state. … This is particularly true with respect to real property…. This principle applies to the banks and shores of waterways, and we have consistently so held.

Id., 429 U.S. at 378–79. As a result, state law, not federal common law, applies to this ownership boundary of Respondents' property, and it is inappropriate to refer to federal common law. The Court's decision in *Georgia v. South Carolina* does not affect the holding of *Coravallis Sand*, because *Georgia v. South Carolina* decided a "dispute between the two States ***over the location of their boundary*** along the lower reaches of the Savannah River…" *Georgia v. South Carolina*, 497 U.S. 376, 379 (1990)(emphasis added). The same is true of the Court's decision in *New Jersey v. New York*, 523 U.S. 767 (1998), which decided the location of the boundary line between New Jersey and New York. *Id.* at 773. Finally, citing *Coravallis Sand*, this Court has held that federal common law does not determine property ownership in cases like this case. *Lowcountry Open Land Tr. v. State*, 347 S.C. 96, 109, 552 S.E.2d 778, 785 (Ct. App. 2001) ("As with riparian rights, littoral rights are governed by the individual states".)

B. South Carolina Law Contradicts Appellants' Avulsion Theory.

This Court, citing *Michaelson v. Silver Beach Imp. Ass'n, Inc.*, 173 N.E.2d 273 (Mass.1961), noted an upland owner would be entitled to the "benefit" of artificially accreted land as long as the owner is the not cause of the artificial accretion. *Horry Cnty. v. Tilghman*, 283 S.C. 475, 481, 322 S.E.2d 831, 834-35 (Ct.App.1984). Also, South Carolina law has regularly reaffirmed the important littoral rights of the Respondents. For instance, *White's Mill Colony Inc. v. Williams*, 363 S.C. 117, 129, 609 S.E.2d 811, 817 (Ct. App.2005) explained the special property rights of littoral property owners "incident to their ownership of the bank." *Id.* at 129, 609 S.E.2d at 817. Similarly, this Court explained that the "littoral right to future alluvion is a vested one which is an inherent and essential attribute of the fee." *Horry Cnty. v. Tilghman*, 283 S.C. at 479, 322 S.E.2d at 833. And of course, South Carolina recognizes that even the presumption of State

ownership of tidelands can be rebutted in some circumstances. *See, e.g., State v. Holston Land Co.*, 272 S.C. 65, 68, 248 S.E.2d 922, 924 (1978) ("The law in South Carolina is well settled that a grant conveying 'marshland' can give rise to private ownership of property to the mean low water mark.")

The *Tilghman* court also noted if the project improved or aided navigation, then the artificial accretion resulting thereby essentially belonged to the public and not to the littoral property owner. *Id.*

Appellants' arguments also ignore the South Carolina Supreme Court's precedent regarding submerged lands on Folly Beach. In *City of Folly Beach v. Atl. House Properties, Ltd.*, 318 S.C. 450, 458 S.E.2d 426 (1995), the Supreme Court held that the submerged land owned by Atlantic House Properties was compensable property in a takings case. As part of the 1992 beach renourishment, Folly Beach was required to purchase the land to be renourished, so it offered to purchase Atlantic House's submerged land for zero dollars. *Id.* at 451, 458 S.E.2d at 426. Upholding the jury's award of $250,000 for that submerged land, the Supreme Court held that compensation is required where the purpose of the taking was for beach renourishment, and not in aid of navigation. *Id.* at 452, 458 S.E.2d at 427. Importantly, title to the land did not transfer to the State by virtue of its submersion. Also important to the Court's decision was Folly Beach's unique exemption under the Beach Front Management Act, S.C. Code Ann. § 48-39-290(E). *Id.* As such, both *Tilghman* and *Atlantic House* recognize that where the project causing artificial accretion does not aid navigation, then the rights of the littoral property owner must prevail.

As the Supreme Court has previously held, beach renourishment on Folly Beach does not aid navigation. Therefore, based on *Williams*, *Tilghman*, and *Atlantic House*, this Court should reject Appellants' theory of avulsion.

C. Other States Have Rejected Appellants' Avulsion Theory.

Appellants' reliance on other states' case law in support of their avulsion theory is plainly misplaced. In suggesting this Court adopt their avulsion theory, Appellants only cite two state cases, one from New Jersey and one from Florida. Other states have not adopted Appellants' avulsion theory. For instance, Texas has not adopted such an expansive view of the doctrine of avulsion. *See, e.g., Severance v. Patterson*, 370 S.W.3d 705, 722, n. 20 (Tex.2012) (citing *Stop the Beach Renourishment, Inc.*, where the Texas Supreme Court stated, "[w]e have not accepted such an expansive view of the doctrine" of avulsion).

Rather, the better rule, is set forth in *Michaelson v. Silver Beach Imp. Ass'n, Inc.*, 173 N.E.2d 273 (Mass.1961). This Court in *Tilghman* favorably cited *Michaelson*. In *Michaelson*, the Massachusetts Supreme Court considered the novel question of whether a dredging project by the Commonwealth of Massachusetts added to the littoral property owner's land. In answering the question in favor of the littoral property owner, the Court reviewed the history of littoral rights in Massachusetts:

> If the beach had been created by accretion, which occurs when the line between water and land bordering thereon is changed by the gradual deposit of alluvial soil upon the margin of the water … the answer would be clear; for it is settled that where accretions are made to land along the seashore the line of ownership follows the changing water line…. Such accumulations need not be due entirely to natural causes, provided they are not caused by the littoral owner himself. …The fact that the building of the breakwaters by public authority may have aided the operation of natural causes in the deposit of the accretions does not modify the general rule that the littoral proprietor is entitled to his proportionate share of such accretions.

> … Here, however, the beach was created solely by the Commonwealth in a relatively short time by its direct efforts.

Id., 173 N.E.2d at 275. In holding the new dredge material added to the property of and belonged to the littoral property owner, the Massachusetts court recognized "[t]he littoral or riparian nature of property is often a substantial, if not the greatest, element of its value. This is true whether the owner uses his access to the sea for navigation, fishing, bathing, or the view." *Id.* at 277. Because the beach renourishment in *Michaelson* was not related to the improvement of navigation, the court held the new beach belonged to the littoral property owners, finding the accretion caused by dredging did not require a different result from natural accretion. *Id.* at 278.

Other jurisdictions besides Texas and Massachusetts have also rejected Appellants' avulsion theory. Albeit not directly on point, Virginia has recognized littoral property owners rights are substantially and negatively affected by beach nourishment under circumstances similar to this case. In *Lynnhaven Dunes Condo. Ass'n v. City of Virginia Beach*, 733 S.E.2d 911 (Va.2012), the Virginia Supreme Court considered whether the Commonwealth's beach renourishment project cut off the littoral property owner's "riparian rights", such that the property owner was entitled to just compensation under the law for its loss of access to the water. *Id.* at 917. The Virginia court noted that the placement of the sand caused a loss of the association's littoral rights by cutting off its access to the Chesapeake Bay. Id. at 916. Citing *Michaelson*, *supra*, the Virginia Supreme Court then held that because the government's beach renourishment was not related to the improvement of navigation, the association was entitled to compensation for loss of its littoral rights. *Id.* at 917-18.

Like *Michaelson* and *Lynnhaven Dunes*, this Court in *Tilghman* and the South Carolina Supreme Court in *Atlantic House* focus on the purpose of the project causing artificial accretion. *Donald*, *supra*, and *Epps v. Freeman*, 261 S.C. 375, 200 S.E.2d 235 (1973) focused on the private owner being the sole cause of the artificial accretion, and do not proscribe ownership of artificial accretion not caused by the upland owner. Therefore, because the beach renourishment here is not the result of the efforts of Respondents, and the beach renourishment did not improve navigation, the *Michaelson* and *Lynnhaven Dunes* rules support the trial court's rejection of Appellants' avulsion theory. And this Court should adopt the reasoning from *Michaelson* and *Lynnhaven Dunes* and affirm the rejection of Appellants' avulsion theory.

III. APPELLANTS HAVE NOT NAMED THE NECESSARY PARTIES IN THIS CASE.

Respondents assert that the Circuit Court's dismissal for Appellants' failure to name necessary parties was improper, arguing that Appellants' decision to omit certain property owners with nearly identical property rights at issue was "reasonable." (Appellants' Br., p. 44). The Circuit Court's dismissal comported with the Uniform Declaratory Judgments Act and the South Carolina Rules of Civil Procedure, such that this Court should affirm the dismissal.

The Uniform Declaratory Judgments Act, S.C. Code Ann. 15-53-10, *et seq.* (the "Act"), provides: "When declaratory relief is sought ***all persons shall be made parties who have or claim any interest which would be affected by the declaration***, and no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. Code Ann. 15-53-80 (emphasis added). Likewise, Rule 12(b)(7), SCRCP, requires dismissal

of a complaint that fails to join a necessary party under Rule 19, SCRCP. South Carolina Rule of Civil Procedure 19 provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Rule 19(a), SCRCP.

Appellants acknowledge that there are approximately fifty (50) "super-beachfront lots" on Folly Beach, R p. 000036-000037, ¶ 14, yet named only eight (8) such lot owners as Respondents. Because Appellants admit that they are asking this Court to rule on a novel legal issue, it is inevitable that, if this case goes forward, this Court, or the South Carolina Supreme Court, will issue binding precedent that will affect the property rights of all 50 owners of such lots. It is axiomatic that persons with property interests at issue are necessary parties to a case that would determine those property interests. *Slatton v. Slatton*, 289 S.C. 128, 130, 345 S.E.2d 248, 249 (1986) (requiring that a party with an interest in the property at issue in the litigation be joined as a necessary party).

Courts have widely applied this line of reasoning to situations similar to the case at hand, finding property owners akin to the fifty "super-beachfront" lot owners here to be necessary parties. In *Bretton Ridge Homeowners Club v. DeAngelis*, 555 N.E.2d 663 (Ohio Ct.App.1988), the court dismissed a case where only two dozen of 508 total property owners within a subdivision were named as parties to a lawsuit. The suit concerned restrictive covenants that applied to all homeowners within the subdivision. In finding that all 508 property owners in the subdivision were necessary parties to the

action, the court noted specifically that each of them had "a legal interest in the litigation that would determine their rights and liabilities." *Id.* at 665. *See also Branham v. Holiday Lake Prop. Owners Ass'n*, 6th Dist. No. H-02-019, 2002-Ohio-5193, 2002 WL 31162730 (2002); *Hitchcock v. Boyack*, 277 A.D.2d 557 (N.Y.App.Div.2000) (plaintiff landowner's failure to join as necessary parties all landowners who would be affected by the outcome of a nuisance action regarding interference with Plaintiff's use of a roadway and access to a beach warranted dismissal of action).

The Court in *Karner v. Roy White Flowers, Inc.,* 527 S.E.2d 40 (N.C.2000) issued a similar ruling. In *Karner,* the North Carolina Supreme Court held that all property owners affected by a residential use restrictive covenant were necessary parties to an action to invalidate that covenant. *Id.* at 44. The Court noted, "[a]n adjudication that extinguishes property rights without giving the property owner an opportunity to be heard cannot yield a valid judgment" and subsequently ruled that all non-party property owners should be joined. *Id. See also Page v. Bald Head Ass'n,* 611 S.E.2d 463, 465 (N.C.Ct.App.2005) (holding that all property owners affected by a residential use permit were necessary parties); *Durham Cty. v. Graham*, 663 S.E.2d 467, 470 (N.C.Ct.App.2008) (ruling that a property owner whose land "could be substantially altered" should a mandatory injunction to be enforced, had an interest in the property that "would be directly affected by the adjudication of the controversy").

While Appellants do not dispute that the Folly Beach "super-beachfront lot" owners not named as Respondents will be impacted by the outcome of this case, Appellants cite *Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission ("CQRL")*, 426 S.C. 97, 825 S.E.2d 721 (Ct.App.2019), a case concerning county

planning commissions' scope of authority, to support their position that these property owners are not necessary litigants. *CQRL* is distinguishable in numerous ways. As an initial matter, the case arises from a dispute regarding standing. The Court did not perform an analysis of whether necessary parties had been omitted. But even if the Court had engaged in a legal analysis germane to the issues raised in this case, the scope of power properly exercised by county commissions is wholly distinct from private property rights and, specifically, title to that property.

Appellants also attempt to defend their omission of a vast majority of super-beachfront lot owners by asserting that they named only those who have taken affirmative steps to develop their lots, arguing that, for other super-beachfront lot owners, the subject matter of this case is "hypothetical and abstract." (Appellants' Br., p. 47). Private property rights—and the value of that property value—are neither hypothetical nor abstract to property owners. Additionally, the Act and the Rules of Civil Procedure do not limit the category of necessary parties to those with a more immediate development interest. The Act's requirement is simple. It provides: "When declaratory relief is sought ***all persons shall be made parties who have or claim any interest which would be affected by the declaration***, and no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. Code Ann. 15-53-80 (emphasis added). Similarly, Rule 19 requires: "A person … shall be joined as a party in the action if (1) in his absence relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of

the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."[11]

Because Appellants have failed to name as parties all of the "super-beachfront lot" owners at Folly Beach who have an interest in and would be affected by Appellants' requested declaration, they have not satisfied the requirements of the Act or South Carolina Rule of Civil Procedure 19, and the trial court properly dismissed the Complaint.

ADDITIONAL SUSTAINING GROUNDS

I. THE CITY OF FOLLY BEACH IS ASKING THE COURT FOR NOTHING MORE THAN AN ADVISORY OPINION, WHICH IS NOT PERMITTED UNDER THE UNIFORM DECLARATORY JUDGMENTS ACT.

The State of South Carolina has asserted no claim to the lots owned by the remaining Respondents. None of the other Appellants have asserted any property claim against Respondents' lots. Without such claims, declaratory relief is improper.

To invoke the Uniform Declaratory Judgments Act, there must exist a justiciable controversy. In *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970) the Supreme Court, citing its prior decisions in *Dantzler v. Callison*, 227 S.C. 317, 88 S.E.2d 64 (1955) and *Guimarin & Doan v. Georgetown Textile & Mfg Co.*, 249 S.C. 561, 165 S.E.2d 618 (1967) stated:

> Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty with respect thereto, which are denied by the adverse party, there is a justiciable controversy calling for the indication of declaratory judgment action.

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[11] Appellants further note that the non-party "super-beachfront" lot owners' interests are the same as any other coastal property owner in Myrtle Beach, Isle of Palms, or Fripp, and Appellants could not have named all coastal property owners as Respondents. (Appellants' Br., p. 47). This argument is, of course, not relevant here because the Order's dismissal was not based on a failure to name all coastal property owners; rather, it was based on Appellants' failure to name other owners of nearly identical private lots. Additionally, Appellants' assertion is inconsistent with Appellants' other arguments that this case is unique to Folly Beach in light of its exclusion from various other coastal laws.

The principle was stated in *Guimarin & Doan*:

> A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character."
>
> While it has been held that the declaratory judgment statute should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships without awaiting a violation of the rights or a disturbance of the relationships, (*Williams Furniture Corporation v. Southern Coatings & Chemical Co.*, 216 S.C. 1, 56 S.E.2d 576, it is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues sought to be raised," *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210. *Power, supra* at 255 S.C. 153-154).

City administrator Spencer Wetmore's affidavit makes it clear that Folly Beach's interest in this action is to promote its own administrative convenience, rather than settle an actual justiciable controversy. In her affidavit, Ms. Wetmore states:

> In short, it is simply impossible for the City to effectively execute its authority and obligations as a municipality when the City can't determine with certainty the ownership status of areas on the beachfront.
>
> Finally the City's interest in this lawsuit is driven by the need for clarity and planning and executing beach renourishment projects. Because of chronic erosion on the island, Folly Beach depends on a regular cycle of beach renourishment, flexibly planned to occur every seven years. Renourishment most recently occurred in 2018, at a price tag in public dollars of 18 million dollars.

R. p. 000142, ¶¶ 16-17. And in Paragraph 20, Ms. Wetmore summarizes the City's position, stating:

> All things considered, the Court's favorable resolution of this lawsuit will: aide the City in pursuit of its beachfront policies, promote the City's economic and safety interests; advance the City's interest and stake in a healthier and more stable public beach; allow the City to operate more freely without fear of liability or conflict; and would alleviate inefficient or misallocated expenses and staff time."

R. p. 000143, ¶ 20. While these interests may be matters of administrative convenience to the City, they are not of a character that demonstrate an active case or controversy between the opposing parties, but rather pursuit of a purely advisory opinion. It is inappropriate for this Court to intervene under the Uniform Declaratory Judgments Act as it has been interpreted by the Supreme Court in *Power*, *supra*.

II. THE CITY OF FOLLY BEACH CANNOT USE THE COURTS TO CIRCUMVENT ITS OWN DEVELOPMENT REGULATORY SCHEME.

By its ordinance Section 166.04-04(C), the City established the minimum building setback of forty (40) feet from the "PERPETUAL EASEMENT LINE" (PEL)(Ordinance 166.04-04(C). The PEL, as it applies to each of the Respondents' lots, is the same line as their beachfront property line. R. pp. 258 – 259 (Aerial photographs).

In their request for injunctive relief, the Appellants request:

> A temporary and permanent injunction prohibiting the Defendants from initiating construction or otherwise taking any action in furtherance of the development of these super beachfront lots; …

R. p. 000036 ¶ (2). The granting of such relief would render meaningless the setbacks established by the city ordinance, and preclude any permitted structure on Respondents' lots.

Appellants essentially ask this Court to supersede all procedures established by City ordinances: 1) to appeal adverse permit decisions to the Board of Zoning Appeals; 2) eliminate the owners' opportunity to develop an administrative record; and 3) appeal a final decision to the Circuit Court pursuant to S.C. Code Section 6-29-780, *et seq.*

The right of a property owner to appeal adverse permitting decisions is a substantial one, as is the right to appeal to the courts upon a complete and meaningful record.

Appellants should not be permitted to use the courts of this State to circumvent the City's own ordinances and allow the City to execute an "end run" around the lawfully established appeal procedures, which would be the effect of the injunctive relief Appellants demand.

CONCLUSION

None of Appellants' claims presents a justiciable controversy for the Court to consider because Appellants lack constitutional and statutory standing. Additionally, Appellants failed to raise and preserve the issue of public importance standing, which does not exist in the facts alleged this case. In addition to lacking standing, Appellants' avulsion theory fails as a matter of law. Common law does not provide a remedy in the circumstances of beach renourishment. Moreover, South Carolina's law specifically supports Respondents' ownership of the accretion under the circumstances alleged in the Complaint. And other jurisdictions support this conclusion in their analyses of similar claims.

The trial court's additional sustaining grounds provide independent reasons to affirm the dismissal of the Complaint. Therefore, for the foregoing reasons, and based on the foregoing arguments, this Court should affirm the dismissal of Appellants' complaint.

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