The State of South Carolina
In The Court of Appeals

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SC Court of Appeals

Appeal from Horry County
Court of Common Pleas
J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2022-000596
Civil Action No. 2021-CP-26-05002

Horry County, South Carolina,... Appellant,

v.

Helicopter Solutions, Inc., d/b/a Helicopter Adventures, Freddie Rick,
and Burroughs & Chapin Company, Inc.,... Respondents.

INITIAL BRIEF OF RESPONDENT HELICOPTER SOLUTIONS, INC., d/b/a HELICOPTER ADVENTURES AND FREDDIE RICK

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

As the Ordinance allows Respondent Helicopter Adventures to lawfully operate at its present location until January 1, 2024, the lower court properly dismissed the Appellant's claims as not justiciable because its claims are not ripe and it lacks standing.

STATEMENT OF THE CASE

Appellant, Horry County, is a political subdivision of the State of South Carolina. (R. ___). Respondent, Helicopter Solutions, Inc. d/b/a Helicopter Solutions ("Helicopter Adventures") is a helicopter sight-seeing tour business owned by Freddie Rick ("Rick"). (R. ___). Helicopter Adventures has operated since 2012 on the land it leases from Respondent Burroughs & Chapin Co., Inc. ("Burroughs & Chapin") at 1860 21st Avenue North, Myrtle Beach, South Carolina ("subject location"). (R. ___).

On July 30, 2021, Appellant filed a declaratory judgment/injunctive relief action seeking to prevent Respondent Helicopter Adventures from operating its business at the subject location on or after January 1, 2024. (R. ___). Specifically, Appellant seeks a judicial determination that (1) operation of a heliport at 1860 21st Ave North must cease on or before January 1, 2024; (2) continued operation of a heliport at 1860 21st Ave North after January 1, 2024 constitutes a public nuisance; and (3) Defendants . . .are not owed any compensation or damages. (R. ___). Appellant also seeks a broad permanent injunction prohibiting Respondents Helicopter Adventures and Rick from operating a heliport anywhere other than at a Public Use Airport after January 1, 2024. (R. ___).

Respondent Burroughs & Chapin filed its Answer on August 27, 2021 denying any intent to allow Helicopter Adventures to renew its lease to the subject location, which

lease expires in the summer of 2023. (R. ___). As pled by Burroughs & Chapin in its Answer at ¶22:

> . . . the current Lease Agreement between Defendant and Helicopter Adventures . . . is set to expire August 31, 2023 with no option for renewal. This Defendant has not formed any intent to enter into a new lease with Helicopter Adventures for the subject premises, or otherwise to enter into any agreement in contravention of Ordinance 15.16.

(R. ___).

On October 1, 2021, Respondents Helicopter Adventures and Rick filed an answer and a motion to dismiss under Rules 12(b)(6) and Rule 12(c), SCRCP, on several grounds including but not limited to: lack of justiciability as to Appellant's claims (not ripe and Appellant lacks standing), Appellant's failure to plead necessary elements for a public nuisance action; and federal preemption of the public nuisance claims. (R. ___).

On January 25, 2022, the lower court heard argument on Respondents Helicopter Adventures' and Rick's Motion to Dismiss. (R. ___). All parties were represented at the hearing. (R. ___). The lower court took the matter under advisement and on April 22, 2022, issued an Order granting the motion to dismiss. (R. ___). Appellant served and filed its Notice of Appeal on May 3, 2022. (R. ___). This appeal followed.

STATEMENT OF FACTS

The relationship between Appellant and Helicopter Adventures dates back to 2010 when Respondent Freddie Rick, who is an owner in Helicopter Adventures, initially contacted the Myrtle Beach and North Myrtle Beach airports to determine whether he could operate his helicopter sight-seeing tour business from either site. *See Helicopter*

Sols., Inc. v. Hinde, 414 S.C. 1, 776 S.E.2d 753 (Ct. App. 2015). "Neither airport would allow this type of business." *Id.*, 414 S.C. at 5, 776 S.E.2d at 755. As such, Respondent Rick made the decision to lease the subject location from Respondent Burroughs & Chapin which lease ends in the summer of 2023. *Id.;* (R. ___). The lease is attached as an exhibit to Appellant's Complaint. (R. ___).

At the time Respondent Helicopter Adventures first leased the subject location, it was zoned Amusement/Commercial. (R. ___). While helicopter sight-seeing facilities were not specifically referenced in any zoning district provisions, a Horry County ordinance allowed the land to be used for "sight-seeing depots." *Id.* at 5, 776 S.E.2d at 755. After significant planning, the Horry County Planning & Zoning, Code Enforcement, Engineering, and Stormwater Department conducted a series of site plan reviews and revisions, and ultimately approved Helicopter Adventure's use of the subject location for its helicopter tour business. *Id.* at 6, 776 S.E.2d at 755-756. Thereafter, a neighboring property owner filed an appeal to the County's zoning board which overturned the Zoning Administrator's decision. *Id.* at 6-7, 776 S.E.2d at 756. Helicopter Adventures appealed the decision in September 2012. *Id.* at 8, 776 S.E.2d at 756.

In September 2015, this Court held that a helicopter sight-seeing tour business fell within the range of permitted uses in Horry County Amusement/Commercial zoning districts. *Id.* at 13, 776 S.E.2d at 759. As such, Respondent Helicopter Adventures continued to lawfully operate its helicopter sight-seeing tour business at the subject location. (R. ___).

On April 20, 2016, seven (7) months after this Court held Respondents' business was permitted under the zoning code, the Horry County Council adopted Ordinance 15-16 ("the Ordinance"). Per ¶ 19 of the Complaint, it appears the Ordinance was crafted with Respondent Helicopter Adventures in mind. (R. ___).

The Ordinance amended Horry County Code §539 to provide that "heliports/helipads shall be permitted only at Public-Use Airports." (R. ___). Under the Ordinance, "[e]xisting heliports/helipads that were legally operating before the enactment of Section 539 in a place other than at a Public Use Airport shall discontinue, or be located in conformity with this ordinance, not later than January 1, 2024." (R. ___). **Importantly, by its very terms, the Ordinance does not prohibit Respondent Helicopter Adventures from lawfully operating its business at the subject location until January 1, 2024.** (R. ___).

It is undisputed that Respondent Helicopter Adventures' lease to the subject location expires in the summer of 2023, well before the January 1, 2024 operative date. (R. ___). Even so, the County alleges that in 2019 it mailed to Appellant Rick a letter notifying him that he must cease his "business at its current location and, if desired, be re-located to a Public Use Airport, by no later than January 1, 2024." (R. ___). The Complaint further alleges in ¶31 that Defendant Rick "[o]n or about **May 24, 2021** . . . informed the County that HA intends to continue operating at its current location unless and until the County provides him with a location at MYR, which is located in the City of Myrtle Beach." *Id.* (emphasis added). Contrary to Appellant's characterization in its

Brief, it is not alleged in the Complaint that Defendant Rick stated he would operate at the subject location "indefinitely." Appellant's Brief at pp. 1, 3-4, 6, 9; (R. ___).

As stated above, the lease for the subject location by its very terms expires in the summer of 2023 and contains a provision in ¶15 requiring Respondent Helicopter Adventures to "promptly observe and comply with all laws, rules, orders, zoning ordinances . . . ." (R. ___). While the Complaint alleges[1] that Burroughs & Chapin intends to renew the lease to the subject location, there is no allegation in the Complaint that any Respondent intends any renewal with an effective date on or after January 1, 2024. (R. ___).[2] The lease does not have an option for renewal. (R. ____). As such, Respondent Helicopter Adventures will cease to have any legal authority to operate at the subject location once the lease expires.

Respondents Helicopter Adventures and Rick request this Court uphold the lower court's dismissal of Appellant's claims as the claims are not justiciable at this time.

STANDARD OF REVIEW

The lower court dismissed Appellant's Complaint under Rule 12(b)(6), SCRCP and Rule 12(c), SCRCP. (R. ___).

"Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action." *Doe v. Marion,* 361 S.C.

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[1] Burroughs & Chapin denies this allegation. (R. ___).

[2] While Appellant states in its Initial Brief that "HA moved to dismiss, stating that it had 'not yet agreed' with its landlord, Defendant Burroughs & Chapin, Inc. (B&C), to renew its lease *to continue past the amortization deadline*," this is a mischaracterization of Respondents' Motion to Dismiss. Appellant's Initial Brief at p. 6 (emphasis added); (R.).

463, 468, 605 S.E.2d 556, 559 (Ct. App. 2004), aff'd, 373 S.C. 390, 645 S.E.2d 245 (2007). When reviewing a dismissal for failure to state a claim, an appellate court applies the same standard as the trial court. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498-99 (2014). The pleadings are construed liberally, and all well-pled facts are presumed true. *Id.* The Court need not presume the truth of allegations pled merely in conclusory fashion or stating legal conclusions. *HHHunt Corp. v. Town of Lexington,* 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010); *Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986)(a mere conclusory allegation, unsupported by particular allegations of fact, is insufficient). Under this standard, "[t]he court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law". *Brouwer v. Sisters of Charity Providence Hospital,* 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014).

"Upon review [of a motion for judgment on the pleadings], the appellate tribunal applies the same standard of review that was implemented by the [circuit] court." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001); *see also Ziegler v. Dorchester Cnty.*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019)("Whether reviewing a grant of summary judgment or a judgment on the pleadings, we apply the same legal standards as the trial court.") The lower court may dismiss a claim under Rule 12(c) when the pleadings are so defective that taking all the facts alleged as true, no cause of action . . . is stated." *Diminich v. 2001 Enterprises, Inc.,* 292 S.C. 141, 355 S.E. 2d 275 (Ct. App. 1987). Judgment on the pleadings is proper "where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in

plaintiff's favor." *Sapp v. Ford Motor Co.,* 386 S.C. 143, 687 S.E.2d 47 (2009). When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000).

ARGUMENT

I. As the Ordinance allows Respondent Helicopter Adventures to lawfully operate at its present location until January 1, 2024, the lower court properly dismissed the Appellant's claims as not justiciable because its claims are not ripe and it lacks standing.

The pleadings, even if taken as true, do not demonstrate any issue that would entitle Appellant to judgment against Respondents *now*. Appellant is requesting relief for a speculative, hypothetical, and contingent injury, and this Court should affirm the lower court's Order dismissing the action.

In its Complaint, Appellant seeks a judicial finding that (1) operation of a heliport at 1860 21st Ave North must cease on or before January 1, 2024[3]; (2) continued operation of a heliport at 1860 21st Avenue North after January 1, 2024 constitutes a public nuisance; and (3) Respondents are not owed any compensation or damages. (R. ___). Lastly, Appellant seeks a broad permanent injunction to prevent Respondent Helicopter Solutions from "operating a heliport anywhere other than at a Public Use Airport after January 1, 2024." (R. ___).

Under South Carolina law, "[a] threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy." *Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Plan. Corp.*, 358 S.C. 460, 477, 596 S.E.2d

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[3] As stated herein, Respondents Helicopter Solutions and Rick do not have a leasehold at the subject location after August 31, 2023. (R. ___).

51, 60 (2004). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." *Id.*; *see also Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466–67 (2004).

Declaratory judgment actions must involve an actual, justiciable controversy that is ripe for determination. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 228, 467 S.E.2d 913, 918 (1996). "It is not enough that a threat of possible injury currently exists; the mere threat of potential injury is too contingent or remote to support present adjudication." *Id.* "While some jurisdictions have made exceptions in declaratory judgment actions where the 'ripening seeds' of an actual controversy exist," our courts "decline to utilize such exception" where "the facts do not indicate an *imminent* violation of rights." *Id.* ftn. 7 (emphasis added).

As to alleged nuisances, "equity will not interfere where the anticipated nuisance is doubtful, contingent, or conjectural. To entitle one to injunctive relief against a threatened or anticipated nuisance, public or private, it must appear that a nuisance will inevitably or necessarily result from the act or thing which it is sought to enjoin." *Strong v. Winn-Dixie Stores*, Inc., 240 S.C. 244, 125 S.E.2d 628 (1962). "It is not enough to show that the anticipated acts threatened to or may become a nuisance . . . ." *Id.*

Not only must a claim be ripe, but a plaintiff must have standing to bring its claims. "Justiciability encompasses . . . ripeness . . . and standing." *Jowers v. S.C. Dep't of Health & Env't Control*, 423 S.C. 343, 353–54, 815 S.E.2d 446, 451 (2018)(internal citations omitted).

Under South Carolina law:

> A plaintiff has standing . . . when he sustained, or is in immediate danger of sustaining, actual prejudice or injury from the . . . action. To meet the 'stringent' test for standing, 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.'

Id. Here, Appellant's claims are not justiciable as they are not ripe and Appellant has not suffered an injury in fact. As such, this Court should affirm the lower court's dismissal.

A. It is undisputed that under the Ordinance, Respondent Helicopter Adventures is lawfully operating at the subject location, and it has no leasehold interest at the subject location after the summer of 2023.

There is no dispute that Respondent Helicopter Adventures can, under the Ordinance, continue lawfully operating at its current location until the operative date in the Ordinance of January 1, 2024. (R. ___). The only allegation pled that Respondent Helicopter Adventures may violate the Ordinance is an alleged *2021* statement by Respondent Rick that he intends to continue operating at the subject location until the County provides him with a location at MYR (a public use airport).[4] (R. ___). However, as acknowledged by Appellant, Respondents are within their rights to operate Helicopter Adventures from the subject location until January 1, 2024. (R. ___); *see also Helicopter Sols., Inc.*, 414 S.C. at 1, 776 S.E.2d at 753.

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[4] These Respondents have denied this allegation. (R. ___).

Respondents' hypothetical future violation of an Ordinance which does not have effect as to Respondents' operations until 2024, and which regulates conduct on property that Respondents may not even have an interest in when the alleged harm arises, is entirely conjectural. Respondents' lease for the subject location ends in the summer of 2023 with no option for renewal in the lease. Appellant has made the factual allegation that "B&C intends to allow HA to renew its Lease, or enter a new lease allowing operation of a heliport at the Property, after the Extended Term of the current Lease ends." (R. ___). Even if the Court considers the allegation as true, there is *no allegation in the Complaint that any intended renewal would allow Respondent Helicopter Adventures to operate from the subject location on or after January 1, 2024.* Indeed, the lease, attached and incorporated into the Complaint, requires Respondent Helicopter Adventures to observe and comply with all laws and ordinances. *See* Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading.").

Appellant has not pled any facts demonstrating Respondents' violation of the ordinance is in any way "imminent" or actual or that it suffered an invasion of a legally protected interest sufficient to constitute an "injury in fact." While Appellant argues in its Brief that "it is common for those subject to land-use amortization clauses to wait until the last minute to sue," Respondent Helicopter Solutions has no leasehold interest in the subject location after the summer of 2023. Appellant's Initial Brief at p. 11; (R. ___). As such, Appellant's argument is conjectural and hypothetical.

As counsel articulated at the hearing, there are only a "series of hypotheticals that [Appellant relies] upon . . . to leapfrog over a bunch of ifs and engage in premature considerations and decision-making." (R. ___). Burroughs & Chapin summarized its position at the hearing: "There is no lease to renew pursuant to the express terms of the instrument after August of 2023. Mr. Ricks could get on a call and say, listen, in January 2024 I'm going to operate a brothel or a munitions plant on that premises. He doesn't have a lease to do that. It's completely speculative." (R. ___).

Appellant is seeking an advisory opinion with its lawsuit and requests relief based upon its anticipation that several contingencies will occur. Appellant's claims are simply not ripe, and Plaintiff lacks standing. This Court should uphold the lower court's Order dismissing Appellant's claims.

B. Contrary to Appellant's argument, the lower court dismissed Appellant's claims based on the law and factual assertions pled by Appellant in its Complaint.

Appellant's main contention on appeal is that the lower court "ignored County's factual assertions and credited HA and Rick's contrary assertions." Appellant's Initial Brief at p. 7. There is no support in the record for Appellant's argument. In issuing its Order of Dismissal, the lower court recognized the "contingent, hypothetical, and abstract" nature of Appellant's claims. *See Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 254, 125 S.E.2d 628, 633 (1962).

As stated in the Order:

> In the instant matter, it is undisputed that Defendants' leasehold interest in the property at issue ends during the summer of 2023, and Horry County Ordinance 15-16 is not legally operative [as to Respondents] until January 1, 2024. As such, any alleged violation by Defendants of Ordinance 15-16 is contingent, hypothetical, and abstract. There are no

> facts on the record indicating that Defendants' violation of Ordinance 15-16 is *imminent,* and because the Ordinance is not yet legally binding [on Respondent Helicopter Adventures], Plaintiff has suffered no invasion of a legally protected interest sufficient to constitute an injury in fact.

Order, p. 2 (emphasis added).

All facts relied upon by the lower court in its Order are found in the four corners of Appellant's Complaint. Specifically, per ¶¶15-16, 24, 36, 41, 45 of the Complaint, there is no dispute that the Ordinance at issue only takes effect as to Respondent Helicopter Adventure's operations at its present location on or after January 1, 2024. (R. ___). A copy of the Ordinance is attached to the Complaint. (R. ___); *see* Rule 10(c), SCRCP. Per ¶¶28-29 of the Complaint, it is undisputed that Respondents' lease at the subject location ceases in the summer of 2023. (R. ___). A copy of the lease is attached to the Complaint. (R. ___); *see* Rule 10(c), SCRCP. The lease in numbered ¶15 requires Respondent Helicopter Solutions to comply with all laws or ordinances. *Id.*

Appellant filed its lawsuit 2 ½ years before the effective date of the Ordinance as relates to Respondent Helicopter Adventures' operations at the subject location. The lower court reviewed the Complaint and properly dismissed the Appellant's claims. As such, this Court should uphold the lower court's dismissal.

C. This Court should not consider Appellant's unpled factual assertions.

In its brief, Appellant makes several factual assertions that are not pled in the Complaint. *See* Rule 12(b)(6) and 12(c), SCRCP. Specifically, the following factual assertions in italics should not be considered by this Court in determining whether the lower court properly granted the Respondents' Motion to Dismiss:

- *"Since 2019, the County has been working to help Rick relocate his business – though it has no legal obligation to do so.* But in May 2021, *during a conference call with County staff and airport management*, Rick stated that he would keep operating his business at its nonconforming location *indefinitely – i.e. in violation of the Ordinance* – unless and until the County provided him with a location at MYR." (Appellant's Initial Brief at p. 6; see also p. 1).

- *"The County says that it has no duty (and no authority) to provide an alternate site for HA business at MYR. HA asserts that the County does have such a duty."* (Appellant's Initial Brief at p. 12).

- *"HA is a multi-million dollar business"* (Appellant's Initial Brief at p. 10; see also p. 12).

The asserted facts pled in the Complaint show only that Appellant's claims are premature and that Appellant lacks standing. The additional assertions set forth in the Appellant's Brief, above, even if considered by this Court, which they should not be, do not change the premature nature of Appellants' lawsuit. As such, Respondents Helicopter Adventure and Rick request this Court affirm the lower court dismissal of Appellant's actions.

II. The dismissal of Appellant's claims against Respondents is also supported by additional sustaining grounds as Appellant failed to plead facts sufficient to entitle it to injunctive relief against an anticipated nuisance, and to the extent Appellant did plead sufficient facts, Appellant's attempts to regulate air traffic operations, air traffic patterns, helicopter noise, and altitude are preempted by federal law.

A. Appellant failed to plead facts sufficient to entitle it to injunctive relief against an anticipated nuisance.

As additional sustaining grounds, Appellant has failed to plead facts sufficient to entitle it to injunction relief on its claims that Respondent's operation *in 2024* will constitute a public nuisance.

As additional sustaining grounds under Rule 210(c), SCACR, Appellant has failed to set forth the necessary elements to support its public nuisance action against Respondents.

Under South Carolina law, "[t]o entitle one to injunctive relief against a threatened or anticipated nuisance, public or private, it must appear that a nuisance will inevitably or necessarily result from the act or thing which it is sought to enjoin." *Strong v. Winn-Dixie Stores, Inc.*, 240 S.C. 244, 254, 125 S.E.2d 628, 633 (1962). Specifically, "[i]t is not enough to show that the anticipated acts threatened to or may become a nuisance, but the evidence must show that a nuisance is inevitable from the proposed use of the premises or will necessarily result." *Id.*, 240 S.C. at 254, 125 S.E.2d at 633. "[E]quity will not interfere where the anticipated nuisance is doubtful, contingent, or conjectural." *Id.*

Here, Appellant seeks injunctive relief on the basis that Respondents' operation of a heliport at the subject location on or after January 1, 2024 is a public nuisance. Because such conduct is entirely speculative, has not occurred, and is not at all inevitable, Appellant's claims for a declaratory judgment and permanent injunction should be dismissed.

Further, Appellant has failed to plead the elements necessary for it to obtain injunctive relief authorized by a statute. Under South Carolina law, "[i]n order for a [County] to get an injunction which is specifically authorized by statute for a zoning violation they must show: (1) that it has an ordinance covering the situation; and (2) that there is a violation of that ordinance." *Cty of Richland v. Simpkins*, 348 S.C. 664,

669, 560 S.E.2d 902, 905 (Ct. App. 2002)(quoting *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000).

As Appellant states in its Complaint, "[t]he land where Defendant HA operates is zoned Amusement/Commercial (AC)" and "[a] helicopter sightseeing business was a permitted use in an AC district." (R. ___). The Complaint acknowledges that Ordinance 15-16 allows Respondent Helicopter Adventures' operations at the subject location until January 1, 2024. (R. ___). As such, Appellant cannot show, as to Respondents, that (1) there is a currently effective ordinance covering the complained of situation or (2) that any ordinance has been violated by Respondents as required to obtain injunctive relief.

Therefore, under Rule 210(c), SCACR, this Court should affirm the lower court's dismissal as to public nuisance on this sustaining ground.

B. Appellant's attempts to regulate air traffic operations, air patterns, helicopter noise, and altitude are preempted by federal law.

As a further additional sustaining ground, "in light of the pervasive nature of the scheme of federal regulation of aircraft noise, as evidenced by the Noise Control Act of 1972, the FAA and the Environmental Protection Agency [have] full control over airport noise, preempting local control. . . . Local ordinances prohibiting night operations and prohibiting air traffic patterns [are also] preempted." *Hoagland v. Town of Clear Lake, Ind.*, 415 F.3d 693, 697 (7th Cir. 2005) (citing, in part, *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973). To the extent Appellant attempts to declare Respondents' helicopter operations a public nuisance in order to regulate aircraft noise,

timing of aircraft operations, air traffic patterns, or air traffic altitudes, it is preempted by federal law, and therefore unconstitutional.

The Supreme Court has interpreted the Supremacy Clause of the U.S. Constitution to elevate federal law above state or local laws in three primary scenarios: (1) where Congress has occupied the field to the exclusion of parallel state legislation, or (2) where the dominant interests of the federal government preclude state intervention, or (3) where the administration of state acts would conflict with the operation of the federal plan. *Pennsylvania v. Nelson*, 350 U.S. 497, 509, 76 S. Ct. 477, 100 L. Ed. 640 (1956). Preemption is predicated upon Congressional intent to monopolize an area of legislation. *See* U.S. Const. art. VI., § 2.

In *City of Burbank v. Lockheed Air Terminal*, the city attempted to enact an ordinance establishing a curfew on the takeoff and landing of jets from a privately owned airport. *Id.,* 411 U.S. at 624. The Court held that the ordinance was unconstitutional because it was preempted by the Supremacy Clause. In so holding, the Court cited language from Justice Jackson's opinion in *Northwest Airlines, Inc. v. Minnesota*, which states:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

Id., 411 U.S. at 633-634.

The Court further reasoned that "it is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption."

Id., 411 U.S. at 633. The Court concluded that although states may *generally* regulate noise through exercise of the police power, "[t]he pervasive control vested in EPA and the FAA . . . leave no room for local curfews or other local controls." *Id.* 411 U.S. at 638.

Just as federal FAA and EPA regulations preempted the City of Burbank's ordinance from restricting flights from a private airport in *City of Burbank*, FAA and EPA regulations should preempt Appellant's action for declaratory and injunctive relief as to an alleged nuisance in this case.

CONCLUSION

For the foregoing reasons, Respondents Helicopter Solutions and Freddie Rick respectfully request this Court affirm the lower court's Order dismissing Appellant's claims against it.

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September 6, 2022

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Cordell Maddox, Circuit Court Judge

Appellate Case No. 2022-000596
Civil Action No. 2021-CP-26-05002

Horry County, a Political Subdivision of the State of South Carolina,............. Appellant,

v.

Helicopter Solutions, Inc. d/b/a Helicopter Adventures, Freddie Rick, and Burroughs & Chapin Company, Inc.,.. Respondents.

PROOF OF SERVICE

I certify that I have served the *Initial Brief of Respondent Helicopter Solutions, Inc., d/b/a Helicopter Adventures and Freddie Rick* by mailing and/or emailing a copy of same to all attorneys of record by email and/or U.S. Mail, postage pre-paid, addressed to:

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Columbia, South Carolina
this 6th day of September, 2022.