THE STATE OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

The Honorable Steven H. John

APPELLATE CASE NO. 2022-000811

Ernest F. Middleton, III, and Joyce J. Middleton, Michael J. Farrar and Diana Farrar, Robert H. Hunt and Jeane M. Sullivan, the Colony Homeowners Association, Inc., and Keep It Green, Inc., ... Respondents,

v.

Georgetown County and Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust dated June 18, 2004, ...Defendants,

Of whom Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust dated June 18, 2004 is the ..... Appellant.

INITIAL APPELLANT BRIEF

Benjamin F. Goff, Sr., Trustee
18 Powers Farm Road
Randolph, MA 02368
(781) 986-0635
Pro Se for Appellant

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2. Whether the Lower Court erred in finding a fairly read cause of action against the Appellant when the Respondents' lawyer stated in the motion hearing Transcript that "we don't think that he did something wrong"?
3. Whether the Lower Court erred in not finding that the Appellant should be a party-in-interest or an involuntary plaintiff as opposed to a defendant?
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9. Whether the Lower Court erred in naming and considering the Appellant's Trust as a Defendant in the Court Docket and Order on Appeal, when a trust cannot sue or be sued?

STATEMENT OF THE CASE

On January 7, 2022, the Respondents filed a complaint under the Uniform Declaratory Judgment Act (UDJA) against Georgetown County, Georgetown County Council and Council members in their capacities as elected members and Benjamin F. Goff Trustee of the Benjamin F. Goff 2004 Revocable Trust, questioning the validity of Ordinances 21-24 and 21-25. Rather than making the Appellant a party-in-interest in accordance with S.C. Code Ann. § 15-53-80, the Appellant, Benjamin F. Goff, Trustee of the Benjamin F. Goff 2004 Revocable Trust, the applicant and property owner, was made a Defendant. Although named as a Defendant in the complaint, the Appellant should have been named as a "party-in-interest" pursuant to S.C. Code Ann. § 15-53-80 or an "involuntary plaintiff" pursuant to Rule 19(a)(2), SCRCP.

Despite knowing the Appellant's residential address, the Appellant was not served with the Summons and Complaint pursuant to Rule 4(a), SCRCP and Rule 12(b)(5), SCRCP. The Appellant appeared pursuant to Rule 4(d), SCRCP, voluntary appearance is equivalent to personal service. Before filing a proof of service with the Court as required by Rule 5(d), SCRCP, the Respondents' lawyer initiated a serving through the Secretary of State's Office to belatedly serve the Summons and Complaint and provide proof of service to the Lower Court.

A Rule 12(b)(6), SCRCP Motion to Dismiss Benjamin F. Goff, Sr., Trustee (Appellant) as a Defendant was filed on January 25, 2022. In addition to the failure to state a cause of action against the Appellant, the Complaint lacked a justiciable controversy and injuries-in-fact to have standing. The Appellant's Motion to Dismiss the Appellant as a Defendant was heard, May 19, 2022. On or about May 25, 2022, the Appellant was informed by the Lower Court in an email that the motion was denied and a fair reading indicated a cause of action against the Appellant as a Defendant and directed the Respondents' lawyer to prepare an Order for the Lower Court.

The Appellant Motion to Dismiss him as a Defendant was heard on May 19, 2022, in which he alleged that the Complaint failed to meet the requirements of the Uniform Declaratory Judgment Act (UDJA) and pursuant to Rule 12(b)(6), SCRCP the Respondents' Complaint does not state any facts that constitute a cause of action against the Appellant. However, in the Order on Appeal, dated June 3, 2022, the Appellant's constitutional rights to apply to rezone private property, has been determined by the Lower Court's Order to remain as a defendant with a fairly read and unstated cause of action in the Respondents' Complaint.

The allegations in the Respondents' Complaint are directed at the Georgetown County Council and elected members, specifically, for violations of the South Carolina Comprehensive Planning Enabling Act, the Comprehensive Land Use Plan and the County Council Rules of Procedure in the approval and adoption of the Appellant's ordinances. The Respondents are seeking to have the Lower Court render the Appellant's ordinances "null and void" because of an alleged violation of the Georgetown County Council Rules of Procedure.

The Respondents' lawyer and the lawyer for the Georgetown County Council agreed to a Stipulation of Dismissal that dismissed any and all claims without prejudice against the Georgetown County Council and elected members as Defendants in their capacities as elected members of the Georgetown County Council. In essence, the Stipulation of Dismissal was an admittance that the Georgetown County Council and elected members' approval and adoption of Ordinances 21-24 and 21-25 was proper and consistent with County Council Rules of Procedure, Roberts Rules of Order and the Model Rules of Parliamentary Procedure for South Carolina Counties, Third Edition.

Additionally, it was an admittance that the legislative decisions of County Councils are not reviewable by the court. Without the County Council and elected members, as Defendants,

the County's and Respondents' lawyers seek to continue the litigation based on alleged constitutional violations. In essence, the Lower Court has concluded that a "fairly read" cause of action exists against the Appellant for the submitted application to rezone unimproved land, and the Appellant should remain as a Defendant without the County Council and elected members. A "fair reading" of the Respondents' Complaint filed in this litigation would indicate that the Appellant should not be a Defendant. Absent the Georgetown County Council and elected Council members, the Appellant will suffer substantial injury and irreparable harm.

On October 26, 2021, a Third Reading was conducted for Ordinance Nos. 21-24 and 21-25. The passage of the ordinances required the reliance on "The South Carolina Association of Counties Model Rules of Parliamentary Procedure for South Carolina Counties, Third Edition (Model Rules). This stemmed from a council member's decision at the Third Reading to abstain from voting on the referenced ordinances on which he previously provided a "yes" vote for passage at the Second Reading on August 24, 2021, stating the absence of a non-required plan.

On legal advice from the County Attorney the ordinances were passed based on "majority of members present and voting", as defined in the Model Rules. Also, other factors allowed the ordinances to pass under "majority of members present" based on the Georgetown County Council Rules of Procedure. According to the Model Rules, 2013 Home Rule Handbook, 2020 and 2021Supplement and County Council Rules of Procedure, the referenced ordinances passed by "majority of members present and voting" and the "valid" majority of members present. Under state law and rules, ordinances adopted by majority vote at the third reading are in effect. The ordinances were codified on November 9, 2021 after allowing the abstaining member on October 26, 2021 to change his vote after a majority approved motion. These actions were in accordance with proper legislative rules and procedures and do not rise to constitutional or

administrative violations and with respect to Ordinances 21-24 and 21-25, they were legitimate legislative actions. Based on settled case law, the legislative actions of the County Council with regard to approval of ordinances are immune from judicial intervention. However, the Lower Court, in denying the Appellant's Motion to Dismiss him as a Defendant, claims a "fairly read" cause of action existed against the Appellant in the Order, dated June 3, 2022 when any and all claims against the County Council and elected members had been dismissed. The Respondents have stated in writings to the Appellant that her clients have no claims against the Appellant.

The Respondents' Complaint was contrived to overcome in the court their failed opposition to the approval and adoption of Ordinances 21-24 and 21-25. It is the furtherance of a civil conspiracy against the Appellant. In that, the Lower Court decided in the Order that the Appellant should remain a Defendant and that a cause of action exists against him in the case, the Appellant decided to appeal the Order denying the Appellant's Motion to Dismiss him as a Defendant and finding a fairly read cause of action to the Appellate Court on June 10, 2022.

STATEMENT OF FACTS

1. There are no facts stated in the Respondents' Complaint that constitutes a fairly read cause of action against the Appellant, pursuant to Rule 12(b)(6), SCRCP. See *Complaint* pp. 9 - 33.

2. A fair reading of all pleadings and exhibits filed in this legal action would not support a cause of action against the Appellant, pursuant to Rule 12(b)(6), SCRCP. See *Court Docket p. 1.*

3. Statements made by the Plaintiffs' lawyer in an Email message, a Letter and Transcript on Record summarily states that her clients have no specific claims against the Appellant. See *Email p. 1* (Feb 7, 2022); *Letter p. 1* (Feb 15, 2022)*; and Transcript* p. 12.

4. Respondents' Complaint does not state any factual wrongdoing by the Appellant in the procedural approval and adoption of Ordinances 21-24 and 21-25. See *Complaint p. 9.*

5. The Respondents' Complaint did not allege any constitutional violations regarding the approval and adoption of Ordinances 21-24 and 21-25. See *Complaint pp. 9 - 33.*

6. The Appellant's rezoning application, designated as Case Number REZ-21-28323, met all requirements and was accepted by the Planning Department, recommended for approval by the Planning Commission and adopted into ordinances by the Georgetown County Council. See *Rezoning Application and Planning Department Report to Georgetown County Planning Commission pp. 1 - 4* (Jul 15, 2021).

7. The allegations in the Respondents' Complaint are directed at the Georgetown County Council and elected Council members, specifically, for violations the South Carolina Comprehensive Planning Enabling Act and the Comprehensive Land Use Plan. See *Complaint pp. 9 - 33.*

8. The Stipulation of Dismissal between the Respondents' and Georgetown County lawyers dismissed any and all claims against the Georgetown County Council and elected members and there are no remaining claims. See *Stipulation of Dismissal p. 1 – 2* (May 5, 2022).

9. Ordinances 21-24 and 21-25 was approved and adopted in accordance with County Council Rules of Procedure, Roberts Rules of Order, 9th Edition and the Model Rules of Parliamentary Procedure for South Carolina Counties, Third Edition on October 26, 2021 and codified on November 9, 2021. See *County Council Minutes pp. 7 and 2* (Oct 26, 2021 and Nov 9, 2021).

10. The Appellant's Trust has been inadvertently designated as a Defendant in the Court Docket and in the Order on Appeal. See Court Docket *p. 1 and Order on Appeal pp. 1 - 5.*

11. Pursuant to Rule 19(a)(2), SCRCP, the Appellant should have been named as an "Involuntary Plaintiff" or "Party-in-Interest" pursuant to S.C. Code Ann. § 15-53-80. See *Rule 19(a)(2), SCRCP and Uniform Declaratory Judgment Act*, (UDJA).

12. The Order on Appeal does not state any allegation in the Respondents' Complaint that fairly read can be construed as a cause of action against the Appellant. See *Complaint* pp. 9 - 33.

13. The Respondents' lawyer, in authoring the Order on Appeal, served in the role of advocate and advisor in an adversarial proceeding. See *Rule 1.8(l), S.C. Rules Professional Conduct.*

14. The Respondents submitted a Petition containing more than one thousand (1,000) plus signatures of residents opposing Ordinances 21-24 and 21-25. See *Complaint p. 18.*

15. The Respondents' Affidavits do not state that they were deprived of property or due process of law or any constitutional guaranteed rights. See *Complaint pp. 36 - 62.*

ARGUMENT

I. APPEALABLE INTERLOCUTORY ORDER

Standard of Review: The Order on appeal involves the merits in the action, in effect determines the outcome of the action, is an abuse of discretion and will prevent an appeal of a final judgment.

Citations: In accordance with S.C. Code Ann. § 14-3-330 - Appellate jurisdiction in law case states in part: The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.
>
> The SC Supreme Court has held that an abuse of discretion arises in cases in which: (1) the judge issuing the order was controlled by some error of law; or (2) where the order,

based upon factual, as distinguished from legal, conclusions, is without evidentiary support. See *Rochester v. Holiday* Magic, Inc., 253 S.C. 147, 169 S.E. (2d) 387 (1969); See *Brown v. Weathers*, 251 S.C. 67, 160 S.E. (2d) 133 (1968); See *Holliday v. Holliday*, 235 S.C. 246, 111 S.E. (2d) 205 (1959); See *Simon v. Flowers*, 231 S.C. 545, 99 S.E. (2d) 391 (1957).

"In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court." See *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). "The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and policies of this state and the Court's sense of law, justice, and right." Id. at 467, 636 S.E.2d at 605-06.

Discussion: An interlocutory order which affects a substantial right, and either in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues an action, is immediately appealable under S.C. Code Ann. § 14-3-330(2)(a). An interlocutory order is appealable under subsection (1) only if it involves the merits, that is, "finally determines some substantial matter forming the whole or a part of some cause of action or defense...." See *Henderson v. Wyatt*, 8 S.C. 112 (1877). Subsection (2)(c) permits the direct appeal of orders which affect a substantial right by striking out an answer.

The threshold issue is whether this Court of Appeals will consider this interlocutory appeal. This interlocutory appeal of the Lower Court Order is based on the grounds that it involves the merits of the legal action and the Appellant will suffer substantial harm to rights and prevents a judgment from which an appeal might be taken, if the order is not corrected until the case is over pursuant to S.C. Code Ann. § 14-3-330(1) and S.C. Code Ann. § 14-3-330(2)(a).

The right to appeal in this case is controlled by S.C. Code Ann. § 14-3-330 (1976 & Supp.1994). Only two of its provisions are potentially applicable to this matter. First, § 14-3-330(1) allows the appeal of an interlocutory order "involving the merits." To involve the merits, the order must "finally determine some substantial matter forming the whole or part of some

cause of action or defense...." See *Mid-State Distributors, Inc., v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993).

Under S.C. Code Ann. § 14-3-330(2), an order which affects a substantial right and in effect determines the action and prevents a judgment from which an appeal may be taken is immediately appealable. An intermediate/interlocutory order is immediately appealable only if it involves the merits of the case or affects a substantial right. S.C. Code Ann. § 14-3-330 (1976). Such orders are reviewable after final judgment. See *Pendergrass v. Martin*, 275 S.C. 413, 272 S.E. (2d) 172 (1980). Moreover, this order effectively discontinues the lawsuit against the County Council and elected members and substitutes the Appellant, thus bringing the order under paragraph S.C. Code Ann. § 14-3-330(2)(a). The Order on appeal in this case, effect the merits and prevents a proper judgment from being rendered in the action from which an appeal might to taken, and the Appellant cannot seek review of the current order from the Lower Court.

The County Council's lawyer filed a Motion to Dismiss the entire legal action on the grounds of legislative immunity and lack of judicial power to grant relief. That motion was apparently resolved with an agreement to file a Stipulation of Dismissal which dismissed any and all claims against the County Council and elected members with none remaining. The Stipulation of Dismissal did not involve and was not signed by the Appellant. All allegations in the Respondents' Complaint were directed at the County Council and elected members.

A letter, dated May 4, 2022, was sent to the Lower Court stating that the Motion to Dismiss was resolved in lieu of a Stipulation of Dismissal pursuant to Rule 41, SCRCP between the County Council's and Plaintiffs' lawyer. It was filed on May 5, 2022 and stated in part that the parties hereby stipulated, pursuant to Rule 41, SCRCP, to the dismissal, without prejudice, of

any and all claims against the County Council and elected members and dismissed them as necessary parties under the Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-80.

The Appellant's Motion to Dismiss, in essence, was to redesignate him as a party-in-interest, as required by S.C. Code Ann. § 15-53-80 of Uniform Declaratory Judgment Act (UDJA) or an involuntary plaintiff in accordance with Rule 19(a)(2), SCRCP. In this appeal, the Appellant is challenging the Order denying to dismiss him as a Defendant and finding an unstated "fairly read" cause of action, where admittedly no claims were made against the Appellant in the Complaint. Effectively, the Lower Court allowed the accused defendants to be released and the unaccused and inadvertently or deliberately designated defendant to remain and be charged with an unspecified cause of action. Consequently, the Appellant is being sued for having submitted a rezoning application that was accepted by the Planning Department, recommended by the Planning Commission and approved and adopted into ordinances by the County Council and elected members. See *Stipulation of Dismissal p. 1 - 2 (May 5, 2022).*

In filing the Motion to Dismiss, the Appellant's sought the removal of the Trustee as a Defendant and to be designated a party-in-interest as required by the UDJA. Further, the Appellant's Motion to Dismiss addressed the inadequacy and futility of the Respondents' Complaint against the County Council because the validity of the Appellant's ordinances was being challenged. In the Complaint and Respondents' Motion in Opposition, the lawyer clearly stated that the UDJA required anyone whose substantial rights are at risk to be named a party. However, the UDJA does not state that the party must be a defendant. The Appellant is a party-in-interest and the Respondents' lawyer clearly recognized that in the opposing motion and in an email, letter and the transcript, stating that her clients have no claims against the Appellant. See *Appellant's Motion. to Dismiss pp. 1 – 5; and Memo in Support Motion to Dismiss pp. 1 – 20.*

Respondents' lawyer states in an email that "my clients have no specific claims (causes of action) against you (Appellant), the only reason you are included as a party is that the Declaratory Judgment Act states that all parties in interest must be named, and the Appellant's Trust is arguably a party-in-interest." In that only the Appellant is named as a Defendant in the Complaint, it translates into no claims against the Appellant's or Trust. For all legal purposes, the Appellant is owner of all assets within the trust; therefore, if the trust is definable as a party-in-interest, the Appellant should be a party-in-interest.

The Appellant's Trust, as a legal entity, was not sued and cannot be sued. The Respondents' lawyer views the Appellant and Appellant's Trust as independent actors, as does the Lower Court in the docket, and conflates them in the Order on Appeal. This is an error in the interpretation of federal and state laws, an abuse of discretion by the Lower Court and a violation of professional conduct by the Respondents' lawyer. *See Email p. 1* (Feb 7, 2022); *Letter p. 1* (Feb 15, 2022); *and Transcript p. 12.*

The Lower Court apparently interpreted the Appellant's motion as only to dismiss the entire Complaint and failed to recognize the specific request of the removing the Appellant as a Defendant and to designate him as party-in-interest or involuntary plaintiff. Respondents' lawyer, in authoring the Order on appeal, capitulated to the Lower Court's guidance which sanctioned the Appellant as a Defendant with an implied fairly read cause of action. The Respondents' Complaint was solely directed at the County Council with no stated allegations against the Appellant, hence the fairly read statement. In viewing the Appellant as a defendant, the Lower Court abused its discretion with regards to the Section 15-53-80 and the Complaint.

The Lower Court Order, which was authored by the Respondents' lawyer, contradicts statements made by the lawyer in an email missive to the Appellant, dated February 7, 2022. The

Respondents' lawyer is a current or former member/officer of the Keep It Green organization that supposedly opposes all rezoning efforts on the Waccamaw Neck area in Georgetown County. However, there was an exception for similar rezoning ordinances adopted concurrently with the Appellant's ordinances. This Order raises questions of entitlement to equal protection under the law and whether the Appellant has any rights the Lower Court is bound to respect.

The interlocutory order involves the merits of the case and will affect the substantial rights of the Appellant in this litigation and in effect determine the outcome and prevent a judgment from which an appeal might be taken. It is obvious from statements in the unheard County Council's Motion to Dismiss that there is a tacit agreement between the County and Respondents' lawyers to continue the litigation that does not inure to the benefit of the Appellant. Given that County Council has legislative immunity that prevents arbitrary judicial intervention, this case should be terminated by the Court of Appeals.

With all allegations and claims in the Respondents' Complaint directed at the County Council and elected members having been dismissed, there are no remaining claims to litigate. It is counterintuitive to suggest any remaining claims against the approval and adoption of Ordinances 21-24 and 21-25 after dismissal of any and all claims against the County Council and elected members. The Appellant cannot defend against a phantom "fairly read" cause of action that is unstated and without a factual evidentiary basis. See *Complaint pp. 33 - 62.*

Contrary to the statement in the Stipulation of Dismissal, there are no remaining claims to adjudicate. There cannot realistically be any claims against the County since they have been dismissed against the County Council and elected members. The Appellant, who should not be a defendant, has been saddled with an unstated "fairly read" cause of action by the Lower Court

where none exists in the Respondents' Complaint. This Order on Appeal is tantamount to a final judgment against the Appellant from which an appeal will be difficult.

This Interlocutory Order denying the Appellant's motion to dismiss him as a defendant and finding a fairly read unstated cause of action should be reviewed as an abuse of discretion. See *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." See *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008).

In accordance with the plain language of the Uniform Declaratory Judgment Act, Section 15-53-80, the Appellant has an interest and should be named a party in the declaratory action. The presumed intent is to protect the rights of those parties who have a claim or interest to protect but are not defendants. "The determination of legislative intent is a matter of law." See *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 529 (2010) (citation omitted).

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, they must be taken and understood in their plain, ordinary and popular sense. *Media Gen.*, 388 S.C. at 148, 694 S.E.2d at 530. The text of a statute is considered the best evidence of the legislative intent; therefore, the courts are bound to give effect to the expressed intent of the legislature. See *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

Whether the Appellant should be a Defendant and a fairly read and unstated cause of action exists is a question of law. An appellate court may decide questions of law with no particular deference to the trial court. In re *Campbell*, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citation omitted). "When an appeal involves stipulated or undisputed facts, an

appellate court is free to review whether the trial court properly applied the law to those facts." See *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. See *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).

II. RESPONDENTS' LAWYER ADVOCATE/ADVISOR/MEMBER

Standard of Review: This is an adversarial litigation by the Keep It Green organization and its members and associates against the Appellant.

Citation: In Section 1,8(l), S.C. Rules of Professional Conduct, Conflict of Interest, Current Clients, Specific Rules:

> "In any adversarial proceeding, a lawyer shall not serve as both an advocate and an advisor to the hearing officer, trial judge or trier of fact. A lawyer serving as an advocate in a particular matter shall not directly or indirectly engage in an ex parte communication with the hearing officer, trial judge or trier of fact concerning the proceeding." See *Rule 1.8 - Conflict of Interest: Current Clients: Specific Rules, S.C. R. Prof'l. Cond. 1.8(l).*

Discussion: The Respondents' lawyer, a current or former board member and/or president of Keep It Green, Inc, a Respondent in the Complaint. The Respondents, in the compulsory Counterclaim Complaint, are alleged to have engaged in a civil conspiracy against the Appellant. See *Argument XIV, Infra.* The Lower Court judge's clerk, in an email, dated May 25, 2022, requested the Respondents' lawyer to prepare the Order for the motion hearing Judge. The Respondents' lawyer, Cynthia Ranck Person, former chief executive officer and current board member of Keep It Green, Inc., represents the Respondents. In essence, the advocate was solicited to become an advisor to the hearing officer in an adversarial proceeding.

Keep It Green and its members participated in an organized and combined effort to oppose the rezoning of the Appellant's property. After the failure to prevent the approval and adoption of the ordinances, this legal action was filed for judicial intervention to render the

ordinances null and void. See *Complaint pp. 9 – 33*. The Respondents' lawyer as an advocate and was invited to be an advisor by the trier of fact in preparing an Order that conflicted with previous admittances and failed to inform the court of the conflict, to the Appellant's knowledge, when solicited to prepare the Order on Appeal. See *Email p. 1* (May 25, 2022).

The Order, as written by Respondents' lawyer conflicted with her written and transcript statements stating that the Respondents had no claims against the Appellant and his presence was necessitated by the Declaratory Judgment Act. However, the Act does not mandate the designation of the parties as defendants; whereas, Rule 19(a)(2) states that in a proper case the Appellant should be an involuntary plaintiff to protect his interest. Additionally, the Order does not state the findings and directives as provided in the email from the judge's clerk; rather, it repeats of the Respondents' Motion in Opposition and willing concurs that the Appellant is a Defendant with an unspecified cause of action. See *Email p. 1* (Feb. 7, 2022); *Letter p. 1* (Feb. 15, 2022); *Transcript p. 12* (May 19, 2022); *and Email p. 1* (May 25, 2022).

The Order, authored by the Respondents' lawyer, as advocate, advisor, client and Keep It Green member, resulted in the Lower Court applying judicial authority to an adversarial statement of the case. Also, the Stipulation of Dismissal had dismissed any and all claims in the Complaint. This is an adversarial case in which the advocate appears to have assumed the role of advocate and advisor to the trier of fact(s). It is a clear and unambiguous violation of Rule 1.8(l).

III. APPELLANT AND TRUST NAMED AS DEFENDANTS

Standard of Review: The Uniform Declaratory Judgment Act does not compel a party with an interest to be named as a defendant as opposed to a party-in-interest. The intent of S.C. Code Ann. § 15-53-80 is to inform and allow a potentially affected party to protect an interest that might be impacted in a legal action against other defendants.

Citations: S.C. Code Ann. § 15-53-80 states in part that:

> "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."

Discussion: In accordance with Fed.R.Civ.P. 17(a), the trustee, as the legal title holder of the trust's property, is generally the real party-in-interest. Under Federal Rule of Civil Procedure 17(b), the capacity of a trust to sue or be sued is determined by the laws of the state where the court is located. See *Fed.R.Civ.P. 17(a) and* (b). The overwhelming weight of authority holds that a trust, under state law, does not have the capacity to sue or be sued in its own name. *See Coverdell v. Mid–South Farm Equipment Ass'n*, 335 F.2d 9, 12–13 (6th Cir.1964) *and IV Scott, Trusts* § 280 (1989). Also see *Court Docket Case Parties p. 1.*

"An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." See *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008).

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." See *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). "The determination of legislative intent is a matter of law." See *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 148, 694 S.E.2d 525, 529 (2010) (citation omitted). If a statute is ambiguous, the courts must construe its terms. See *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 750 S.E.2d 61 (2013). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." Id. at 128, 750 S.E.2d at 63 (citation omitted).

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." See *Media Gen.*, 388 S.C. at 148, 694 S.E.2d at 530 (quoting *Hodges v.*

Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). "If a statute's 'terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense.'" Id. (citation omitted). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." Id. (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03, at 94 (5th ed. 1992)). "Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id.

The Appellant, the sole trustee of the Appellant's Trust, for all legal purposes is the owner of all assets held. Under Fed.R.Civ.P. 17(a), the trustee, as the legal title holder of the trust's property, is generally the real party in interest with the power to prosecute or defend actions in the name of the trust. Accordingly, the Appellant's Trust should not be designated as a Defendant. In this litigation, the Interlocutory Order leaves the Appellant as a Defendant with an implied cause of action to defend claims specifically filed against the Georgetown County Council and elected members, all of whom have been dismissed from the lawsuit as Defendants.

The Appellant's Motion to Dismiss was predicated on being dismissed as a Defendant and designated as a party-in-interest in accordance with the Uniform Declaratory Judgment Act, Section 15-53-80 or Rule 19(a)(2), SCRCP which states that in a proper case the Appellant should be an involuntary plaintiff. It is an abuse of discretion and a disregard for the plain language of the Uniform Declaratory Judgment Act for the Appellant to remain designated as a Defendant. Maintaining the Appellant as a Defendant, naming the Appellant's Trust as a Defendant and creating a fairly read unstated cause of action against them is an abuse of discretion based upon errors of law and findings that are without factual evidentiary support. See *Order on Appeal pp. 1 – 6; Court Docket p. 1.*

IV. ORDER CONFLICTS WITH LAWYER'S ADMITTANCES

Standard of Review: The Order on Appeal conflicts with written and recorded transcript statements and admittances made by Respondents' lawyer.

Citations: Rule 3.3, S.C. Rules of Professional Conduct, Candor towards the Tribunal and Rule 19(a)(2)(i) states in part:

> "A lawyer shall not knowingly: (a) (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; or (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." (d) "In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." See *Rule 3.3 - Candor toward the Tribunal, S.C. R. Prof'l. Cond. 3.3.*
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> Rule 19(a)(2)(i), SCRCP "if 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." . . . "in a proper case, an involuntary plaintiff."

Discussion: The Lower Court Order that was authored by the Respondent's lawyer and approved by the motion hearing judge. However, the Lower Court Order is inconsistent with the admitted facts and the intent of the Respondents' Complaint for joining the Appellant, which was required by S.C. Code Ann. § 15-53-80 of the Uniform Declaratory Judgment Act, which required he be made a party-in-interest. Pursuant to 19(a)(2), SCRCP, the Appellant should have been joined as an involuntary plaintiff as opposed to a Defendant. There was no wrongdoing by the Appellant stated in the pleadings; therefore, he should not have been named as a Defendant. Absence from the Order on Appeal are the specific guidance, contained in the directions provided to the Respondents' lawyer, from by the judge's clerk. The Lower Court guidance stated that:

> "The Motion to Dismiss is denied. A fair reading of the pleadings establishes a cause of action as against this Defendant. This is based solely on the contents of the pleadings as required by a motion under 12(b)(6). This is not a ruling by the Court as to the viability

or sustainability of the action as against this Defendant. That remains to be decided. Defendant Goff is free to file a Motion for Summary Judgment at any stage, should he believe that is warranted. Attorney Persons, please draft a proposed order based on the above and e-file it to Judge John's attention."

In an email message, dated February 7, 2022, subject, Middleton v. Georgetown County..., the Respondents' lawyer stated:

"We received your Motion to Dismiss and wanted to let you know that we have a potential resolution of your motion if the county is willing to agree. My clients have no specific claims against you, and the only reason you are included as a party is that the Declaratory Judgment Act states that all "parties in interest" must be named. As owner of the land, the trust is arguably a party in interest. If the county is willing to stipulate that you are not a party in interest for purposes of the DJA, and that a decision on the issues would be binding on all parties without having you as a party, we would agree to your dismissal without prejudice."

In a letter, dated February 15, 2022, subject, Middleton v. Georgetown County, 2022-CP-2200-032, the Respondents' lawyer stated:

"My clients have no specific claims against you apart from the fact that the trust owns the real property. You are included as a party because the Declaratory Judgment Act provides that all "parties in interest" must be named. As owner of the land, the trust is a party in interest. If the county is willing to stipulate that a decision on the issues would be binding on all parties without having you named as a party, and if the court agrees, we would be willing to dismiss you without prejudice."

In the Transcript of Record on May 19, 2022, subject, Middleton v. Georgetown County, 2022-CP-2200-032, the Respondents' lawyer stated:

"I certainly – I sympathize with Mr. Goff's position in the sense that I know he feels he didn't do anything wrong, and we don't think that he did something wrong. But it is a declaratory judgment action, and he does own the property that is affected by these ordinances. And so under the Declaratory Judgment Act, he is a necessary party." See Transcript Page 12, Lines 10-15.

Respondents' Complaint does not state any wrongdoing by the Appellant in the procedural approval and adoption of the ordinances. Even though, the Appellant's Trust is not individually listed as a Defendant in the Respondents' Complaint, it has been defined as a Defendant by the Court. The Appellant only submitted an application to rezone an unimproved

parcel of land, Case Number REZ-21-28323, to the Georgetown County Planning Department, provided supporting memorandums of the need, and it resulted in the approval and adoption of the ordinances by the Georgetown County Council.

The application met all requirements and was accepted by the Georgetown Planning Department, recommended for approval by the Planning Commission and adopted into ordinances by the County Council. Consequently, the Order on Appeal, as crafted by the Respondents' lawyer and approved by the Lower Court, does not reflect the case facts and admittances made in the written statements to the Appellant and the transcript in court. In accordance with Rule 19(a)(2)(i), SCRCP, the Appellant should be an involuntary plaintiff.

Whereas, the Uniform Declaratory Judgment Act mandates that 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." Consequently, the Appellant should have been designated and as involuntary plaintiff or party-in-interest. The Appellant's motion was misconstrued as a motion to dismiss the Complaint as opposed to dismissing him as a defendant and redesignating him as a party-in-interest or involuntary plaintiff. This was clearly understood and expressed by the Respondents' lawyer. See *Email p. 1 (Feb 7, 2022); and Letter p.1 (Feb 15, 2022).*

It is disingenuous and a violation of professional conduct for the Respondents' lawyer to prepare an Order that defines the Appellant as a Defendant when the lawyer has stated otherwise in written communications. The Lower Court should have dismissed the Respondents' Complaint in its entirety as opposed to implying a cause of action against the Appellant to prolong this case. The unwillingness the Lower Court to redesignate the Appellant as an

involuntary plaintiff or party-in-interest violated the constitutional privilege of rezoning private property by owners without the threat of becoming an unaccused defendant.

Any and all averments by the Appellant to dismiss the Complaint in its entirety were based on the lack of standing, a justiciable controversy and to protect his interest as a required party who was likely to be substantially harm by the litigation. In that any and all claims have been dismissed against the County Council and elected members, the Order on Appeal has targeted the Appellant with an unspecified cause of action. Having dismissed the County Council and elected members, the Respondents' lawyer, as the author, has disingenuously used the Order to support their Complaint and redirect the litigation towards the Appellant as a Defendant with an implied, unstated and unsupported cause of action. Absence the County Council and elected members, there are no remaining claims or defendants other than the Appellant.

V. NO FACTS FOR A CAUSE OF ACTION AGAINST APPELLANT

Standard of Review: As required under Rule 12(b)(6), the complaint does not state any cause of action against the Appellant or any facts that can be construed as a cause of action against the Appellant and the Respondents' lawyer admitted in written statements and the transcript that her clients have no claims against the Appellant.

Citations: The Appellate Court may review questions of law and abuse of discretion.

> Rule 12(b)(6), SCRCP states as a defense, in law or fact to a cause of action: "failure to state facts sufficient to constitute a cause of action" should dismiss a complaint.
>
> "An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008).
>
> "Upon review of an action in equity, this Court may make factual findings based on its own view of the preponderance of the evidence." See *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 120-21, 603 S.E.2d 905, 907 (2004). "Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. See *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

Discussion: A motion to dismiss should be granted under Rule 12(b)(6) when the complaint fails to state facts sufficient to constitute a cause of action. The court need not adopt a party's legal conclusions based on those alleged facts. See *DeBerry v. McCain*, 275 S.C. 569, 274 S.E.2d 293, 296 (1981); *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 635, 699 S.E.2d 699, 705 (Ct. App. 2010); *Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E. 2d 362, 364-65 (Ct. App. 2001). An allegation of a mere legal conclusion is insufficient to state a cause of action. See *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (1986); *Smith v. Ashmore*, 184 S.C. 316, 192 S.E. 565 (1937).

Nowhere, in the Respondents' Complaint is there any allegations of wrongdoing by the Appellant. The Respondents' lawyer has stated in an email message, letter and the transcript that her clients have no specific claims against the Appellant. "The only reason you are included as a party is that the Declaratory Judgment Act states that all "parties in interest" must be named." However, arbitrarily and capriciously, the Appellant was named as a Defendant in the Summons and Complaint, Court Docket and Order on Appeal. It is inconceivable that a "fair reading" of the Respondents' Complaint would conclude that a cause of action exists against the Appellant. With the previous admittances of no claims against the Appellant, the motion decision and Order by the Lower Court contradicts the reality, admitted facts and evidence in the case.

The Appellant only submitted an application to rezone an unimproved parcel of land, Case Number REZ-21-28323, to the Georgetown County Planning Department and it resulted in the approval and adoption of the ordinances by the Georgetown County Council. The application met all requirements and was accepted by the Planning Department, recommended for approval by the Planning Commission and adopted into ordinances by the Georgetown County Council.

In deciding a motion to dismiss, all pleadings are to be construed in a light most favorable to the plaintiff; however, in this instant complaint, the alleged facts by the Respondents are speculative conclusions and contrived evidentiary facts. The Respondents' Complaint does not state any facts that constitutes a cause of action against the Appellant as required by 12(b)(6), SCRCP. All allegations of wrongdoing in the Respondents' Complaint are directed at the Georgetown County Council and elected Council members along with a request to nullify and void the Ordinances 21-24 and 21-25. Having stipulated to dismiss all claims against the County Council and elected members, the Appellant has been left as a party regardless of designation. On April 11, 2022, the lawyer for the County Council and elected members filed a Motion to Dismiss the Complaint based on legislative immunity relating to the enacting the challenged ordinances and the lack of power of the court to compel the County Council to take legislative action with respect to the challenged ordinances. See *County's Motion to Dismiss pp. 1 – 2.*

A Letter to Court, dated May 4, 2022, implied an agreement between the lawyers resulted in a Stipulation of Dismissal, filed of May 5, 2022, to dismiss the all claims against the County Council and elected members from the Respondents' Complaint. With the real Defendants exonerated and protected by legislative immunity, this left the Appellant as the sole Defendant in a legal action in which he did nothing wrong. Absent the claims against the County Council, the Complaint is void. The Lower Court rejected the Respondents' lawyer transcript statement of no claims against Appellant. With the dismissal of the County Council and elected members, the Respondents should not be allowed to continue this litigation against the Appellant for exercising a constitutional right to petition for rezoning of private property. See *Transcript p. 12.*

A patently false and disingenuous statement in the Respondents' Complaint, Paragraph 33 states: "The zoning change application form states that "the burden of proving the need for

the proposed amendment rests with the applicant;" however, no "need" for the proposed amendment is set forth on the completed application form or otherwise." This only statement of implication cannot credibly be seen as a "fairly read" cause of action against the Appellant. With regard to "need" the Proposed Zoning Amendment application states: "It is understood by the undersigned that while this application will be carefully reviewed and considered, the burden of proving the need for the proposed amendment rests with the applicant." There was no requirement to provide a "need" justification in or along with the application. As understood by all applicants, the burden of proving the "need" to the approving authorities is the sole responsibility of the applicant during the required public readings. See *Answer pp. 4 – 5.*

The Appellant submitted supporting letters to the Planning Department, Planning Commission and the County Council members in advance of each reading on the ordinances. The letters outlined the compatibility of the rezoning request with the current and future proposed Comprehensive Land Use Plan as required by the S.C. Comprehensive Planning Enabling Act. The ordinances were approved and adopted because the rezoning request was in concert with the goals and objectives of Planning Department, Planning Commission, the County Council and the County's Future Land Use Map. The Appellant had the right and responsibility to support the approval and adoption of the ordinances as did the Respondents to oppose them within the bounds of civil discourse. Having loss at the County Council, the Respondents sought judicial intervention to void and nullify the ordinances based on false statements. See *Letters, Jul 15, 2021 pp. 1 - 2; Aug 4, 2021 pp. 1 – 4; Aug 24, 2021 pp. 1 - 3; and Oct 26, 2021 pp. 1 - 3.*

Other than as property owners exercising a constitutional right to rezone private property in accordance with the County rules, the Respondents' Complaint did not state any facts that constitutes a cause of action against the Appellant. The Appellant should not be accountable for

the action of the Georgetown County Council, an elected legislative body having legislative immunity against judicial intervention into properly adopted ordinances. The Complaint is devoid of facts supporting a claim against Appellant and/or the County Council. Through the Stipulation of Dismissal, the Respondents have conceded to dismiss any and all claims and that the court cannot provide judicial relief because the County Council has legislative immunity with regard to the passage of the challenged ordinances. In the interest of justice, this Complaint should be dismissed in its entirety and any future litigation against Georgetown County exclude any effort to nullify the Ordinances 21-24 and 21-25.

VI. LEGISLATIVE IMMUNITY VOIDS COMPLAINT

Standard of Review: The Lower Court accepted a Stipulation of Dismissal that allowed the Georgetown County Council and elected members to be dismissed from the complaint based on legislative immunity and lack of judicial power to render relief.

Citations: Pursuant to Rule 41(b), Involuntary Dismissal: Non-suit: The complaint should be dismissed, as requested, for failure to prosecute and comply with the stated rule.

> In a case decided by the S.C. Supreme Court, owners of property adjacent to rezoned land challenged the rezoning ordinance, arguing it conflicted with the local Zoning Land Development Regulations (ZLDR). See *Mikell v. County of Charleston*, 375 S.C. 552, 654 S.E.2d 92 (Ct. App. 2007), petition for cert. filed (S.C. January 24, 2008). The court specifically held that the zoning regulations and S.C. Code Ann. § 6-29-740 provide "County Council with final decision-making authority in rezoning actions. Id. at 560, 654 S.E.2d at 96-97. As noted in Mikell, "there is nothing to suggest that County Council cannot change an ordinance that it created." Id. at 561, 654 S.E.2d at 97.
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> With regards to legislative immunity, the Courts have opined in multiple cases: South Carolina recognizes the longstanding doctrine of legislative immunity for legislators carrying on their legislative duties. See *Richardson v. McGill*, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (holding a legislator was absolutely immune from liability for comments made during the performance of his legislative duties). Legislative immunity protects legislators from "deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good." See *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). The public good is undermined by any restriction placed on a

legislator's ability to exercise legislative discretion, including the fear of personal liability. See *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1998).

Discussion: Although few South Carolina cases discuss legislative immunity, the Supreme Court has addressed similar public policy considerations for immunity for other types of public officials carrying out their official duties. See *Williams v. Condon*, 347 S.C. 227, 242-43, 553 S.E.2d 496, 505 (Ct. App. 2001) (noting qualifying a prosecutor's immunity would "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" (quoting *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976).

Specifically, the South Carolina Supreme Court stated that: "The governing bodies of municipalities clothed with authority to determine residential and industrial districts are better qualified by their knowledge of the situation to act upon such matters than are the Courts, and they will not be interfered with . . . unless there is plain violation of the constitutional rights of citizens. There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and where the Planning and Zoning Commission and the city council of a municipality has acted after considering all the facts, the Court should not disturb the finding unless such action is arbitrary, unreasonable, or in obvious abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority.

Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations." See *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) (citation omitted).

S.C. Supreme Court: "The County Council's decision was not arbitrary or capricious, as required by the applicable scope of review. See *Bear Enters. v. County of Greenville*, 319 S.C. 137, 141-42, 459 S.E.2d 883, 886 (Ct. App. 1995) (stating the reviewing court will focus on whether the municipal zoning authority's decision was arbitrary or capricious). County Council reviewed the Planning Department report and the Planning Commission recommendation and minutes and received a public briefing, with questions and answers, for the second and third readings. Accordingly, County Council's decision was neither arbitrary nor capricious."

With respect to judicial review of zoning ordinances, the S.C. Supreme Court has noted that there is a strong presumption in favor of validity of municipal zoning ordinances and validity of their application. See *Bob Jones University, Inc. v. City of Greenville*, 243 S.C. 351, 133 S.E.2d 843 (1963). The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent upon the party attacking it to show through clear and convincing evidence the arbitrary and capricious nature of the ordinance. See *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1992). The Court has concluded that the action of a municipality regarding the rezoning of property will not be overturned by a court as long as the decision is "fairly debatable". See *Rushing v. City of Greenville*, 265 S.C. 285, 217 S.E.2d 797 (1975).

The S.C. Supreme Court has cautioned that, "[i]t is not the role of the courts to substitute their judgment for that of local legislative bodies, which are better qualified to act upon local zoning matters." See *Smith v. Georgetown County Council*, 292 S.C. 235, 355 S.E.2d 864 (Ct.App.1987). Id. 355 S.E.2d at 866. The record in this case contains such evidence as to preclude finding that the zoning ordinances are arbitrary and capricious.

A Land Use Plan prepared by the Planning Commission has no power to zone property. The plan does not establish the zoning for the property, nor does it mandate the County Council to abide by the plan. It merely provides a general direction for considering future rezoning, which is a legislative process. See *Hampton v. Richland County*, 292 S.C. 500, 357 S.E.2d 463 (Ct.App.1987) (an ordinance rezoning a particular piece of property, like an ordinance adopting a comprehensive zoning plan, is legislative, and as such, presumptively valid because it is not the court's prerogative to pass upon the wisdom of the municipality's decision).

The lawyer for Georgetown County and County Council filed a Motion to Dismiss the Plaintiffs' Complaint citing case laws that clothed the County Council with legislative immunity relating to enacting the challenged ordinances. Subsequent to the scheduled court hearing, the lawyers agreed to a Stipulation of Dismissal to dismiss the claims against the County Council and elected members as Defendants in the case. This was an affirmation by the Respondents that the approved and adopted ordinances were valid and beyond judicial intervention. The County Council and elected members' Motion to Dismiss was scheduled in the Court Roster for May 19, 2022, but was not heard by the Lower Court.

As stated in the Motion to Dismiss for Georgetown, et al, "Ordinances 21-24 and 21-25 were enacted within legitimate legislative activity by the County Council and are legislatively immune and not subject to judicial review." See *S.C. Pub. Int. Found. v Courson*, 420 S.C. 120, 125, 801 S.E.2d 185, 187 (Ct. App. 2017). Courts lack the power to compel a legislative body to take legislative action with respect to a challenged ordinance. See *Foster v. Taylor*, 210 S.C. 324, 333, 42 S.E.2d. 531, 536 (1947) ("The court will, of course, not attempt to compel the legislature by mandamas to perform a legislative duty or function.")".

Accordingly, the Respondents' Complaint which contested the approval and adoption of Ordinances 21-24 and 21-25 is not viable. In that courts lack the power to compel a legislative body to take legislative action with respect to a challenged ordinance, no relief, if any, is available to the Respondents in this litigation. Consequently, the Respondents' challenge to the County Council's approval and adoption of Ordinance 21-24 and Ordinance 21-25, enacted on October 26, 2021 and codified on November 9, 2021 is barred by doctrines of legislative authority and judicial lack of power to compel a legislative body.

VII. COUNTY COUNCIL'S MOTION TO DISMISS NOT HEARD

Standard of Review: Georgetown County filed a Rule 12(b)(6) Motion to Dismiss the Complaint in its entirety that was scheduled and not heard by the Lower Court; thereby, preventing a fair and necessary adjudication that should have ended the litigation and denying the Appellant procedural due process under the Fourteenth Amendment.

> **Citation:** In not hearing the County's Motion to Dismiss, the Appellant's constitutional rights were abridged:
>
> The U.S. Const. amend. XIV: Procedural due process, based on principles of fundamental fairness, that addresses which legal procedures are required to be followed in state proceedings. Relevant issues, include notice, opportunity for hearing and basis of decision.

Discussion: The County's Motion to Dismiss the Respondents' complaint in its entirety was scheduled for a hearing on May 19, 2022 and the Court Docket does not reflect that it was withdrawn by motion. Presumably, the County's motion was resolved by the Stipulation of Dismissal between the County's and Respondents' lawyers. As stated in County's Rule 12(b)(6), SCRCP Motion to Dismiss, a complaint should be dismissed for the "failure to state facts sufficient to constitute a cause of action. *See County Motion to Dismiss p. 1 - 2 (April 11, 2022).*

The County's lawyer sent and filed a letter to the Honorable Judge Benjamin H. Culbertson on May 4, 2022 stating that the parties have reached a resolution on the County Council's Rule 12(b)(6), SCRCP Motion to Dismiss that was filed on April 11, 2022. The Appellant was not a part of the discussion or agreement and was not served with the filings as required by Rule 5(a), SCRCP.

In lieu of proceeding with the Motion to Dismiss, the County and Respondents' lawyers apparently agreed in the Stipulation of Dismissal to dismiss any and all claims against the County Council and elected members and stated that they are not necessary parties under S.C. Code Ann. § 15-53-80 of the Uniform Declaratory Judgment Act. The Stipulation of Dismissal, which effectively removed the County Council and elected members as Defendants should not have prevented the Lower Court from hearing and ruling on the County Council's Motion to Dismiss. In essence, by not hearing the motion, the Appellant was denied due process and equal protection and has incurred a substantial risk of irreparable injury and harm.

The motion stated that the County Council and elected members had legislative immunity as it relates to enacting the challenged ordinances since they were in the sphere of legitimate legislative activity. Additionally, it stated that no relief was possible in that courts lack the power to compel a legislative body to take legislative action with respect to a challenged ordinance. Settled case laws were cited to support both grounds for dismissal of the Respondents' Complaint in its entirety. Absence, a hearing and oral argument, the Appellant was denied his constitutional rights to due process of the law as required by the Fourteenth Amendment.

In the so-called resolution of the County's Motion to Dismiss and the agreed Stipulation of Dismissal, the County and Respondents dismissed without prejudice any and all claims against the Georgetown County Council and elected members. All of the allegations in the

Respondents' Complaint were directed at the County Council for approving and adopting the challenged ordinances. Having dismissed all claims against the County Council, the Respondents' Complaint became futile and moot. Therefore, neither the Appellant nor the County should continue as defendants in this action. The Appellant was joined under Section 15-53-80 of UDJA. Although, the County as a legal entity can sue and be sued, it was not the individual actor in the litigation as opposed to the County Council and elected members. There was an apparent tacit agreement to avoid the hearing on the Motion to Dismiss that had a high probability of being granted to allow purported and non-existent constitutional claims in continuation of the Respondents' Complaint to void and nullify the Appellant's ordinances.

The S.C. Supreme Court has opined that county ordinances are not challengeable unless they are arbitrary and capricious. Additionally, the appellate courts have stated that controversies that are "fairly debatable" are not ripe for judicial intervention. With regard to the ordinances, the Respondents' Complaint alleges a violation of the County Council Rules of Procedure and those allegations are fairly debatable. See *Argument XIII, Infra.*

In lieu of challenging the County's Motion to Dismiss, the Respondents agreed to a resolution to dismiss any and all claims against the County Council and elected members. Whereas, a hearing and ruling on the motion would have, more likely than not, ended the Complaint in its entirety. With regard to the ordinances, the Respondents' Complaint did not allege or specify any constitutional issues, but rather an administrative violation of the County Council Rules of Procedure. The Lower Court, in not hearing and ruling on the County Council's Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP failed to consider if a cause of action existed for constitutional issues. The statement that the Respondents seek to challenge the constitutionality of the ordinances in the County's Motion to Dismiss is an unsupported

statement that allows another pathway to nullify the ordinances; thereby, implying that constitutional violations only occurred with the Appellant ordinances as opposed to those approved and adoption concurrently, before and after. If heard and ruled on by the Lower Court, the County lawyer's Motion to Dismiss should have resulted in the dismissal of the Complaint in its entirety based on the doctrine of legislative immunity that deters judicial intervention.

VIII. COUNTY'S AND RESPONDENTS' STIPULATION OF DISMISSAL

Standard of Review: The Appellant was not a party to the agreement or informed regarding the Respondents and County Council lawyers' Stipulation of Dismissal and was not requested to sign the Stipulation of Dismissal at any time.

> **Citation:** Rule 41(a)(B), SCRCP states in part: An action may be dismissed - (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action.
>
> Rule 41(b), SCRCP states in part: Involuntary Dismissal: Non-suit, Effect Thereof; For failure of the plaintiff to prosecute and comply with these rules.

Discussion: A Stipulation of Dismissal pursuant to Rule 41, SCRCP between the County Council's .and Plaintiffs' lawyer was filed on May 5, 2022, states that "The parties hereby stipulated, pursuant to Rule 41, SCRCP, to the dismissal, without prejudice, of any and all claims against Defendants Georgetown County Council, Louis Morant, Lillie Jean Johnson, Raymond Newton, Steve Goggans, Everett Carolina, John Thomas and Bob Anderson, in their capacities as elected members of the Georgetown County Council, in the above-captioned matter. This dismissal has no effect on the remaining claims or defendants. The parties further stipulate that the dismissed parties are not necessary parties under Section 15-53-80 of the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. § 15-53-10, et. Seq."

The Respondents' lawyer and the lawyer for Georgetown County and County Council agreed to the dismissal of any and all claims without prejudice against the "Georgetown County Council and elected Council members Defendants based on legislative immunity that prevented judicial intervention to grant relief. With all allegations and claims in the Respondents' Complaint directed at the County Council and elected members, there are no remaining claims to litigate against the County or the Appellant. See *Stipulation of Dismissal p. 1 – 2* (May 5, 2022).

The Stipulation of Dismissal appeared predicated on Georgetown County and Respondents continuing the Complaint without the County Council and elected members to further litigate the purported constitutionality of the ordinances as implied in the County lawyer's Motion to Dismiss. With the Stipulation of Dismissal, the County lawyer's Motion to Dismiss was scheduled but not heard on May 19, 2022. In that the County and Appellant had filed their Answers to the Complaint, pursuant to Rule 41(a)(B), SCRCP the Stipulation of Dismissal was required to be signed by all parties.

The Respondents' lawyer conceded to settled case laws on legislative immunity of County Councils and the Court's lack of power to intercede. The Stipulation of Dismissal between the Respondents' lawyer and the County Council's lawyer, submitted to the Court on May 5, 2022, essentially voided the Respondents' Complaint in accordance with settled case laws. This was an admittance of the lack of a justiciable controversy pursuant to S.C. Code Ann. § 15-53-70 and the futility of any and all claims to void and nullify the challenged ordinances. The Respondents effectively accepted the unquestioned validity of the ordinances and in fact, the futility of Complaint. It was exculpatory with respect to Appellant and ordinances.

The dismissal of the Georgetown County Council and elected members, at whom the allegations in the Complaint are directed, voided all allegations of procedural violations and

protects the validity of the Ordinances 21-24 and 21-25. Also, the Respondents have dismissed any and all claims against County Council and elected members and there are no remaining claims. This was tantamount to voiding all allegations regarding the approval and adoption of the ordinances; thereby, ending the Respondents' Complaint in its entirety. With the acceptance of the Stipulation of Dismissal, there are no remaining claims to prosecute; therefore, pursuant to Rule 41(b), SCRCP it should have been involuntarily dismissed as a non-suit in the Lower Court.

IX. NO CONSTITUTIONAL ISSUES INVOLVING ORDINANCES

Standard of Review: There are no allegations or claims in the complaint or statements in the affidavits or pleadings that the Respondents were deprived of property, due process of law or any constitutional rights of the United States or South Carolina.

Citations: S.C. Code Ann. § 15-53-80, Parties, states in part:

> "If the statute, ordinance or franchise is alleged to be unconstitutional the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard."

> "[E]very presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." See *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 154, 705 S.E.2d 53, 54, 55 (2011). "[T]he power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations." See *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965).

Discussion: S.C. Code Ann. § 15-53-80 of the Uniform Declaratory Judgment Act requires service on the Attorney General if an ordinance alleged to be unconstitutional. No such service occurred because the allegations against the County Council involved only administrative violations of County Council Rules of Procedure related to the passage of the ordinances.

A municipal ordinance is a legislative enactment and is presumed to be constitutional. See *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 504 S.E.2d 112 (1998). The burden of proving

the invalidity of a zoning ordinance is on the party attacking it and it is incumbent on the attacking party to show the arbitrary and capricious character of the ordinance through clear and convincing evidence. Id.; see also *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 230, 489 S.E.2d 630 (1997) (a strong presumption exists in favor of the validity and application of zoning ordinances). "Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights." See *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991).

"There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application, and when the planning commission and the city council of a municipality have acted after reviewing all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or in clear abuse of its discretion, or unless it has acted illegally and in excess of its lawfully delegated authority." See *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963).

There were no alleged violations of the South Carolina Constitution, deprivation of property or due process of law, regarding the approval and adoption of the Ordinances 21-24 and 21-25. In that Georgetown County remains a Defendant, a statement in the filed Motion to Dismiss that County is the proper party to challenge the constitutionality of a county ordinance suggests further litigation on constitutionality. The Respondents' Complaint did not allege deprivation of property or due process law violations or any challenge to the constitutionality of the ordinances. See *Complaint pp. 26 – 33; and Transcript pp. 1 - 17.*

X. INSUFFICIENCY OF SERVICE OF SUMMONS/COMPLAINT

Standard of Review: The Respondents had the proper mailing and physical address of the Appellant and failed to properly or timely served the Summons and Complaint as

prescribed by Rule 4(a), SCRCP or file proof of service as required by Rule 5(d), SCRCP; therefore, an insufficiency of service of process in violation of Rule 12(b)(5), SCRCP.

Citations: The service of a Summons and Complaint must adhere to the following rules:

> Rule 4(a), SCRCP Summons: Issuance, states in part that "Copies of the original summons shall be served upon each defendant"; Rule 12(b)5, states: Insufficiency of service of process; and Rule 5(d), SCRCP: Filing, states in part that "The summons and complaint shall be filed before service. Proof of service shall be filed within ten (10) days after service of the summons and complaint. Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court's own initiative or upon application of any party.
>
> Rule 4(d), Personal Service, states in part that "Voluntary appearance by defendant is equivalent to personal service".

Discussion: Specifically, the Respondents' lawyer failed to serve the process as required under Rule 4(a), SCRCP, failed Rule 12(b)(5), SCRCP and to file proof of service under Rule 5(d), SCRCP after filing the Summons and Complaint on January 7, 2022. Despite having the Appellant's address in the Complaint, a traditional service through a Sheriff or Constable was not attempted. The Appellant appeared voluntarily with the filing of a Motion to Dismiss him as a Defendant in the Respondents' Complaint on January 25, 2022. The Respondents' lawyer wanted the Appellant to file an "Acceptance of Service" that would negate the requirements for proof of service. Failing that, the Respondents' lawyer involved the South Carolina Secretary of State's Office to solve that problem. The County Council and elected members who were served on January 7, 2022 filed their individual "Acceptance of Service" on February 25, 2022.

Although, a non-resident trustee, the name and address of the Appellant was known to the Respondents' lawyer through the public records in Georgetown County and stated in the Complaint. Additionally, the Respondents and their lawyer were aware of the address in the Motion to Dismiss and the rezoning application. Consequently, the failure to properly serve the

Summons and Complaint on the Appellant amounted to gross negligence or deliberate intent along with naming the Appellant as a Defendant in the litigation. See *Complaint, p. 7.*

The Appellant did not receive any service of filings from the County's lawyer and none from the Respondents' lawyer, with exception of the belatedly served Summons and Complaint. The Appellant has obtained access to the filed documents from the Public Index. Neither the County nor Respondents' lawyers have complied with Rule 5(a), SCRCP with regards to serving of filed papers on the Appellant, including the Order on Appeal. See *Court Docket pp. 1 – 5.*

XI. RSPONDENTS LACKS STANDING

Standard of Review: Standing requires an injury-in-fact which is an invasion of a legally protected interest, concrete and particularized and actual or imminent and direct.

> **Citations:** "A plaintiff has standing to challenge legislation when he sustained, or is in immediate danger of sustaining, actual prejudice or injury from the legislative 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." See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351, 364 (1992).
>
> The courts have explained ripeness by defining what is not ripe, stating "an issue that is contingent, hypothetical, or abstract is not ripe for judicial review." See *Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty.*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).

Discussion: When an organization sues in its representative capacity on behalf of its constituent members ("associational standing"), it must be shown that its members have standing to sue in their own right. See *Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 359, 713 S.E.2d 287, 292 (2011). Specifically, South Carolina has adopted the United States Supreme Court's test in *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333 (1977) to determine when an organization can sue on behalf of its members under the Hunt test:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect

> are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

See *Hunt,* 432 U.S. at 343; see also *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 551 S.E.2d 588, 589 (Ct. App. 2001); See *Georgetown Cty.*, 713 S.E.2d at 292 (citing *Hunt*). "To satisfy the third prong of this test, the organization must show that the right it seeks to vindicate is common to the membership and the interest of the harmed members in the proceedings derives from their membership." See *Georgetown Cty.*, 713 S.E.2d at 293.

In *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001), the state supreme court adopted the "stringent standing test" applied by the United States Supreme Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992) for determining constitutional standing. Under that test, an organization seeking redress for an injury to the organization itself (so-called "individual standing") must carry the burden of demonstrating each of the following three elements: (1) 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." (2) There must be a causal connection between the injury and conduct complained of—the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." (3) It must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id. at 601, 550 S.E.2d at 291 (quoting Lujan).* "In order for the injury to be 'particularized,' it must affect the plaintiff in a personal and individual way." *Id. at 602, 550 S.E.2d at 292 (quoting Lujan).* Merely alleging an injury that all members of the public suffer from fails to establish the first prong requiring an individualized injury. See *Carnival Corp. v. Historic Ansonborough Neighborhood Association,* 407 S.C. 67, 77, 753 S.E.2d 846, 851 (2014).

In their affidavits, the Respondents state that they were supposedly monetarily and retroactively injured by the unanticipated rezoning of the Appellant's property since they paid a premium for their neighboring and adjacent lots. Respondents fail to allege a concrete, particularized, actual or imminent injury to themselves but merely assert generalized grievances, against the Georgetown County Planning Department, Planning Commission, and County Council, supposedly suffered by the public as a whole, which are insufficient to establish standing. See Carnival, 407 S.C. at 76, 753 S.E.2d at 851 ("Plaintiffs fail to allege a particularized injury either to themselves or their members. Rather, they assert only generalized grievances suffered by the public as a whole which are insufficient to establish standing.").

In general, a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or there is an immediate danger that a direct injury will be sustained. See *Bodman v. State*, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013). Under the public importance exception, standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." See *Baird v. Charleston Cty.,* 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). Therefore, it is insufficient for a Respondents to simply state that the case involves a matter of public importance. See *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008); *Bodman*, 403 S.C. at 68, 742 S.E.2d at 366.

To establish standing against the Appellant, the Respondents would have to provide proof that they have (1) Suffered an "injury in fact" resulting from an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) Should have to show a causal connection between the injury and the conduct complained of and that the injury, if any, is connected to the challenged action of the Appellant and not the result of an independent action of the County Council; and (3) Should have proof that

it is likely as opposed to merely speculative that a declaratory judgment will terminate the controversy. See *Complaint Affidavits pp. 36 - 62.*

The Respondents, who are neighboring adjacent property owners, state that they have statutory standing under S.C. Code Ann. § 6-29-760(C) of the South Carolina Comprehensive Planning Enabling Act. However, none of the Respondents who have demonstrated a concrete, particularized, actual or imminent injury-in-fact from the adopted ordinances to warrant standing-to-sue. They have not provided any evidence of payment that the so-called paid premiums, if any, were due to neighboring zoning status only or other marketing factors.

Statutory standing requires an injury-in-fact which is an invasion of a legally protected interest, concrete and particularized and actual or imminent. The adjacent Colony subdivision Respondents questionable injury-in-fact does not meet the necessary legal burden or the requirements for standing to sustain this lawsuit against the Appellant and/or the County Council and its elected members. See *Complaint pp. 36 - 62.*

XII. COMPLAINT LACKS A JUSTICIABLE CONTROVERSY

Standard of Review: The Uniform Declaratory Judgment Act requires a justiciable controversy; whereas, the Respondents arbitrarily claim without stating a factual basis or citing evidence that the ordinances did not pass and that the County Council violated the Comprehensive Plan, County Rules of Procedure and the Freedom of Information Act.

Citations: The Uniform Declaratory Judgment Act and case law states:

> S.C. Code Ann. § 15-53-70 "Declaratory judgment may be refused. The court may refuse to render or enter a declaratory judgment or decree when such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."
>
> The fact that Respondents brought its lawsuit under the SCDJA does not by itself confer standing as that act is remedial in nature. See *Bodman*, 403 S.C. at 67 & n.1, 742 S.E.2d at 366 & n.1; see also *Carolina All. for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999) (parties cannot by

consent or agreement confer jurisdiction on the court to render a declaratory judgment in the absence of an actual justiciable controversy.)

Discussion: S.C. Const. art. I, § 3, provides that no person shall be deprived of property without due process of law. As required for declaratory lawsuits, the Appellant has not denied the legal character or right to property of the Respondents. The Respondents' Complaint simply asserted that they have statutory standing without a justiciable controversy or injury-in-fact to bring this action due to the County Council's approval of Appellant's ordinances which is alleged to be a matter of wide concern and public importance.

The courts will not address the merits of any case unless it presents a justiciable controversy. See *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430-31, 468 S.E.2d 861, 864 (1996). In Byrd, the Court stated, "Before any action can be maintained, there must exist a justiciable controversy," and, "This Court will not . . . make an adjudication where there remains no actual controversy." See Id.; see also *Peoples Fed. Sav. & Loan Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 477, 596 S.E.2d 51, 60 (2004) ("A threshold inquiry for any court is a determination of justiciability, i.e., whether the litigation presents an active case or controversy."). "Justiciability encompasses . . . ripeness . . . and standing." See *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). Standing is "a personal stake in the subject matter of the lawsuit." See *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001).

The Uniform Declaratory Judgment Act (UDJA) "is remedial and procedural in nature and does not create substantive rights or duties." See *Felts v. Richland County*, 299 S.C. 214, 383 S.E.2d 261, 262-63 (Ct. App. 1989). For a party to state a claim under the act, a justiciable controversy must be demonstrated. See *Graham v. See State Farm Mutual Automobile Ins. Co.*, 319 S.C. 69, 459 S.E.2d 844, 845-46 (1995); See *Orr v. Clyburn*, 277 S.C. 536, 290 S.E.2d 804,

807 (1982). A justiciable controversy is "a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." See *Pee Dee Elec. Coop v. Carolina Power & Light Co.*, 279 S.C. 764, 301 S.E.2d 761, 761 (1983).

The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. See *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002). "To determine if plaintiff has a justiciable controversy, standing must be assessed at the time the action is commenced, not at some later point." See *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018). "To have standing, one must have a personal stake in the subject matter of the lawsuit; i.e., one must be the 'real party in interest.'" See *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424, 427 (1996) ("Plaintiffs have not been deprived of property or sustained any injury to same").

"Appellant has not been deprived of due process of law because he was not deprived of his property due to the adoption of the Plan, nor due to the manner of the Plan's adoption. Appellant's claim in this regard is not justiciable because it is not ripe for review." See *Waters v. South Carolina Land Resources Conservation Comm'n*, 321 S.C. 219, 467 S.E.2d 913 and *McClanahan v. Richland County*, 350 S.C. 433, 567 S.E.2d 240 (Ct. App. 2002).

XIII. THIRD READING ALLEGATIONS ARE FAIRLY DEBATABLE

Standard of Review: The allegations in the Complaint regarding the approval and adoption of Ordinances 21-24 and 21-25 are without merit and fairly debatable.

> **Citations:** The S.C. Supreme Court has stated that, "[w]e cannot insinuate our judgment into a review of the City Council's decision, but must leave that decision undisturbed if the propriety of that decision is even fairly debatable." See *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) (citation omitted) and *Lenardis v. City of Greenville*, 316 S.C. 471, 472, 450 S.E.2d 597, 598 (Ct. App. 1994).

Accordingly, the SC Supreme Court will not overturn the action of [county council] if the decision is fairly debatable because the County Council's action is presumed to have been a valid exercise of power and it is not the prerogative of the Court to pass upon the wisdom of the decision. See *Rushing v. City of Greenville*, 265 S.C. 285, 288, 217 S.E.2d 797, 799 (1975); *Lenardis v. City of Greenville*, 316 S.C. 471, 472, 450 S.E.2d 597, 598 (Ct.App.1994).

The SC Courts have determined in multiple cases that: The SC Supreme Court has stated that: "We have long recognized the principal that the power to zone is exclusively for the legislature and that zoning decisions will not be interfered with when made in the exercise of the governing body's police power to accomplish the desired end unless there is a plain violation of the citizens" constitutional rights." See *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991) (internal citations omitted). "Rezoning is a legislative matter, and the court has no power to zone property." See *Bear Enters, v. County of Greenville*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct.App.1995). "The decision of the legislative body is presumptively valid, and the property owner has the burden of proving otherwise."

S.C. Code Ann. Section 4-9-120 does not require county council to make specific findings that amendment of ordinance is in the public interest. See *Smith v. Georgetown County Council*, 292 S.C. 235, 355 S.E.2d 864 (Ct. App. 1987).

The court recognizes that a holistic reading of the Enabling Act indicates its purpose is to provide the flexibility and ability for a local governing authority to make local decisions regarding zoning. See S.C. Code Ann. §§ 6-29-720(C) & 740 (Supp. 2007); *Dunbar v. City of Spartanburg*, 266 S.C. 113, 119, 221 S.E.2d 848, 850 (1976) (noting a predecessor to the Enabling Act of 1994 was broad in its scope and gave municipalities much authority in the field of zoning). A reviewing court should practice judicial restraint and not supplant its judgment for the local governing authority's judgment.

Discussion: The South Carolina Association of Counties Model Rules of Parliamentary Procedure for South Carolina Counties states as follows:

Model Rule 2, Applicability Deviation from Rules, states "These Rules shall apply to all meetings of county council, including committee meetings. As used in these Rules, the term "Meeting" means the convening of a quorum of the membership of county council to discuss or act upon a matter over which county council has supervision, control, jurisdiction or advisory power; the term "Quorum" means a simple majority of the membership of county council, or committee of county council. These Rules were adopted as guidelines to assist county council, in conducting orderly and productive meetings. Any deviation from or waiver of these Rules shall not affect or void any action taken by county council. Furthermore, such deviation or waiver does not convey any right or cause of action to third parties not otherwise imposed by law."

Model Rule 3, Model Rules of Parliamentary Procedure for South Carolina Counties and Robert's Rules of Order Newly Revised (current edition) to Govern Other Cases, states "County council will refer to the Model Rules, and the Comment sections contained therein, as the primary resource in determining the intent and meaning of these Rules. In all cases not covered by these Rules, county council shall be governed by such rules as are set out in the most recent edition of Robert's Rules of Order Newly Revised (RONR). Provided, however, that state and federal law shall take precedence over these Rules in all cases. Whenever possible, these Rules should be interpreted to conform to state and federal law; if an irreconcilable difference occurs, only the portion of the Rule or Rules directly in conflict with state or federal law is to be overruled, the remaining portions surviving."

Model Rule 8, Voting, Number of Votes Required for Passage, states "RONR, and/or state law may require differing number of members to vote in support of an action. The term "majority" or "simple majority" means more than half of those members present and voting. When a two-thirds majority is required, the term "two-thirds majority" or "super-majority" means at least two-thirds of those present and voting. The term "positive majority" means a majority of the members of council must vote in support of the action, regardless of the number of members present or not. ... Any ordinance, resolution, or motion, unless otherwise required by these Rules, or by state or federal statute, passes if it receives a simple-majority of the votes cast. RONR, and/or state law may require differing number of members to vote in support of an action. The term "majority" or "simple majority" means more than half of those members present and voting."

Model Rule 17, Motion to Reconsider, states "The problem with the Motion to Reconsider and the Motion to Amend Something Previously Adopted is that ordinances and resolutions passed by county council become effective without referral to another chamber or to an executive branch for signature. Neither of these motions can be used to reconsider or amend an ordinance or resolution that has become effective. However, the third reading to an ordinance may be reconsidered only at the same meeting in which the third reading was adopted."

Robert's Rules of Order Newly Revised (RONR) states: Changing One's Vote. "A member has the right to change his vote up to the time the result is announced, after that he can make the change only by permission of the assembly, which can be given by unanimous consent (p. 52), or by the adoption of a motion to grant the permission, which is undebatable." See *RONR (9th Ed.) Sec. 44.*

RONR states: Assembly's Prerogative in Judging Voting Procedures. "Unless the bylaws provide otherwise, the assembly itself is the judge of all questions arising which are incidental to the voting and counting of votes." See *RONR (9th Ed.) Sec. 44.*

Under the Home Rule Act, a county council must comply with the requirements of [§ 4-9-120, 1976 Code] in passing temporary as well as permanent ordinances. 1975-76 Op. Atty. Gen., No. 4410. The 2013 Home Rule Handbook cited the following opinions:

> "A time extension is not an amendment or revision of an ordinance. Instead, it is a non-legislative act affecting the execution of a law rather than the substance of the law. Therefore, a county council may, by resolution, extend the time set in ordinances for the county administrator to execute agreements." Unpublished Op. Atty. Gen., dated March 21, 2000.
>
> "Repealing or amending an existing county ordinance is considered a "legislative action" and thus must be done in accordance with the procedures outlined in § 4-9-120. If the procedures are not followed, the existing ordinance will remain in effect." See *Op. Atty. Gen., dated September 30, 2002.*

The South Carolina Ethics Commission has taken the position that the conflicted member should not only abstain from debating and voting on the matter, but also should not attend that portion of the meeting in which the conflict will arise. See *Ethics Advisory Opinion 93- 081.*

The Georgetown County Council Rules of Procedure states as follows:

> "Sec. 2-485. Third Reading: After the ordinance has been given second reading, and if a public hearing has been held if required by law or action of council, it shall be given third reading on a subsequent public meeting and amendments may be offered on third reading the same as on second reading. After all amendments and privileged motions, if any are disposed of, the question shall be passage of the ordinance. See (Ord. No. 99-30, Art. IX, § 9-5, 5-25-99)."
>
> "Sec. 2-486. Votes Required For Passage: No ordinance or amendment shall be adopted unless at least a majority of the members present shall have voted for its passage on second and third readings. The repeal or amendment of ordinances shall follow the same procedure set forth for adoption. See (*Ord. No. 99-30, Art. IX, § 9-6, 5-25-99*)."
>
> "Sec.2-489. Effective Date Of Ordinances: Ordinances shall take effect on the day the ordinance is given third reading unless another date is specified in the ordinance. See (*Ord. No. 99-30, Art. IX, § 9-9, 5-25-99*)."

Ordinance 21-24 and Ordinance 21-25 pass by legislative action of the majority of members voting and/or present on October 26, 2021; whereas, the County Council on November 9, 2021, through an executive action, documented the adoption of the ordinances on that date with a 4-2 vote in favor with one recusal. Since the ordinances were in effect after approval at the Third Reading, this was a non-legislative act affecting the execution of ordinances rather than the substance of the ordinances. Without stating a factual and/or legal basis, the Respondents claim that the ordinances did not pass on October 26, 2021.

In accordance with the Model Rules and County Council Rules of Procedure, both ordinances were approved and adopted on October 26, 2021. The 2013 Home Rule Handbook states that "A time extension is not an amendment or revision of an ordinance. Instead, it is a non-legislative act affecting the execution of a law rather than the substance of the law. Therefore, a county council may, by resolution, extend the time set in ordinances for the county administrator to execute agreements. See *Unpublished Op. Atty. Gen., dated March 21, 2000.*" Hence, Ordinance 21-24 and Ordinance 21-25 are in effect and properly require legislative action to repeal or recall as opposed to judicial intervention.

The Respondents state in their Complaint and affidavits that Ordinances 21-24 and 21-25 did not pass and/or was defeated at the Third Reading on October 26, 2021. However, the October 26, 2021 meeting minutes which were approved on December 14, 2021 clearly states that both ordinances passed by 3-2 votes. One council member recused and another abstained from voting. In addition, several council members and the Respondents' lawyer were reported in a local newspaper as clearly understanding that the ordinances had pass on October 26, 2021.

The Complaint admits and minutes state that a vote did not occur in executive session. In that the three legally mandated public hearing requirements had already been met, public

comments were not necessary or required. Without evidence, the Respondents are attempting to contrast an apparent executive action on November 9, 2021 as improper and to discount a proper legislative action on October 26, 2021with false and contrived statements. The October 26, 2021 and November 9, 2021meeting minutes were approved unanimously at the December 14, 2021 meeting. With respect to the ordinances, the allegations of the Respondents are fairly debatable.

The factual reality is that County Council Rules of Procedure which define passage the vote of the majority present did not include a rule for members abstaining from voting. Assuming a quorum, defaulting to Roberts Rules of Order Newly Revised (RONR) does not resolve the arising issues. As in this case, the Model Rules are the preemptive authority in defining passage of an ordinance as the majority present and voting; therefore, Ordinances 21-24 and 21-25 pass on October 26, 2021 and were codified on November 9, 2021.

As stated by the County Council Clerk in the approved October 26, 2021Meeting Minutes: "Mr. Watson ("the county attorney") confirmed that the vote on both ordinances was 3-2, and therefore received third reading approval." At the County Council meeting on November 9, 2021, Ordinances 21-24 and 21-25, after a vote change by the abstaining councilman, were officially signed and adopted by the County Council Chairman, County Attorney and County Council Clerk.

XIV. ORGANIZED AND COMBINED OPPOSITION

Standard of Review: The Respondents have engaged in an organized and combined action to oppose the ordinances and thereby injure the Appellant's property.

> **Citations:** "A plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." See *Paradis v. Charleston County School District*, 433 S.C. 562. 574, 861 S.E.2d 774 (SC Sup. Ct. 2021.

> A plaintiff need not allege an unlawful act to state a cause of action; lawful acts may become actionable as a civil conspiracy if the objective is to ruin or damage the business of another. See *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988).
>
> Therefore, the primary inquiry in civil conspiracy is whether the principal purpose of the combination is to injure the plaintiff. See *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. See *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006).

Discussion: The Keep It Green organization and members expressed purpose is to prevent increases in residential land use and population density on the Waccamaw Neck in Georgetown County. See *Complaint pp. 4 - 5*. A petition exceeding 1000 plus signatures was submitted by Keep It Green to the County Council opposing the rezoning of the Appellant's property. See *Complaint p. 18*. According to their affidavits, the adjacent Colony subdivision Respondents are all members of the Keep It Green organization and all deny awareness that the ordinances had passed October 26, 2021. See *Complaint pp. 36 – 62; and Answer pp. 32 - 40.*

The Complaint contained several letters, as exhibits, addressed to the County Council ripe with unsupported statements, that demonstrate the extent of the organized and combined effort of the Respondents to cause proximal harm to the Appellant's property. See *Letter pp. 76 - 78* (Jul 14, 2021); *Letter pp. 89 – 90* (Aug 20, 2021); *and Letter pp. 94 – 100* (Oct 26, 2021).

Proof of unlawful means or independently unlawful acts in order to establish a civil conspiracy is no longer required by South Carolina Courts. A cause of action may arise from an act two or more people committed even where no cause of action would arise if an individual committed the same act. Under South Carolina law, lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another. The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to

injure the plaintiff." See *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986). In order to establish conspiracy, a party must produce evidence "from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. See *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987). The Respondents' Complaint itself is such evidentiary proof.

CONCLUSIONS

Any and all claims in the Respondents' Complaint have been dismissed against the County Council and elected members, who have legislative immunity and the Respondents' Complaint does not state any claims against the Appellant. The Appellant should not have been named as a Defendant as opposed to an Involuntary Plaintiff or Party-in-Interest. It is an abuse of discretion by the Lower Court and an error in interpreting the statues and laws for the Appellant to be a Defendant with a fairly read and unstated cause of action in this litigation.

The Respondents' lawyer admitted in written statements and the hearing transcript that her clients have no claims against the Appellant. The Lower Court's finding that a "fairly read" cause of action exists against the Appellant is not supported by the allegations, facts or evidence in the Respondents' Complaint and other documents. This interlocutory Order affects the merits of the litigation and will prevent the appeal of a final judgment. The Order on appeal should be vacated by the Court of Appeals and the Respondents' Complaint dismissed in its entirety.

Respectfully Submitted,
The Appellant

Date: August 31, 2022

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THE STATE OF SOUTH CAROLINA

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

The Honorable Steven H. John

APPELLATE CASE NO. 2022-000811

Ernest F. Middleton, III, and Joyce J. Middleton, Michael J. Farrar and Diana Farrar, Robert H. Hunt and Jeane M. Sullivan, the Colony Homeowners Association, Inc., and Keep It Green, Inc., Respondents,

v.

Georgetown County and Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust dated June 18, 2004, Defendants,

Of whom Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust dated June 18, 2004 is the Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Appellant Brief in the above referenced case was served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on August 31, 2022 to the following:

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