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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Civil Action No. 2020-CP-40-03475
Appellate Case No. 2022-000389

University Hill Neighborhood Association, ...Respondent,

v.

City of Columbia, City of Columbia Design and Development Review Commission, and Trinitas Ventures, LLC, ... Appellants.

AMENDED RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CA NO: 2020-CP-40-03475

University Hill Neighborhood Association

Plaintiffs,

vs.

**PLAINTIFF'S ORDER
DENYING DEFENDANTS' MOTIONS
TO DISMISS**

City of Columbia, City of Columbia Design
and Development Review Commission, and
Trinitas Ventures, LLC

Defendants.

I. Introduction

On Friday, September 11, 2020, a hearing was held concerning Motions to Dismiss filed by the Defendant. Present by WebX for this hearing were: Peter M. Balthazor, attorney for Defendants City of Columbia Design/Development Review Commission; Lyndey R.Z. Bryant, attorney for Trinitas Ventures, LLC; M. McMullen Taylor, attorney for City of Columbia; Richard A. Harpootlian, attorney for University Hill Neighborhood Association; and F. Patrick Hubbard, attorney for University Hill Neighborhood Association. This Order is based on this hearing and on the filings by the parties.

A. The Motions to Dismiss filed by the Defendants

This appeal involves a decision by the City of Columbia Design and Development Review Commission (DDRC) granting final approvals for the construction of "Trinitas," an eight-story

apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) the DDRC, a “Board of Architectural Review” established pursuant to S.C. Code §§ 6-29-880 et seq. and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), a real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein. The DDRC, Trinitas, and the City have each filed a motion to dismiss.

B. The Importance of Distinguishing Between the Two Parts of the Appeal

Before addressing the specific grounds for dismissal in the motions to dismiss, it is important to review the differences between the two distinct claims made in Plaintiff’s Complaint. As stated in the beginning of Paragraph 3 of the Complaint:

This appeal of the DDRC decision concerning the Trinitas project has two parts. The first part involves an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. The second part of this appeal concerns provisions of the *Guidelines* that require “site plan review” within the -DD area to be done by the DDRC rather than the City of Columbia Planning Commission.

The motions to dismiss fail to recognize the importance of the difference in these two parts. As a result, many of the arguments concerning site plan review issue are simply not relevant. For example, the motions filed by the DDRC and Trinitas argue that the appeal of the approval of the site plan is not timely because Plaintiff failed to satisfy the thirty day time limit for appeal in S.C.

Code § 6-29-900 (A). Similarly, the City argues that it “is not a proper party as it relates to an appeal of a DDRC decision” pursuant to Section 6-29-900 (A).

These arguments miss the point concerning the second claim in this appeal. The site plan review part of the Complaint: (1) asserts that the shifting by the City of the site plan review to the DDRC was *ultra vires*, and (2) relies on the general jurisdiction of the Circuit Court, not on the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A). This point, as well as the nature and role of site plan review, will be developed further below in Part II-B-2 of this Order.

Plaintiff’s Memorandum in Opposition to Defendants’ Motions to Dismiss indicates at page 3 that the site plan review claim has been combined with the appeal pursuant to Section 6–29–900(A) for three reasons. First, the facts of both parts of the Complaint are interconnected in the record concerning the appeal pursuant to Section 6-29-900(A). Second, combining the two parts enables Trinitas, a real party in interest in terms of the Section 6-29-900(A) appeal, to assert its interests in the *ultra vires* claim. Third, Plaintiff was motivated to assert the *ultra vires* claim at this point in time, rather than earlier, because there was no harm to substantial interests of Plaintiff and its members until the decision by the DDRC to approve the site plan for the Trinitas project.

C. Grounds for Dismissal

When considered together, the motions to dismiss filed by Defendants assert the following two grounds for dismissal of the appeal pursuant to Section 6-29-900(A): (1) Plaintiff lacks

standing to bring claims, and (2) Plaintiff has failed to state a claim.¹ None of the motions identifies the subsection of Rule 12(b) of the South Carolina Rules of Procedure which is relied upon. However, it appears that both grounds are based on subsection 12(b)(6), which addresses “failure to state facts sufficient to constitute a cause of action.”

II. Summary of Facts and DDRC Decisions

A. The DD Overlay District and Guidelines for the District

The site for the apartment building proposed to be constructed by Trinitas is within an “overlay” district within the City of Columbia. Overlay districts are explicitly permitted under Section 6-29-720(C)(5) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 [hereinafter “State Enabling Act”], which describes an overlay zone as a district that “imposes a set of requirements or relaxes a set of requirements by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. . . .”

The overlay district herein is termed as the “City Center Design/Development District of Columbia, South Carolina” and is referred to as “-DD area” in Sections 17-253 and 17-655(b) of

¹ Trinitas Motion to Dismiss, Part III.

the Columbia City Code.² An overlay district like the DD area is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists. The Guidelines for the DD area are adopted by reference in Columbia City Code § 17-253 (referring to “City Center Design/Development Guidelines”) and § 17-655(b)(2) (referring to “requirements set forth in design guidelines adopted by the city council”).

The guidelines that are incorporated by these references in the City Code are contained in a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [hereinafter *Guidelines*].³ The *Guidelines* were prepared by planning experts and were prepared as a “planning document” rather than as an ordinance.⁴ As a result, the *Guidelines* are unusual in that they contain only precatory terms like “non-binding” and “should” rather than mandatory terms like “must” and “shall.” Chapter 5 of the *Guidelines* provides a supplementary regulatory framework for assessing the design of private development in the DD overlay district. In addition, Section 5.1 of this chapter of the *Guidelines* states: “The guidelines in this chapter are

² The Parties have filed a “Joint Stipulation Regarding City of Columbia Ordinances.” Exhibit A of these Stipulations contains selected portions of the City of Columbia Code of Ordinances, Chapter 17, Planning, Land Development and Zoning.

³ See Exhibit B to Joint Stipulation, *supra* note 2.

⁴ For example, in discussing “Building Heights” at page 5-2, the *Guidelines* state: “This section provides *non-binding* general direction for development within City Center, with the recommendation that the *City’s regulatory plans and codes be amended* to reflect the guidance included here.” (emphasis added).

illustrative rather than prescriptive.” As indicated below at Part III-B-1-b of this Order, the precatory, non-binding nature of the *Guidelines* presents problems in their application.

The Introduction to Chapter 5 notes:

The key emphasis of the guidelines in this chapter is to reinforce the existing fabric of City Center by ensuring that new projects are developed within the rhythm of the existing development pattern. This “contextual” approach to evaluating the design of new projects is fundamental to the implementation of the *Guidelines*.

Section 5.3.1 note that the height of proposed structures should “relate to the *adjacent* development context.” (emphasis added)

The proposed Trinitas project would be constructed on a site at the northwest corner of the intersection of Gervais Street and Pickens Street in the block bounded by Gervais Street, Pickens Street, Senate Street, and Henderson Street. Paragraphs 14–20 of the Complaint address the “contextual” “rhythm of the existing development pattern” and “adjacent development context” surrounding the proposed apartment building.

B. The Trinitas Applications

In 2019, Trinitas filed its initial application for Design approval and for Site Plan approval with the DDRC for an eight-story apartment building at 1600–1620 Gervais Street in Columbia. The building would be 75 feet tall and would occupy virtually all of the land on the site. See Complaint ¶¶26, 29, Exhibit 2.

The DDRC conducted four public hearings to address the initial application and subsequent revised applications for design approval and for site plan approval filed by Trinitas. At the regular

January 2020 public hearing, both applications were denied. (Complaint ¶25a) Subsequently, these denials were rescinded at a special called meeting on February 7. (Complaint ¶25a). At the regular March hearing, the DDRC granted site plan approval for the project. Design approval was granted by the DDRC at the regular July public hearing. In addition to these four public hearings, the DDRC conducted a “work session” on the design approval on June 10, 2020.

III. Argument

A. Standard of Review for Motion to Dismiss

As indicated at Part I-C above, the Defendants have, in effect, filed Rule 12(b)(6) motions to dismiss. A Rule 12(b)(6) motion “tests the sufficiency of the allegations of the complaint. . . .” James F. Flanagan, *South Carolina Civil Procedure* 100 (3d. ed. 2010). Consequently, only the pleading is examined. *Crocker v. Barr*, 295 S.C. 195, 367 S.E.2d 471 (Ct. App. 1988). If material outside the Complaint is considered, the motion becomes a motion for summary judgment and must be addressed pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

B. Statement of Plaintiff’s Claims

1. Appeal pursuant to S.C. Code Section 6-29-930(A)

Section 6-29-930(A) includes the following standard for appeals from a board of architectural review:

The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

The application of this standard of review was summarized in *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361, 362 (Ct. App. 2005) (citations omitted), as follows:

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by evidence. Furthermore, our standard of review of a board of architectural review's decision is the same as that of the trial court.

a. Mistake of Law by DDRC in Addressing Building Height

As indicated above at Part II-A, the *Guidelines* adopt a contextual approach to development. Where height is concerned, Section 5.3.1 of the *Guidelines* states:

As a general rule, and consistent with current zoning provisions, buildings within most of City Center should be *no more than five stories*. . . . [I]t is not the intent of these Guidelines to establish new height standards for development in City Center. It is, however, critical that in applying these Guidelines—as well as other

development regulations—the City be consistent in considering the height of proposed structures as they relate to the *adjacent development context*.

(emphasis added)

The DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, the decision was based on a legal misinterpretation by the staff of the DDRC. This interpretation took the position that the *Guidelines* did not regulate the height of the building. This interpretation was set forth in an email from Lucinda Statler (the City’s Principal Planner/Urban Design) to Thomas Gottshall, President of the University Hill Neighborhood Association. (See Exhibit 1 to Complaint) Part of this latter states:

The DDRC makes decisions as to whether a project meets or does not meet the design guidelines, which are qualitative measures for evaluating projects within the City Center Design District. The underlying [C-3, General Commercial Use] zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the [underlying C-3 General Commercial Use] zoning, the [C-3] zoning prevails. Please refer to Section 5.3.1 *Building Heights*, in the City Center Design Guidelines. “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section provides *non-binding general direction* for development within City Center...”

(emphasis in original) This same interpretation was adopted in the *Staff Report* for the July 2020 meeting, which states: “The building height and mass remain the same [as earlier versions of the

proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance.”

The Commission’s reliance on Statler’s interpretation and on the *Staff Report* was a mistake of law for a number of reasons. The initial problem with this interpretation is that the interpretation conflicts with Section 17-181 of the Columbia City Code, which states:

Within each district, the regulations set forth by this article shall apply uniformly to each class or kind of structure or land. In their interpretation and application, the provisions of this article shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. *Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that imposing the higher standards, shall govern.* Unless deed restrictions, covenants or other contracts directly involve the city as a party in interest, the city shall have no administrative responsibility for enforcing such deed restrictions or covenants.

(emphasis added)

To the extent that the interpretation relies on the concept of “vested rights,” the interpretation conflicts with the definition of vested rights in Columbia City Code, Section 17-2(a), which states: “A vested right is triggered only upon the approval or conditional approval of a site specific development plan.” Section 17-1(b) defines a “site specific development plan” as follows: “Site specific development plan means those documents that comprise a complete application for a zoning permit, certificate of zoning compliance, variance, special exception, planned unit development, sketch plat or plan, or other similar approval that authorizes the

developer or landowner to proceed with investment in grading, installation of utilities, streets and other infrastructure, and to undertake other significant expenditures necessary to prepare for application for a building permit.” An underlying zoning classification of C-3 zoning does not satisfy this definition of site specific development plan.

Another problem with the interpretation concerning height adopted by the DDRC is that it makes *all* the guidelines meaningless. Statler’s letter states: “When the design guidelines seem to conflict with the [underlying] zoning, the zoning prevails.” If this statement is valid, imposing any of the *Guidelines* would be impermissible because the underlying C-3 zoning does not have any limits on such concerns as façade proportion and rhythm, proportion of openings, horizontal rhythms, alignment of architectural elements, wall articulation, and roofs and upper story details—all of which are addressed in the *Guidelines*.

As indicated above in Part II-A of this Order, an overlay is described in Section 6-29-720(c)(5) of the State Enabling Act as a district that “imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district.” It is clear from the content of the *Guidelines* that the *Guidelines* are meant to impose requirements, not relax them. The interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay and the underlying zoning backwards. The design overlay involved herein is adopted to *increase* requirements by imposing *additional* requirements. If the underlying zoning will control, why bother with the time and expense of the overlay?

The general treatment of overlays in land use regulation parallels the language of S.C. Code § 6-29-720(c)(5). For example, John R. Nolan & Patricia E. Sallcin, *Land Use in a Nutshell* 218 (2006) describes an overlay as follows:

Overlay zoning is a flexible zoning technique that allows a municipality either to encourage or to discourage development in certain areas. An overlay zone is defined as a mapped overlay district superimposed on one or more established zoning districts. *A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements.*

(emphasis added)

South Carolina follows the approach of “two sets of zoning requirements” in overlay cases. For example, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) involved an “Airport Overlay District” (AO) which, among other things, restricted certain uses and expansions within the AO District. The church claimed it was entitled to a building permit for a proposed expansion because: (1) an earlier permit included the expansion⁵; and (2) an incorrect approach had been used in determining whether the expansion would increase the “occupant load” of the church’s property. “Occupant load” in the area within the AO District was important because of a concern for a high potential for accidents affecting the public areas near a military airport. The defendants rejected both of the church’s claims.

The church appealed and a master-in-equity ruled in favor of the church. The Court of Appeals reversed the decision of the master-in-equity. In terms of the “occupant load” concern of

⁵ In an opinion filed on September 16, 2020, the Supreme Court reversed the decision of the Court of Appeals and held that the earlier permit included the expansion. Opin. No. 27995. The Supreme Court did not address the overlay issue because “our determination concerning the validity of the original permit resolves this case” *Id.* at fn. 8.

the AO District, the Court held “the evidence in the record clearly supports the Planning Commission’s finding that the [proposed] fellowship hall would increase the occupant load for the site.” 828 S.E.2d at 241. In reaching this decision, the Court followed the general principle that, where an overlay imposes additional requirements, those additional requirements supplement or replace the underlying zoning.

Heilker v. Zoning Board of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) involved the application of a “Highway Corridor Overlay Zoning” scheme adopted by the City of Beaufort. The overlay was concerned with the protection and promotion of aesthetics and safety. The overlay contained new restrictions concerning the outdoor display of certain type of merchandise in the “Highway Corridor” district. The central issue in the case was whether the outdoor displays at issue were: (1) part of the “use” of the land for retail sale, or (2) merely an “activity or practice” incidental to the “use.” If the display was a use, the overlay did not apply; if it was a practice, the restrictions of the overlay applied.

The Zoning Board of Appeals (ZBA) ruled that it was a practice, and Heilker appealed. A special judge reversed the ZBA’s finding, and the Court of Appeals reversed the special judge. As with *Grays Hill Baptist Church*, *Heilker* held that, where an overlay applied, restrictions supercede the underlying zoning.

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the *Guidelines*. As a result, the DDRC failed to follow the general rule of making the parcel within the overlay district “simultaneously subject to two sets of zoning regulations.”

b. Mistake of law in application of “non-binding” precatory standards—The problem of delegation of legislative power and lack of controls of discretion

A fundamental problem plagues the application of a system of non-binding guidelines. As indicated above at Part II-A (footnote 2) of this Order, the planners who drafted the *Guidelines* addressed topics like the height of buildings in terms of “illustrative” “non-binding general direction for development within City Center, with the recommendation that the City’s regulatory plans and codes be amended to reflect the guidance included here.” (*Guidelines*, pp. 5-1, 5-2) However, instead of adopting “regulatory plans and codes,” the City chose to forego exercising its legislative power in favor of simply adopting the *Guidelines* as the ordinance rather than develop and codify a regulatory scheme. See Columbia Code §§ 17-253, 17-655(b)(1).

As a result of this approach, the DDRC and its staff have been authorized to apply “non-binding” guidelines. However, such application presents the issue of whether the *Guidelines* constitute an improper delegation of the City’s legislative power.

The framework for addressing issues concerning a claim of unlawful delegation of legislative power is set forth in *South Carolina State Highway Department v. Harbin*, 86 S.E.2d 466 (S.C. 1955), which held that a provision of the statute authorizing the highway department to suspend or revoke a driver’s license “*for any cause satisfactory to*” the department was an unconstitutional delegation of legislative power. *Id.* at 468 (emphasis added)

Harbin summarized the principles concerning delegation of legislative power to an administrative agency as follows:

The question of delegation of legislative power has confronted the courts with many perplexing problems, particularly during recent years when the complexities of

government have been constantly on the increase. It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board “to fill up the details” by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. “However, it is necessary that the statute declare a legislative policy establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a property regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.”

Id. at 470 (authorities deleted)

The Court’s conclusion concerning the unconstitutionality of the delegation involved in *Hardin* was stated as follows:

When the authority of the State Highway Department to suspend or revoke a license for any cause which it deems satisfactory is considered in the light of the foregoing principles, said provision must be declared invalid as an unlawful delegation of legislative power. It sets up no standard to guide the Department and contains no limitations. As a general rule, “A statute which in effect reposes an absolute, unregulated, an undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers.”

Id. at 370–71 (authority deleted)

In the regulation of land use, the unlawful delegation concern can also be expressed in terms of due process. For example, *Restaurant Row Associate v. Horry County*, 335 S.C. 209, 516 S.E.2d 4426, 445 (1999), stated: “When deciding whether to grant a variance, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939).”

The cited case of *Schloss Poster Advertising Co.* involved an ordinance providing as follows: “Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the city of Rock Hill without having first obtained from the city council a permit to do so.” In effect, the City Council had delegated to itself an unrestrained power to grant or deny permits to construct billboards. In holding that this “delegation” was unconstitutional, the Court noted:

The ordinance before us is in no sense a zoning ordinance as provided in Sections 7390–7398, Code 1932, nor does it prescribe rules or conditions for the issuance of permits for the erection of billboards to which all persons similarly situated may conform. It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them, the right and power to absolutely prohibit the use of property for the erection of billboards.

The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes not uniform rule upon which the special permission is to be granted.

2 S.E.2d at 394

In her email to Thomas Gottshall concerning the application of the *Guidelines*, Lucinda Statler described the decision-making process of the DDRC and its staff as follows:

There are 17 pages of guidelines that pertain to new construction that are considered. The staff evaluations and the DDRC's decisions are based on the *overall determination* as to whether a project substantially meets– or does not meet– the design guidelines. This means that there are likely areas where the project may not be exactly what is recommended, and other areas where they meet and exceed what is recommended. It is an *overall assessment* of the project and of course, there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision, rather than only staff. In the almost 14 years that I have served as staff to this Commission, I would be hard pressed to think of a project that met every single guideline. This would be unattainable for most projects, as there are many factors that determine a development's feasibility. The design review process is built to provide some flexibility in this balancing act.

(Exhibit 1 to Complaint (emphasis added))

This “overall assessment” approach is, in effect, basically a “we know it when we assess it overall” test. Such a test recognizes “no standard to guide [decisions] . . . and contains no limitations.” As a result, there is neither a meaningful standard to guide the exercise of discretion nor a framework to provide a workable basis for judicial review of the exercise of discretion.

As a result, the “overall assessment” approach is virtually the same as the legislative authorization in *Harbin* to suspend or revoke a license “for any cause satisfactory to” the Highway Department. The approach is also effectively the same as the ordinance granting the Rock Hill City Council the power to decide who could erect billboards without any provisions to limit and structure the exercise of discretion. Therefore, to the extent that the DDRC uses this approach, the Complaint has sufficiently pled this claim. See Complaint ¶¶ 23-25.

c. Abuse of Discretion in Applying Guidelines

Paragraphs 26-31 of the Complaint address abuse of discretion by the DDRC in applying the *Guidelines*. These paragraphs contain sufficient details and specificity concerning abuse of discretion and lack of factual basis to withstand a motion to dismiss.

2. Ultra Vires Grant of Power to DDRC to Conduct Site Plan Review.

a. Ultra Vires nature of grant of power to DDRC to conduct Site Plan Review

Article 7 of the State Enabling Act addresses land development regulation by local governments. In contrast, provisions concerning boards of architectural review are contained in Article 5 (“Local Planning – Zoning”) of the State Enabling Act. The scope of Article 7 is very broad, partly because terms like “land development” and “subdivision” are defined very broadly. (See S.C. Code §§ 6-29-1110 (2), –(4)).

Planning commissions play a critical role under Article 7 in all the aspects of land development. Central to their role is the power to approve, or disapprove, plans for development. The phrase “plans for development” is very inclusive because numerous terms— e.g., “sketch plans, preliminary plans, and final plans” – are used to describe the plans involved. (See S.C. Code § 6-29-1150)

Under the Columbia scheme of land of development regulation set forth in Article IV of Chapter 17 (“Planning, Development and Zoning”) of the City Code, the Planning Commission is charged with implementing the land development regulation. As a part of this scheme, terms like “sketch plan,” “site plan,” and “preliminary plat” are used to identify specific types of plans. See Columbia City Code § 17-464. For a category termed “Group Development,”⁶ a system of plan

⁶ There are three categories of “group development” set forth within the definition of “subdivision, development type” in Columbia City Code § 17-464. These are:

Group development means a development such as shopping center, office buildings, industrial sites, mobile home parks and apartment complexes where the site is not subdivided in lots, blocks and streets, but includes two or more units designed or intended for separate occupancy.

Group commercial or industrial development means a single building or combination of buildings containing 25,000 square feet of gross floor area, or two or more buildings containing a combined total of 25,000 square feet gross floor area.

Group housing development means a single lot of record upon which are erected three or more dwelling units and all the structures thereon. This definition shall include apartments, condominiums and townhouses, whether rented or sold.

review termed “site plan review” is established. (See Columbia City Code §§ 17-464, 17-581 through § 17-589).

As indicated in Paragraph 32 of the Complaint, the *Guidelines* for the DD area shifted the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC. This approach to site plan review is *ultra vires* because it conflicts with explicit language in Section 6-29-1150(A) of the State Enabling Act, which addresses the submission of plans or plats to the planning commission. This section states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the *planning commission or designated staff*.” (emphasis added). The shifting of site plan review to the DDRC pursuant to the *Guidelines* conflicts with this clear mandate of Section 6-29-1150(A) concerning the role of the planning commission.

The purpose of the State Enabling Act is to enable or authorize local governments to engage in planning and regulating the use and development of land. As noted in Section 6-29-330(A) of the S.C. Code: “A municipality may exercise the powers granted *under the provisions of this chapter* in the total area within its corporate limits.” (emphasis added).⁷ The phrase “under the provisions of this chapter” indicates that the “powers granted” are defined by and limited by the Enabling Act.

⁷ The State Enabling Act is contained in Title 6, Chapter 29

Thus, the provision in the portion of Section 6-29-1150(A) quoted above imposes an express requirement that local land development regulations “*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the planning commission or designated staff.” (emphasis added) In short, there *must* be: (1) a system for approval or disapproval of plans and plats; and (2) the procedure for this system *must* be undertaken by the planning commission.

The general principle for applying an enabling act was stated by the Rhode Island Supreme Court as follows: Where a local government “purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void.” *Hardy v. Zoning Board of Review of the Town of Conventry*, 321 A.2d 289, 290–29 (R.I. 1974).

The South Carolina Supreme Court applied this principle in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2 777 (2010). At issue was the rezoning of a large parcel of land from the classification AG-15 (agricultural with minimum lot area of three acres) to PD (“planned development district”). This PD district would have 107 dwellings, which was the same number as would be allowed under AG-15. However, the minimum lot size for the PD was reduced to one acre.

Sinkler noted that Section 6-29-720(C)(4) of the Enabling Act explicitly authorizes the use of planned development schemes and quoted the following language:

“[P]lanned development district” or a development project comprised of *housing of different types and densities and of compatible commercial uses*, or shopping

centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development *and is characterized by a unified site design for a mixed-use development.*

690 S.E.2d at 781 (emphasis in original). *Sinkler* also quoted Section 6-29-740, which contains additional details concerning a PD district. This section provides:

In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that *will result in improved design, character, and quality of new mixed use developments* and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. *The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.*

690 S.E.2d at 779 (emphasis in original)

The Supreme Court, relying on the statutory language quoted above, held:

[T]he [zoning] ordinance [with only residential uses] did not meet the parameters for a PD. . . . [H]aving invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act.

Sinkler, 690 S.E.2d at 781, 782. In authorizing the DDRC to undertake site plan review, the City of Columbia, like Charleston County in *Sinkler*, failed “to meet the requirements” of the Enabling Act. Consequently, the authorization was *ultra vires*.

In addition, depending on the details of any specific application, many other provisions of the *Guidelines* are potentially *ultra vires* because these other provisions in the *Guidelines* could overlap with various aspects of the statutorily-mandated site plan review by the City of Columbia Planning Commission. More specifically, depending on the facts involved, potential conflicts could arise in terms of parking, location and screening of service and loading areas, other screening, setbacks, open spaces, and landscaping because these matters should be addressed in site plan review under some circumstances. Compare Columbia City Code §§ 17.464 (Definitions), -491, -492, -511, -531, -581, -582, -583, -586, -587, -588, -589 with *Guidelines* §§ 4.3, 4.4, 5.3.6, 5.4, 5.5, 5.6, 5.10.

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. See, e.g., *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city’s decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of conveyance by Circuit Court); *City of North Charleston v. North Charleston Distric*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342

S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgement that certain contracts entered into by school district were *ultra vires* and, therefore, invalid).

b. Jurisdiction of Circuit Court

Article V, Section 11 of the South Carolina Constitution provides: “The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law.” Because this grant of general jurisdiction supports the filing of this *ultra vires* action in Circuit Courts, it was the basis of all of the South Carolina cases cited above in Part III-B-2-a of this Order, except *O’Brien v. South Carolina ORBIT*, which was filed in the original jurisdiction of the Supreme Court.

C. Standing

1. Statutory standing

Section 6-29-900(A) states, in relevant part, as follows: “A person who may have a *substantial interest* in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county” (emphasis added). Defendant Trinitas asserts that Plaintiff does not adequately plead a substantial interest. This argument is addressed in the discussion of constitutional standing at Part III-C-2 below.

Defendant Trinitas also relies on *Graham v. Lloyd’s of London*, 296 S.C. 249, 255, 371, S.E.2d 801, 804 (Ct. App. 1988), which states the following principle: “In the eye of the common law, the association itself is an ‘airy nothing,’ a ‘nonexistent legal ghost having no capacity to

enjoy legal rights or to suffer legal wrongs.” It is important to note that this principle was *not* applied in *Graham* because the common law had been changed by statute. The South Carolina Code contains numerous examples of this change. *See, e.g.*, S.C. Code § 33-31-140 (15)-(27) (defining “entity” and “person”).

Defendant Trinitas also makes assertions attacking the lack of information about certain aspects of Plaintiff association. However, no authority is given concerning why the information is relevant.

The issue of personhood for an association is important because of the fundamental rights of association and petitioning of government. *See, e.g.*, U.S. Const. Amend. 1 (right to “petition the Government for redress of grievances”; *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 928 (2010) (Scalia, J. conc.); *NAACP v. State of Alabama*, 357 U.S. 449 (1958). Consequently, it would not be appropriate to grant Defendants’ motions to dismiss simply on the basis of the common law view of unincorporated associations or on the basis of claims of lack of necessary information that are not supported by authority.

2. Constitutional Standing

In order to grant a motion to dismiss, it must be shown that these allegations are not sufficient to satisfy the requirements of constitutional standing. Paragraphs 4 and 5 of Plaintiff’s complaint state:

4. Plaintiff University Hill Neighborhood Association (Association) is an unincorporated association. The boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly

overlapping historic districts—a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This district is “identified as Architectural District No. 1” and is “bounded by Laurens, Senate, Henderson and Greene Streets. . . .” *Id.* at § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic Districts.

5. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed. Many resident members of the Association live in areas near the proposed Trinitas project. Substantial interests of the Association and of its members are affected by the decision of the DDRC to approve the Trinitas project.

Plaintiffs claim that these allegations place them within the well-established doctrine that associations have standing to bring a suit on behalf of their members. This doctrine has been summarized as follows:

Sometimes, an organization initiates a lawsuit on behalf of a member or members. Like an individual party, the organization must also have standing to file suit. The policy behind permitting associational standing is to allow a group with shared resources to pursue a common, collective interest. *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 713 S.E.2d 287 (2011) (Hearn, J., dissenting); *see also Intl Union, United Auto., Aerospace & Agric. Implement*

Workers of Am. v. Brock, 477 U.S. 274 (1986) (“[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.”). An organization’s mere interest in the litigation is not enough to confer standing. *Beaufort Realty Co.*, 346 S.C. 298, 551 S.E.2d 588; *Carolina Alliance for Fair Emp’t v. S.C. Dep’t of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). An organization has proper standing to bring a suit on behalf of its members only when its members would otherwise have standing to sue in their own right; the interests at stake are germane to the organization’s purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co.*, 346 S.C. 298, 551 S.E.2d 588; *see also Carnival Corp.*, 407 S.C. 67, 753 S.E.2d 846 (finding that the plaintiffs failed to allege a particularized injury either to themselves or their members because they asserted only generalized grievances suffered by the public as a whole).

Jean Hoefer Toal, Amelia Warring Walker & Margaret E. Baker, *Appellate Practice in South Carolina* 128–29 (3d ed. 2016).

Though the DDRC and the City claim that Plaintiff does not satisfy the standard of particularized injury, they do not provide any detailed arguments in support of their claims. Instead, the DDRC Motion to Dismiss incorporates the arguments of Trinitas, and the City’s motion notes that its position “will be more fully argued in a subsequent memorandum and oral argument.” The “subsequent memorandum” has now been filed. However, it has the same problem

as the motion—i.e., the City still fails to recognize how the claim against the City differs from the claim against the DDRC. (See Part I-B above)

Trinitas argues that its Motion to Dismiss should be granted because there is a lack of specific concrete, particularized injury to at least one member of the Plaintiff. Trinitas bases its position upon *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846 (2014) and *Preservation Soc’y of Charleston v. S.C. Dep’t of Health and Envir. Control*, 845 S.E.2d 481 (2020). In particular, Trinitas argues that the association in *Carnival Corp.* did not have associational standing because it did not provide examples of specific individualized harms to members in its complaint. In contrast, argues Trinitas, the association in *Preservation Society* had associational standing because it had provided affidavits showing specific individualized harms.

The distinction stressed by Trinitas does not support its position in the matters before this court. The affidavits in *Preservation Society* had been filed in an administrative proceeding where the plaintiffs in *Preservation Society* were seeking a “contested case hearing.” These affidavits were part of the record on appeal.

As indicated above at Part II-B of this Order, the DDRC conducted four public hearings and one work session in considering the Trinitas applications. The record for these meetings contains documents and testimony which: (1) provide specific evidence of concrete particularized harm, and (2) were sworn to be true. Thus, they are the equivalent of the affidavits which were filed at the administrative level in *Preservation Society*. Consequently, Plaintiff is in the same situation as the associations in *Preservation Society* because testimony and documents, submitted under oath, of individualized harm is in the record of the appeal before this Court.

3. Public Importance Standing

The South Carolina Supreme Court has held that “a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999). The approach for addressing a claim of public importance standing was addressed in *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854, 859 (2017), as follows:

[W]hen deciding whether to confer public importance standing, courts must take these competing policy concerns [of citizen access to courts and a need to achieve judicial economy and freedom from frivolous suits] into consideration, and must also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.

a. Issues Involved

This suit involves three important issues where future guidance is needed. These issues are:

- (1) Whether important aspects of a development within the DD area, like height, are determined by the underlying zoning or by the *Guidelines*;
- (2) Whether the grant by the City of the power of site plan review to the DDRC for development within the DD area was *ultra vires*; and
- (3) Whether the “overall assessment” approach to the application of the precatory, non-binding language of the *Guidelines* constitutes an improper delegation of the City’s legislative power and a denial of due process.

b. Importance of Issues

The DD area of Columbia regulated by the *Guidelines* “consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River.” Columbia City Code, Section § 17-253. Given the size of this area, issues concerning the validity, proper scope, and application of the *Guidelines* effectively determine important aspects of development in the downtown core of Columbia.

In addition, Columbia has many other overlay districts. *See, e.g.*, Columbia City Code §§ 17-306, 17-307, 17-308, 17-309, 17-310, 17-311, 17-312, 17-313, 17-314, 17-315, 17-322, 17-323, 17-324, 17-325, 17-326, 17-681 (historic districts). Important issues concerning the relationship between these overlays and the underlying zoning involved could arise under these schemes.

More broadly, issues concerning overlay schemes and underlying zoning could arise throughout South Carolina. Overlay schemes are authorized by Section 6-27-720(C)(5) of the State Enabling Act and are a generally recognized technique for land use regulation.⁸

c. Need for Future Guidance Concerning Issues

⁸ *See, e.g.*, Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law 93–94 (3d ed. 2013); John R. Nolon, Land Use in a Nutshell 219–22 (2006); Peter W. Salsich, Jr. & Timothy J. Tryniecki, Land Use Regulation 222–23 (3d ed. 2015).

Future guidance in addressing these three issues is needed for the same reasons that these issues are important. More specifically, issues will arise concerning the validity, proper scope, and application of the *Guidelines* and concerning overlays generally because of: (1) the large area covered by the DD overlay, (2) other overlay schemes in Columbia, and (3) overlay schemes in South Carolina.

As indicated above in Part III-B-1-a of this Order, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) and *Heilker v. Zoning Board of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) held that overlay schemes in South Carolina follow the general rule that an overlay zone is “simultaneously subject to two sets of zoning regulation.” Thus, this appeal raises the issue of which approach will be followed in South Carolina: The approach used herein by the DDRC or the approach used in *Grays Hill Baptist Church* and *Heilker*?

Grays Hill Baptist Church involved an airport overlay district. Section 17-307 of the Columbia City Code contains an overlay district termed: “—AP airport height restrictive areas,” which applies in the area around Owens Field Airport. If the approach adopted by the DDRC were applied to the AP overlay, the height restrictions of the overlay would not apply.

The City of Columbia also has overlay corridor districts designed to impose supplemental sign regulations (See Sections 17-310, 17-313, 17-314, 17-315). The concerns underlying these overlay districts are similar to those in *Heilker*. As a result, issues concerning the relationship of the overlay involved vis á vis the underlying zoning could arise in applying these corridor overlays.

IV. Conclusion

For reasons given in this Order, Defendants' Motions to Dismiss are denied. In particular, it is important to note that the position of the DDRC concerning height was a mistake of law and that the grant by the City of the power of site plan review within the DD overlay area to the DDRC was *ultra vires*.

Hon. L. Casey Manning
Fifth Circuit Court



Richland Common Pleas

Case Caption: University Hill Neighborhood Association vs City Of Columbia ,
defendant, et al

Case Number: 2020CP4003475

Type: Order/Other

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2020-10-07 10:26:16 page 33 of 33

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4003475

University Hill Neighborhood Association
PLAINTIFF(S)

City Of Columbia et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

A hearing was held by Webex on September 11, 2020 on Motions to Dismiss filed by City of Columbia, City of Columbia Design and Development Review Commission (DDRC), and Trinitas Ventures, LLC. Dick Harpootlian was present on behalf of Plaintiff University Hill Neighborhood Association, Lyndey R.Z. Bryant on behalf of Trinitas Ventures, LLC, Peter Balthazor on behalf of DDRC, and M. McMullen Taylor on behalf of City of Columbia. The Court entered an Order Denying Defendants' Motions to Dismiss on October 7, 2020. Subsequently, Trinitas Ventures, LLC and DDRC filed a joint Rule 59(e) Motion to Alter or Amend the October 7 Order, and City of Columbia filed a solo Rule 59(e) Motion. Plaintiff filed a Response to Defendants' Rule 59(e), SCRPC, Motions to Alter or Amend Order on November 10, 2020. After consideration of the October 7 Order, the Rule 59(e) Motions from all Defendants, and Plaintiff's Response, the Court DENIES both Rule 59(e) Motions to Alter or Amend.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/18/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: University Hill Neighborhood Association vs City Of Columbia ,
defendant, et al

Case Number: 2020CP4003475

Type: Order/Electronic Form 4

So Ordered

s/L. Casey Manning, 2061

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CA NO: 2020-CP-40-03475

University Hill Neighborhood Association

Plaintiffs/Appellant

vs.

City of Columbia, City of Columbia Design
and Development Review Commission, and
Trinitas Ventures, LLC

Defendants/Respondents

ORDER

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Parties

This case involves two decisions by the City of Columbia Design and Development Review Commission (DDRC) that granted final approvals for the construction of “Trinitas,” an eight-story, 750 feet tall apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) DDRC, a “Board of Architectural Review” established pursuant to S.C. Code §§ 6-29-880 et seq and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), the real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein.

Plaintiff University Hill Neighborhood Association (Association) is an unincorporated association. The boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic districts in Columbia. One is a local City of Columbia Historical District; the other is a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This local district is “identified as Architectural District No. 1” and is “bounded by Laurens, Senate, Henderson and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District, named University Neighborhood Historic District, by the National Register of Historic Districts. U.S. Dept. of the Interior, National Park Service, certified Aug. 8, 2004.

B. Procedural History

The DDRC conducted four public hearings to address the initial application and subsequent revised applications for design approval and for site plan approval filed by Trinitas. At the regular January 2020 public hearing, both applications were denied. (Exhibit 6, at pp. 43–46, filed as Supplement to Record on Appeal by DDRC, Apr. 20, 2021 [hereinafter Supplement to Record]. Subsequently, these denials were rescinded at a special called meeting on February 7. (Supplement to Record, Exhibit 7, at pp. 15–16). At the regular March hearing, the DDRC granted site plan approval for the project (Supplement to Record, Exhibit 8, at pp. 76–77). Design approval was granted by the DDRC at the regular July public hearing (Supplement to Record, Exhibit 10, at pp. 18–19).

In addition to these four public hearings, the DDRC conducted a “work session” on the design approval on June 10, 2020 (See Supplement to Record, Exhibit 9).

On July 23, 2020, the Association filed a complaint/appeal in Circuit Court. The DDRC, Trinitas, and the City each filed an answer and a Motion to Dismiss. The motions to dismiss were denied. (Order filed Oct. 7, 2020) The denial of these motions was appealed. The Court of Appeals dismissed the appeal on the ground that the order was not immediately appealable. (Appellate Case No. 2020-001586, Order filed Jan. 14, 2021).

On September 13, 2021, the DDRC and Trinitas filed a Petition for Writ of Mandamus pursuant to 245(B) SCACR, or, in the alternative, Petition for Certification pursuant to Rule 245(A) SCACR. University Hill Neighborhood Association file a Return to this filing.

On September 30, 2021, the parties in this action requested the Supreme Court to hold in abeyance all deadlines associated with the Petition for Writ of Mandamus and Petition for Certification. The Court granted the request. The parties informed the Supreme Court that on October 14, 2021, Circuit Court Judge Casey L. Manning held a final merits hearing to consider

all issues in the case. The Circuit Court requested proposed orders from the parties by November 4, 2021.

Due to these continuing developments in the case, the parties again requested the Supreme Court to hold all current deadlines in abeyance until the Circuit Court issues an order. Petitioners contend that while an order by the Circuit Court may resolve the Petition for Mandamus, such an order may not resolve the Petition for Certification. By letter of October 15, 2021, the Clerk of the Supreme Court advised the parties that this matter will be continued to be held in abeyance until November 12, 2021, and that the Court should be notified of the status of this matter at that time.

C. Facts

The site for the proposed Trinitas apartment building is within an “overlay” district within the City of Columbia. Overlay districts are explicitly permitted under Section 6-29-720(C)(5) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 [hereinafter Enabling Act], which describes an overlay zone as a district that “*imposes a set of requirements or relaxes a set of requirements by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. . . .*” (emphasis added).

The overlay district herein is termed the “City Center Design/Development District of Columbia, South Carolina” and is referred to as “-DD area” in Sections 17-253 and 17-655(b)(2) of the Columbia City Code.¹ As indicated in Argument Three below, an overlay district like the

¹ The Parties have filed a “Joint Stipulation Regarding City of Columbia Ordinances.” [“Joint Stipulation”] Exhibit A of the Joint Stipulation contains selected portions of the City of Columbia Code of Ordinances, Chapter 17, Planning, Land Development and Zoning.

-DD area is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists.

The City Council of Columbia did not draft a zoning ordinance to govern decisions in the -DD area. Instead, it simply adopted a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [*Guidelines*].² This result was accomplished by adopting the *Guidelines* by reference in Columbia City Code § 17-253 (referring to “City Center Design/Development Guidelines”) and § 17-655(b)(2) (referring to “requirements set forth in design guidelines adopted by the city council”).

This approach was chosen even though the *Guidelines*: (1) were prepared by planning experts to guide the drafting of an ordinance, and (2) explicitly state that the *Guidelines* are “non-binding” and are not meant to serve as an ordinance. To this end, Section 3.5.2 of the *Guidelines* states, “*It is through the Zoning Ordinance that the Design Development Guidelines will be implemented. . . .*” (emphasis added) As an example of this non-binding process, the discussion of “Building Heights” at page 5-2 of the *Guidelines* states: “This section provides *non-binding* general direction for development within City Center, with the recommendation that the *City’s regulatory plans and codes be amended* to reflect the guidance included here.” (emphasis added).

As a result of this use of a planning guide as an ordinance, design in the -DD area is based on precatory terms like “non-binding” and “should” rather than mandatory terms like “must” and “shall.” For example, Section 5.1 of the *Guidelines*, which addresses the design of private development in the -DD overlay district, states: “The guidelines in this chapter are *illustrative rather than prescriptive*.” (emphasis added)

² See Exhibit B to Joint Stipulation, *supra* note 1.

D. Summary of Challenges to Approvals

It is important to distinguish among the Association's three distinct challenges to the approvals of the Trinitas project. One challenge concerns provisions of the *Guidelines* that require "site plan review" within the -DD area to be done by the DDRC rather than by the City of Columbia Planning Commission. The site plan review part of the Complaint: (1) asserts that the shift by the City of the site plan review to the DDRC was *ultra vires*, and (2) relies on the general jurisdiction of the Circuit Court. Thus, it is not governed by the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A).

Another challenge asserts that, because the *Guidelines* were intended to guide the drafting of an ordinance rather than to serve as an ordinance, the adoption of the non-binding *Guidelines* as the ordinance was an unlawful delegation of the legislative power of the City of Columbia. Jurisdiction on this claim is based on the general jurisdiction of the Circuit Court.

The Association asserts that the site plan review claim and the unlawful delegation claim were combined with the appeal pursuant to Section 6-29-900(A) for three reasons. First, the facts concerning all three of the Association's claims are interconnected in the record concerning the appeal of the decisions pursuant to Section 6-29-900(A). Second, combining these two claims enables Trinitas, a real party in interest in terms of the Section 6-29-900(A) appeal, to assert its interests in these two claims. Third, the Association was motivated to assert the *ultra vires* claim and the unlawful delegation claim at the point in time when the Complaint was filed, rather than earlier, because there was no harm to substantial interests of the Association and its members until the DDRC approved the site plan and the design for the Trinitas project.

The third challenge involves an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. This challenge asserts that the DDRC abused its discretion in approving the height of the Trinitas apartment building because it made a mistake of law in deciding that the

height of the proposed Trinitas project should be determined by the underlying zoning rather than the -DD overlay zoning.

The Association claims it has standing to bring the three challenges summarized above. The Defendants/Respondents dispute this claim.

E. Standard of Review

The Standard of Review for Arguments One and Two involves matters of law and statutory interpretation. Therefore, the standard of review is de novo. *South Carolina Public Interest Foundation v. Calhoun County Council*, 432 S.C. 492, 854 S.E. 2d 836, 837 (2021) (“[T]he interpretation of a statute is a question of law for the Court to review de novo.”)

The Standard of Review for Argument Three is set for the in Section 6-29-930(A) of the South Carolina Code:

The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

The application of this standard of review was summarized in *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361, 362 (Ct. App. 2005) (citations omitted), as follows:

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by *committing errors of law* or bases its decision on findings of fact that are not supported by evidence. Furthermore, our

standard of review of a board of architectural review's decision is the same as that of the trial court.

(emphasis added) This third challenge asserts that the DDRC abused its discretion by committing an error of law in its decision that the underlying zoning controlled the determination of the height of the building.

The determination of whether standing requirements are satisfied is a matter for the court addressing the issues. *See, e.g., Preservation Society of Charleston v. South Carolina Department of Health and Environmental Control*, 430 S.C. 200, 845 S.E.2d 481, 489 (S.C. 2020) (Based on review of evidence involved, the Court concluded: "We find Petitioner's allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative").

II. SITE PLAN REVIEW CHALLENGE

A. Site Plan Review by DDRC

Title 6, Chapter 29 of the South Carolina Code contains the Enabling Act. Article 7 (titled as “Local Planning – Local Development”) of the Enabling Act addresses land development regulation by local governments. In contrast, provisions concerning boards of architectural review like the DDRC are contained in Article 5 (“Local Planning – Zoning”) of the Enabling Act. The scope of Article 7 is very broad, largely because terms like “land development” and “subdivision” are defined very broadly. (See S.C. Code §§ 6-29-1110(2), –(4)).

Planning commissions play a critical role under Article 7 in all the aspects of land development. Central to their role is the power to approve, or disapprove, plans for development. The phrase “plans for development” is very inclusive because numerous terms—e.g., “sketch plans, preliminary plans, and final plans”—are used to describe the plans involved. (See S.C. Code § 6-29-1150)

Under the Columbia scheme of land of development regulation set forth in Article IV of Chapter 17 (“Planning, Development and Zoning”) of the City Code, the Planning Commission is charged with implementing the land development regulations. As a part of this scheme, terms like “sketch plan,” “site plan,” and “preliminary plat” are used to identify specific types of plans. Columbia City Code § 17-464. For a category termed “Group Development,”³ a system of plan

³ There are three categories of “group development” set forth within the definition of “subdivision, development type” in Columbia City Code § 17-464. These are:

review termed “site plan review” is established. (See Columbia City Code §§ 17-464, 17-581 through § 17-589).

Section 3.5.4 of the *Guidelines* for the -DD area shifts the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC.⁴ This approach to site plan review is *ultra vires* because it conflicts with explicit language in subsection

Group development means a development such as shopping center, office buildings, industrial sites, mobile home parks and apartment complexes where the site is not subdivided in lots, blocks and streets, but includes two or more units designed or intended for separate occupancy.

Group commercial or industrial development means a single building or combination of buildings containing 25,000 square feet of gross floor area, or two or more buildings containing a combined total of 25,000 square feet gross floor area.

Group housing development means a single lot of record upon which are erected three or more dwelling units and all the structures thereon. This definition shall include apartments, condominiums and townhouses, whether rented or sold.

⁴ Section 3.5.4 of the *Guidelines* states:

Within City Center, the D/DRC and Design/Development Review staff *will* assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

(emphasis added). This section is one of the rare instances where the *Guidelines* use a mandatory term like “will” rather than a precatory term like “should.”

6-29-1150(A) of the Enabling Act, which addresses the submission of plans or plats to the planning commission. This subsection addresses “Submission of plan or plat to planning commission” and states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the *planning commission or designated staff*.” (emphasis added). The shifting of site plan review to the DDRC pursuant to the *Guidelines* conflicts with this clear mandate that the planning commission must approve or disapprove plans.⁵

The purpose of the Enabling Act is to enable or authorize local governments to engage in planning and in regulating the use and development of land. As noted in Section 6-29-330(A) of the S.C. Code: “A municipality may exercise the powers granted *under the provisions of this chapter* in the total area within its corporate limits.” (emphasis added). The phrase “under the provisions of this chapter” indicates that the “powers granted” are both defined by and limited by the Enabling Act.

Thus, the portion of Section 6-29-1150(A) quoted above imposes an express requirement that local land development regulations “*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the planning commission or designated staff.” (emphasis added) Thus, the section imposes the following two requirements: (1) There *must* be a system for approval or disapproval of plans and plats; and (2) this system *must* be undertaken by the planning commission.

⁵ When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the DDRC stated that the question of the validity of the grant of this power is “out of our hands.” (Supplement to Record, Exhibit 8, at pp.14–16).

The Rhode Island Supreme Court stated the general principle for applying an enabling act as follows: Where a local government “purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void.” *Hardy v. Zoning Board of Review of the Town of Conventry*, 321 A.2d 289, 290–29 (R.I. 1974).

The South Carolina Supreme Court applied this principle in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2 777 (2010). At issue was the rezoning of a large parcel of land from the classification AG-15 (agricultural with minimum lot area of three acres) to PD (“planned development district”). This PD district would have 107 dwellings, which was the same number as would be allowed under AG-15. However, the minimum lot size for the PD was reduced to one acre.

Sinkler noted that Section 6-29-720(C)(4) of the Enabling Act explicitly authorizes the use of planned development schemes and quoted the following language:

“[P]lanned development district” or a development project comprised of *housing of different types and densities and of compatible commercial uses*, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development *and is characterized by a unified site design for a mixed-use development*.

690 S.E.2d at 781 (emphasis in original). *Sinkler* also quoted Section 6-29-740, which contains additional details concerning a PD district. This section provides:

In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that *will result in improved design, character, and quality of new mixed use developments* and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. *The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.*

690 S.E.2d at 779 (emphasis in original)

The Supreme Court, relying on the statutory language quoted above, held:

[T]he [zoning] ordinance [with only residential uses] did not meet the parameters for a PD. . . . [H]aving invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold *the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act.*

Sinkler, 690 S.E.2d at 781, 782 (emphasis added).

In authorizing the DDRC to undertake site plan review, the City of Columbia, like Charleston County in *Sinkler*, failed “to meet the requirements” of the Enabling Act. Consequently, this grant of power to the DDRC was *ultra vires* and is, therefore, invalid because the authorization did not satisfy “the terms of the Enabling Act.”

B. Arguments of Defendants/Respondents

Defendants/Respondents make five arguments concerning the issue of whether the grant of power to the DDRC was ultra vires:

- (1) The issue is moot,
- (2) The Association does not have standing under S.C. Code §6-29-1150,
- (3) Appellant failed to preserve the issue, and
- (4) The DDRC never decided the issue.
- (5) This court lacks jurisdiction.

As indicated below, none of these arguments is valid.

1. Mootness

Section 3.5.4 of the Guidelines provides/includes the following provision: “Within the City Center, the DDRC and the Design/Development Review staff will assume responsibility for site plan review.”⁶ Respondents argue that, because the City has deleted Section 3.5.4 of the *Guidelines*, the site plan issue is moot.

⁶ Section 3.5.4 provides as follows:

3.5.4 Site Plan Review

Site plan review in Columbia is handled by the City’s Planning Department, which has authority to approve site plans for building projects of 25,000 square feet or less; larger projects must go before the City’s Planning Commission. Once applications are accepted, the Planning Department has 10 days to review the project, including evaluation of the site plan and preparation of a staff report for

This ordinance amendment does **not** moot the site review issue because eliminating the grant of the responsibility for site plan review to the DDRC does not eliminate the ultra vires problem. In fact, it makes the situation worse because the process of site plan review by Planning Commission involves matters that are also authorized for review by the DDRC under the *Guidelines*.

a. Planning Commission Site Plan Review

The Columbia City Code provisions concerning site review of “group developments”⁷ by the City of Columbia Planning Commission involve a number of concerns, including the following:

- (1) Procedures and requirements for specific plans and constructions drawings (§ 17-582);
- (2) Off-street parking (§ 17-583);
- (3) Water and Sewer Service (§ 17-584);

the Planning Commission. The Commission may then approve, approve with conditions, or deny the project. Planning Commission decisions are appealable to the circuit court, not the City Council.

Within City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

⁷ See Columbia Zoning Ordinance § 17-464 (establishing the three types of “group development” quoted in note 3 *supra*).

- (4) Storm Drainage (§ 17-585);
- (5) Parking areas, driveways, and internal street (§ 17-586);
- (6) Building setbacks (§ 17-587);
- (7) Internal design and spacing (§ 17-588); and
- (8) Screening (§17-589).

b. DDRC Site Plan Review

Even though Section 3.5.4 has been deleted from the *Guidelines*, there are other sections of the *Guidelines* which implement the now-deleted Section 3.5.4 by addressing the same site plan review concerns that are addressed by the Planning Commission. More specifically, these sections provide for DDRC approval of the following:

- (1) Subsection 5.4.1 of the *Guidelines* sets out a scheme to determine setbacks, which are also regulated by the Planning Commission.⁸
- (2) Subsection 5.4.2 addresses “building orientation,” which is also involved in Planning Commission review.⁹
- (3) Section 5.5 addresses “open spaces,” which are also a matter for Planning Commission review.¹⁰
- (4) Section 5.10 addresses parking and screening, which are also reviewed by the Planning Commission.¹¹

⁸ Columbia City Code §17-587.

⁹ *See id.* § 17-582.

¹⁰ *Id.* §§ 17-582, 17-588.

¹¹ *See id.* §§ 17-582, 17-583, 17-586, & 17-589.

c. Conclusion

This overlap of review authority by both the Planning Commission and the DDRC conflicts with the Enabling Act.

d. Likelihood of Conflicts in Site Plan Review

Because of the overlap, the Association asserts that there is also a substantial likelihood that an application receiving a decision by the Planning Commission on a particular concern will conflict with a decision by the DDRC on the same concern. Such a result is obviously undesirable. At oral argument, Defendants/Respondents argued that the argument concerning overlap was speculative and hypothetical. However, given the number of important areas of overlap, the concerns for overlap appears to be justified.

This problem of overlap of review by both the DDRC and the Planning Commission was identified at page 18 of Plaintiff's Memorandum in Opposition to Motion to Dismiss. This Memorandum was filed on September 2, 2020. Thus, Respondents were on notice that Section 3.5.4 was not the only section involving an ultra vires grant of power.

2. Section 6-29-1150

Section 6-29-1150 is not relevant to the ultra vires argument. Jurisdiction is based upon Article V, Section 11 of the South Carolina Constitution.

3. Failure to Preserve Ultra Vires Issue

Various arguments in the Brief of Respondents fail to distinguish between deciding on the basis of adjudication and deciding on the basis of a public hearing. For example, in footnote 23 on page 19, Defendants/Respondents argue:

“Testimony by the University of South Carolina and Historic Columbia, referenced on page 36 of Appellant’s Brief, is irrelevant, as neither entity appealed either of the DDRC’s decisions.”¹²

Respondents provide no authority for this assertion.

Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008) addressed the issue of the due process rights of a landowner’s request to subdivide his property. The court stressed that adjudication is very different from decisions by discretionary zoning boards and commissions. See 656 S.E.2d at 350–51. It is generally accepted that “the purpose of holding a public hearing is for the government to obtain public testimony or comment on a particular matter.”¹³ Given this goal, it is absurd to say that a person’s testimony only counts if that person appeals.

4. Failure of DDRC to Address Issue

This is a puzzling argument. The parties agree that the “DDRC does not have authority to determine its own authority. . . .” Brief of Respondents, p. 28. When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the

¹² For additional examples, see footnote 11 at page 8 of Brief of Defendants/Respondents (“A representative of Historic Columbia, John Shearer, also objected to Trinitas’ application for design approval quote based on . . . scale and on mass and height.” *Id.* at 51:5-6. Historic Columbia did not appeal the DDRC’s Design Approval Decision as to the Proposed Construction.”); page 15 (reliance on *Powell ex rel. Kelly v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), which was decided within the context of adjudication); pages 26–28 (relying on adjudicative concepts of preservation of issue to challenge position of appellants).

¹³ New Hampshire Municipal Association, Running a Smooth Public Hearing, p. 2, available at <https://www.nhmunicipal.org/town-city-article/running-smooth-public-hearing>.

DDRC states that the question of the validity of the grant of this power is “out of our hands.” (Supplement to Record, Exhibit 8, at pp. 14–16). This lack of authority is the reason jurisdiction on this issue is based upon Article V, Section 11 of the South Carolina Constitution rather than on S.C. Code §6-29-1150.

5. Jurisdiction

The Defendants/Respondents have challenged the jurisdiction of this court to address the site plan issue. Article V, Section 11 of the South Carolina Constitution provides: “The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law.” Because this grant of general jurisdiction supports the filing of this *ultra vires* action in Circuit Court, it was the basis of all of the South Carolina *ultra vires* cases cited in Part C below, except *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008), which was filed in the original jurisdiction of the Supreme Court.

C. Remedy for Ultra Vires Act

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. *See, e.g., South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *Sinkler v. Boyd, supra* (holding circuit court properly invalidated rezoning); *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city’s decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of

conveyance by Circuit Court); *City of North Charleston v. North Charleston District*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgement that certain contracts entered into by school district were *ultra vires* and, therefore, invalid). Because the grant of power to the DDRC to address site plan review was *ultra vires*, that grant of power is invalid.

III. MISTAKE OF LAW IN DECIDING THAT THE HEIGHT OF THE PROPOSED BUILDING WAS DETERMINED BY THE UNDERLYING C-3 ZONING RATHER THAN THE -DD OVERLAY ZONING

A. The Height Restrictions in the *Guidelines*

Chapter 5 of the *Guidelines* contains the “Guidelines for Private Development.” The Introduction to this chapter notes:

The key emphasis of the guidelines in the chapter is to reinforce the exiting fabric of City Center by ensuring that new projects are developed within the rhythm of the existing development pattern. *This “contextual” approach* to evaluating the design of new projects is *fundamental to the implementation* of the *Guidelines*.

(emphasis added) Thus, the *Guidelines* view this contextual approach as fundamental to design review. Where height is concerned, Section 5.3.1 of the *Guidelines* states:

As a general rule, and consistent with current zoning provisions, buildings within most of City Center *should be no more than five stories*. . . . [I]t is not the intent of these Guidelines to establish new height standards for development in City Center. It is, however, *critical* that in applying these Guidelines—as well as other development regulations—the City be consistent in considering the height of proposed structures as they relate to the *adjacent development context*.

(emphasis added)

The Association argues that the DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, even though height “should be no more than five stories

and the DDRC should use the “contextual approach” to evaluating the design of new projects is “critical” and “fundamental” to the implementation of the *Guidelines*, the decision was based on a mistaken legal interpretation by the staff of the DDRC that the five-story guideline and the contextual approach of the *Guidelines* did not regulate the height of the building. The basis of this interpretation was set forth in an email from Lucinda Statler (the City’s Principal Planner/Urban Design) to Thomas Gottshall, President of the University Hill Neighborhood Association. (See Exhibit 1 to Complaint) Part of this email states:

The DDRC makes decisions as to whether a project meets or does not meet the design guidelines, which are qualitative measures for evaluating projects within the City Center Design District. The underlying [C-3, General Commercial Use] zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the [underlying C-3 General Commercial Use] zoning, the [C-3] zoning prevails. Please refer to Section 5.3.1 *Building Heights*, in the City Center Design Guidelines. “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center”¹⁴

(emphasis in original) This interpretation was adopted in the *Staff Report* for the July 2020 meeting. This report states: “The building height and mass remain the same [as earlier versions of

¹⁴ Similar language is contained in Lucinda Statler’s comments at the July 2020 DDRC meeting. (Supplemental Record, Exhibit 10 at 2–3)

the proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance.” (Record, Exhibit 5 at 5)

The Brief of Defendants/Respondents argues that nothing in the DDRC’s Design Approval Decision states that it was based on positions or conclusions of staff or on staff recommendations. The Record does not support this argument.

The Record makes it clear that the DDRC had been told by the staff that it could not apply the *Guidelines* because height was to be determined by the underlying C-3 zoning. For example, the DDRC “Staff Comments” consistently stated that the underlying C-3 zoning controlled the decision on height.¹⁵ In addition, at the June 10, 2020, “work session,” the staff of the DDRC stated that it wanted to “ensure that we all understand that the DDRC can’t require a reduction in the allowable height or the allowable building envelope that’s permitted by zoning.” The chairman of the DDRC replied to this statement as follows: “Right. And I appreciate that. Understand that.” (Supplement to Record, Exhibit 9, at pp. 69–70).

The motion to approve the height incorporates this understanding about the allowable building envelope. As to height and mass, the motion stated the following:

“It meets the following sections of section 5.3, building mass and organization which are 5.3.1 building height, in which is stated, quote, *The city’s comprehensive*

¹⁵ The written comments from the staff at the July meeting included the following:

While the building is 8 stories, its total height is 75’, meeting the C-3 zoning requirement. The U of SC law school, across Pickens Street, is 58’ to the top of the third floor, and 70’ to the roof pitch; the Hilton Garden Inn is just under 75’.

...

The building height and mass remain the same, consistent with the allowable envelope provided by the Zoning ordinance.

(Record, July DDRC 011)

plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.”

Supplemental Record, Exhibit 10 at p. 18 (emphasis added). Given exchanges between staff and the DDRC like that quoted in the preceding paragraph, it is clear that the reference to the quote from Section 5.3.1 was intended to implement the understanding that “the DDRC can’t require a reduction in the allowable building envelope that’s permitted by [the underlying C-3] zoning.”

In addition Defendants/Respondents concede that the DDRC approval of the height was based on the current underlying zoning, not the current overlay zoning. The Brief of Defendants/Respondents makes this clear at p. 42, which includes the following:

The applicable City zoning ordinance, City Code Section 17-275, allows for buildings in the C-3 zoning section to be between 50 and 75 feet. Columbia, S.C., Code of Ordinances § 17-275 at note c (“Buildings between the height of 50 and 75 feet may be allowed[.]”). Since the height of the structure at issue is undisputedly within this limit, the Proposed Construction is compliant with [the] City’s zoning ordinance and therefore is also compliant with the *Guidelines*.

B. The DDRC Interpretation Was a Mistake of Law

Because the DDRC interpretation was a mistake of law, approval based on this mistake was an abuse of discretion.

1. Provisions in the Enabling Act and in the Columbia Zoning Code Concerning Conflicts Between Requirements

The Commission's reliance on the staff's interpretation was a mistake of law because the interpretation conflicts with provisions in the Enabling Act and in the Columbia City Code concerning conflicts between requirements.

Section 6-29-960 of the Enabling Act states the following approach to be used when requirements conflict:

When the regulations made under the authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other more restrictive standards than are required in or under another statute, or local ordinance or regulation, the regulations made under authority of this chapter govern. When the provisions of another statute require more restrictive standards than are required by the regulations made under authority of this chapter, the provisions of that statute govern.

Section 17-181 of the Columbia City Code states:

Within each district, the regulations set forth by this article shall apply uniformly to each class or kind of structure or land. In their interpretation and application, the provisions of this article shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. *Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that*

imposing the higher standards, shall govern. Unless deed restrictions, covenants or other contracts directly involve the city as a party in interest, the city shall have no administrative responsibility for enforcing such deed restrictions or covenants.

(emphasis added)

Article V of the Columbia City Code addresses “Historic Preservation and Architectural Review.” Section 17-675 contains the following specific provision concerning conflicts in requirements where design review is involved:

The most restrictive regulations of the zoning ordinance or any other ordinance of the city or those included in this division shall prevail. However, if the commission finds it desirable to impose less restrictive requirements than the zoning ordinance, such deviation shall by referred to the zoning board of adjustment for review as a special exception.

The *Guidelines* provide two standards for determining the permissible height of a building. First, Section 5.3.1 of the *Guidelines* adopts “a general rule [that] . . . buildings within most of the City Center should be no more than five stories.” *Guidelines* § 5.3.1. Second, Section 5.3.1 notes that a “contextual approach is fundamental to the implementation of the Guidelines” and that this approach is “critical that in applying these Guidelines . . . the City be consistent in considering the height of proposed structures as they relate to the adjacent development context.” The adjacent

development is mostly one, two, and three story buildings.¹⁶ The only exception to this pattern is a hotel, which is: (1) across a wide, very busy street and (2) is outside the -DD district.¹⁷ Based on these two quantitative measures of adjacent development, the maximum height would either be three stories or five stories.

These two *Guidelines* standards for determining height are more restrictive than the underlying zoning of 75 feet. Given the requirements that the “more restrictive” standards shall govern, the more restrictive *Guideline* approach should have determined the height rather than the less restrictive underlying zoning.

2. The DDRC analysis of “vested rights” conflicts with the Columbia Zoning Code

To the extent that the staff interpretation relies on the concept of “vested rights,” the interpretation conflicts with the definition of vested rights in Columbia City Code, Section 17-2(a). This section states: “A vested right is triggered only upon the approval or conditional approval of a site specific development plan.” Section 17-1(b) defines a “site specific development plan” as follows: “Site specific development plan means those documents that comprise a complete application for a zoning permit, certificate of zoning compliance, variance, special exception, planned unit development, sketch plat or plan, or other similar approval that authorizes the developer or landowner to proceed with investment in grading, installation of utilities, streets and other infrastructure, and to undertake other significant expenditures necessary to prepare for

¹⁶ See “Analysis of Application of Certificate of Design Approval for Trinitas,” Record, Exhibit 3, at pp. 50, 135.

¹⁷ *Id.*

application for a building permit.” An underlying zoning classification of C-3 zoning does not satisfy this definition of site-specific development plan.

3. The DDRC Interpretation Is Fallacious

Another problem with the interpretation concerning height adopted by the DDRC is that the “logic” of the argument makes *all* the guidelines meaningless. Statler’s email states: “When the design guidelines seem to conflict with the [underlying] zoning, the zoning prevails.” If this general statement were valid, imposing any of the *Guidelines* would be impermissible because the underlying C-3 zoning does not have any limits on such concerns as façade proportion and rhythm, proportion of openings, horizontal rhythms, alignment of architectural elements, wall articulation, roofs, and upper story details. See Chapter 5 of the *Guidelines*.

The distinction between “qualitative measures” and “quantitative measures” in the Statler email has two flaws. First, the email does not provide a reason for regarding the distinction as relevant to the question of whether the *Guidelines* or the underlying zoning should determine height. Second, the *Guidelines* contain quantitative measures for concerns other than height. For example, Section 5.3.3 address “Proportion of Openings” as follows:

Maintain the predominant difference between upper story openings and street level storefront openings (windows and doors). Usually, there is a much greater window area (*70 percent*) at the storefront level for pedestrians to have a better view of the merchandise displayed behind as opposed to upper stories which have smaller window openings (*40 percent*).

Whenever an infill building is proposed between two adjacent commercial structures, the characteristic rhythm, proportion and spacing of existing door and window openings should be maintained.

(emphasis added) Despite the quantitative nature of this guideline, the DDRC used it rather than the underlying zoning to address the proportion of openings. (Supplemental Record, Exhibit 10 at 10–11)

4. The DDRC Interpretation Conflicts with the Enabling Act and with Doctrine Concerning Overlay Districts

The *Guidelines* state: (1) that “zoning should be consistent with *current zoning provisions*” and (2) that “the City’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of building.” (emphasis added) (*Guidelines* § 5.3.1 at p. 5-2). The term “current zoning provisions” requires further analysis because there are two separate “current zoning provisions” involved.

When the City Council adopted the *Guidelines* as a part of its zoning code by reference in Columbia City Code Section 17-253 and Section 17-655(b)(2), the *Guidelines* became a part of Columbia’s “current zoning provisions.” As a result, the *Guidelines* are now a part of Columbia’s “current zoning provisions.” If the *Guidelines* were not part of today’s current zoning provisions, the DDRC could not apply them in the -DD overlay area.

The result of the adoption by reference is that, under today’s current zoning provisions, the site of the proposed Trinitas project is subject to two distinct zoning schemes: (1) the regulations for the underlying zoning category of C-3 and (2) the -DD overlay zoning provisions of the *Guidelines*. Thus, the question in this litigation is: Should the determination of height be based on the current underlying zoning provisions or on the current overlay -DD provisions?

As indicated above at Part I-C, an overlay is described in Section 6-29-720(C)(5) of the Enabling Act as a district that “*imposes* a set of requirements *or relaxes* a set of requirements imposed by the underlying zoning district.” (emphasis added) It is clear from the content of the

Guidelines that the *Guidelines* are meant to impose requirements, not relax them. The legal interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay like that involved herein and the underlying zoning backwards. The -DD design overlay involved herein is adopted to *increase* requirements by imposing *additional* requirements in order to address design concerns. If the underlying zoning will control where there is a conflict with the additional requirements of the overlay zoning, there is no reason to bother with the time and expense of applying the increased requirements of the overlay.

The general treatment of overlays in land use regulation parallels the language of S.C. Code § 6-29-720(C)(5). For example, John R. Nolan & Patricia E. Sallcin, *Land Use in a Nutshell* 218 (2006) describes an overlay as follows:

Overlay zoning is a flexible zoning technique that allows a municipality either to encourage or to discourage development in certain areas. An overlay zone is defined as a mapped overlay district superimposed on one or more established zoning districts. *A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements.*

(emphasis added)

South Carolina follows this approach of “two sets of zoning requirements” in overlay cases. For example, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) involved an “Airport Overlay District” (AO) which, among other things, restricted certain uses and expansions within the AO District. The church claimed it was entitled to a building

permit for a proposed expansion because: (1) an earlier permit included the expansion;¹⁸ and (2) an incorrect approach had been used in determining whether the expansion would increase the “occupant load” of the church’s property. “Occupant load” in the area within the AO District was important because of a concern for a high potential for accidents affecting the public areas near a military airport. The defendants rejected both of the church’s claims.

The church appealed, and a master-in-equity ruled in favor of the church. The Court of Appeals reversed the decision of the master-in-equity. In terms of the “occupant load” concern of the AO District, the Court held “the evidence in the record clearly supports the Planning Commission’s finding that the [proposed] fellowship hall would increase the occupant load for the site.” 828 S.E.2d at 241. In reaching this decision, the Court followed the general principle that, where an overlay imposes additional requirements, those additional requirements supplement or replace the underlying zoning.

Heilker v. Zoning Board of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) involved the application of a “Highway Corridor Overlay Zoning” scheme adopted by the City of Beaufort. The overlay was concerned with the protection and promotion of aesthetics and safety and contained new restrictions concerning the outdoor display of certain types of merchandise in the “Highway Corridor” district. The central issue in the case was whether the outdoor displays at issue were: (1) part of the “use” of the land for retail sale, or (2) merely an

¹⁸ In an opinion filed on September 16, 2020, the South Carolina Supreme Court reversed the decision of the Court of Appeals and held that the earlier permit included the expansion. *Grays Hill Baptist Church v. Beaufort Country*, 431 S.C. 630, 850 S.E.2d 29 (2020). The Supreme Court did not address the overlay issue because “our determination concerning the validity of the original permit resolves this case” *Id.* at 850 S.E.2d 32, fn. 8.

“activity or practice” incidental to the “use.” If the display was a use, the overlay did not apply; if it was an activity or practice, the restrictions of the overlay applied.

The Zoning Board of Appeals (ZBA) ruled that it was a practice, and Heilker appealed. A special judge reversed the ZBA’s finding, and the Court of Appeals reversed the special judge. *Heilker* adopted the same approach as *Grays Hill Baptist Church* and held that, where an overlay applied, the restrictions in the overlay supersede the underlying zoning.

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC ignored the legal effect of the adoption of the *Guidelines* by reference. As a result, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the height requirements in the *Guidelines* even though the *Guidelines* constitute the overlay part of current zoning. (See Part III-B-1 above for discussion of height requirement in the *Guidelines*.) Because the DDRC failed to follow the general rule of making the parcel within the overlay district “simultaneously subject to two sets of zoning regulations,” the DDRC made an error of law. This error constitutes an abuse of discretion.

5. Arguments of Defendants/Respondents

The Brief of Defendants/Respondents relies on generic rules of statutory instruction rather than the explicit provisions in the Enabling Act and the Columbia City Codes. Underlying their approach is a failure to appreciate the legal effect in terms of “current zoning” of the adoption of the *Guidelines* by reference. As a result, their arguments do not address the question of whether the underlying C-3 zoning or the overlay zoning of the *Guidelines* should prevail.

They also fail to address the problems concerning vested rights under the City Zoning Code and the fallacious nature of the argument concerning the flaw in the quantitative/qualitative distinction. Many courts have noted that where an important point is not addressed in a party's argument, the point is deemed to have been abandoned. *E.g.*, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); *Finch v. Finch*, 442 S.W.3d 209, 233 (Mo. App. 2014)

Defendants/Respondents also argue that the Association's positions on the role of the *Guidelines* as to the overlay zoning is inconsistent with its position on the issue of unlawful delegation. To the extent that consistency is a problem, both sides have this problem.

If the adoption of the *Guidelines* by reference was not an improper delegation, the *Guidelines* provide the legal framework for the overlay zoning. As a result, Defendants/Respondents cannot logically claim that the height provisions in Section 5.3.1 of the *Guidelines* are not more restrictive than the underlying C-3 zoning. Because these provisions are more restrictive, the Section 6-29-960 of the Enabling Act and Sections 17-181 and 16-675 of the City Code are applicable.

IV. STANDING

A. Associational Standing

1. Doctrine

The doctrine of associational standing was recently summarized by the Supreme Court as follows:

[A]n organization has associational standing to bring suit on behalf of its members when (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020). The associations in *Preservation Society* were:

[seeking] a contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston. Petitioners maintain they have standing to seek this hearing as “affected persons” under section 44-1-60 (G) of the South Carolina Code (2018). The ALC concluded Petitioners did not have standing and granted summary judgment to Respondents.

Id. at 483.

The Supreme Court decision focused on the first standing requirement—i.e., on whether any member of the petitioning organizations had standing as individuals under the statutory term of “affected persons.” In addressing this issue, the Court noted:

Petitioners are community and neighborhood organizations comprised primarily of members who own property near the proposed passenger cruise facility. . . . [T]he court of appeals acknowledged Petitioners presented affidavits from individual members expressing concern over their reduced quality of life arising from the effects upon them *individually*, such as pollution and health effects, traffic congestion, property values, effects on their businesses in the area, and effects on the historical integrity of the area where they resided. . . . Nevertheless, the court of appeals, relying on *Carnival Corp.*, agreed with the ALC that the claims of possible environmental and personal harm were purely speculative or were merely generalized grievances equally affecting the public as a whole.

Id. at 488.

The Supreme Court concluded that the associations’ “allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative.” *Id.* at 489. The proximity of the members of the associations to the terminal involved play a role in this conclusion. The court noted:

While geographic proximity may not be a determinative factor in every case, it is highly relevant to our analysis in this case. Here members would suffer the environmental consequences Petitioners allege the project will create, such as

breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution.

Id. at 489–90.

Defendants/Respondents primarily rely on two cases in their challenge to the Association’s standing: *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014) and *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

Carnival Corp. involved a suit brought by two neighborhood associations, a historic preservation society, and the Coastal Conservation Society. The alleged injuries involved were essentially public nuisance claims. 753 S.E.2d at 851. Because the plaintiffs lacked the special injury required for bringing a public nuisance claim, the court held that the plaintiffs lacked standing. *Id.* at 852. The court also held that public importance standing did not apply because of the nature of the claims involved and because the claims could be brought by persons who could show the required injuries, the public importance exception did not apply. *Id.* at 853.

Beaufort Realty Co. involved a challenge to a decision by the County Zoning Administrator that plats filed for a subdivision were exempt from the need for approval. The court held that the League did not have standing because there was no evidence of harm to individual members and that a “severe concern” for potential harm was, by itself, inadequate to satisfy the standard of concrete particular harm. 551 S.E.2d at 590.

The Association relies primarily on the following two cases: *Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control*, 430 S.C. 200, 845 S.E.2d 481 (2020) and *Citizens for Quality Rural Living, Inc.*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019).

Preservation Society of Charleston addressed the procedural issue of whether the organizational plaintiffs had standing to request a “contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston.” 845 S.E.2d at 483. As indicated above, the court held that the plaintiffs had standing because: (1) the organizations had members who owned property near the “proposed passenger cruise facility” at issue; and (2) the associations’ allegations of potential harm to members in the nearby neighborhoods “through affidavits and other filings, are not speculative.” 845 S.E.2d at 488–89. The harms were not speculative because, given the proximity to the facility, the members would be exposed to adverse health effects and increases in traffic and noise.

Citizens for Quality Rural Living, like *Preservation Society of Charleston*, focused on: (1) the fact that plaintiffs owned property in a defined neighborhood that was in the immediate vicinity of the proposed subdivision at issue in the case, and (2) members of the neighborhood “will be impacted by the additional traffic” and by the incompatibility of the subdivision with the surrounding rural community. 825 S.E.2d at 723, 730.

All four cases focus on a common concern: Is there evidence to show a reasonable likelihood of specific, serious injury to individuals in the association that are not experienced by the general public? In *Carnival Corp.* and *Beaufort Realty*, there was no such evidence. In *Preservation Society of Charleston* and *Citizens for Quality Rural Living*, such evidence had been shown. As indicated in Part IV-A-2 below, members of the Association have satisfied the requirement of showing likelihood of substantial injury different from that suffered by the general public.

2. Standing—“Substantial Interest”

Section 6-29-900(A) of the Enabling Act addresses standing to appeal from a design decision by an architectural review board as follows: “A person who may have a *substantial interest* in *any* decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from *any* decision of the board to the circuit court” (emphasis added)

Citizens for Quality Rural Living, Ins., v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (S.C. Ct. App. 2019) addressed the issue of standing in the context of an appeal from a decision by a planning commission. The Court held that Section 6-29-1150 of the Enabling Act granted “any party in interest” a right to appeal from a decision of a planning commission. In terms of the meaning of the term “party in interest,” the court adopted the approach of *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013), which defined “a real party in interest for purposes of standing as ‘a party with a real, material, or *substantial interest* in the outcome of the litigation (quoting *Hill v. S.C. Dep’t of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E. 2d 612, 623 (2010)).” 825 S.E. 2d at 727, n.6 (emphasis added). *Citizens for Quality Rural Living* also noted that the association involved had a substantial interest, and thus standing, because “its *members include persons who own property and live in the immediate vicinity of the proposed subdivision.*” *Id.* (emphasis added)

Plaintiff University Hill Neighborhood Association is an unincorporated association. As indicated above in Part I-C of the Statement of Case, the boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic district—a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.”

Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This district is “identified as Architectural District No. 1” and is “bound by Laurens, Senate, Henderson, and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic Districts. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed. Given these boundaries, it is clear that this association, like the associations in *Preservation Society of Charleston* and *Citizens for Quality Living*, contains individuals who live in a defined area in proximity to a proposed use.

The record herein shows that these individuals will suffer non-speculative harm from the Trinitas proposal. Numerous residents of the University Hill Neighborhood testified under oath at public hearings concerning the Trinitas project that: (1) they lived within the boundaries of the University Hill Neighborhood Association, and (2) they as individuals and the neighborhood area as a whole would experience substantial negative impacts from the proposed project. These

testifying residents include the following: Tom Gottshall,¹⁹ John McGill,²⁰ Beth Richardson,²¹ Catherine Fenner,²² April Lucas,²³ Douglas Carlisle,²⁴ John Stucker,²⁵ and Bobby Lyles.²⁶

¹⁹ Supplemental Record, Exhibit 6, at pp. 17-20 (noting, inter alia, that the proposed project is “adjacent to our neighborhood” and that, as a result of students in the proposed projects, hundreds of students will be “moving . . . through our neighborhood at night.”; Supplemental Record, Exhibit 8, at pp. 43-46, 48-50 (noting that the project did not meet *Guidelines*, that the project “is to be marketed to students”); Supplemental Record, Exhibit 9, at pp. 9-11 (emphasizing objections to height as violating *Guidelines*). Mr. Gottschall also submitted written materials to the DDRC. See Record, Exhibit 1, at p. 4; Record, Exhibit 2, at p. 9; Record, Exhibit 3, at p. 46; Record, Exhibit 4, at p. 22; Record, Exhibit 5, at p. 86.

²⁰ Supplemental Record, Exhibit 6, at pp. 23-25 (noting investment in homes in neighborhood, size of proposed building, and negative impacts of auto, bike, and pedestrian traffic).

²¹ Supplemental Record, Exhibit 6, at pp. 25-26 (noting size of proposed building and reasons why residents of proposed project are likely to be mostly students, expressing concern for “overloading the neighborhood,” and describing significant investments in homes in the neighborhood).

²² Supplemental Record, Exhibit 6, at pp. 26-27 (noting concern for negative impacts of students returning to campus area from Five Points late at night and concern that project will “smother our historic neighborhood”); Exhibit 8, at pp. 59-61 (referring to “people staggering home” in early hours of the day).

²³ Supplemental Record, Exhibit 6, at pp. 27-28 (noting problems resulting from students returning from Five Points and “banging on our doors at 2:30 in the morning”).

²⁴ Supplemental Record, Exhibit 6, at pp. 30-31 (giving reasons to believe students will reside in proposed project and describing specific problems from drunken students “who have trooped through the neighborhood”).

²⁵ Supplemental Record, Exhibit 6, at pp. 41-43 (expressing concern for negative impact of auto and pedestrian traffic by students).

Among their concerns were an increase in vehicular and pedestrian traffic through the neighborhood. Because Trinitas is a “university centric developer,”²⁷ it is likely that students will reside in the proposed project. As a result, pedestrian traffic from students going to and from class would flow through the neighborhood. In addition, because of topography and a railroad, the route for these students and other young adults living in the proposed project returning from the bars in the “Five Points” area of Columbia to the proposed Trinitas project would be through the University Hill neighborhood. These people “moving . . . through our neighborhood at night”²⁸ would inevitably include some drunken and rowdy students who will, like many young people before them, engage in things like the following:

- conduct involving “damage and vandalism and just altogether bad behavior in the small hours of the morning,”²⁹
- “people banging on our doors at 2:30 in the morning,”³⁰
- “people staggering home at” 5:00 am,³¹ and

²⁶ Supplemental Record, Exhibit 8, at pp. 57-59 (stating that he was a resident of the Heritage and president of the homeowners’ association and expressing concern that the scale of the proposed project would “overload” the neighborhood).

²⁷ Testimony of Linda Irving, Trinitas’s representative, Supplemental Record, Exhibit 6, at p. 29; Supplemental Record, Exhibit 8, at p. 6.

²⁸ Testimony of Tom Gottschall, Supplemental Record, Exhibit 6, at pp. 17-20.

²⁹ Testimony of John McGill, Supplemental Record, Exhibit 6, at pp. 23-25.

³⁰ Testimony of April Lucas, Supplemental Record, Exhibit 6, at pp. 27-28.

³¹ Testimony of Catherine Fenner, Supplemental Record, Exhibit 8, at pp. 59-61.

- students who have appeared “to be dead,” engaged in yelling and “waking me up” at 2:30 in the morning, and “urinating in my driveway.”³²

The residents also expressed concern for the visual impact of a large, monolithic building looming over the area.

The University of South Carolina owns two properties adjacent to the proposed building. Representatives of the University of South Carolina also gave testimony concerning the negative impacts of the proposed Trinitas project on the historical and residential character of the University Hill Neighborhood and concerning the negative impact on joint plans between the University and the neighborhood.³³ Representatives of Historic Columbia gave testimony objecting to failure to follow the *Guidelines* and negative impact on historical character of the area.³⁴ The evidence also

³² Testimony of Douglas Carlisle, Supplemental Record, Exhibit 6, at pp. 30-31.

³³ Derek Bruner, Supplemental Record, Exhibit 6, at pp. 22-23 (indicating negative impact on University Hill neighborhood from “student presence adjacent to and throughout their neighborhood,” stressing conflicts with University’s master plan, and noting that “height and scale and the mass” does not balance with neighborhood); see Letter from Bruner to Lucinda Statler, Record, Mar. 4, 2020, Exhibit 3, at p. 44; Dan D’Alberto, Supplemental Record, Exhibit 8, at pp. 56-57 (noting the plans of the University and stressing that the University “is in lockstep with University Hill Neighborhood in that we agree with the letter they submitted.”).

³⁴ Robin Waites, Supplemental Record, Exhibit 6, at pp. 20-22 (describing historical character of area and negative impact of scale of proposed building, and objecting to violation of *Guidelines*); John Sherer, Supplemental Record, Exhibit 8, at pp. 50-53 (describing factual errors in the Trinitas presentation, stressing the negative impact of the “view shed” of the project, and noting that the church building south of the project is historic).

includes a detailed written review of the historic importance of the buildings and surrounding area in the vicinity of the Trinitas project.³⁵

Defendants/Respondents argue that this detailed factual testimony is “speculative,” “conclusory,” and “hypothetical.” However, the number of specific points made in the sworn testimony before the DDRC are, like the record in *Preservation Society*, “not speculative” and affect the residents “individually.”

3. Conclusion

The evidence in the record on appeal contains sworn testimony concerning the harmful impacts on the members of the University Hill Neighborhood Association. As in *Preservation Society* and *Citizens for Quality Living*, their neighborhood is adjacent to the block where the project would be built. As a result, they have “geographic proximity” and “live in the immediate vicinity of the proposed” building. In addition, their concerns for increased traffic are the same as the concerns of the members of the associations in these two cases. As in *Preservation Society*, the residents of the University Hill Neighborhood are concerned about “traffic congestion, property values . . . and effects on the historical integrity of the area where they resided.” 845 S.E.2d at 488. Like the residents in *Citizens for Quality Living*, the residents are concerned about the traffic and “incompatibility of the subdivision with the surrounding” community. 825 S.E.2d at 721.

³⁵ Testimony and written analysis of Patrick Hubbard, Record, Exhibit 8, at pp. 53-56, 167-69, 206-09; see “Analysis of Application of Certificate of Design Approval for Trinitas,” Record, Exhibit 3, at pp. 50, 135.

In addition, at the March 12, 2020, Hearing, Linda Irving, speaking as “Trinitas’s representative,”³⁶ recognized the importance of considering the negative impacts on the neighborhood. Ms. Irving stated: “The site is not within the bounds of a historic district or within a residential neighborhood, though *their proximity must absolutely be factored heavily*.”³⁷

Given the testimony of residents in the immediate vicinity of the project and of representatives of the University of South Carolina and Historic Columbia, combined with the admission by the Trinitas representative that the proximity of historic districts and residential neighborhoods “must be absolutely factored heavily,” the Association and its members have shown a substantial interest in the decisions of the DDRC concerning the Trinitas project.

B. Public Importance Standing

The South Carolina Supreme Court has held that “a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). The approach for addressing a claim of public importance standing was addressed in *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854, 859 (2017), as follows:

[W]hen deciding whether to confer public importance standing, courts must take these competing policy concerns [of citizen access to courts and a need to achieve judicial economy and freedom from frivolous suits] into consideration, and must

³⁶ Supplemental Record, Exhibit 8, at p. 6.

³⁷ Supplemental Record, Exhibit 8, at p. 35. (emphasis added)

also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.

1. Issues Involved

This suit involves three important issues where future guidance is needed. These issues are:

- (1) Whether important aspects of a development within the -DD area, like height, are determined by the underlying zoning or by the overlay zoning of the *Guidelines*;
- (2) Whether the grant by the City of the power of site plan review to the DDRC for development within the -DD area was *ultra vires*; and
- (3) Whether the “overall determination” approach to the application of the precatory, non-binding language of the *Guidelines* constitutes an improper delegation of the City’s legislative power and a denial of due process.

2. Importance of Issues

The -DD area of Columbia regulated by the *Guidelines* “consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River.” Columbia City Code, § 17-253. Given the size of this area, issues concerning the validity, proper scope, and application of the *Guidelines* effectively determine important aspects of development in the downtown core of Columbia.

In addition, Columbia has many other overlay districts. *See, e.g.*, Columbia City Code §§ 17-306, 17-307, 17-308, 17-309, 17-310, 17-311, 17-312, 17-313, 17-314, 17-315, 17-322, 17-323, 17-324, 17-325, 17-326, 17-681 (historic districts). Important issues concerning the relationship between these overlays and the underlying zoning involved could arise under these schemes.

More broadly, issues concerning overlay schemes and underlying zoning could arise throughout South Carolina. Overlay schemes are authorized by Section 6-29-720(C)(5) of the Enabling Act and are a generally recognized technique for land use regulation.³⁸

3. Need for Future Guidance

Future guidance in addressing these three issues is needed for the same reasons that these issues are important. More specifically, issues will arise concerning the validity, proper scope, and application of the *Guidelines* and concerning overlays generally because of: (1) the large area covered by the -DD overlay, (2) other overlay schemes in Columbia, and (3) overlay schemes in South Carolina.

As indicated above in Part III, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) and *Heilker v. Zoning Board of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) held that overlay schemes in South Carolina follow the general rule that an overlay zone is “simultaneously subject to two sets of zoning regulation.” Thus, this appeal raises the issue of which approach will be followed in South Carolina: The approach used herein by the DDRC or the approach used in *Grays Hill Baptist Church* and *Heilker*?

Grays Hill Baptist Church involved an airport overlay district. Section 17-307 of the Columbia City Code contains an overlay district termed: “—AP airport height restrictive areas,”

³⁸ See, e.g., Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* 93–94 (3d ed. 2013); John R. Nolon, *Land Use in a Nutshell* 219–22 (2006); Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation* 222–23 (3d ed. 2015).

which applies in the area around Owens Field Airport. If the approach adopted by the DDRC were applied to the AP overlay, the height restrictions of the overlay would not apply.

The City of Columbia also has overlay corridor districts designed to impose supplemental sign regulations (see Columbia City Code, §§ 17-310, 17-313, 17-314, 17-315). The concerns underlying these overlay districts are similar to those in *Heilker*. As a result, issues concerning the relationship of the overlay involved vis á vis the underlying zoning could arise in applying these corridor overlays.

4. Agreement on Public Importance

On September 13, 2021, Trinitas and the DDRC filed a Petition for Writ of Mandamus Pursuant to 245(B), SCACR, or, in the alternative, Petition for Certification Pursuant to Rule 245(A), SCACR.³⁹ At pages 10–17 of this filing, Trinitas and the DDRC argue: (1) that “[t]his case involves issues of significant public interest,”⁴⁰ and (2) that “this case has the potential to affect every board of architectural review established by governmental bodies throughout the state and all applicants who file applications through those boards.”⁴¹ Given these statements, the parties are in agreement that this case satisfies the public important test for standing.

³⁹ The City did not join in this filing. However, the attorney for the City indicated in a letter dated September 22, 2021, that “the City of Columbia does not oppose the petition.”

⁴⁰ Page 10.

⁴¹ Page 17.

V. IMPROPER DELEGATION OF LEGISLATIVE POWER

As indicated above at Part I-C, the drafters of the *Guidelines* viewed the *Guidelines* as “illustrative” rather than prescriptive. *Guidelines* § 5.1 at p. 5-1. The drafters also stated that “it is not the intent of these Guidelines to establish new height standards for City Center.” *Guidelines*, § 5.3 at 5-3. Instead, the purpose of the *Guidelines* was to provide “*non-binding* general direction for development within City Center, *with the recommendation that the City’s regulatory plans and codes be amended to reflect the guidance included here.*” *Guidelines*, § 5.3.1 at p. 5-2 (emphasis added). Thus, the intent of the *Guidelines* was that “*the Design Development Guidelines will be implemented*” by amending the regulatory “Zoning Ordinance.” See *Guidelines* § 3.5.2 (emphasis added).

However, despite this explicit language concerning the need for “regulatory plans and codes” in a “Zoning Ordinance,” the City Council chose to bypass the necessary steps of drafting and adopting an ordinance. Instead, the Council simply adopted the non-binding *Guidelines* as the ordinance. As indicated above in Part I-C, this outcome was achieved by adopting the *Guidelines* by reference. See Columbia City Code §§ 17-253, 17-655(b)(1). The Association argues that a result of this approach, the DDRC and its staff have been authorized to apply a scheme of “illustrative” “non-binding” guidelines and that such an open-ended authorization constitutes an improper delegation of the City’s legislative power.

A. Unlawful Delegation

The framework for addressing issues of unlawful delegation of legislative power is set forth in *South Carolina State Highway Department v. Harbin*, 86 S.E.2d 466 (S.C. 1955), which held that a provision of the statute authorizing the highway department to suspend or revoke a driver’s

license “*for any cause satisfactory to*” the department was an unconstitutional delegation of legislative power. *Id.* at 468 (emphasis added).

Harbin summarized the principles concerning delegation of legislative power to an administrative agency as follows:

The question of delegation of legislative power has confronted the courts with many perplexing problems, particularly during recent years when the complexities of government have been constantly on the increase. It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board “to fill up the details” by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. “However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.”

Id. at 470 (authorities deleted)

The Court’s conclusion concerning the unconstitutionality of the delegation involved in *Harbin* was stated as follows:

When the authority of the State Highway Department to suspend or revoke a license for any cause which it deems satisfactory is considered in the light of the foregoing

principles, said provision must be declared invalid as an unlawful delegation of legislative power. *It sets up no standard to guide the Department and contains no limitations.* As a general rule, “A statute which in effect reposes *an absolute, unregulated, an undefined discretion* in an administrative body bestows arbitrary powers and is *an unlawful delegation of legislative powers*. We have held invalid municipal ordinances attempting to vest such arbitrary powers in municipal authorities.”

Id. at 370–71 (emphasis added) (authorities deleted)

In the regulation of land use, the unlawful delegation concern can also be expressed in terms of due process. For example, *Restaurant Row Associate v. Horry County*, 335 S.C. 209, 516 S.E.2d 4426, 445 (1999), stated: “When deciding whether to grant a variance, a local board must be *guided by standards which are specific* in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939).” (emphasis added) Because the ordinance at issue was sufficiently specific, the decision at issue in *Restaurant Row Associates* was upheld.

The cited case of *Schloss Poster Advertising Co.* involved an ordinance providing as follows: “Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the city of Rock Hill without having first obtained from the city council a permit to do so.” In effect, the City Council had delegated to itself an unrestrained power to grant or deny permits to construct billboards. In holding that this “delegation” was unconstitutional, the Court noted:

The ordinance before us is in no sense a zoning ordinance as provided in Sections 7390–7398, Code 1932, nor does it prescribe rules or conditions for the issuance of

permits for the erection of billboards to which all persons similarly situated may conform. *It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them,* the right and power to absolutely prohibit the use of property for the erection of billboards.

The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes not uniform rule upon which the special permission is to be granted.

2 S.E.2d at 394 (emphasis added).

B. Association's Argument

In an email to Thomas Gottshall, the President of the University Hill Neighborhood Association, concerning the application of the *Guidelines*, Lucinda Statler, the Principal Planner/Urban Design for the City, stressed that Section 5.3.1 of the *Guidelines* stated: “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center. . . .” (emphasis in original)

In this email, Ms. Statler described the decision-making process of the DDRC and its staff as follows:

There are 17 pages of guidelines that pertain to new construction that are considered. The staff evaluations and the DDRC’s decisions are based on the *overall determination* as to whether a project substantially meets—or does not meet—the design guidelines. This means that there are likely areas where the

project may not be exactly what is recommended, and other areas where they meet and exceed what is recommended. It is an *overall assessment* of the project and of course, there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision, rather than only staff. *In the almost 14 years that I have served as staff to this Commission, I would be hard pressed to think of a project that met every single guideline.* This would be unattainable for most projects, as there are many factors that determine a development's feasibility. The design review process is built to provide some flexibility in this balancing act.

(Exhibit 1 to Complaint (emphasis added))

The Association argues that this “overall assessment-overall determination-substantially meets-cannot meet every single guideline” approach of “general direction” to “non-binding guidelines,” is, in effect, a “we know it when we see it” test. As such, argues the Association, the test is contrary to the holding of *Harbin* because it sets up “no standard to guide [decisions] . . . and contains no limitations” and, as in the ordinance in *Schloss Poster Advertising Co.*, the *Guidelines* do “not profess to prescribe regulations.”

The Association argues that, as a result of this approach, there is neither a meaningful standard to guide the exercise of discretion nor a framework to provide a workable regulatory framework for judicial review of the exercise of discretion. For example, even though there has never been a “project that met every single guideline,” the *Guidelines* contain no standards to guide the DDRC in assessing whether and how much guidelines can be waived or softened in deciding whether a project “substantially meets” the design guidelines.

The Association also questions the expertise of the Commission because there is no reason to simply assume that the Commission possesses the extreme wisdom necessary for such unlimited discretion. The treatment of the Trinitas project is claimed to illustrate the human fallibility of the Commission. At the January 9, 2020, meeting, the Commission rejected the staff recommendation of approval with restrictions and voted to deny the requests for design approval and for site plan approval of the Trinitas project. Subsequently, a special meeting was called for February 7 to receive legal advice and to consider rescinding the January denials of approval. At the February 7 meeting, the Commission went into executive session to receive legal advice relating to a pending, threatened, or potential claim. The Commission then moved out of executive session and moved to rescind its own decision to deny design approval and site plan approval.

The Association also argues that the lack of any meaningful standard to limit and structure discretion is reflected in the following comments by Lyndey Bryant, counsel for Trinitas, at the March 21, 2020, DDRC Hearing:

As to building height, the guidelines clearly express a *nonbinding general direction* for buildings within the city center expressly recognizing that zoning ordinances are the primary legal vehicle for expressing regulations concerning the height of buildings. Although there is a recommendation that building not exceed five stories, there is a specific preference in the guidelines at Section 5.3.1, which says, low profile office buildings, commercial buildings and residences will not yield the density, urban scale and character which is desired for the city center and should therefore be discouraged. *In other words, the opposite proposition also holds true.*

(Supplement to Record, Exhibit 8, at pp. 47–48 (emphasis added). At this hearing, Ms. Bryant also noted: “The guidelines are illustrative rather than prescriptive, and do not set forth detailed or rigid

standards.” (Supplement to Record, Exhibit 8, at p. 41) The Association asserts that this assessment of the contradictory, standardless nature of the *Guidelines* by counsel for Trinitas is virtually the same as the claim of the Association that the City Council has delegated its legislative power to the DDRC.

C. Argument of Defendants/Respondents

The Defendants/Respondents argue that the *Guidelines* contain numerous specific policies and standards that are sufficient to structure decisions concerning design. They also argue that the expertise of the members of the DDRC helps guard against abuse.

D. A “Perplexing” Problem

As noted in *Harbin*, the “question of delegation of legislative power has confronted the courts with many perplexing problems. . . .” 86 S.E.2d at 470. *Harbin* also notes:

The difficulty is in the application of these general principles, for there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated to an administrative agency. The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegations of its own legislative power is not capable of precise definition.

86 S.E.2d at 470.

This challenge is particularly perplexing in the case at issue. On the one hand, there are “standards” and “policies.” On the other hand, the *Guidelines* explicitly state that these standards and policies are nonbinding. Moreover, a ruling in favor of the Association’s claim would result

in a situation where the City would have virtually no design controls for the downtown area of Columbia.

It is important to note that the Association is challenging two specific approvals: (1) site plan approval and (2) design approval. This court has determined that the Association has standing to challenge these approvals and that both approvals are invalid. As a result, the Association has prevailed in terms of the approvals of the Trinitas project.

The Supreme Court has noted that, where a court addressing an appeal has disposed of the issues involved, it “need not address remaining issues when disposition of prior issue is dispositive.” *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591, 598 (1999); accord, e.g., *Whiteside v. Cherokee County School District No. One*, 311 S.C. 335, 428 S.E.2d 886, 889 (1993). This principle has been applied in zoning cases. E.g., *Heilker v. Zoning Board of Appeals*, 346 S.C. 401, 552 S.E.2d 42, 48 (2001). Because the issues of site plan approval and design approval have been resolved in the Association’s favor, the best approach for the perplexing issue of nondelegation in this case is to adopt the approach of these cases and not address the delegation of legislative authority issue.

VI. CONCLUSION

For the reasons stated in this Brief, this Court holds:

- (1) the Association has standing,
- (2) because the decision by the City of Columbia to grant the authority to conduct site plan review to the DDRC was ultra vires and, therefore, void, the approval of the site plan is reversed,
- (3) because the DDRC abused its discretion by making a mistake of law in deciding that the height of the proposed building was determined by the underlying zoning rather than the -DD overlay, the design approval of the Trinitas proposal by the DDRC is invalid, and, therefore, is reversed, and
- (4) it is not necessary or useful to address the issue of whether the adoption of the *Guidelines* as an ordinance was an unlawful delegation of the legislative power of the City.

Hon. L. Casey Manning
Fifth Circuit Court



Richland Common Pleas

Case Caption: University Hill Neighborhood Association vs City Of Columbia ,
defendant, et al

Case Number: 2020CP4003475

Type: Order/Relief

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2021-12-07 09:56:03 page 57 of 57

Manning, L. Casey Law Clerk (Victoria Elgin)

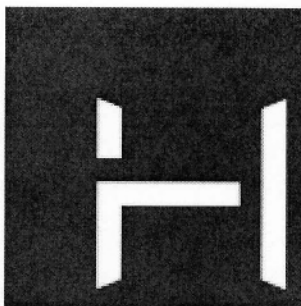
From: Holli Miller <holli@harpootlianlaw.com>
Sent: Tuesday, March 8, 2022 10:25 AM
To: Manning, L. Casey Law Clerk (Victoria Elgin); Manning, L. Casey
Cc: Lyndey R. Z. Bryant; Dick Harpootlian; HUBBARD, PATRICK; Pete Balthazor; mary.taylor@columbiasc.gov; cliff.moore@arlaw.com; jennifer.shirey@arlaw.com
Subject: University Hill Neighborhood Association v. City of Columbia, et al.; C/A No. 2020-CP-40-03475
Attachments: 2022-03-08 PL Mot to Recon Order FINAL.docx
Follow Up Flag: Follow up
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*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge Manning,

Attached please find University Hill Neighborhood Association's proposed order in this matter.

Holli

**Holli Miller**

Paralegal at Richard A. Harpootlian, PA

Address 1410 Laurel Street Columbia, SC 29201

Phone 803-252-4848 **Fax** 803-252-4810 **Email** holli@harpootlianlaw.com

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

University Hill Neighborhood Association,

Plaintiff,

v.

City of Columbia, City of Columbia Design
and Development Review Committee, and
Trinitas Ventures, LLC,

Defendant.

C/A No.: 2020-CP-40-03475

ORDER

Respondents have filed a rule 59(e), SCRP, Motion to Reconsider. Plaintiff has filed a Response to the Motion to Reconsider. For the reasons given in this Order, the Motion to Reconsider is denied.

I. DISCUSSION

The Motion to Reconsider is based on six separate grounds. These grounds are addressed below in the order they are addressed in the Motion.

A. **Argument 1: “This Court misunderstood or failed to fully consider Respondents’ arguments concerning mootness.”**

The court understood and fully considered the mootness arguments. *See* Order 13–16.

Eliminating Section 3.5.4 did not moot the ultra vires problem because Sections 5.4.1, 5.4.2, 5.5, and 5.10 grant the DDRC the authority to undertake site plan review of site plan concerns that are also reviewed by the Planning Commission.

Section 6-29-1150(a) explicitly states that local land development regulations “*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the Planning Commission or designated staff” (emphasis added). Thus, the section imposes the

following two requirements: (1) There *must* be a system for approval or disapproval of plans and plats; and (2) this system *must* be applied by the Planning Commission.

It is very likely that at some point, an applicant will be faced with conflicting decisions by the overlap of site plan review concerns between the DDRC and the Planning Commission. However, the legal effect of the ultra vires argument is not altered by the likelihood of conflicting decisions. The ultra vires effect results from granting the DDRC the power to review the same concerns as those that must be addressed by the Planning Commission.

B. Argument 2: “The Order fails to fully consider whether alleged overlaps in authority between the Planning Commission and the DDRC actually conflicts [sic] with the Enabling Act.”

Defendants/Respondents argue the explicit language in Section 1150(A) quoted above just not apply because:

Appellant did not argue that Sections 5.4, 5.5 and 5.10 of the Guidelines unlawfully confer authority to the DDRC to review site plans within the City Center, nor can it, because nothing in these provisions even referenced the DDRC, much less delegate authority to review site plans. Sections 5.4, 5.5 and 5.10 of the Guidelines concern substantive elements of a site plan. See Guidelines, pp. 5-7–5-8, p. 5-9, p. 5-21.

Mot. Reconsider 5–6.

The first sentence in this second argument ignores what happened as the DDRC considered whether to approve the site plan involved. At the March 12, 2020, DDRC meeting, the DDRC considered the “Site/Subdivision Plan” for the Trinitas project. Record, March 12, 2020, DDRC 68-70; Supplement to Record, March 12, 2020, at 156. (Jonathan Chambers, a DDRC staff member, notes that the DDRC was considering site plan review for the Trinitas project.) At the end of the consideration of the site plan for Trinitas, the DDRC voted to approve the site plan. Supplemental Record, March 12, 2020, DDRC Meeting, at 28-29. If “nothing in . . . [Sections 5.4,

5.5, and 5.10] delegates authority to [the DDRC]" to review site plans, what was the point of the DDRC hearing and decision?

The second sentence in the argument is puzzling because it concedes that "Sections 5.4, 5.5 and 5.10 of the Guidelines concern substantive elements of a site plan." As indicated at pages 14-16 of the Order, Sections 5.4, 5.5, and 5.10 address concerns that are a part of site plan review by the Planning Commission. As a result, Sections 5.4, 5.5, and 5.10 are ultra vires because Section 6-29-1150(A) of the Enabling Act states that the Planning Commission must review site plans.

C. Argument 3: "The order mistakenly applied the wrong remedy concerning Appellant's claim that the City of Columbia's delegation of site plan review to the DDRC is ultra vires."

Defendants/Respondents argue that, because the "ultra vires claim was against the City of Columbia, not the DDRC," the "reversal of the DDRC's site plan approval was in error."

This argument ignores the following: Because the grant of power to the DDRC to conduct site plan review was ultra vires, the DDRC could not validly conduct aspects of site plan review. As a result, the DDRC had no lawful power to make a "quasi- adjudicative decision" to grant or to deny approval of a site plan. Since the DDRC had no such power, the proper remedy was to reverse the decision.

D. Argument 4: "The Order failed to rule on Respondents' arguments concerning Appellant's claim that the Guidelines constitute unlawful delegation of legislative authority by City Council."

The approach used in addressing the unlawful delegation issue is well-established. In addition to the authorities cited in the Order, the South Carolina Supreme Court recently used this approach in a zoning case filed on December 8, 2021. *Greenville Bistro, LLC v. Greenville County*, 435 S.C. 146, 164 n.6, 866 S.E.2d 562, 175 n.6 (2021).

E. Argument 5: “The Order failed to rule on Respondent’s [sic] argument that Appellant lacked standing to hear its *ultra vires* claim against the City because Appellant made no showing of the traceability and redressability elements of standing.”

The order properly applied the standard for associational standing set forth in the cases discussed at pages 33–37 of the Order. As in *Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control*, 430 S.C. 211, 845 S.E.2d 481, 488 (2020), members of the University Hill Neighborhood Association provided sworn “allegations of potential harm to members” near the proposed project. *See* Order 37–44. Their testimony was supplemented by sworn testimony from officials from the University of South Carolina and Historic Columbia. *See* Order 41–42. In addition, Trinitas’s representative gave testimony concerning the student orientation of the project and of the need to consider the proximity of the project to the University Hill Neighborhood. *See* Order 40, 43.

The Motion to Reconsider argues that the plaintiff was required to show that the decision by the Planning Commission “would be different in substance than a site plan approved by the Planning Commission” Mot. Reconsider 15–16. This argument misses the point that, because the grant of site plan review power to the DDRC was *ultra vires*, the decision was void. Nothing more is necessary. More specifically, there is no requirement of showing that the Planning Commission would have been decided differently.

F. Argument 6: “This Court misunderstood or failed to fully consider issues concerning the ‘public importance’ exception to standing.”

Argument 6 is based on a confusion on the part of the Defendants/Respondents concerning the issues involved.

The ultra vires issue is not limited to Section 3.5.4 of the Guidelines. It also concerns Sections 5.4.1, 5.4.2, 5.5, and 5.10. *See* Order 13–16. Issues concerning the legality of these sections are important and are likely to recur.

The overlay issue is also important and likely to recur. *See* Order 43–46.

Defendants/Respondents argue that statements in their Petition for Writ of Mandamus pursuant to 245(B), SCACR, or, in the alternative, Petition for Certification pursuant to Rule 245(A), SCACR, are not relevant to show agreement on the issues involved. However, the discussion at pages 15–17 of the Petition indicates that the substantive issues involved include questions concerning the role of overlay zoning, an issue of public importance that is likely to recur. For example, this discussion argues:

The case at bar . . . seeks to test the limits of municipal rule-making authority and scope of review of a board of architectural review. The case further raises questions about the relationship between City and the DDRC. It involves that board's interpretation of municipal guidelines regarding architectural design, which apply throughout City's jurisdiction.

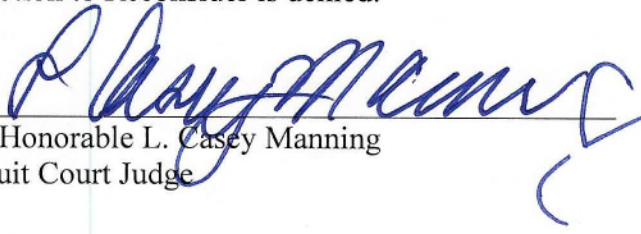
. . .

[A] decision in this case has the potential to affect every board of architectural review established by governmental bodies throughout the State and all applicants who file applications through those boards.

The broad, sweeping language in these quotes applies to public importance standing as well as to the issue of certification.

II. CONCLUSION

For the reasons given in this Order, the Motion to Reconsider is denied.


The Honorable L. Casey Manning
Circuit Court Judge

March 8, 2022
Columbia, South Carolina.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

University Hill Neighborhood Association,

Plaintiff,

v.

City of Columbia, City of Columbia Design
 and Development Review Committee, and
 Trinitas Ventures, LLC,

Defendant.

C/A No.: _____

SUMMONS

YOU ARE HEREBY SUMMONED AND REQUIRED to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer thereto on the subscribers at their office located at 1410 Laurel Street, Columbia, South Carolina 29201, within thirty (30) days of the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will move for entry of Default Judgment and apply to the Court for the relief sought therein.

Respectfully submitted,

s/Richard A. Harpootlian
 Richard A. Harpootlian (SC Bar No. 2725)
 RICHARD A. HARPOOTLIAN, P.A.
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 rah@harpootlianlaw.com

ATTORNEY FOR THE PLAINTIFF

July 23, 2020

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

University Hill Neighborhood Association,

Plaintiff,

v.

City of Columbia, City of Columbia Design
and Development Review Committee, and
Trinitas Ventures, LLC,

Defendant.

C/A No.: _____

COMPLAINT

(Appeal Involving Decision of City of
Columbia Design and Development Review
Commission)

The Plaintiff, complaining of the Defendants herein, respectfully alleges as follows:

A. Introduction

1. This appeal involves a decision by the City of Columbia Design and Development Review Commission (DDRC) granting final approval for the construction of “Trinitas,” an eight-story apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia.

2. The proposed site for the apartment building is an “overlay” district within the City of Columbia. The district is termed as Columbia City Center Design/Development District of Columbia, South Carolina and is referred to as “-DD area” in Section 17-655(b) of the Columbia City Code. An overlay district like the -DD area is designed to impose design requirements in addition to the underlying zoning that already exists. The requirements for the -DD area are “set forth in design guidelines adopted by the City Council.” Columbia City Code § 17-655(b)(2). The guidelines that are incorporated by this reference in the City Code are contained in a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998)

[hereinafter *Guidelines*]. The *Guidelines* are unusual in that they contain only precatory terms like “non-binding” and “should” rather than mandatory terms like “must” and shall.

3. This appeal of the DDRC decision concerning the Trinitas project has two parts. The first part involves an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. The second part of this appeal concerns provisions of the *Guidelines* that require “site plan review” within the -DD area to be done by the DDRC rather than the City of Columbia Planning Commission.

a. Appeal based on Section 6-29-900(A), *et.seq.*

Section 6-29-930(A) includes the following standard for appeals from a board of architectural review:

The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

The DDRC approval was not “correct as a matter of law” in two respects:

(1) Mistaken legal interpretations

The DDRC approval was based on two fundamental mistakes of law.

First, the approval was based on erroneous legal interpretations of the *Guidelines* like the following: “The underlying zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines

seem to conflict with the zoning, the [underlying] zoning prevails.” (See Exhibit 1 to this Complaint: Email of Lucinda Statler, Principal Planner/Urban Design, in response to email from Thomas Gottshall, current President of the University Hill Neighborhood Association) This interpretation is contrary to: (1) the purpose of the overlay district to impose regulations in addition to the existing underlying zoning, and (2) specific provisions in the Columbia City Code addressing vested rights and the interpretation of the zoning code. (See Columbia City Code §§ 17-2, 17-181)

Second, the decision was based on the view that, because of the use of precatory rather than mandatory terms, DDRC decisions can lawfully be based simply on a virtually unlimited discretionary decision-making power to make “the overall determination as to whether a project substantially meets—or does not meet—the design guidelines.” (See Exhibit 1 to this Complaint). Under this approach, “there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision” (*Id.*) This view of the nature of the discretionary role of the DDRC is a mistake of law. At the very least, discretionary decisions by the DDRC should be based on articulated reasons for reducing (or increasing) requirements.

(2) Insufficient evidence.

There is not sufficient evidence to support a finding by the DDRC that there are reasons that justify reducing the requirements of a number of specific provisions in the *Guidelines*.

b. The ultra vires nature of granting DDRC the power to grant site plan review

Site plan review involves local government approval of specific aspects of virtually all land development. *See* S.C. Code § 6-29-1110. The provisions concerning site plan review are contained in Article 7 of the South Carolina Enabling Act (“Local Planning – Land Development Regulation”). In contrast, provisions concerning boards of architectural review are contained in Article 5 (“Local Planning – Zoning”). Section 6-29-1150(A) states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff.” (emphasis added)

In adopting the *Guidelines*, the Columbia City Council shifted site plan review to the DDRC. This shift conflicts with the clear mandate of Section 6-29-1150(A) concerning the role of the planning commission. As a result, the authorization by the City of site plan review by the DDRC is an ultra vires act.

B. Parties

4. Plaintiff University Hill Neighborhood Association (Association) is an unincorporated association. The boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic districts—a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17–654(a)(3), 17–681(b)(1). This district is “identified as Architectural District No. 1” and is “bounded by Laurens, Senate, Henderson and Greene Streets . . .” *Id.* at § 17–681(b)(1). Nearly

all of this area is also recognized as a National Historic District by the National Register of Historic Districts.

5. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed. Many resident members of the Association live in areas near the proposed Trinitas project. Substantial interests of the Association and of its members are affected by the decision of the DDRC to approve the Trinitas project.

6. Defendant City of Columbia (City) is a municipality organized under the laws of South Carolina.

7. Defendant DDRC is a “Board of Architectural Review” established pursuant to S.C. Code §§ 6–29–880 *et seq.* and Columbia City Code §§ 17-651 *et seq.*

8. Defendant Trinitas Ventures, LLC is a real estate development company with a home office in Indiana.

C. The Guidelines

9. The *Guidelines* apply to the development within the boundaries of the DD “overlay district” designated by the City of Columbia. An overlay district like that involved herein is an overlaying scheme of additional regulations that supplements the underlying regulations for the zoning districts within the boundaries of the overlay district by applying an additional layer of restrictions on development. The Trinitas project is within this DD overlay district.

10. Chapter 5 of the *Guidelines* provides a supplementary regulatory framework for assessing the design of private development in the DD overlay district. The Introduction to this chapter notes:

The key emphasis of the guidelines in this chapter is to reinforce the existing fabric of City Center by ensuring that new projects are developed within the rhythm of the existing development pattern. This “contextual” approach to evaluating the design of new projects is fundamental to the implementation of the *Guidelines*.

11. Part 5.3 of Chapter Five of the *Guidelines* addresses specific parts of the contextual approach to design. These specifics are:

Sec. 5.3.1—Building Heights,

Sec. 5.3.2—Façade Proportion and Rhythm,

Sec. 5.3.3—Proportion of Openings,

Sec. 5.3.4—Horizontal Rhythms/Alignment of Architectural Element,

Sec. 5.3.5—Wall Articulation, and

Sec. 5.3.6—Roofs and Upper Story Details

12. Part 5.4 of chapter of the *Guidelines* addresses site plan review. Other parts of the *Guidelines* address matters that could be appropriate for site plan review.

13. Exterior details of building design are addressed in Parts 5.7, 5.8, and 5.10.

D. Context: The “Rhythm of the Existing Development Pattern” in the Area of the Proposed Trinitas Project

14. The Trinitas project would be constructed on a site at the corner of the intersection of Gervais Street and Pickens Street in the block bounded by Gervais Street, Pickens Street, Senate Street, and Henderson Street. The area adjacent to the site on the northeast corner of this block has several one-story commercial buildings. The southern half of the block contains two historic structures—McMaster College and a church building.

a. McMaster College

McMaster College, an historic building built in 1911, was originally used as a public school. It is currently occupied by the University of South Carolina (USC) School of Visual Arts and Design. McMaster College is a three-story red brick structure with white “cast stone” accents, including an elaborate cast stone cornice. The building is set back from Pickens Street and Senate Street with on-site landscaping and sidewalks. A parking lot is located east of the building along Henderson Street.

b. Former First Church of Christ, Scientist

This 1920s Church, which until recently was owned by the First Church of Christ, Scientist, faces Pickens Street. It is now owned by the USC Development Foundation. The building has a neoclassical revival style with a stone façade and a colonnade across the Pickens Street entrance. The height of the roof peak of the building is approximately the same as the height of McMaster College.

15. The block west of the proposed site contains four buildings. The east and south parts of this block contain large landscaped spaces used for parking and pedestrian access. The southeast corner of the lot contains a small “park.”

a. USC School of Law

The USC School of Law moved from its old location to this new building in 2017. The law school has three stories. Because of a design emphasis on natural light and an open feeling, the building has high ceilings and large windows. Though it is a “tall” three-story building, the mass and scale are balanced by the exterior appearance because the exterior façade is predominately brick, glass, granite, and “stone” accents. The building site also has extensive landscaped open spaces on the south and east sides. The main entrance, which is on Senate Street, features granite walls and steps. The result is a building that balances “human scale” with “monumental scale.” (*See Guidelines*, Section 5.3 (“... City Center should complement existing structures while providing a sense of human scale and proportion.”); Glossary at 7-2 (defining “Scale (Human)”)).

b. Horry-Guignard House

The Horry-Guignard House is located on the northwest corner of Pickens Street and Senate Street. The house was built between 1813 and 1814 by Peter Horry, who was a merchant, planter, and a colonel in the Revolutionary War. The house is on the National Register of Historic Places (hereinafter National Register) and is a Grade I local landmark under the Columbia historic preservation scheme. It is currently owned by USC. A small historic building is east of the Horry-Guignard House.

c. Taylor House and Stables

The Taylor house and stables were built in 1908 for Thomas Taylor, Jr., who was president of Taylor Manufacturing Co. It is on the National Register. In 1950, the Columbia Museum of Art converted the house to a museum. The house is now owned by USC.

16. The predominantly residential area southeast of the proposed project has two roughly overlapping historic districts. The City of Columbia has designated this residential area as an “Architectural Conservation District.” Columbia City Code §§ 17-654 (a)(3), 17-681(b)(1). This district is “identified as Architectural District No. 1” and is “bounded generally by Laurens, Senate, Henderson and Greene Streets...” *Id.* at § 17-681 (b)(1). Nearly all of this area is also a National Historic District.

17. The area north of the site is separated from the site by Gervais Street, which is a wide, major traffic artery leading into downtown Columbia from areas east of the City. The Guidelines state at page 2–7 that the Gervais “corridor accommodates over 40,000 vehicle trips per day, so many visitors gain their first impression of City Center from Gervais Street.” In contrast to the residential and university areas on the south side of Gervais Street, the area on the north side is characterized by mostly one to three story structures and by predominately commercial uses. Because of these differences in development patterns between the two sides of Gervais Street, the contextual approach of the *Guidelines* requires a different analysis for each side of Gervais Street. Consequently, the height of the Hilton Hotel located in the block across Gervais Street from the proposed project involves a very different analytical context than that of the areas to the east, west, and south of the proposed site. It is also important to note: (1) the hotel is on the southeast corner of the lot, (2) a large, open parking lot on the southwest corner

provides open space helps balance the mass of the hotel, and (3) the hotel is not within the DD district.

18. The block east of the proposed site is predominantly commercial in use. The buildings are mostly two or three stories high.

19. The northwest corner of Pickens Street and Gervais Street is occupied by a two-story “Victorian style” house. For many years, it was used as a funeral home. The parcel includes considerable open space.

20. The area surrounding the proposed Trinitas site can be summarized in terms of the following aspects:

- (1) Height is generally two or three stories.
- (2) Mass and scale are balanced by both moderate height, typically two or three stories, and by considerable surrounding open space.
- (3) Exterior facades are characterized by detailed materials like brick and wooden siding.
- (4) A large number of historic structures are in the area.

Because of these aspects, the area has a sense of human scale and proportion. (*See Guidelines* § 2.5.1 at 2–7 (referring to Gervais Street’s “human scale”); § 5.3 at 5-2). In addition, the large number of historic structures provides a meaningful sense of place in time.

E. Abuse of Discretion in Applying Guidelines

1. Role of Guidelines in Regulating Height

21. The DDRC abused its discretion by a mistake of law concerning height restrictions. More specifically, the decision was based on a legal interpretation by the staff of the DDRC that the *Guidelines* did not regulate the height of the building. (See Exhibit 1 to this Complaint) Part of this letter states: “The underlying zoning [C-3, General Commercial Use] provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the zoning, the [underlying C-3, General Commercial Use] zoning prevails.” In addition, the *Staff Report* for the July 2020 meeting states: “The building height and mass remain the same [as earlier versions of the proposed project], consistent with the allowable envelope provided by the zoning ordinance.”

22. The Commission’s reliance on Statler’s interpretation and on the *Staff Report* was a mistake of law for three reasons:

- (1) Because the purpose of the overlay district regulations was to *add* supplemental design requirements, including limits on heights, *in addition to* the requirements of the underlying zoning, these additional requirements replace and supplant the height restrictions of the underlying zoning for the site of the Trinitas project.
- (2) Section 17-181 of the Columbia City Code provides: “Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that imposing the higher standards, shall govern.”
- (3) Section 17-2 of the Columbia City Code limits establishment of vested rights to “the approval or conditional approval of a site specific development plan.”

2. Role of Reasons in a Precatory System of Regulation

23. The *Guidelines* adopt an unusual approach to regulating design. More specifically, the guidelines in Chapter 5 for private development provide “*non-binding general direction* for development” and “are meant to be *illustrative rather than prescriptive*.” (Section 5.1 (emphasis added)). As a part of this scheme, the *Guidelines* adopt a flexible approach in which, for example, “the design of a building *should* be compatible with its function and its surrounding (context).” (Section 5.2 (emphasis added)). In terms of building height, the *Guidelines* provide “*non-binding general direction* for development within City Center” (Section 5.3.1 at 5–2 (emphasis added)).

24. The DDRC and its staff have adopted the position that the DDRC has virtually unlimited discretionary decision-making power to make “the overall determination as to whether a project substantially meets—or does not meet—the design guidelines.” (See Exhibit 1 to this Complaint) Under this approach “there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision” (*Id.*)

25. The view of the discretionary power of the DDRC by the DDRC and its staff is wrong in two respects.

a. Lack of Requisite Wisdom

First, the DDRC lacks the extreme wisdom necessary for such unlimited discretion. The treatment of the Trinitas project illustrates the human fallibility of the DDRC. At the January 9, 2020, meeting the DDRC rejected the staff recommendation of approval with restrictions and voted to deny the request for design approval and site plan approval of the Trinitas project. Subsequently, a special meeting was called for the February 7 to

receive legal advice and to consider rescinding the January denials of approval. At the February 7 meeting, the DDRC went into executive session to receive legal advice relating to a pending, threatened, or potential claim. The DDRC then moved out of executive session and moved to rescind the design disapproval and the site plan disapproval.

b. The Nondelegation Doctrine.

Second, the use of precatory terms like “illustrative,” “should,” and “non-binding” (rather than mandatory terms like “shall” or “must”) presents a basic problem: If *Guidelines* were literally non-binding on the DDRC, then the *Guidelines* would conflict with the nondelegation-of-legislative-power doctrine. In order to avoid this problem, it is clear that, no matter how useful flexibility might be, the *Guidelines* must provide more than mere vague suggestions that provide no meaningful limit on the exercise of administrative discretion. At the very least, a discretionary decision to reduce (or increase) a specific guideline should be accompanied by reasons for the reduction (or the increase). Similarly, decisions concerning compatibility and context should be supported by reasons for the choices that are made.

26. The most important instances of this lack of reasons arise in the context of the discussion of building mass and height in the *Staff Reports* for the January, March, and July meetings. For example, the *January Staff Report* recommended approval of the height and mass of Trinitas simply on the basis of the following summary of heights rather than the required contextual analysis of building mass and height:

While the building is 8 stories, its total height is 75’ to meet the C-3 zoning requirement. The U of SC law school, across Pickens Street,

is 58' to the top of the third floor and 70' to the roof pitch; the Hilton Garden Inn is just under 75'.

This “bare bones” statement, by itself, is clearly inadequate to support a recommendation of approval of a 75 foot building, which would be higher than any building in the adjacent area.

27. Under the *Guidelines*, the mass and height of a proposed building: (1) “should complement existing structure while providing a sense of human scale and proportion,” (2) should be “consistent in considering the height of the proposed structures as they relate to the *adjacent* development context,” and (3) “[a]s a general rule . . . should be *no more than five stories*.” (*Guidelines* § 5.3.1 (emphasis added)). In order to structure the exercise of discretion under these three guidelines, the comments in the staff reports should contain reasons for: (1) not following the five-story maximum rule, (2) considering only the two tallest buildings and ignoring the remaining buildings on the block with the proposed site and the buildings in the adjacent area, (3) failing to consider the difference in mass and scale that results from the open space around the law school and the Hilton Garden Inn vis à vis the proposed Trinitas building, which will have virtually no open space to reduce the impact of two solid cubes that join to form an eight-story solid mass, and (4) not considering the impact of wall articulation and the pitched roof of the law school on its mass. Given the *complete* lack of reasons, the required contextual compatibility analysis was not undertaken. As a result, the record is far too incomplete to support the approval by the DDRC.

28. The staff analysis and recommendations for the March and July meetings of the DDRC contain similar conclusory language, unsupported by reasons for failure to follow the *Guidelines*.

29. In terms of horizontal mass, the Gervais Street side of this L-shaped building is 294 feet 2 inches long, which is approximately the length of a football field. The west side along Pickens Street is 120 feet long, the east side of the building is 181 feet 2 inches long, and the part of the south side of the building that joins the east side is 141 feet 3 inches long. (Exhibit 2 to this Complaint: Floor Plan Diagram) The mass of a large building can be reduced or balanced by things like open space around the building, pitched roofs, setbacks as the height rises, variation in the depth of the exterior walls with large windows, inset windows, ornamental features, and the use of human scale materials. The Trinitas proposal uses virtually none of these techniques. Moreover, where it does use one, the use is inadequate to achieve a meaningful reduction in scale. In short, the use of things like panels, windows, and projections is so minimal that it is no better than “putting lipstick on a pig.” The impact of this large, monolithic L-shaped building at the proposed site is *not* compatible with the area. As a result, because of its height and horizontal mass and its bare minimal open space setbacks, the Trinitas building will loom over and dwarf the church building and McMaster College.

30. The “Proportion of Openings” requirements in Section 5.3.3 of the *Guidelines* provide another area where specific standards are not satisfied. More specifically, (1) instead of the standard for the storefront window area of 70 percent in the *Guidelines*, the project has 33.2 percent for Gervais Street and 38.5 percent for Pickens Street, and (2) Instead of the standard of 40 percent for upper story openings in the *Guidelines*, the upper floors have 33.2 percent for Gervais Street and 38.5 percent for Pickens Street. Even though the *Guidelines* are non-binding,

a departure from the *Guidelines* must be accompanied with reasons for allowing a departure that does not satisfy the *Guidelines*.

31. The DDRC abused its discretion in applying the *Guidelines* by relying on the approach of virtually unlimited discretion in its approval of the Trinitas project. This was a mistake of law which resulted in the failure of the DDRC to provide reasons for recommending approval despite failure to satisfy the *Guidelines* approval.

F. Ultra vires assignment of Site Plan Review to DDRC by City

32. The *Guidelines* note that “[s]ite plan review in Columbia is handled by the City’s Planning Department, which has authority to approve site plans for building projects of 25,000 square feet or less; larger projects must go before the City’s Planning Commission.” (*Guidelines* at 3–12). In order to “streamline the overall development review process,” the *Guidelines* state: “Within City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review.” (*Guidelines* at 3–12). Section 5.4 explicitly addresses site plan review by DDRC. As a part of this process, applicants with a project in the DD District must file a “City of Columbia Application for Site Plan/Subdivision Plat Review” with the DDRC, not the Planning Commission. As a result, the D/DRC and its staff have, in fact, displaced the Planning Commission insofar as site plan review in the –DD area is involved.

33. This approach to site plan review is ultra vires because it conflicts with explicit language in the South Carolina Local Government Comprehensive Planning Enabling Act. Section 6–29–1150(A) of the Act states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff.” (emphasis added). The shifting of

site plan review to the D/DRC pursuant to the *Guidelines* conflicts with the clear mandate of Section 6–29–1150(A) concerning the role of the planning commission.

34. In addition to the provisions of Sections 3-12 and 5.4 of the *Guidelines* quoted in Paragraph 30 above, other provisions of the *Guidelines* are potentially ultra vires because the provisions in the *Guidelines* could overlap with various aspects of site plan review by the City of Columbia Planning Commission. More specifically, depending on the facts involved, potential conflicts could arise in terms of parking, location and screening of service and loading areas, other screening, setbacks, open spaces, and landscaping because these matters should be addressed in site plan review under some circumstances. *Compare* Columbia City Code §§ 17.464 (Definitions), -491, -492, -511, -531, -581, -582, -583, -586, -587, -588. -589 with *Guidelines* §§ 4.3, 4.4, 5.3.6, 5.4, 5.5, 5.6, 5.10.

35. When this problem of conflict with the Enabling Act was raised at the March 12, 2020, meeting of the DDRC, the Chair of the DDRC ruled that the DDRC could not and would not address this issue.

36. In administering site plan review concerning the Trinitas Project, the DDRC simply ignored the provisions concerning setbacks in Section 5.4.1 of the *Guidelines*. Instead of applying the *Guidelines*, the DDRC granted approval solely on the satisfaction of the minimum setbacks allowed by the underlying C-3 zoning. This use of the underlying C-3 rules, rather than the *Guidelines*, was a mistake of law.

G. Importance of resolution of legal issues herein

37. The DDRC made unlawful mistakes of law concerning: (1) the height within the overlay district, (2) the need for reasons in applying flexible guidelines, and (3) the ultra vires assignment of site plan review to the DDRC by the City of Columbia. These mistakes of law are

likely to continue in the future if not resolved herein. Therefore, these concerns should be addressed herein in order to provide future guidance concerning land development regulation in the large downtown area regulated by the DD overlay district.

H. Prayer for Relief

38. Plaintiff respectfully requests this Court to reverse the decision of the DDRC and to grant appropriate injunctive and declaratory relief as well as any other relief as the Court may deem just and proper.

Respectfully submitted,

s/Richard A. Harpootlian
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ATTORNEY FOR THE PLAINTIFF

July 23, 2020

EXHIBIT 1

(Email dated June 19, 2020 of Lucinda Statler,
Principal Planner/Urban Design in response to email
of Thomas Gottshall, current president of University
Hill Neighborhood Association)

From: Statler, Lucinda S <Lucinda.Statler@columbiasc.gov>
Sent: Friday, June 19, 2020 10:03 AM
To: Thomas Gottshall
Cc: Dick Harpootlian; HUBBARD, PATRICK
Subject: Re: [EXTERNAL] Trinitas and DDRC

Tom, et al.,

The DDRC makes decisions as to whether a project meets or does not meet the design guidelines, which are qualitative measures for evaluating projects within the City Center Design District. The underlying zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the zoning, the zoning prevails. Please refer to Section 5.3.1 *Building Heights* in the City Center Design Guidelines. "The City's Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings. This section provides *non-binding general direction* for development within City Center..."

There are 17 pages of guidelines that pertain to new construction that are considered. The staff evaluations and the DDRC's decisions are based on the overall determination as to whether a project substantially meets- or does not meet- the design guidelines. This means that there are likely areas where the project may not be exactly what is recommended, and other areas where they meet and exceed what is recommended. It is an overall assessment of the project and of course, there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision, rather than only staff. In the almost 14 years that I have served as staff to this Commission, I would be hard pressed to think of a project that met every single guideline. This would be unattainable for most projects, as there are many factors that determine a development's feasibility. The design review process is built to provide some flexibility in this balancing act.

hope this helps sort through some of the nuances. I regret that you and the neighborhood are unsatisfied with the process, but I do think it has resulted in an improved design, which is ultimately the purpose for express guidelines.

Best,
 Lucinda



Lucinda Statler, AICP
 Principal Planner/Urban Design

Planning and Development Services
 1136 Washington Street, Columbia, SC 29201
 Phone: 803-545-0229

Please note the change to my email address from lsstatler@columbiasc.net to lucinda.statler@columbiasc.gov Effective July 2018

From: Thomas Gottshall <trgottshall@gmail.com>
Sent: Wednesday, June 17, 2020 11:14 AM
To: Statler, Lucinda S <Lucinda.Statler@columbiasc.gov>
Cc: Dick Harpootlian <rah@harpootlianlaw.com>; PATRICK' <phubbard@law.sc.edu>
Subject: [EXTERNAL] Trinitas and DDRC

CAUTION: This email originated outside of the organization. Do not click links or open attachments from unknown senders or suspicious emails. Never enter a username or password on a site that you did not knowingly access.

Lucinda,

I write you because we are instructed not to write to the individual DDRC members. The proposed height of the Trinitas building has consistently been a main concern of the University Hills residents. Given the importance of this concern, it is important to understand the legal framework in terms of the power of the DDRC.

It is our understanding that under the basic zoning rules for the subject site, Trinitas could be 75 feet in height. However we believe that, because the site is in the City Center Design/Development District, the guidelines control height, despite the basic zoning scheme.

It appears that some members of the DDRC and the DDRC staff do not agree with the position of the University Hills residents concerning the role of the Design Guidelines. For example, at the DDRC Work Session on Wednesday, June 10, as the DDRC members were summing up their views, one Commissioner noted that he would have liked to help the neighborhood more but his view was that the DDRC had no authority to deny or curtail the project because of its height and thus could not require a design of less than 75 feet for approval. In addition, prior to the vote on the Motion to Rescind at the February DDRC meeting, a staff member instructed the DDRC that they could not consider height as a part of their Motion to Rescind.

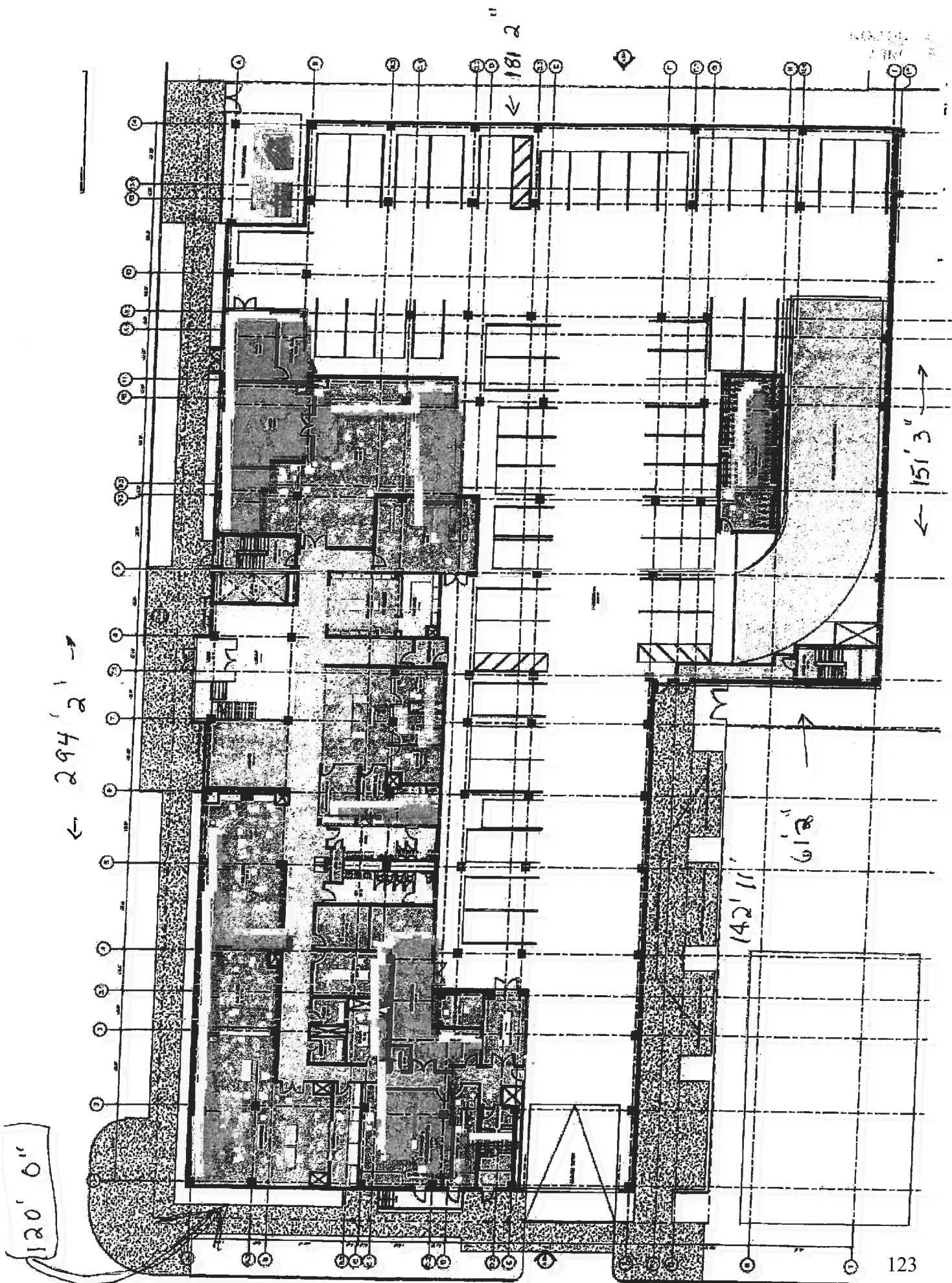
Before the July meeting of the DDRC, we would appreciate clarification concerning the position of the DDRC and the DDRC staff concerning the following question: Does the DDRC have legal authority to deny approval for a project for this location, which is zoned for a height up to 75 feet under basic zoning, on the basis that the design of the building does not meet the City Center Design/Development Guidelines, particularly Guidelines 5.2 and 5.3.1? In other words, does the DDRC have the ability to turn down a project for reasons of its design as not consistent with Center City Guidelines, even if the height is consistent with basic zoning, if the DDRC found design violations as to height, mass or scale?

In order for us to have time to consider your answer before the next DDRC meeting, I would appreciate your informing me within the next five business days of the answer to these questions.

Thomas R. Gottshall
res., University Hill Design Guidelines
824 Senate Street
Columbia, SC 29201
cell 803 4579-4268

EXHIBIT 2

(Floor Plan Diagram)



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

University Hill Neighborhood Association,

Appellant,

v.

City of Columbia, City of Columbia Design and
Development Review Committee, and Trinitas
Ventures, LLC

Respondents.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2020-CP-40-03475

**TRINITAS VENTURES, LLC'S
RESPONSE TO PETITION**

Trinitas Ventures, LLC ("Trinitas Ventures"), by and through its undersigned attorneys, hereby answers the Notice of Appeal/Petition of University Hill Neighborhood Association ("Appellant") filed July 23, 2020 ("Petition"), as follows:

FOR A FIRST DEFENSE

1. Each and every paragraph of Plaintiff's Petition not specifically admitted, qualified, or explained herein is denied.

2. The allegations in Paragraphs 1, 2, 3, and 3(a) of the Petition state legal conclusions to which no response is required.

3. Trinitas Ventures denies the allegations in Paragraphs 3(a)(1), 3(a)(2), and 3(b) of the Petition and demands strict proof thereof.

4. Trinitas Ventures is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 4 and 5 of the Petition and therefore denies same. Further, Trinitas Ventures denies Appellant has standing, individually or on behalf of its members, to file this appeal. See Trinitas Ventures' Motion to Dismiss.

5. Trinitas Ventures admits the allegations in Paragraphs 6 and 7 of the Petition upon information and belief.

6. Answering the allegations in Paragraph 8 of the Petition, Trinitas Ventures denies that it is the proper defendant in this case; instead, Trinitas Development, LLC, is the applicant seeking certificates of design approval and site plan approval before the DDRC. Further responding to the allegations in this paragraph, Trinitas Ventures admits it has a home office in Indiana.

7. The allegations in Paragraphs 9, 10, 11, 12, and 13 of the Petition state legal conclusions to which no response is required. To the extent a response is required, Trinitas Ventures demands Appellant prove the application of these referenced Guideline sections to the decisions at issue in this appeal and demands strict proof of grounds for reversal of the DDRC's decisions as they relate to the project at issue.

8. Trinitas Ventures admits the allegations in Paragraph 14 of the Petition; however, Trinitas Ventures notes that Appellant has not fully described all surrounding areas of the proposed construction site and craves reference to Trinitas Development's applications, letters, other filings, and oral argument before the DDRC in support of the proposed construction within the context of the surrounding buildings and neighborhoods.

9. Trinitas Ventures admits the allegations in Paragraphs 14(a) and 14(b) upon information and belief.

10. Trinitas Ventures admits the allegations in Paragraph 15 of the Petition; however, Trinitas Ventures notes that Appellant has not fully described all surrounding areas of the proposed construction site and craves reference to Trinitas Development's applications, letters, other filings,

and oral argument before the DDRC in support of the proposed construction within the context of the surrounding buildings and neighborhoods.

11. Trinitas Ventures admits the allegations in Paragraphs 15(a), 15(b), and 15(c) upon information and belief.

12. Answering the allegations in Paragraph 16 of the Petition, Trinitas Ventures denies that the area surrounding the proposed construction is “predominantly residential.” The remaining allegations in this paragraph are legal conclusions to which no response is required.

13. Answering the allegations in Paragraph 17 of the Petition, Trinitas Ventures admits that the area north of the proposed project is separated by Gervais Street, a wide, major traffic artery leading into downtown Columbia from areas east of the City. Trinitas Ventures denies Appellant’s attempts to distinguish the Hilton Hotel located in the block across from the proposed construction. The remaining allegations in this paragraph state legal conclusions to which no response is required.

14. Trinitas Ventures admits the allegations in Paragraphs 18 and 19 of the Petition upon information and belief.

15. Trinitas Ventures denies the allegations in Paragraph 20, including subparagraphs (1), (2), (3), and (4), of the Petition. Trinitas Ventures specifically denies Appellant’s attempts to characterize surrounding neighborhoods and buildings as distinguishable from the proposed construction.

16. Trinitas Ventures denies the allegations in Paragraphs 21, 22, including subparagraphs (1), (2), and (3) of Paragraph 22, and demands strict proof thereof.

17. The allegations in Paragraph 23 state legal conclusions to which no response is required. To the extent a response is required, Trinitas Ventures denies the DDRC abused its discretion in applying the City Center Design District Guidelines.

18. Trinitas Ventures denies the allegations in Paragraphs 24, 25, including subparagraphs (a) and (b) of Paragraph 25, and 26 of the Petition and demands strict proof thereof.

19. The allegations in Paragraph 27 state legal conclusions to which no response is required. To the extent a response is required, Trinitas Ventures denies the DDRC abused its discretion in applying the City Center Design District Guidelines.

20. Trinitas Ventures denies the allegations in Paragraphs 28, 29, 30, and 31 of the Petition and demands strict proof thereof.

21. The allegations in Paragraphs 32, 33, and 34 state legal conclusions to which no response is required. To the extent a response is required, Trinitas Ventures denies the DDRC abused its discretion in applying the City Center Design District Guidelines and denies the DDRC committed any ultra vires acts.

22. Answering the allegations in Paragraph 35 of the Petition, Trinitas Ventures admits only so much as alleges that Appellant raised an assertion regarding the Enabling Act at the DDRC's public hearing on March 12, 2020. The remaining allegations of this paragraph are denied and Trinitas Ventures demands strict proof thereof.

23. Trinitas Ventures denies the allegations in Paragraphs 36 and 37 of the Petition and demands strict proof thereof.

24. Responding to Paragraph 38 of the Petition (Appellant's prayer for relief), Trinitas Ventures denies Appellant has standing to bring this suit, has named the wrong defendant-Trinitas entity, has failed to state a claim entitling Appellant to relief and asserts this Court lacks personal

jurisdiction over Trinitas Ventures and the subject matter of this action to the extent Appellant appeals from the DDRC's March 12, 2020, decision granting Trinitas Development's application for site plan approval. As such, Trinitas Ventures denies Appellant is entitled to any relief and requests that the Petition and Notice of Appeal be dismissed with prejudice.

FOR A SECOND DEFENSE
(Motion to Dismiss for Lack of Standing)

25. Appellant has failed to allege sufficient facts to establish standing—statutory and constitutional—on its own behalf or on behalf of at least one of its members. Further, Appellant has failed to allege sufficient facts for the public interest exception to standing. Therefore, the Petition must be dismissed in its entirety with prejudice.

FOR A THIRD DEFENSE
**(Motion to Dismiss for Failure to Timely Appeal
as to the DDRC's March 12, 2020 Site Plan Approval Decision)**

26. The DDRC granted Trinitas' application for site plan approval during its March 12, 2020, public hearing (the "Site Plan Approval Decision"). Appellant admitted that it appeared at the March 12, 2020 hearing and argued on its behalf. *See* Petition at ¶ 35. Appellant, therefore, had actual knowledge of the DDRC's Site Plan Approval Decision as of March 12, 2020. *See id.* S.C. Code Ann. § 6-29-900(A) (Supp. 2019) requires an appeal "be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review." *See also* City of Columbia Ordinances at Section 17-677 (Appeals). Appellant failed to timely appeal the DDRC's Site Plan Approval Decision, filing the subject appeal on July 23, 2020, more than thirty days from March 12, 2020. "Service of the notice of intent to appeal is a jurisdictional requirement, and [an appeals court] has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206,

207 (1985) (citations omitted). The Petition should be dismissed with respect to the DDRC's March 12, 2020 Site Plan Approval Decision as this Court lacks subject matter jurisdiction.

FOR A FOURTH DEFENSE
(Motion to Dismiss based on Lack of Subject Matter Jurisdiction)

27. Appellant has failed to state a claim entitling it to relief as a matter of law. The appeal was brought pursuant to S.C. Code Ann. § 6-29-900 (Supp. 2019), *et seq.* However, S.C. Code Ann. § 6-29-930 limits the scope of an appeal from the DDRC to “**only** whether the decision of the board is **correct** as a matter of law.” S.C. Code Ann. § 6-23-930(A) (Supp. 2019) (emphasis added). Here, Appellant's Petition alleges the DDRC's action in undertaking a site plan review of the proposed project is *ultra vires* because it conflicts with the South Carolina Local Government Comprehensive Planning Enabling Act. Appellant's assertions as to the overreaching effect of the City of Columbia's Design District Guidelines or the DDRC's exercise of discretion go beyond the permissible scope of an appeal under the statutory framework. *See* S.C. Code Ann. § 6-29-930(A). This Court does not have subject matter jurisdiction to hear the issues raised by Appellant in an appeal from a decision from a board of architectural review. The Petition should therefore be dismissed in its entirety.

FOR A FIFTH DEFENSE

28. The Petition is barred in whole or in part by the doctrines of waiver, estoppel, judicial estoppel, collateral estoppel, res judicata, issue preclusion, or claim preclusion.

WHEREFORE, having fully set forth its Answer to the Complaint, Trinitas prays for an order affirming the decisions of the DDRC and dismissing the appeal.

Respectfully submitted,

s/Lyndey R. Z. Bryant

Lyndey R. Z. Bryant (SC Bar No. 100804)

W. Cliff Moore III (SC Bar No. 4067)

ADAMS AND REESE LLP

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Attorneys for Trinitas Ventures, LLC

August 24, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A NO.: 2020-CP-40-03475

University Hill Neighborhood Association,

Plaintiff,

v.

City of Columbia, City of Columbia Design
and Development Review Committee, and
Trinitas Ventures, LLC,

Defendants.

**ANSWER ON BEHALF OF CITY OF
COLUMBIA
DESIGN/DEVELOPMENT REVIEW
COMMISSION**

The Respondent, City of Columbia Design/Development Review Commission (hereinafter “DDRC” or “Respondent”) (incorrectly identified in the Complaint as City of Columbia Design and Development Review Committee) respectfully makes the following Answer to the Complaint (Appeal Involving Decision of Columbia Design and Development Review Commission) filed by Plaintiff/Appellant University Hill Neighborhood Association (hereinafter “Appellant”) on July 23, 2020:

FOR A FIRST DEFENSE

(Motion to Dismiss for failure to timely file appeal
concerning site plan approval)

1. The Respondent held a public hearing on March 12, 2020, concerning Trinitas Ventures, LLC’s request for site plan approval.
2. At the conclusion of the hearing on March 12, 2020, the Respondent voted 5-1 in favor of a motion to approve the site plan.
3. Section 6-29-900 states an “appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.”
4. The Appellant filed this appeal on July 23, 2020.

5. At the time the Appellant filed its Complaint, more than thirty (30) days had elapsed after the Respondent's decision granting site plan approval.

6. Therefore, the Appellant's appeal concerning the site plan decision is not timely and any issues raised by the Appellant concerning this decision should be dismissed, including, but not limited to, Appellant's claim that the Respondent's actions in reviewing and granting site plan approval were *ultra vires*.

FOR A SECOND DEFENSE

(Lack of Subject Matter Jurisdiction)

7. The Appellant alleges in its Complaint that the Respondent's action in undertaking a site plan review of the proposed project is *ultra vires* because it conflicts with the South Carolina Local Government Comprehensive Planning Enabling Act.

8. This Court does not have subject matter jurisdiction to hear this issue in an appeal from a decision of a board of architectural review.

9. In an appeal from a decision of an architectural board, this Court is without subject matter jurisdiction to hear and decide any issues outside of those specifically within the Respondent's authority to hear. The Respondent does not have the authority to hear and decide issues such as that raised by the Appellant in this action.

10. The Respondent decided only whether the site plan should be approved. The Respondent decided this by its application of the zoning ordinance and applicable guidelines.

11. The Respondent did not decide any issues concerning the Respondent's ability to hear site plan reviews.

12. This Court "must determine only whether the decision of the board is correct as a matter of law." S.C. Code Ann. 6-29-930(A) (Supp. 2019).

13. This Court is without subject matter jurisdiction to hear issues that were not decided by the Respondent.

14. Therefore, this Court should dismiss any claims which assert the Respondent exceeded its authority to administer the site plan review for this project.

FOR A THIRD DEFENSE

(Lack of Standing)

15. The Respondent asserts that the Appellant lacks standing to bring this action.

FOR A FOURTH DEFENSE

(Responding to the allegations of the Appellant's Complaint)

16. The Respondent denies the substantive grounds for appeal as stated by the Appellant and asserts that there is evidence in the record supporting the decision(s) of the Respondent, and, consequently, this Court should affirm the decision(s) and the Appeal should be dismissed.

17. The Respondent craves reference to the certified copy of the proceedings, including the audio/video footage of the hearings, and to City of Columbia ordinances and guidelines, as submitted to the Court herein, and denies any allegation or statement of the Complaint which is inconsistent with such record or which was not presented to the Respondent for its review, and the Respondent moves to strike any evidence, allegation or argument of the Complaint which was not raised below or which was not included in the record below.

18. The Respondent denies Appellant is entitled to the relief sought to the extent that one or more of Appellant's grounds for appeal or assertions of reversible error were not raised to or ruled upon by the DDRC.

19. To the extent that the Appeal may contain factual and/or legal matter that was not presented to the DDRC, such matter is not part of the record and should be stricken from the record and should not be considered by the Court in its determination of this appeal.

20. Respondent denies Appellant is entitled to the relief sought to the extent Appellant seeks relief or asserts reversible error concerning matters that were outside the jurisdiction of the DDRC and/or this Court.

21. Respondent, through its undersigned counsel, and by way of the attached certification, hereby certifies that it has attached to this Answer a copy of the proceedings held before the DDRC on January 9, 2020, February 7, 2020, March 12, 2020, June 10, 2020, and July 9, 2020 (Bates numbered, respectively, as January DDRC001-138, February DDRC001-012, March DDRC001-208, June DDRC001-026, and July DDRC001-088) as Exhibits One through Five.¹ In lieu of providing a transcript of the evidence heard before the board, the DDRC is providing links to the full audio/video footage of the hearings held at meetings of the DDRC on January 9, 2020, February 7, 2020, March 12, 2020, June 10, 2020, and July 9, 2020. The audio/video footage can be found at the following links on the City of Columbia's CityTV (youtube.com/user/ColumbiaSCGovernment):

January 9, 2020:

<https://www.youtube.com/watch?v=INJZiZkKN7c&t=6575s> (the relevant portion of the meeting begins at 32:20 and ends at 1:42:00)

February 7, 2020:

<https://www.youtube.com/watch?v=TMmJB8GtJa4>

¹ The Respondent's Answer and the materials constituting the certified record exceed the allowable size for a single submission. Therefore, counsel will provide a copy of these materials to the court on a separately-filed disk, with a copy to all parties.

March 12, 2020:

<https://www.youtube.com/watch?v=mCxEahab15k&t=4273s> (the relevant portion of the meeting begins at 29:50 and ends at 2:40:30)

June 10, 2020:

<https://www.youtube.com/watch?v=nmfJEmWh7YQ>

July 9, 2020:

<https://www.youtube.com/watch?v=5j0C4KxZfZs&t=2308s> (the relevant portion of the meeting begins at 9:25 and ends at 37:05)

WHEREFORE, having fully set forth its Answer to the Complaint, the DDRC prays for an order of this Court affirming the decisions of the DDRC and dismissing this appeal.

Respectfully Submitted,

s/Peter M. Balthazor

Peter M. Balthazor, SC Bar No. 68244

RILEY POPE & LANEY, LLC

2838 Devine Street (29205-2508)

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Columbia, South Carolina 29211-1412

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Email: peteb@rplfirm.com

*Attorneys for Defendant/Respondent City of
Columbia Design/Development Review Commission*

August 24, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A NO.: 2020-CP-40-03475

University Hill Neighborhood Association,

Plaintiff,

v.

CERTIFICATIONCity of Columbia, City of Columbia Design
and Development Review Committee, and
Trinitas Ventures, LLC,

Defendants.

I, Amy Moore, as Principal Planner, Historic Preservation for the City of Columbia, and as the secretary for the Design/Development Review Commission, hereby certify that the attached documents are a copy of the proceedings held before the Design/Development Review Commission on January 9, 2020, February 7, 2020, March 12, 2020, June 10, 2020, and July 9, 2020 (labeled January DDRC001-138, February DDRC001-012, March DDRC001-208, June DDRC001-026, and July DDRC001-088, respectively), together with audio/video recordings of the proceedings of the Design/Development Review Commission which can be found at the following links on the City of Columbia's CityTV ([youtube.com/user/ColumbiaSCGovernment](https://www.youtube.com/user/ColumbiaSCGovernment)):

January 9, 2020:

<https://www.youtube.com/watch?v=INJZiZkKN7c&t=6575s> (the relevant portion of the meeting begins at 32:20 and ends at 1:42:00)

February 7, 2020:

<https://www.youtube.com/watch?v=TMmJB8GtJa4>

March 12, 2020:

<https://www.youtube.com/watch?v=mCxEahab15k&t=4273s> (the relevant portion

of the meeting begins at 29:50 and ends at 2:40:30)

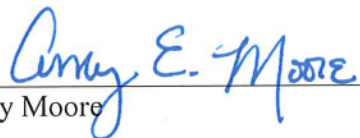
June 10, 2020:

<https://www.youtube.com/watch?v=nmfJEmWh7YQ>

July 9, 2020:

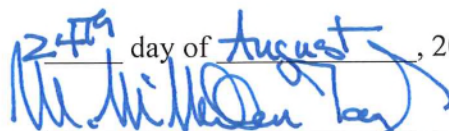
<https://www.youtube.com/watch?v=5j0C4KxZfZs&t=2308s> (the relevant portion

of the meeting begins at 9:25 and ends at 37:05)


Amy Moore

August 24, 2020
Columbia, South Carolina

SWORN TO BEFORE ME THIS

24th day of August, 2020
 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 12, 2029

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2020-CP-40-03475
	)	
University Hill Neighborhood	)	
Association,	)	
	)	CITY OF COLUMBIA'S ANSWER
Plaintiff,	)	TO PLAINTIFF'S COMPLAINT
	)	
vs.	)	
	)	
	)	
City of Columbia, City of Columbia	)	
Design and Development Review	)	
Committee, and Trinitas Ventures,	)	
LLC,	)	
Defendants.	)	

The Defendant City of Columbia (hereinafter "City"), answers the Plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. Each and every allegation not specifically admitted, qualified, or explained is denied and strict proof is demanded thereof.
2. The City admits the allegations set forth in Paragraph 1.
3. Answering Paragraph 2, the City admits that the proposed development at issue is located within the Columbia's City Center Design/Development District ("DD area"). Further answering Paragraph 2, the City craves reference to Sections 17-253, 17-311, and 17-655(b) of the City Code of Ordinances. The City denies Plaintiff's allegation that the City Center Guidelines are unusual in that they contain only precatory terms like "non-binding" and "should" rather than mandatory terms like "must" and "shall."

4. Paragraph 3 is comprised of explanatory statements of Plaintiff's claims on appeal of the DDRC decision; therefore, no answer is required of Defendant City of Columbia. To the extent a response is required from the City, the City denies the allegations contained in Paragraph 3.
5. Answering Paragraph 4, the City lacks sufficient knowledge or information to ascertain if Plaintiff meets the legal requirements of recognition as an unincorporated association and therefore, denies same. Further answering Paragraph 4, the City lacks sufficient knowledge or information to ascertain if Plaintiff represents the interests of persons owning property within the geographic boundaries of the University Hill neighborhood, and therefore, denies same. Further answering Paragraph 4, the City admits that the University Hill neighborhood is located within an Architectural District as described within Section 17-681(b)(1) of the City Code of Ordinances, and is also designated as a National Historic District.
6. Answering Paragraph 5, the City lacks sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph 5 and therefore denies same.
7. The City admits the allegations set forth in Paragraphs 6 and 7.
8. Answering Paragraph 8, the City lacks sufficient information to form a belief as to the truth or falsity of the allegations of Paragraph 8 and therefore denies same.
9. Paragraphs 9 – 31 assert no allegations against the City to which a response is required. To the extent a response is required from the City, the City craves reference to the actual City Center Development/Design Guidelines ("Guidelines") for the language contained

therein, as well as the record before the DDRC concerning the development at issue in this case.

10. Answering Paragraph 32, the City craves reference to the actual City Center Development/Design Guidelines ("Guidelines") for the language contained therein.
11. Answering Paragraph 33, the City craves reference to S.C. Code Ann. § 6-29-1150 for the language contained therein. Further answering Paragraph 33, the City denies the conclusions of law found therein.
12. Answering Paragraph 34, the City denies the conclusions of law found therein.
13. Paragraphs 35-37 assert no allegations against the City to which a response is required.
14. The City denies that Plaintiff is entitled to the relief sought in Paragraph 38 as against the City.

FOR A SECOND DEFENSE

15. The City repeats and reiterates each of the foregoing allegations as may be relevant hereto.
16. The Plaintiff lacks standing to bring this action against the City of Columbia.

FOR A THIRD DEFENSE

17. The City repeats and reiterates each of the foregoing allegations as may be relevant hereto.
18. No private right of action exists under S.C. Code Ann. § 6-29-1150(A), nor the City's Guidelines.

FOR A FOURTH DEFENSE

19. The City repeats and reiterates each of the foregoing allegations as may be relevant hereto.
20. There is no justiciable controversy between Plaintiff and the City of Columbia because Plaintiff's claim against the City may be mooted, without conceding any point of law.

FOR A FIFTH DEFENSE

21. The City repeats and reiterates each of the foregoing allegations as may be relevant hereto.
22. The City is not a proper party as it relates to an appeal of a DDRC decision.

FOR A SIXTH DEFENSE

23. The City repeats and reiterates each of the foregoing allegations as may be relevant hereto.
24. To the extent that Plaintiff is making a facial challenge to the City's enactment of ordinances establishing the City Center Design/Development District and its guidelines, the statute of limitations has run on such a claim.

FOR A SEVENTH DEFENSE

25. The City repeats and reiterates each of the foregoing allegations as may be relevant hereto.
26. Plaintiff fails to state fact facts sufficient to constitute a cause of action for injunctive relief.

WHEREFORE, having fully set forth its Answer to the Complaint, the Defendant City of Columbia prays that the Complaint be dismissed with costs taxed unto the Plaintiff, and for such other and further relief as the Court may deem just and proper.

s/M. McMullen Taylor
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Attorney for Defendant City of Columbia

August 24, 2020
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2020-CP-40-03475

University Hill Neighborhood Association..... Plaintiff/Respondent,

v.

City of Columbia, City of Columbia Design and Development Review Committee and
Trinitas Ventures LLC Defendants/Appellants.

NOTICE OF APPEAL

City of Columbia, City of Columbia Design/Development Review Committee, and Trinitas Ventures LLC (“Appellants”) appeal the order dated December 7, 2021 of the Honorable L. Casey Manning and the order dated March 10, 2022 denying Appellants’ Motion for Reconsideration. *See Exhibits 1 and 2.* Appellants received written notice of the lower court’s order denying reconsideration on March 10, 2022. Appellants also appeal the circuit court’s order denying motions to dismiss, filed October 7, 2020, and order denying reconsideration of the order denying motions to dismiss, filed November 19, 2020. *See Exhibits 3 and 4.*

(signatures on following page)

March 30, 2022

Respectfully submitted,

s/Lyndey R. Z. Bryant
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2020-CP-40-03475

University Hill Neighborhood Association..... Plaintiff/Respondent,

v.

City of Columbia, City of Columbia Design and Development Review Committee and
Trinitas Ventures LLC Defendants/Appellants.

PROOF OF SERVICE

I certify that I caused to have served the **Notice of Appeal** on the Plaintiff/Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 30, 2022, addressed to its attorneys as follows:

Richard A. Harpootlian, Esq.
RICHARD A. HARPOOTLIAN, P.A.
Post Office Box 1090
Columbia, South Carolina 29202

-and-

F. Patrick Hubbard, Esq.
1525 Senate Street
Columbia, South Carolina 29208

Attorneys for University Hill Neighborhood Association

s/Lyndey R. Z. Bryant
Lyndey R. Z. Bryant, Esquire

Exhibit 1

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CA NO: 2020-CP-40-03475

University Hill Neighborhood Association

Plaintiffs/Appellant

vs.

City of Columbia, City of Columbia Design
and Development Review Commission, and
Trinitas Ventures, LLC

Defendants/Respondents

ORDER

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Parties

This case involves two decisions by the City of Columbia Design and Development Review Commission (DDRC) that granted final approvals for the construction of “Trinitas,” an eight-story, 750 feet tall apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) DDRC, a “Board of Architectural Review” established pursuant to S.C. Code §§ 6-29-880 et seq and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), the real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein.

Plaintiff University Hill Neighborhood Association (Association) is an unincorporated association. The boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic districts in Columbia. One is a local City of Columbia Historical District; the other is a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This local district is “identified as Architectural District No. 1” and is “bounded by Laurens, Senate, Henderson and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District, named University Neighborhood Historic District, by the National Register of Historic Districts. U.S. Dept. of the Interior, National Park Service, certified Aug. 8, 2004.

B. Procedural History

The DDRC conducted four public hearings to address the initial application and subsequent revised applications for design approval and for site plan approval filed by Trinitas. At the regular January 2020 public hearing, both applications were denied. (Exhibit 6, at pp. 43–46, filed as Supplement to Record on Appeal by DDRC, Apr. 20, 2021 [hereinafter Supplement to Record]. Subsequently, these denials were rescinded at a special called meeting on February 7. (Supplement to Record, Exhibit 7, at pp. 15–16). At the regular March hearing, the DDRC granted site plan approval for the project (Supplement to Record, Exhibit 8, at pp. 76–77). Design approval was granted by the DDRC at the regular July public hearing (Supplement to Record, Exhibit 10, at pp. 18–19).

In addition to these four public hearings, the DDRC conducted a “work session” on the design approval on June 10, 2020 (See Supplement to Record, Exhibit 9).

On July 23, 2020, the Association filed a complaint/appeal in Circuit Court. The DDRC, Trinitas, and the City each filed an answer and a Motion to Dismiss. The motions to dismiss were denied. (Order filed Oct. 7, 2020) The denial of these motions was appealed. The Court of Appeals dismissed the appeal on the ground that the order was not immediately appealable. (Appellate Case No. 2020-001586, Order filed Jan. 14, 2021).

On September 13, 2021, the DDRC and Trinitas filed a Petition for Writ of Mandamus pursuant to 245(B) SCACR, or, in the alternative, Petition for Certification pursuant to Rule 245(A) SCACR. University Hill Neighborhood Association file a Return to this filing.

On September 30, 2021, the parties in this action requested the Supreme Court to hold in abeyance all deadlines associated with the Petition for Writ of Mandamus and Petition for Certification. The Court granted the request. The parties informed the Supreme Court that on October 14, 2021, Circuit Court Judge Casey L. Manning held a final merits hearing to consider

all issues in the case. The Circuit Court requested proposed orders from the parties by November 4, 2021.

Due to these continuing developments in the case, the parties again requested the Supreme Court to hold all current deadlines in abeyance until the Circuit Court issues an order. Petitioners contend that while an order by the Circuit Court may resolve the Petition for Mandamus, such an order may not resolve the Petition for Certification. By letter of October 15, 2021, the Clerk of the Supreme Court advised the parties that this matter will be continued to be held in abeyance until November 12, 2021, and that the Court should be notified of the status of this matter at that time.

C. Facts

The site for the proposed Trinitas apartment building is within an “overlay” district within the City of Columbia. Overlay districts are explicitly permitted under Section 6-29-720(C)(5) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 [hereinafter Enabling Act], which describes an overlay zone as a district that “*imposes a set of requirements or relaxes a set of requirements by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. . . .*” (emphasis added).

The overlay district herein is termed the “City Center Design/Development District of Columbia, South Carolina” and is referred to as “-DD area” in Sections 17-253 and 17-655(b)(2) of the Columbia City Code.¹ As indicated in Argument Three below, an overlay district like the

¹ The Parties have filed a “Joint Stipulation Regarding City of Columbia Ordinances.” [“Joint Stipulation”] Exhibit A of the Joint Stipulation contains selected portions of the City of Columbia Code of Ordinances, Chapter 17, Planning, Land Development and Zoning.

-DD area is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists.

The City Council of Columbia did not draft a zoning ordinance to govern decisions in the -DD area. Instead, it simply adopted a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [*Guidelines*].² This result was accomplished by adopting the *Guidelines* by reference in Columbia City Code § 17-253 (referring to “City Center Design/Development Guidelines”) and § 17-655(b)(2) (referring to “requirements set forth in design guidelines adopted by the city council”).

This approach was chosen even though the *Guidelines*: (1) were prepared by planning experts to guide the drafting of an ordinance, and (2) explicitly state that the *Guidelines* are “non-binding” and are not meant to serve as an ordinance. To this end, Section 3.5.2 of the *Guidelines* states, “*It is through the Zoning Ordinance that the Design Development Guidelines will be implemented. . . .*” (emphasis added) As an example of this non-binding process, the discussion of “Building Heights” at page 5-2 of the *Guidelines* states: “This section provides *non-binding* general direction for development within City Center, with the recommendation that the *City’s regulatory plans and codes be amended* to reflect the guidance included here.” (emphasis added).

As a result of this use of a planning guide as an ordinance, design in the -DD area is based on precatory terms like “non-binding” and “should” rather than mandatory terms like “must” and “shall.” For example, Section 5.1 of the *Guidelines*, which addresses the design of private development in the -DD overlay district, states: “The guidelines in this chapter are *illustrative rather than prescriptive*.” (emphasis added)

² See Exhibit B to Joint Stipulation, *supra* note 1.

D. Summary of Challenges to Approvals

It is important to distinguish among the Association's three distinct challenges to the approvals of the Trinitas project. One challenge concerns provisions of the *Guidelines* that require "site plan review" within the -DD area to be done by the DDRC rather than by the City of Columbia Planning Commission. The site plan review part of the Complaint: (1) asserts that the shift by the City of the site plan review to the DDRC was *ultra vires*, and (2) relies on the general jurisdiction of the Circuit Court. Thus, it is not governed by the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A).

Another challenge asserts that, because the *Guidelines* were intended to guide the drafting of an ordinance rather than to serve as an ordinance, the adoption of the non-binding *Guidelines* as the ordinance was an unlawful delegation of the legislative power of the City of Columbia. Jurisdiction on this claim is based on the general jurisdiction of the Circuit Court.

The Association asserts that the site plan review claim and the unlawful delegation claim were combined with the appeal pursuant to Section 6-29-900(A) for three reasons. First, the facts concerning all three of the Association's claims are interconnected in the record concerning the appeal of the decisions pursuant to Section 6-29-900(A). Second, combining these two claims enables Trinitas, a real party in interest in terms of the Section 6-29-900(A) appeal, to assert its interests in these two claims. Third, the Association was motivated to assert the *ultra vires* claim and the unlawful delegation claim at the point in time when the Complaint was filed, rather than earlier, because there was no harm to substantial interests of the Association and its members until the DDRC approved the site plan and the design for the Trinitas project.

The third challenge involves an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. This challenge asserts that the DDRC abused its discretion in approving the height of the Trinitas apartment building because it made a mistake of law in deciding that the

height of the proposed Trinitas project should be determined by the underlying zoning rather than the -DD overlay zoning.

The Association claims it has standing to bring the three challenges summarized above. The Defendants/Respondents dispute this claim.

E. Standard of Review

The Standard of Review for Arguments One and Two involves matters of law and statutory interpretation. Therefore, the standard of review is de novo. *South Carolina Public Interest Foundation v. Calhoun County Council*, 432 S.C. 492, 854 S.E. 2d 836, 837 (2021) (“[T]he interpretation of a statute is a question of law for the Court to review de novo.”)

The Standard of Review for Argument Three is set for the in Section 6-29-930(A) of the South Carolina Code:

The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

The application of this standard of review was summarized in *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361, 362 (Ct. App. 2005) (citations omitted), as follows:

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by *committing errors of law* or bases its decision on findings of fact that are not supported by evidence. Furthermore, our

standard of review of a board of architectural review's decision is the same as that of the trial court.

(emphasis added) This third challenge asserts that the DDRC abused its discretion by committing an error of law in its decision that the underlying zoning controlled the determination of the height of the building.

The determination of whether standing requirements are satisfied is a matter for the court addressing the issues. *See, e.g., Preservation Society of Charleston v. South Carolina Department of Health and Environmental Control*, 430 S.C. 200, 845 S.E.2d 481, 489 (S.C. 2020) (Based on review of evidence involved, the Court concluded: "We find Petitioner's allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative").

II. SITE PLAN REVIEW CHALLENGE

A. Site Plan Review by DDRC

Title 6, Chapter 29 of the South Carolina Code contains the Enabling Act. Article 7 (titled as “Local Planning – Local Development”) of the Enabling Act addresses land development regulation by local governments. In contrast, provisions concerning boards of architectural review like the DDRC are contained in Article 5 (“Local Planning – Zoning”) of the Enabling Act. The scope of Article 7 is very broad, largely because terms like “land development” and “subdivision” are defined very broadly. (See S.C. Code §§ 6-29-1110(2), –(4)).

Planning commissions play a critical role under Article 7 in all the aspects of land development. Central to their role is the power to approve, or disapprove, plans for development. The phrase “plans for development” is very inclusive because numerous terms—e.g., “sketch plans, preliminary plans, and final plans”—are used to describe the plans involved. (See S.C. Code § 6-29-1150)

Under the Columbia scheme of land of development regulation set forth in Article IV of Chapter 17 (“Planning, Development and Zoning”) of the City Code, the Planning Commission is charged with implementing the land development regulations. As a part of this scheme, terms like “sketch plan,” “site plan,” and “preliminary plat” are used to identify specific types of plans. Columbia City Code § 17-464. For a category termed “Group Development,”³ a system of plan

³ There are three categories of “group development” set forth within the definition of “subdivision, development type” in Columbia City Code § 17-464. These are:

review termed “site plan review” is established. (See Columbia City Code §§ 17-464, 17-581 through § 17-589).

Section 3.5.4 of the *Guidelines* for the -DD area shifts the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC.⁴ This approach to site plan review is *ultra vires* because it conflicts with explicit language in subsection

Group development means a development such as shopping center, office buildings, industrial sites, mobile home parks and apartment complexes where the site is not subdivided in lots, blocks and streets, but includes two or more units designed or intended for separate occupancy.

Group commercial or industrial development means a single building or combination of buildings containing 25,000 square feet of gross floor area, or two or more buildings containing a combined total of 25,000 square feet gross floor area.

Group housing development means a single lot of record upon which are erected three or more dwelling units and all the structures thereon. This definition shall include apartments, condominiums and townhouses, whether rented or sold.

⁴ Section 3.5.4 of the *Guidelines* states:

Within City Center, the D/DRC and Design/Development Review staff *will* assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

(emphasis added). This section is one of the rare instances where the *Guidelines* use a mandatory term like “will” rather than a precatory term like “should.”

6-29-1150(A) of the Enabling Act, which addresses the submission of plans or plats to the planning commission. This subsection addresses “Submission of plan or plat to planning commission” and states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the *planning commission or designated staff*.” (emphasis added). The shifting of site plan review to the DDRC pursuant to the *Guidelines* conflicts with this clear mandate that the planning commission must approve or disapprove plans.⁵

The purpose of the Enabling Act is to enable or authorize local governments to engage in planning and in regulating the use and development of land. As noted in Section 6-29-330(A) of the S.C. Code: “A municipality may exercise the powers granted *under the provisions of this chapter* in the total area within its corporate limits.” (emphasis added). The phrase “under the provisions of this chapter” indicates that the “powers granted” are both defined by and limited by the Enabling Act.

Thus, the portion of Section 6-29-1150(A) quoted above imposes an express requirement that local land development regulations “*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the planning commission or designated staff.” (emphasis added) Thus, the section imposes the following two requirements: (1) There *must* be a system for approval or disapproval of plans and plats; and (2) this system *must* be undertaken by the planning commission.

⁵ When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the DDRC stated that the question of the validity of the grant of this power is “out of our hands.” (Supplement to Record, Exhibit 8, at pp.14–16).

The Rhode Island Supreme Court stated the general principle for applying an enabling act as follows: Where a local government “purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void.” *Hardy v. Zoning Board of Review of the Town of Conventry*, 321 A.2d 289, 290–29 (R.I. 1974).

The South Carolina Supreme Court applied this principle in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2 777 (2010). At issue was the rezoning of a large parcel of land from the classification AG-15 (agricultural with minimum lot area of three acres) to PD (“planned development district”). This PD district would have 107 dwellings, which was the same number as would be allowed under AG-15. However, the minimum lot size for the PD was reduced to one acre.

Sinkler noted that Section 6-29-720(C)(4) of the Enabling Act explicitly authorizes the use of planned development schemes and quoted the following language:

“[P]lanned development district” or a development project comprised of *housing of different types and densities and of compatible commercial uses*, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development *and is characterized by a unified site design for a mixed-use development*.

690 S.E.2d at 781 (emphasis in original). *Sinkler* also quoted Section 6-29-740, which contains additional details concerning a PD district. This section provides:

In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that *will result in improved design, character, and quality of new mixed use developments* and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. *The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.*

690 S.E.2d at 779 (emphasis in original)

The Supreme Court, relying on the statutory language quoted above, held:

[T]he [zoning] ordinance [with only residential uses] did not meet the parameters for a PD. . . . [H]aving invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold *the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act.*

Sinkler, 690 S.E.2d at 781, 782 (emphasis added).

In authorizing the DDRC to undertake site plan review, the City of Columbia, like Charleston County in *Sinkler*, failed “to meet the requirements” of the Enabling Act. Consequently, this grant of power to the DDRC was *ultra vires* and is, therefore, invalid because the authorization did not satisfy “the terms of the Enabling Act.”

B. Arguments of Defendants/Respondents

Defendants/Respondents make five arguments concerning the issue of whether the grant of power to the DDRC was ultra vires:

- (1) The issue is moot,
- (2) The Association does not have standing under S.C. Code §6-29-1150,
- (3) Appellant failed to preserve the issue, and
- (4) The DDRC never decided the issue.
- (5) This court lacks jurisdiction.

As indicated below, none of these arguments is valid.

1. Mootness

Section 3.5.4 of the Guidelines provides/includes the following provision: “Within the City Center, the DDRC and the Design/Development Review staff will assume responsibility for site plan review.”⁶ Respondents argue that, because the City has deleted Section 3.5.4 of the *Guidelines*, the site plan issue is moot.

⁶ Section 3.5.4 provides as follows:

3.5.4 Site Plan Review

Site plan review in Columbia is handled by the City’s Planning Department, which has authority to approve site plans for building projects of 25,000 square feet or less; larger projects must go before the City’s Planning Commission. Once applications are accepted, the Planning Department has 10 days to review the project, including evaluation of the site plan and preparation of a staff report for

This ordinance amendment does **not** moot the site review issue because eliminating the grant of the responsibility for site plan review to the DDRC does not eliminate the ultra vires problem. In fact, it makes the situation worse because the process of site plan review by Planning Commission involves matters that are also authorized for review by the DDRC under the *Guidelines*.

a. Planning Commission Site Plan Review

The Columbia City Code provisions concerning site review of “group developments”⁷ by the City of Columbia Planning Commission involve a number of concerns, including the following:

- (1) Procedures and requirements for specific plans and constructions drawings (§ 17-582);
- (2) Off-street parking (§ 17-583);
- (3) Water and Sewer Service (§ 17-584);

the Planning Commission. The Commission may then approve, approve with conditions, or deny the project. Planning Commission decisions are appealable to the circuit court, not the City Council.

Within City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

⁷ See Columbia Zoning Ordinance § 17-464 (establishing the three types of “group development” quoted in note 3 *supra*).

- (4) Storm Drainage (§ 17-585);
- (5) Parking areas, driveways, and internal street (§ 17-586);
- (6) Building setbacks (§ 17-587);
- (7) Internal design and spacing (§ 17-588); and
- (8) Screening (§17-589).

b. DDRC Site Plan Review

Even though Section 3.5.4 has been deleted from the *Guidelines*, there are other sections of the *Guidelines* which implement the now-deleted Section 3.5.4 by addressing the same site plan review concerns that are addressed by the Planning Commission. More specifically, these sections provide for DDRC approval of the following:

- (1) Subsection 5.4.1 of the *Guidelines* sets out a scheme to determine setbacks, which are also regulated by the Planning Commission.⁸
- (2) Subsection 5.4.2 addresses “building orientation,” which is also involved in Planning Commission review.⁹
- (3) Section 5.5 addresses “open spaces,” which are also a matter for Planning Commission review.¹⁰
- (4) Section 5.10 addresses parking and screening, which are also reviewed by the Planning Commission.¹¹

⁸ Columbia City Code §17-587.

⁹ *See id.* § 17-582.

¹⁰ *Id.* §§ 17-582, 17-588.

¹¹ *See id.* §§ 17-582, 17-583, 17-586, & 17-589.

c. Conclusion

This overlap of review authority by both the Planning Commission and the DDRC conflicts with the Enabling Act.

d. Likelihood of Conflicts in Site Plan Review

Because of the overlap, the Association asserts that there is also a substantial likelihood that an application receiving a decision by the Planning Commission on a particular concern will conflict with a decision by the DDRC on the same concern. Such a result is obviously undesirable. At oral argument, Defendants/Respondents argued that the argument concerning overlap was speculative and hypothetical. However, given the number of important areas of overlap, the concerns for overlap appears to be justified.

This problem of overlap of review by both the DDRC and the Planning Commission was identified at page 18 of Plaintiff's Memorandum in Opposition to Motion to Dismiss. This Memorandum was filed on September 2, 2020. Thus, Respondents were on notice that Section 3.5.4 was not the only section involving an ultra vires grant of power.

2. Section 6-29-1150

Section 6-29-1150 is not relevant to the ultra vires argument. Jurisdiction is based upon Article V, Section 11 of the South Carolina Constitution.

3. Failure to Preserve Ultra Vires Issue

Various arguments in the Brief of Respondents fail to distinguish between deciding on the basis of adjudication and deciding on the basis of a public hearing. For example, in footnote 23 on page 19, Defendants/Respondents argue:

“Testimony by the University of South Carolina and Historic Columbia, referenced on page 36 of Appellant’s Brief, is irrelevant, as neither entity appealed either of the DDRC’s decisions.”¹²

Respondents provide no authority for this assertion.

Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008) addressed the issue of the due process rights of a landowner’s request to subdivide his property. The court stressed that adjudication is very different from decisions by discretionary zoning boards and commissions. See 656 S.E.2d at 350–51. It is generally accepted that “the purpose of holding a public hearing is for the government to obtain public testimony or comment on a particular matter.”¹³ Given this goal, it is absurd to say that a person’s testimony only counts if that person appeals.

4. Failure of DDRC to Address Issue

This is a puzzling argument. The parties agree that the “DDRC does not have authority to determine its own authority. . . .” Brief of Respondents, p. 28. When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the

¹² For additional examples, see footnote 11 at page 8 of Brief of Defendants/Respondents (“A representative of Historic Columbia, John Shearer, also objected to Trinitas’ application for design approval quote based on . . . scale and on mass and height.” *Id.* at 51:5-6. Historic Columbia did not appeal the DDRC’s Design Approval Decision as to the Proposed Construction.”); page 15 (reliance on *Powell ex rel. Kelly v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), which was decided within the context of adjudication); pages 26–28 (relying on adjudicative concepts of preservation of issue to challenge position of appellants).

¹³ New Hampshire Municipal Association, Running a Smooth Public Hearing, p. 2, available at <https://www.nhmunicipal.org/town-city-article/running-smooth-public-hearing>.

DDRC states that the question of the validity of the grant of this power is “out of our hands.” (Supplement to Record, Exhibit 8, at pp. 14–16). This lack of authority is the reason jurisdiction on this issue is based upon Article V, Section 11 of the South Carolina Constitution rather than on S.C. Code §6-29-1150.

5. Jurisdiction

The Defendants/Respondents have challenged the jurisdiction of this court to address the site plan issue. Article V, Section 11 of the South Carolina Constitution provides: “The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law.” Because this grant of general jurisdiction supports the filing of this *ultra vires* action in Circuit Court, it was the basis of all of the South Carolina *ultra vires* cases cited in Part C below, except *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008), which was filed in the original jurisdiction of the Supreme Court.

C. Remedy for Ultra Vires Act

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. See, e.g., *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *Sinkler v. Boyd, supra* (holding circuit court properly invalidated rezoning); *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city’s decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of

conveyance by Circuit Court); *City of North Charleston v. North Charleston District*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgement that certain contracts entered into by school district were *ultra vires* and, therefore, invalid). Because the grant of power to the DDRC to address site plan review was *ultra vires*, that grant of power is invalid.

III. MISTAKE OF LAW IN DECIDING THAT THE HEIGHT OF THE PROPOSED BUILDING WAS DETERMINED BY THE UNDERLYING C-3 ZONING RATHER THAN THE -DD OVERLAY ZONING

A. The Height Restrictions in the *Guidelines*

Chapter 5 of the *Guidelines* contains the “Guidelines for Private Development.” The Introduction to this chapter notes:

The key emphasis of the guidelines in the chapter is to reinforce the exiting fabric of City Center by ensuring that new projects are developed within the rhythm of the existing development pattern. *This “contextual” approach to evaluating the design of new projects is fundamental to the implementation of the Guidelines.*

(emphasis added) Thus, the *Guidelines* view this contextual approach as fundamental to design review. Where height is concerned, Section 5.3.1 of the *Guidelines* states:

As a general rule, and consistent with current zoning provisions, buildings within most of City Center *should be no more than five stories*. . . . [I]t is not the intent of these Guidelines to establish new height standards for development in City Center. It is, however, *critical* that in applying these Guidelines—as well as other development regulations—the City be consistent in considering the height of proposed structures as they relate to the *adjacent development context*.

(emphasis added)

The Association argues that the DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, even though height “should be no more than five stories

and the DDRC should use the “contextual approach” to evaluating the design of new projects is “critical” and “fundamental” to the implementation of the *Guidelines*, the decision was based on a mistaken legal interpretation by the staff of the DDRC that the five-story guideline and the contextual approach of the *Guidelines* did not regulate the height of the building. The basis of this interpretation was set forth in an email from Lucinda Statler (the City’s Principal Planner/Urban Design) to Thomas Gottshall, President of the University Hill Neighborhood Association. (See Exhibit 1 to Complaint) Part of this email states:

The DDRC makes decisions as to whether a project meets or does not meet the design guidelines, which are qualitative measures for evaluating projects within the City Center Design District. The underlying [C-3, General Commercial Use] zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the [underlying C-3 General Commercial Use] zoning, the [C-3] zoning prevails. Please refer to Section 5.3.1 *Building Heights*, in the City Center Design Guidelines. “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center”¹⁴

(emphasis in original) This interpretation was adopted in the *Staff Report* for the July 2020 meeting. This report states: “The building height and mass remain the same [as earlier versions of

¹⁴ Similar language is contained in Lucinda Statler’s comments at the July 2020 DDRC meeting. (Supplemental Record, Exhibit 10 at 2–3)

the proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance.” (Record, Exhibit 5 at 5)

The Brief of Defendants/Respondents argues that nothing in the DDRC’s Design Approval Decision states that it was based on positions or conclusions of staff or on staff recommendations. The Record does not support this argument.

The Record makes it clear that the DDRC had been told by the staff that it could not apply the *Guidelines* because height was to be determined by the underlying C-3 zoning. For example, the DDRC “Staff Comments” consistently stated that the underlying C-3 zoning controlled the decision on height.¹⁵ In addition, at the June 10, 2020, “work session,” the staff of the DDRC stated that it wanted to “ensure that we all understand that the DDRC can’t require a reduction in the allowable height or the allowable building envelope that’s permitted by zoning.” The chairman of the DDRC replied to this statement as follows: “Right. And I appreciate that. Understand that.” (Supplement to Record, Exhibit 9, at pp. 69–70).

The motion to approve the height incorporates this understanding about the allowable building envelope. As to height and mass, the motion stated the following:

“It meets the following sections of section 5.3, building mass and organization which are 5.3.1 building height, in which is stated, quote, *The city’s comprehensive*

¹⁵ The written comments from the staff at the July meeting included the following:

While the building is 8 stories, its total height is 75’, meeting the C-3 zoning requirement. The U of SC law school, across Pickens Street, is 58’ to the top of the third floor, and 70’ to the roof pitch; the Hilton Garden Inn is just under 75’.

...

The building height and mass remain the same, consistent with the allowable envelope provided by the Zoning ordinance.

(Record, July DDRC 011)

plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.”

Supplemental Record, Exhibit 10 at p. 18 (emphasis added). Given exchanges between staff and the DDRC like that quoted in the preceding paragraph, it is clear that the reference to the quote from Section 5.3.1 was intended to implement the understanding that “the DDRC can’t require a reduction in the allowable building envelope that’s permitted by [the underlying C-3] zoning.”

In addition Defendants/Respondents concede that the DDRC approval of the height was based on the current underlying zoning, not the current overlay zoning. The Brief of Defendants/Respondents makes this clear at p. 42, which includes the following:

The applicable City zoning ordinance, City Code Section 17-275, allows for buildings in the C-3 zoning section to be between 50 and 75 feet. Columbia, S.C., Code of Ordinances § 17-275 at note c (“Buildings between the height of 50 and 75 feet may be allowed[.]”). Since the height of the structure at issue is undisputedly within this limit, the Proposed Construction is compliant with [the] City’s zoning ordinance and therefore is also compliant with the *Guidelines*.

B. The DDRC Interpretation Was a Mistake of Law

Because the DDRC interpretation was a mistake of law, approval based on this mistake was an abuse of discretion.

1. Provisions in the Enabling Act and in the Columbia Zoning Code Concerning Conflicts Between Requirements

The Commission's reliance on the staff's interpretation was a mistake of law because the interpretation conflicts with provisions in the Enabling Act and in the Columbia City Code concerning conflicts between requirements.

Section 6-29-960 of the Enabling Act states the following approach to be used when requirements conflict:

When the regulations made under the authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other more restrictive standards than are required in or under another statute, or local ordinance or regulation, the regulations made under authority of this chapter govern. When the provisions of another statute require more restrictive standards than are required by the regulations made under authority of this chapter, the provisions of that statute govern.

Section 17-181 of the Columbia City Code states:

Within each district, the regulations set forth by this article shall apply uniformly to each class or kind of structure or land. In their interpretation and application, the provisions of this article shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. *Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that*

imposing the higher standards, shall govern. Unless deed restrictions, covenants or other contracts directly involve the city as a party in interest, the city shall have no administrative responsibility for enforcing such deed restrictions or covenants.

(emphasis added)

Article V of the Columbia City Code addresses “Historic Preservation and Architectural Review.” Section 17-675 contains the following specific provision concerning conflicts in requirements where design review is involved:

The most restrictive regulations of the zoning ordinance or any other ordinance of the city or those included in this division shall prevail. However, if the commission finds it desirable to impose less restrictive requirements than the zoning ordinance, such deviation shall be referred to the zoning board of adjustment for review as a special exception.

The *Guidelines* provide two standards for determining the permissible height of a building. First, Section 5.3.1 of the *Guidelines* adopts “a general rule [that] . . . buildings within most of the City Center should be no more than five stories.” *Guidelines* § 5.3.1. Second, Section 5.3.1 notes that a “contextual approach is fundamental to the implementation of the Guidelines” and that this approach is “critical that in applying these Guidelines . . . the City be consistent in considering the height of proposed structures as they relate to the adjacent development context.” The adjacent

development is mostly one, two, and three story buildings.¹⁶ The only exception to this pattern is a hotel, which is: (1) across a wide, very busy street and (2) is outside the -DD district.¹⁷ Based on these two quantitative measures of adjacent development, the maximum height would either be three stories or five stories.

These two *Guidelines* standards for determining height are more restrictive than the underlying zoning of 75 feet. Given the requirements that the “more restrictive” standards shall govern, the more restrictive *Guideline* approach should have determined the height rather than the less restrictive underlying zoning.

2. The DDRC analysis of “vested rights” conflicts with the Columbia Zoning Code

To the extent that the staff interpretation relies on the concept of “vested rights,” the interpretation conflicts with the definition of vested rights in Columbia City Code, Section 17-2(a). This section states: “A vested right is triggered only upon the approval or conditional approval of a site specific development plan.” Section 17-1(b) defines a “site specific development plan” as follows: “Site specific development plan means those documents that comprise a complete application for a zoning permit, certificate of zoning compliance, variance, special exception, planned unit development, sketch plat or plan, or other similar approval that authorizes the developer or landowner to proceed with investment in grading, installation of utilities, streets and other infrastructure, and to undertake other significant expenditures necessary to prepare for

¹⁶ See “Analysis of Application of Certificate of Design Approval for Trinitas,” Record, Exhibit 3, at pp. 50, 135.

¹⁷ *Id.*

application for a building permit.” An underlying zoning classification of C-3 zoning does not satisfy this definition of site-specific development plan.

3. The DDRC Interpretation Is Fallacious

Another problem with the interpretation concerning height adopted by the DDRC is that the “logic” of the argument makes *all* the guidelines meaningless. Statler’s email states: “When the design guidelines seem to conflict with the [underlying] zoning, the zoning prevails.” If this general statement were valid, imposing any of the *Guidelines* would be impermissible because the underlying C-3 zoning does not have any limits on such concerns as façade proportion and rhythm, proportion of openings, horizontal rhythms, alignment of architectural elements, wall articulation, roofs, and upper story details. *See* Chapter 5 of the *Guidelines*.

The distinction between “qualitative measures” and “quantitative measures” in the Statler email has two flaws. First, the email does not provide a reason for regarding the distinction as relevant to the question of whether the *Guidelines* or the underlying zoning should determine height. Second, the *Guidelines* contain quantitative measures for concerns other than height. For example, Section 5.3.3 address “Proportion of Openings” as follows:

Maintain the predominant difference between upper story openings and street level storefront openings (windows and doors). Usually, there is a much greater window area (*70 percent*) at the storefront level for pedestrians to have a better view of the merchandise displayed behind as opposed to upper stories which have smaller window openings (*40 percent*).

Whenever an infill building is proposed between two adjacent commercial structures, the characteristic rhythm, proportion and spacing of existing door and window openings should be maintained.

(emphasis added) Despite the quantitative nature of this guideline, the DDRC used it rather than the underlying zoning to address the proportion of openings. (Supplemental Record, Exhibit 10 at 10–11)

4. The DDRC Interpretation Conflicts with the Enabling Act and with Doctrine Concerning Overlay Districts

The *Guidelines* state: (1) that “zoning should be consistent with *current zoning provisions*” and (2) that “the City’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of building.” (emphasis added) (*Guidelines* § 5.3.1 at p. 5-2). The term “current zoning provisions” requires further analysis because there are two separate “current zoning provisions” involved.

When the City Council adopted the *Guidelines* as a part of its zoning code by reference in Columbia City Code Section 17-253 and Section 17-655(b)(2), the *Guidelines* became a part of Columbia’s “current zoning provisions.” As a result, the *Guidelines* are now a part of Columbia’s “current zoning provisions.” If the *Guidelines* were not part of today’s current zoning provisions, the DDRC could not apply them in the -DD overlay area.

The result of the adoption by reference is that, under today’s current zoning provisions, the site of the proposed Trinitas project is subject to two distinct zoning schemes: (1) the regulations for the underlying zoning category of C-3 and (2) the -DD overlay zoning provisions of the *Guidelines*. Thus, the question in this litigation is: Should the determination of height be based on the current underlying zoning provisions or on the current overlay -DD provisions?

As indicated above at Part I-C, an overlay is described in Section 6-29-720(C)(5) of the Enabling Act as a district that “*imposes* a set of requirements *or relaxes* a set of requirements imposed by the underlying zoning district.” (emphasis added) It is clear from the content of the

Guidelines that the *Guidelines* are meant to impose requirements, not relax them. The legal interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay like that involved herein and the underlying zoning backwards. The -DD design overlay involved herein is adopted to *increase* requirements by imposing *additional* requirements in order to address design concerns. If the underlying zoning will control where there is a conflict with the additional requirements of the overlay zoning, there is no reason to bother with the time and expense of applying the increased requirements of the overlay.

The general treatment of overlays in land use regulation parallels the language of S.C. Code § 6-29-720(C)(5). For example, John R. Nolan & Patricia E. Sallcin, *Land Use in a Nutshell* 218 (2006) describes an overlay as follows:

Overlay zoning is a flexible zoning technique that allows a municipality either to encourage or to discourage development in certain areas. An overlay zone is defined as a mapped overlay district superimposed on one or more established zoning districts. *A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements.*

(emphasis added)

South Carolina follows this approach of “two sets of zoning requirements” in overlay cases. For example, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) involved an “Airport Overlay District” (AO) which, among other things, restricted certain uses and expansions within the AO District. The church claimed it was entitled to a building

permit for a proposed expansion because: (1) an earlier permit included the expansion;¹⁸ and (2) an incorrect approach had been used in determining whether the expansion would increase the “occupant load” of the church’s property. “Occupant load” in the area within the AO District was important because of a concern for a high potential for accidents affecting the public areas near a military airport. The defendants rejected both of the church’s claims.

The church appealed, and a master-in-equity ruled in favor of the church. The Court of Appeals reversed the decision of the master-in-equity. In terms of the “occupant load” concern of the AO District, the Court held “the evidence in the record clearly supports the Planning Commission’s finding that the [proposed] fellowship hall would increase the occupant load for the site.” 828 S.E.2d at 241. In reaching this decision, the Court followed the general principle that, where an overlay imposes additional requirements, those additional requirements supplement or replace the underlying zoning.

Heilker v. Zoning Board of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) involved the application of a “Highway Corridor Overlay Zoning” scheme adopted by the City of Beaufort. The overlay was concerned with the protection and promotion of aesthetics and safety and contained new restrictions concerning the outdoor display of certain types of merchandise in the “Highway Corridor” district. The central issue in the case was whether the outdoor displays at issue were: (1) part of the “use” of the land for retail sale, or (2) merely an

¹⁸ In an opinion filed on September 16, 2020, the South Carolina Supreme Court reversed the decision of the Court of Appeals and held that the earlier permit included the expansion. *Grays Hill Baptist Church v. Beaufort Country*, 431 S.C. 630, 850 S.E.2d 29 (2020). The Supreme Court did not address the overlay issue because “our determination concerning the validity of the original permit resolves this case” *Id.* at 850 S.E.2d 32, fn. 8.

“activity or practice” incidental to the “use.” If the display was a use, the overlay did not apply; if it was an activity or practice, the restrictions of the overlay applied.

The Zoning Board of Appeals (ZBA) ruled that it was a practice, and Heilker appealed. A special judge reversed the ZBA’s finding, and the Court of Appeals reversed the special judge. *Heilker* adopted the same approach as *Grays Hill Baptist Church* and held that, where an overlay applied, the restrictions in the overlay supersede the underlying zoning.

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC ignored the legal effect of the adoption of the *Guidelines* by reference. As a result, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the height requirements in the *Guidelines* even though the *Guidelines* constitute the overlay part of current zoning. (See Part III-B-1 above for discussion of height requirement in the *Guidelines*.) Because the DDRC failed to follow the general rule of making the parcel within the overlay district “simultaneously subject to two sets of zoning regulations,” the DDRC made an error of law. This error constitutes an abuse of discretion.

5. Arguments of Defendants/Respondents

The Brief of Defendants/Respondents relies on generic rules of statutory instruction rather than the explicit provisions in the Enabling Act and the Columbia City Codes. Underlying their approach is a failure to appreciate the legal effect in terms of “current zoning” of the adoption of the *Guidelines* by reference. As a result, their arguments do not address the question of whether the underlying C-3 zoning or the overlay zoning of the *Guidelines* should prevail.

They also fail to address the problems concerning vested rights under the City Zoning Code and the fallacious nature of the argument concerning the flaw in the quantitative/qualitative distinction. Many courts have noted that where an important point is not addressed in a party's argument, the point is deemed to have been abandoned. *E.g.*, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); *Finch v. Finch*, 442 S.W.3d 209, 233 (Mo. App. 2014)

Defendants/Respondents also argue that the Association's positions on the role of the *Guidelines* as to the overlay zoning is inconsistent with its position on the issue of unlawful delegation. To the extent that consistency is a problem, both sides have this problem.

If the adoption of the *Guidelines* by reference was not an improper delegation, the *Guidelines* provide the legal framework for the overlay zoning. As a result, Defendants/Respondents cannot logically claim that the height provisions in Section 5.3.1 of the *Guidelines* are not more restrictive than the underlying C-3 zoning. Because these provisions are more restrictive, the Section 6-29-960 of the Enabling Act and Sections 17-181 and 16-675 of the City Code are applicable.

IV. STANDING

A. Associational Standing

1. Doctrine

The doctrine of associational standing was recently summarized by the Supreme Court as follows:

[A]n organization has associational standing to bring suit on behalf of its members when (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020). The associations in *Preservation Society* were:

[seeking] a contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston. Petitioners maintain they have standing to seek this hearing as “affected persons” under section 44-1-60 (G) of the South Carolina Code (2018). The ALC concluded Petitioners did not have standing and granted summary judgment to Respondents.

Id. at 483.

The Supreme Court decision focused on the first standing requirement—i.e., on whether any member of the petitioning organizations had standing as individuals under the statutory term of “affected persons.” In addressing this issue, the Court noted:

Petitioners are community and neighborhood organizations comprised primarily of members who own property near the proposed passenger cruise facility. . . . [T]he court of appeals acknowledged Petitioners presented affidavits from individual members expressing concern over their reduced quality of life arising from the effects upon them *individually*, such as pollution and health effects, traffic congestion, property values, effects on their businesses in the area, and effects on the historical integrity of the area where they resided. . . . Nevertheless, the court of appeals, relying on *Carnival Corp.*, agreed with the ALC that the claims of possible environmental and personal harm were purely speculative or were merely generalized grievances equally affecting the public as a whole.

Id. at 488.

The Supreme Court concluded that the associations’ “allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative.” *Id.* at 489. The proximity of the members of the associations to the terminal involved play a role in this conclusion. The court noted:

While geographic proximity may not be a determinative factor in every case, it is highly relevant to our analysis in this case. Here members would suffer the environmental consequences Petitioners allege the project will create, such as

breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution.

Id. at 489–90.

Defendants/Respondents primarily rely on two cases in their challenge to the Association’s standing: *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014) and *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

Carnival Corp. involved a suit brought by two neighborhood associations, a historic preservation society, and the Coastal Conservation Society. The alleged injuries involved were essentially public nuisance claims. 753 S.E.2d at 851. Because the plaintiffs lacked the special injury required for bringing a public nuisance claim, the court held that the plaintiffs lacked standing. *Id.* at 852. The court also held that public importance standing did not apply because of the nature of the claims involved and because the claims could be brought by persons who could show the required injuries, the public importance exception did not apply. *Id.* at 853.

Beaufort Realty Co. involved a challenge to a decision by the County Zoning Administrator that plats filed for a subdivision were exempt from the need for approval. The court held that the League did not have standing because there was no evidence of harm to individual members and that a “severe concern” for potential harm was, by itself, inadequate to satisfy the standard of concrete particular harm. 551 S.E.2d at 590.

The Association relies primarily on the following two cases: *Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control*, 430 S.C. 200, 845 S.E.2d 481 (2020) and *Citizens for Quality Rural Living, Inc.*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019).

Preservation Society of Charleston addressed the procedural issue of whether the organizational plaintiffs had standing to request a “contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston.” 845 S.E.2d at 483. As indicated above, the court held that the plaintiffs had standing because: (1) the organizations had members who owned property near the “proposed passenger cruise facility” at issue; and (2) the associations’ allegations of potential harm to members in the nearby neighborhoods “through affidavits and other filings, are not speculative.” 845 S.E.2d at 488–89. The harms were not speculative because, given the proximity to the facility, the members would be exposed to adverse health effects and increases in traffic and noise.

Citizens for Quality Rural Living, like *Preservation Society of Charleston*, focused on: (1) the fact that plaintiffs owned property in a defined neighborhood that was in the immediate vicinity of the proposed subdivision at issue in the case, and (2) members of the neighborhood “will be impacted by the additional traffic” and by the incompatibility of the subdivision with the surrounding rural community. 825 S.E.2d at 723, 730.

All four cases focus on a common concern: Is there evidence to show a reasonable likelihood of specific, serious injury to individuals in the association that are not experienced by the general public? In *Carnival Corp.* and *Beaufort Realty*, there was no such evidence. In *Preservation Society of Charleston* and *Citizens for Quality Rural Living*, such evidence had been shown. As indicated in Part IV-A-2 below, members of the Association have satisfied the requirement of showing likelihood of substantial injury different from that suffered by the general public.

2. Standing—“Substantial Interest”

Section 6-29-900(A) of the Enabling Act addresses standing to appeal from a design decision by an architectural review board as follows: “A person who may have a *substantial interest* in *any* decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from *any* decision of the board to the circuit court” (emphasis added)

Citizens for Quality Rural Living, Ins., v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (S.C. Ct. App. 2019) addressed the issue of standing in the context of an appeal from a decision by a planning commission. The Court held that Section 6-29-1150 of the Enabling Act granted “any party in interest” a right to appeal from a decision of a planning commission. In terms of the meaning of the term “party in interest,” the court adopted the approach of *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013), which defined “a real party in interest for purposes of standing as ‘a party with a real, material, or *substantial interest* in the outcome of the litigation (quoting *Hill v. S.C. Dep’t of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E. 2d 612, 623 (2010)).” 825 S.E. 2d at 727, n.6 (emphasis added). *Citizens for Quality Rural Living* also noted that the association involved had a substantial interest, and thus standing, because “its *members include persons who own property and live in the immediate vicinity of the proposed subdivision.*” *Id.* (emphasis added)

Plaintiff University Hill Neighborhood Association is an unincorporated association. As indicated above in Part I-C of the Statement of Case, the boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic district—a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.”

Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This district is “identified as Architectural District No. 1” and is “bound by Laurens, Senate, Henderson, and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic Districts. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed. Given these boundaries, it is clear that this association, like the associations in *Preservation Society of Charleston* and *Citizens for Quality Living*, contains individuals who live in a defined area in proximity to a proposed use.

The record herein shows that these individuals will suffer non-speculative harm from the Trinitas proposal. Numerous residents of the University Hill Neighborhood testified under oath at public hearings concerning the Trinitas project that: (1) they lived within the boundaries of the University Hill Neighborhood Association, and (2) they as individuals and the neighborhood area as a whole would experience substantial negative impacts from the proposed project. These

testifying residents include the following: Tom Gottshall,¹⁹ John McGill,²⁰ Beth Richardson,²¹ Catherine Fenner,²² April Lucas,²³ Douglas Carlisle,²⁴ John Stucker,²⁵ and Bobby Lyles.²⁶

¹⁹ Supplemental Record, Exhibit 6, at pp. 17-20 (noting, inter alia, that the proposed project is “adjacent to our neighborhood” and that, as a result of students in the proposed projects, hundreds of students will be “moving . . . through our neighborhood at night.”; Supplemental Record, Exhibit 8, at pp. 43-46, 48-50 (noting that the project did not meet *Guidelines*, that the project “is to be marketed to students”); Supplemental Record, Exhibit 9, at pp. 9-11 (emphasizing objections to height as violating *Guidelines*). Mr. Gottschall also submitted written materials to the DDRC. See Record, Exhibit 1, at p. 4; Record, Exhibit 2, at p. 9; Record, Exhibit 3, at p. 46; Record, Exhibit 4, at p. 22; Record, Exhibit 5, at p. 86.

²⁰ Supplemental Record, Exhibit 6, at pp. 23-25 (noting investment in homes in neighborhood, size of proposed building, and negative impacts of auto, bike, and pedestrian traffic).

²¹ Supplemental Record, Exhibit 6, at pp. 25-26 (noting size of proposed building and reasons why residents of proposed project are likely to be mostly students, expressing concern for “overloading the neighborhood,” and describing significant investments in homes in the neighborhood).

²² Supplemental Record, Exhibit 6, at pp. 26-27 (noting concern for negative impacts of students returning to campus area from Five Points late at night and concern that project will “smother our historic neighborhood”); Exhibit 8, at pp. 59-61 (referring to “people staggering home” in early hours of the day).

²³ Supplemental Record, Exhibit 6, at pp. 27-28 (noting problems resulting from students returning from Five Points and “banging on our doors at 2:30 in the morning”).

²⁴ Supplemental Record, Exhibit 6, at pp. 30-31 (giving reasons to believe students will reside in proposed project and describing specific problems from drunken students “who have trooped through the neighborhood”).

²⁵ Supplemental Record, Exhibit 6, at pp. 41-43 (expressing concern for negative impact of auto and pedestrian traffic by students).

Among their concerns were an increase in vehicular and pedestrian traffic through the neighborhood. Because Trinitas is a “university centric developer,”²⁷ it is likely that students will reside in the proposed project. As a result, pedestrian traffic from students going to and from class would flow through the neighborhood. In addition, because of topography and a railroad, the route for these students and other young adults living in the proposed project returning from the bars in the “Five Points” area of Columbia to the proposed Trinitas project would be through the University Hill neighborhood. These people “moving . . . through our neighborhood at night”²⁸ would inevitably include some drunken and rowdy students who will, like many young people before them, engage in things like the following:

- conduct involving “damage and vandalism and just altogether bad behavior in the small hours of the morning,”²⁹
- “people banging on our doors at 2:30 in the morning,”³⁰
- “people staggering home at” 5:00 am,³¹ and

²⁶ Supplemental Record, Exhibit 8, at pp. 57-59 (stating that he was a resident of the Heritage and president of the homeowners’ association and expressing concern that the scale of the proposed project would “overload” the neighborhood).

²⁷ Testimony of Linda Irving, Trinitas’s representative, Supplemental Record, Exhibit 6, at p. 29; Supplemental Record, Exhibit 8, at p. 6.

²⁸ Testimony of Tom Gottschall, Supplemental Record, Exhibit 6, at pp. 17-20.

²⁹ Testimony of John McGill, Supplemental Record, Exhibit 6, at pp. 23-25.

³⁰ Testimony of April Lucas, Supplemental Record, Exhibit 6, at pp. 27-28.

³¹ Testimony of Catherine Fenner, Supplemental Record, Exhibit 8, at pp. 59-61.

- students who have appeared “to be dead,” engaged in yelling and “waking me up” at 2:30 in the morning, and “urinating in my driveway.”³²

The residents also expressed concern for the visual impact of a large, monolithic building looming over the area.

The University of South Carolina owns two properties adjacent to the proposed building. Representatives of the University of South Carolina also gave testimony concerning the negative impacts of the proposed Trinitas project on the historical and residential character of the University Hill Neighborhood and concerning the negative impact on joint plans between the University and the neighborhood.³³ Representatives of Historic Columbia gave testimony objecting to failure to follow the *Guidelines* and negative impact on historical character of the area.³⁴ The evidence also

³² Testimony of Douglas Carlisle, Supplemental Record, Exhibit 6, at pp. 30-31.

³³ Derek Bruner, Supplemental Record, Exhibit 6, at pp. 22-23 (indicating negative impact on University Hill neighborhood from “student presence adjacent to and throughout their neighborhood,” stressing conflicts with University’s master plan, and noting that “height and scale and the mass” does not balance with neighborhood); see Letter from Bruner to Lucinda Statler, Record, Mar. 4, 2020, Exhibit 3, at p. 44; Dan D’Alberto, Supplemental Record, Exhibit 8, at pp. 56-57 (noting the plans of the University and stressing that the University “is in lockstep with University Hill Neighborhood in that we agree with the letter they submitted.”).

³⁴ Robin Waites, Supplemental Record, Exhibit 6, at pp. 20-22 (describing historical character of area and negative impact of scale of proposed building, and objecting to violation of *Guidelines*); John Sherer, Supplemental Record, Exhibit 8, at pp. 50-53 (describing factual errors in the Trinitas presentation, stressing the negative impact of the “view shed” of the project, and noting that the church building south of the project is historic).

includes a detailed written review of the historic importance of the buildings and surrounding area in the vicinity of the Trinitas project.³⁵

Defendants/Respondents argue that this detailed factual testimony is “speculative,” “conclusory,” and “hypothetical.” However, the number of specific points made in the sworn testimony before the DDRC are, like the record in *Preservation Society*, “not speculative” and affect the residents “individually.”

3. Conclusion

The evidence in the record on appeal contains sworn testimony concerning the harmful impacts on the members of the University Hill Neighborhood Association. As in *Preservation Society* and *Citizens for Quality Living*, their neighborhood is adjacent to the block where the project would be built. As a result, they have “geographic proximity” and “live in the immediate vicinity of the proposed” building. In addition, their concerns for increased traffic are the same as the concerns of the members of the associations in these two cases. As in *Preservation Society*, the residents of the University Hill Neighborhood are concerned about “traffic congestion, property values . . . and effects on the historical integrity of the area where they resided.” 845 S.E.2d at 488. Like the residents in *Citizens for Quality Living*, the residents are concerned about the traffic and “incompatibility of the subdivision with the surrounding” community. 825 S.E.2d at 721.

³⁵ Testimony and written analysis of Patrick Hubbard, Record, Exhibit 8, at pp. 53-56, 167-69, 206-09; see “Analysis of Application of Certificate of Design Approval for Trinitas,” Record, Exhibit 3, at pp. 50, 135.

In addition, at the March 12, 2020, Hearing, Linda Irving, speaking as “Trinitas’s representative,”³⁶ recognized the importance of considering the negative impacts on the neighborhood. Ms. Irving stated: “The site is not within the bounds of a historic district or within a residential neighborhood, though *their proximity must absolutely be factored heavily*.”³⁷

Given the testimony of residents in the immediate vicinity of the project and of representatives of the University of South Carolina and Historic Columbia, combined with the admission by the Trinitas representative that the proximity of historic districts and residential neighborhoods “must be absolutely factored heavily,” the Association and its members have shown a substantial interest in the decisions of the DDRC concerning the Trinitas project.

B. Public Importance Standing

The South Carolina Supreme Court has held that “a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). The approach for addressing a claim of public importance standing was addressed in *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854, 859 (2017), as follows:

[W]hen deciding whether to confer public importance standing, courts must take these competing policy concerns [of citizen access to courts and a need to achieve judicial economy and freedom from frivolous suits] into consideration, and must

³⁶ Supplemental Record, Exhibit 8, at p. 6.

³⁷ Supplemental Record, Exhibit 8, at p. 35. (emphasis added)

also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.

1. Issues Involved

This suit involves three important issues where future guidance is needed. These issues are:

- (1) Whether important aspects of a development within the -DD area, like height, are determined by the underlying zoning or by the overlay zoning of the *Guidelines*;
- (2) Whether the grant by the City of the power of site plan review to the DDRC for development within the -DD area was *ultra vires*; and
- (3) Whether the “overall determination” approach to the application of the precatory, non-binding language of the *Guidelines* constitutes an improper delegation of the City’s legislative power and a denial of due process.

2. Importance of Issues

The -DD area of Columbia regulated by the *Guidelines* “consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River.” Columbia City Code, § 17-253. Given the size of this area, issues concerning the validity, proper scope, and application of the *Guidelines* effectively determine important aspects of development in the downtown core of Columbia.

In addition, Columbia has many other overlay districts. *See, e.g.*, Columbia City Code §§ 17-306, 17-307, 17-308, 17-309, 17-310, 17-311, 17-312, 17-313, 17-314, 17-315, 17-322, 17-323, 17-324, 17-325, 17-326, 17-681 (historic districts). Important issues concerning the relationship between these overlays and the underlying zoning involved could arise under these schemes.

More broadly, issues concerning overlay schemes and underlying zoning could arise throughout South Carolina. Overlay schemes are authorized by Section 6-29-720(C)(5) of the Enabling Act and are a generally recognized technique for land use regulation.³⁸

3. Need for Future Guidance

Future guidance in addressing these three issues is needed for the same reasons that these issues are important. More specifically, issues will arise concerning the validity, proper scope, and application of the *Guidelines* and concerning overlays generally because of: (1) the large area covered by the -DD overlay, (2) other overlay schemes in Columbia, and (3) overlay schemes in South Carolina.

As indicated above in Part III, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) and *Heilker v. Zoning Board of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) held that overlay schemes in South Carolina follow the general rule that an overlay zone is “simultaneously subject to two sets of zoning regulation.” Thus, this appeal raises the issue of which approach will be followed in South Carolina: The approach used herein by the DDRC or the approach used in *Grays Hill Baptist Church* and *Heilker*?

Grays Hill Baptist Church involved an airport overlay district. Section 17-307 of the Columbia City Code contains an overlay district termed: “—AP airport height restrictive areas,”

³⁸ See, e.g., Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* 93–94 (3d ed. 2013); John R. Nolon, *Land Use in a Nutshell* 219–22 (2006); Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation* 222–23 (3d ed. 2015).

which applies in the area around Owens Field Airport. If the approach adopted by the DDRC were applied to the AP overlay, the height restrictions of the overlay would not apply.

The City of Columbia also has overlay corridor districts designed to impose supplemental sign regulations (see Columbia City Code, §§ 17-310, 17-313, 17-314, 17-315). The concerns underlying these overlay districts are similar to those in *Heilker*. As a result, issues concerning the relationship of the overlay involved vis á vis the underlying zoning could arise in applying these corridor overlays.

4. Agreement on Public Importance

On September 13, 2021, Trinitas and the DDRC filed a Petition for Writ of Mandamus Pursuant to 245(B), SCACR, or, in the alternative, Petition for Certification Pursuant to Rule 245(A), SCACR.³⁹ At pages 10–17 of this filing, Trinitas and the DDRC argue: (1) that “[t]his case involves issues of significant public interest,”⁴⁰ and (2) that “this case has the potential to affect every board of architectural review established by governmental bodies throughout the state and all applicants who file applications through those boards.”⁴¹ Given these statements, the parties are in agreement that this case satisfies the public important test for standing.

³⁹ The City did not join in this filing. However, the attorney for the City indicated in a letter dated September 22, 2021, that “the City of Columbia does not oppose the petition.”

⁴⁰ Page 10.

⁴¹ Page 17.

V. IMPROPER DELEGATION OF LEGISLATIVE POWER

As indicated above at Part I-C, the drafters of the *Guidelines* viewed the *Guidelines* as “illustrative” rather than prescriptive. *Guidelines* § 5.1 at p. 5-1. The drafters also stated that “it is not the intent of these Guidelines to establish new height standards for City Center.” *Guidelines*, § 5.3 at 5-3. Instead, the purpose of the *Guidelines* was to provide “*non-binding* general direction for development within City Center, *with the recommendation that the City’s regulatory plans and codes be amended to reflect the guidance included here.*” *Guidelines*, § 5.3.1 at p. 5-2 (emphasis added). Thus, the intent of the *Guidelines* was that “*the Design Development Guidelines will be implemented*” by amending the regulatory “Zoning Ordinance.” See *Guidelines* § 3.5.2 (emphasis added).

However, despite this explicit language concerning the need for “regulatory plans and codes” in a “Zoning Ordinance,” the City Council chose to bypass the necessary steps of drafting and adopting an ordinance. Instead, the Council simply adopted the non-binding *Guidelines* as the ordinance. As indicated above in Part I-C, this outcome was achieved by adopting the *Guidelines* by reference. See Columbia City Code §§ 17-253, 17-655(b)(1). The Association argues that a result of this approach, the DDRC and its staff have been authorized to apply a scheme of “illustrative” “non-binding” guidelines and that such an open-ended authorization constitutes an improper delegation of the City’s legislative power.

A. Unlawful Delegation

The framework for addressing issues of unlawful delegation of legislative power is set forth in *South Carolina State Highway Department v. Harbin*, 86 S.E.2d 466 (S.C. 1955), which held that a provision of the statute authorizing the highway department to suspend or revoke a driver’s

license “*for any cause satisfactory to*” the department was an unconstitutional delegation of legislative power. *Id.* at 468 (emphasis added).

Harbin summarized the principles concerning delegation of legislative power to an administrative agency as follows:

The question of delegation of legislative power has confronted the courts with many perplexing problems, particularly during recent years when the complexities of government have been constantly on the increase. It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board “to fill up the details” by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. “However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.”

Id. at 470 (authorities deleted)

The Court’s conclusion concerning the unconstitutionality of the delegation involved in *Harbin* was stated as follows:

When the authority of the State Highway Department to suspend or revoke a license for any cause which it deems satisfactory is considered in the light of the foregoing

principles, said provision must be declared invalid as an unlawful delegation of legislative power. *It sets up no standard to guide the Department and contains no limitations.* As a general rule, “A statute which in effect reposes *an absolute, unregulated, an undefined discretion* in an administrative body bestows arbitrary powers and is *an unlawful delegation of legislative powers*. We have held invalid municipal ordinances attempting to vest such arbitrary powers in municipal authorities.”

Id. at 370–71 (emphasis added) (authorities deleted)

In the regulation of land use, the unlawful delegation concern can also be expressed in terms of due process. For example, *Restaurant Row Associate v. Horry County*, 335 S.C. 209, 516 S.E.2d 4426, 445 (1999), stated: “When deciding whether to grant a variance, a local board must be *guided by standards which are specific* in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939).” (emphasis added) Because the ordinance at issue was sufficiently specific, the decision at issue in *Restaurant Row Associates* was upheld.

The cited case of *Schloss Poster Advertising Co.* involved an ordinance providing as follows: “Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the city of Rock Hill without having first obtained from the city council a permit to do so.” In effect, the City Council had delegated to itself an unrestrained power to grant or deny permits to construct billboards. In holding that this “delegation” was unconstitutional, the Court noted:

The ordinance before us is in no sense a zoning ordinance as provided in Sections 7390–7398, Code 1932, nor does it prescribe rules or conditions for the issuance of

permits for the erection of billboards to which all persons similarly situated may conform. *It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them,* the right and power to absolutely prohibit the use of property for the erection of billboards.

The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes not uniform rule upon which the special permission is to be granted.

2 S.E.2d at 394 (emphasis added).

B. Association's Argument

In an email to Thomas Gottshall, the President of the University Hill Neighborhood Association, concerning the application of the *Guidelines*, Lucinda Statler, the Principal Planner/Urban Design for the City, stressed that Section 5.3.1 of the *Guidelines* stated: “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center. . . .” (emphasis in original)

In this email, Ms. Statler described the decision-making process of the DDRC and its staff as follows:

There are 17 pages of guidelines that pertain to new construction that are considered. The staff evaluations and the DDRC’s decisions are based on the *overall determination* as to whether a project substantially meets—or does not meet—the design guidelines. This means that there are likely areas where the

project may not be exactly what is recommended, and other areas where they meet and exceed what is recommended. It is an *overall assessment* of the project and of course, there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision, rather than only staff. *In the almost 14 years that I have served as staff to this Commission, I would be hard pressed to think of a project that met every single guideline.* This would be unattainable for most projects, as there are many factors that determine a development's feasibility. The design review process is built to provide some flexibility in this balancing act.

(Exhibit 1 to Complaint (emphasis added))

The Association argues that this “overall assessment-overall determination-substantially meets-cannot meet every single guideline” approach of “general direction” to “non-binding guidelines,” is, in effect, a “we know it when we see it” test. As such, argues the Association, the test is contrary to the holding of *Harbin* because it sets up “no standard to guide [decisions] . . . and contains no limitations” and, as in the ordinance in *Schloss Poster Advertising Co.*, the *Guidelines* do “not profess to prescribe regulations.”

The Association argues that, as a result of this approach, there is neither a meaningful standard to guide the exercise of discretion nor a framework to provide a workable regulatory framework for judicial review of the exercise of discretion. For example, even though there has never been a “project that met every single guideline,” the *Guidelines* contain no standards to guide the DDRC in assessing whether and how much guidelines can be waived or softened in deciding whether a project “substantially meets” the design guidelines.

The Association also questions the expertise of the Commission because there is no reason to simply assume that the Commission possesses the extreme wisdom necessary for such unlimited discretion. The treatment of the Trinitas project is claimed to illustrate the human fallibility of the Commission. At the January 9, 2020, meeting, the Commission rejected the staff recommendation of approval with restrictions and voted to deny the requests for design approval and for site plan approval of the Trinitas project. Subsequently, a special meeting was called for February 7 to receive legal advice and to consider rescinding the January denials of approval. At the February 7 meeting, the Commission went into executive session to receive legal advice relating to a pending, threatened, or potential claim. The Commission then moved out of executive session and moved to rescind its own decision to deny design approval and site plan approval.

The Association also argues that the lack of any meaningful standard to limit and structure discretion is reflected in the following comments by Lyndey Bryant, counsel for Trinitas, at the March 21, 2020, DDRC Hearing:

As to building height, the guidelines clearly express a *nonbinding general direction* for buildings within the city center expressly recognizing that zoning ordinances are the primary legal vehicle for expressing regulations concerning the height of buildings. Although there is a recommendation that building not exceed five stories, there is a specific preference in the guidelines at Section 5.3.1, which says, low profile office buildings, commercial buildings and residences will not yield the density, urban scale and character which is desired for the city center and should therefore be discouraged. *In other words, the opposite proposition also holds true.*

(Supplement to Record, Exhibit 8, at pp. 47–48 (emphasis added). At this hearing, Ms. Bryant also noted: “The guidelines are illustrative rather than prescriptive, and do not set forth detailed or rigid

standards.” (Supplement to Record, Exhibit 8, at p. 41) The Association asserts that this assessment of the contradictory, standardless nature of the *Guidelines* by counsel for Trinitas is virtually the same as the claim of the Association that the City Council has delegated its legislative power to the DDRC.

C. Argument of Defendants/Respondents

The Defendants/Respondents argue that the *Guidelines* contain numerous specific policies and standards that are sufficient to structure decisions concerning design. They also argue that the expertise of the members of the DDRC helps guard against abuse.

D. A “Perplexing” Problem

As noted in *Harbin*, the “question of delegation of legislative power has confronted the courts with many perplexing problems. . . .” 86 S.E.2d at 470. *Harbin* also notes:

The difficulty is in the application of these general principles, for there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated to an administrative agency. The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegations of its own legislative power is not capable of precise definition.

86 S.E.2d at 470.

This challenge is particularly perplexing in the case at issue. On the one hand, there are “standards” and “policies.” On the other hand, the *Guidelines* explicitly state that these standards and policies are nonbinding. Moreover, a ruling in favor of the Association’s claim would result

in a situation where the City would have virtually no design controls for the downtown area of Columbia.

It is important to note that the Association is challenging two specific approvals: (1) site plan approval and (2) design approval. This court has determined that the Association has standing to challenge these approvals and that both approvals are invalid. As a result, the Association has prevailed in terms of the approvals of the Trinitas project.

The Supreme Court has noted that, where a court addressing an appeal has disposed of the issues involved, it “need not address remaining issues when disposition of prior issue is dispositive.” *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591, 598 (1999); accord, e.g., *Whiteside v. Cherokee County School District No. One*, 311 S.C. 335, 428 S.E.2d 886, 889 (1993). This principle has been applied in zoning cases. E.g., *Heilker v. Zoning Board of Appeals*, 346 S.C. 401, 552 S.E.2d 42, 48 (2001). Because the issues of site plan approval and design approval have been resolved in the Association’s favor, the best approach for the perplexing issue of nondelegation in this case is to adopt the approach of these cases and not address the delegation of legislative authority issue.

VI. CONCLUSION

For the reasons stated in this Brief, this Court holds:

- (1) the Association has standing,
- (2) because the decision by the City of Columbia to grant the authority to conduct site plan review to the DDRC was ultra vires and, therefore, void, the approval of the site plan is reversed,
- (3) because the DDRC abused its discretion by making a mistake of law in deciding that the height of the proposed building was determined by the underlying zoning rather than the -DD overlay, the design approval of the Trinitas proposal by the DDRC is invalid, and, therefore, is reversed, and
- (4) it is not necessary or useful to address the issue of whether the adoption of the *Guidelines* as an ordinance was an unlawful delegation of the legislative power of the City.

Hon. L. Casey Manning
Fifth Circuit Court



Richland Common Pleas

Case Caption: University Hill Neighborhood Association vs City Of Columbia ,
defendant, et al
Case Number: 2020CP4003475
Type: Order/Relief

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2021-12-07 09:56:03 page 57 of 57

Exhibit 2

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

University Hill Neighborhood Association,
Plaintiff,
v.

C/A No.: 2020-CP-40-03475

City of Columbia, City of Columbia Design
and Development Review Committee, and
Trinitas Ventures, LLC,
Defendant.

ORDER

Respondents have filed a rule 59(e), SCRP, Motion to Reconsider. Plaintiff has filed a Response to the Motion to Reconsider. For the reasons given in this Order, the Motion to Reconsider is denied.

I. DISCUSSION

The Motion to Reconsider is based on six separate grounds. These grounds are addressed below in the order they are addressed in the Motion.

A. Argument 1: "This Court misunderstood or failed to fully consider Respondents' arguments concerning mootness."

The court understood and fully considered the mootness arguments. *See* Order 13–16.

Eliminating Section 3.5.4 did not moot the ultra vires problem because Sections 5.4.1, 5.4.2, 5.5, and 5.10 grant the DDRC the authority to undertake site plan review of site plan concerns that are also reviewed by the Planning Commission.

Section 6-29-1150(a) explicitly states that local land development regulations "*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the Planning Commission or designated staff" (emphasis added). Thus, the section imposes the

following two requirements: (1) There *must* be a system for approval or disapproval of plans and plats; and (2) this system *must* be applied by the Planning Commission.

It is very likely that at some point, an applicant will be faced with conflicting decisions by the overlap of site plan review concerns between the DDRC and the Planning Commission. However, the legal effect of the ultra vires argument is not altered by the likelihood of conflicting decisions. The ultra vires effect results from granting the DDRC the power to review the same concerns as those that must be addressed by the Planning Commission.

B. Argument 2: “The Order fails to fully consider whether alleged overlaps in authority between the Planning Commission and the DDRC actually conflicts [sic] with the Enabling Act.”

Defendants/Respondents argue the explicit language in Section 1150(A) quoted above just not apply because:

Appellant did not argue that Sections 5.4, 5.5 and 5.10 of the Guidelines unlawfully confer authority to the DDRC to review site plans within the City Center, nor can it, because nothing in these provisions even referenced the DDRC, much less delegate authority to review site plans. Sections 5.4, 5.5 and 5.10 of the Guidelines concern substantive elements of a site plan. See Guidelines, pp. 5-7–5-8, p. 5-9, p. 5-21.

Mot. Reconsider 5–6.

The first sentence in this second argument ignores what happened as the DDRC considered whether to approve the site plan involved. At the March 12, 2020, DDRC meeting, the DDRC considered the “Site/Subdivision Plan” for the Trinitas project. Record, March 12, 2020, DDRC 68-70; Supplement to Record, March 12, 2020, at 156. (Jonathan Chambers, a DDRC staff member, notes that the DDRC was considering site plan review for the Trinitas project.) At the end of the consideration of the site plan for Trinitas, the DDRC voted to approve the site plan. Supplemental Record, March 12, 2020, DDRC Meeting, at 28-29. If “nothing in . . . [Sections 5.4,

5.5, and 5.10] delegates authority to [the DDRC]" to review site plans, what was the point of the DDRC hearing and decision?

The second sentence in the argument is puzzling because it concedes that "Sections 5.4, 5.5 and 5.10 of the Guidelines concern substantive elements of a site plan." As indicated at pages 14-16 of the Order, Sections 5.4, 5.5, and 5.10 address concerns that are a part of site plan review by the Planning Commission. As a result, Sections 5.4, 5.5, and 5.10 are ultra vires because Section 6-29-1150(A) of the Enabling Act states that the Planning Commission must review site plans.

C. Argument 3: "The order mistakenly applied the wrong remedy concerning Appellant's claim that the City of Columbia's delegation of site plan review to the DDRC is ultra vires."

Defendants/Respondents argue that, because the "ultra vires claim was against the City of Columbia, not the DDRC," the "reversal of the DDRC's site plan approval was in error."

This argument ignores the following: Because the grant of power to the DDRC to conduct site plan review was ultra vires, the DDRC could not validly conduct aspects of site plan review. As a result, the DDRC had no lawful power to make a "quasi- adjudicative decision" to grant or to deny approval of a site plan. Since the DDRC had no such power, the proper remedy was to reverse the decision.

D. Argument 4: "The Order failed to rule on Respondents' arguments concerning Appellant's claim that the Guidelines constitute unlawful delegation of legislative authority by City Council."

The approach used in addressing the unlawful delegation issue is well-established. In addition to the authorities cited in the Order, the South Carolina Supreme Court recently used this approach in a zoning case filed on December 8, 2021. *Greenville Bistro, LLC v. Greenville County*, 435 S.C. 146, 164 n.6, 866 S.E.2d 562, 175 n.6 (2021).

E. Argument 5: “The Order failed to rule on Respondent’s [sic] argument that Appellant lacked standing to hear its *ultra vires* claim against the City because Appellant made no showing of the traceability and redressability elements of standing.”

The order properly applied the standard for associational standing set forth in the cases discussed at pages 33–37 of the Order. As in *Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control*, 430 S.C. 211, 845 S.E.2d 481, 488 (2020), members of the University Hill Neighborhood Association provided sworn “allegations of potential harm to members” near the proposed project. *See* Order 37–44. Their testimony was supplemented by sworn testimony from officials from the University of South Carolina and Historic Columbia. *See* Order 41–42. In addition, Trinitas’s representative gave testimony concerning the student orientation of the project and of the need to consider the proximity of the project to the University Hill Neighborhood. *See* Order 40, 43.

The Motion to Reconsider argues that the plaintiff was required to show that the decision by the Planning Commission “would be different in substance than a site plan approved by the Planning Commission” Mot. Reconsider 15–16. This argument misses the point that, because the grant of site plan review power to the DDRC was *ultra vires*, the decision was void. Nothing more is necessary. More specifically, there is no requirement of showing that the Planning Commission would have been decided differently.

F. Argument 6: “This Court misunderstood or failed to fully consider issues concerning the ‘public importance’ exception to standing.”

Argument 6 is based on a confusion on the part of the Defendants/Respondents concerning the issues involved.

The ultra vires issue is not limited to Section 3.5.4 of the Guidelines. It also concerns Sections 5.4.1, 5.4.2, 5.5, and 5.10. *See* Order 13–16. Issues concerning the legality of these sections are important and are likely to recur.

The overlay issue is also important and likely to recur. *See* Order 43–46.

Defendants/Respondents argue that statements in their Petition for Writ of Mandamus pursuant to 245(B), SCACR, or, in the alternative, Petition for Certification pursuant to Rule 245(A), SCACR, are not relevant to show agreement on the issues involved. However, the discussion at pages 15–17 of the Petition indicates that the substantive issues involved include questions concerning the role of overlay zoning, an issue of public importance that is likely to recur. For example, this discussion argues:

The case at bar . . . seeks to test the limits of municipal rule-making authority and scope of review of a board of architectural review. The case further raises questions about the relationship between City and the DDRC. It involves that board’s interpretation of municipal guidelines regarding architectural design, which apply throughout City’s jurisdiction.

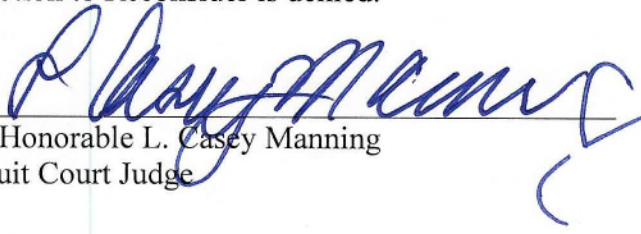
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[A] decision in this case has the potential to affect every board of architectural review established by governmental bodies throughout the State and all applicants who file applications through those boards.

The broad, sweeping language in these quotes applies to public importance standing as well as to the issue of certification.

II. CONCLUSION

For the reasons given in this Order, the Motion to Reconsider is denied.


The Honorable L. Casey Manning
Circuit Court Judge

March 8, 2022
Columbia, South Carolina.

Manning, L. Casey Law Clerk (Victoria Elgin)

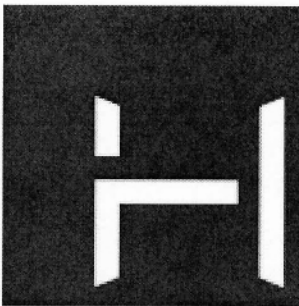
From: Holli Miller <holli@harpootlianlaw.com>
Sent: Tuesday, March 8, 2022 10:25 AM
To: Manning, L. Casey Law Clerk (Victoria Elgin); Manning, L. Casey
Cc: Lyndey R. Z. Bryant; Dick Harpootlian; HUBBARD, PATRICK; Pete Balthazor; mary.taylor@columbiasc.gov; cliff.moore@arlaw.com; jennifer.shirey@arlaw.com
Subject: University Hill Neighborhood Association v. City of Columbia, et al.; C/A No. 2020-CP-40-03475
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Dear Judge Manning,

Attached please find University Hill Neighborhood Association's proposed order in this matter.

Holli



Holli Miller

Paralegal at Richard A. Harpootlian, PA

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Exhibit 3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CA NO: 2020-CP-40-03475

University Hill Neighborhood Association

Plaintiffs,

vs.

**PLAINTIFF'S ORDER
DENYING DEFENDANTS' MOTIONS
TO DISMISS**

City of Columbia, City of Columbia Design
and Development Review Commission, and
Trinitas Ventures, LLC

Defendants.

I. Introduction

On Friday, September 11, 2020, a hearing was held concerning Motions to Dismiss filed by the Defendant. Present by WebX for this hearing were: Peter M. Balthazor, attorney for Defendants City of Columbia Design/Development Review Commission; Lyndey R.Z. Bryant, attorney for Trinitas Ventures, LLC; M. McMullen Taylor, attorney for City of Columbia; Richard A. Harpootlian, attorney for University Hill Neighborhood Association; and F. Patrick Hubbard, attorney for University Hill Neighborhood Association. This Order is based on this hearing and on the filings by the parties.

A. The Motions to Dismiss filed by the Defendants

This appeal involves a decision by the City of Columbia Design and Development Review Commission (DDRC) granting final approvals for the construction of "Trinitas," an eight-story

apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) the DDRC, a “Board of Architectural Review” established pursuant to S.C. Code §§ 6-29-880 et seq. and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), a real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein. The DDRC, Trinitas, and the City have each filed a motion to dismiss.

B. The Importance of Distinguishing Between the Two Parts of the Appeal

Before addressing the specific grounds for dismissal in the motions to dismiss, it is important to review the differences between the two distinct claims made in Plaintiff’s Complaint. As stated in the beginning of Paragraph 3 of the Complaint:

This appeal of the DDRC decision concerning the Trinitas project has two parts. The first part involves an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. The second part of this appeal concerns provisions of the *Guidelines* that require “site plan review” within the -DD area to be done by the DDRC rather than the City of Columbia Planning Commission.

The motions to dismiss fail to recognize the importance of the difference in these two parts. As a result, many of the arguments concerning site plan review issue are simply not relevant. For example, the motions filed by the DDRC and Trinitas argue that the appeal of the approval of the site plan is not timely because Plaintiff failed to satisfy the thirty day time limit for appeal in S.C.

Code § 6-29-900 (A). Similarly, the City argues that it “is not a proper party as it relates to an appeal of a DDRC decision” pursuant to Section 6-29-900 (A).

These arguments miss the point concerning the second claim in this appeal. The site plan review part of the Complaint: (1) asserts that the shifting by the City of the site plan review to the DDRC was *ultra vires*, and (2) relies on the general jurisdiction of the Circuit Court, not on the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A). This point, as well as the nature and role of site plan review, will be developed further below in Part II-B-2 of this Order.

Plaintiff’s Memorandum in Opposition to Defendants’ Motions to Dismiss indicates at page 3 that the site plan review claim has been combined with the appeal pursuant to Section 6–29–900(A) for three reasons. First, the facts of both parts of the Complaint are interconnected in the record concerning the appeal pursuant to Section 6-29-900(A). Second, combining the two parts enables Trinitas, a real party in interest in terms of the Section 6-29-900(A) appeal, to assert its interests in the *ultra vires* claim. Third, Plaintiff was motivated to assert the *ultra vires* claim at this point in time, rather than earlier, because there was no harm to substantial interests of Plaintiff and its members until the decision by the DDRC to approve the site plan for the Trinitas project.

C. Grounds for Dismissal

When considered together, the motions to dismiss filed by Defendants assert the following two grounds for dismissal of the appeal pursuant to Section 6-29-900(A): (1) Plaintiff lacks

standing to bring claims, and (2) Plaintiff has failed to state a claim.¹ None of the motions identifies the subsection of Rule 12(b) of the South Carolina Rules of Procedure which is relied upon. However, it appears that both grounds are based on subsection 12(b)(6), which addresses “failure to state facts sufficient to constitute a cause of action.”

II. Summary of Facts and DDRC Decisions

A. The DD Overlay District and Guidelines for the District

The site for the apartment building proposed to be constructed by Trinitas is within an “overlay” district within the City of Columbia. Overlay districts are explicitly permitted under Section 6-29-720(C)(5) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 [hereinafter “State Enabling Act”], which describes an overlay zone as a district that “imposes a set of requirements or relaxes a set of requirements by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. . . .”

The overlay district herein is termed as the “City Center Design/Development District of Columbia, South Carolina” and is referred to as “-DD area” in Sections 17-253 and 17-655(b) of

¹ Trinitas Motion to Dismiss, Part III.

the Columbia City Code.² An overlay district like the DD area is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists. The Guidelines for the DD area are adopted by reference in Columbia City Code § 17-253 (referring to “City Center Design/Development Guidelines”) and § 17-655(b)(2) (referring to “requirements set forth in design guidelines adopted by the city council”).

The guidelines that are incorporated by these references in the City Code are contained in a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [hereinafter *Guidelines*].³ The *Guidelines* were prepared by planning experts and were prepared as a “planning document” rather than as an ordinance.⁴ As a result, the *Guidelines* are unusual in that they contain only precatory terms like “non-binding” and “should” rather than mandatory terms like “must” and “shall.” Chapter 5 of the *Guidelines* provides a supplementary regulatory framework for assessing the design of private development in the DD overlay district. In addition, Section 5.1 of this chapter of the *Guidelines* states: “The guidelines in this chapter are

² The Parties have filed a “Joint Stipulation Regarding City of Columbia Ordinances.” Exhibit A of these Stipulations contains selected portions of the City of Columbia Code of Ordinances, Chapter 17, Planning, Land Development and Zoning.

³ See Exhibit B to Joint Stipulation, *supra* note 2.

⁴ For example, in discussing “Building Heights” at page 5-2, the *Guidelines* state: “This section provides *non-binding* general direction for development within City Center, with the recommendation that the *City’s regulatory plans and codes be amended* to reflect the guidance included here.” (emphasis added).

illustrative rather than prescriptive.” As indicated below at Part III-B-1-b of this Order, the precatory, non-binding nature of the *Guidelines* presents problems in their application.

The Introduction to Chapter 5 notes:

The key emphasis of the guidelines in this chapter is to reinforce the existing fabric of City Center by ensuring that new projects are developed within the rhythm of the existing development pattern. This “contextual” approach to evaluating the design of new projects is fundamental to the implementation of the *Guidelines*.

Section 5.3.1 note that the height of proposed structures should “relate to the *adjacent* development context.” (emphasis added)

The proposed Trinitas project would be constructed on a site at the northwest corner of the intersection of Gervais Street and Pickens Street in the block bounded by Gervais Street, Pickens Street, Senate Street, and Henderson Street. Paragraphs 14–20 of the Complaint address the “contextual” “rhythm of the existing development pattern” and “adjacent development context” surrounding the proposed apartment building.

B. The Trinitas Applications

In 2019, Trinitas filed its initial application for Design approval and for Site Plan approval with the DDRC for an eight-story apartment building at 1600–1620 Gervais Street in Columbia. The building would be 75 feet tall and would occupy virtually all of the land on the site. See Complaint ¶¶26, 29, Exhibit 2.

The DDRC conducted four public hearings to address the initial application and subsequent revised applications for design approval and for site plan approval filed by Trinitas. At the regular

January 2020 public hearing, both applications were denied. (Complaint ¶25a) Subsequently, these denials were rescinded at a special called meeting on February 7. (Complaint ¶25a). At the regular March hearing, the DDRC granted site plan approval for the project. Design approval was granted by the DDRC at the regular July public hearing. In addition to these four public hearings, the DDRC conducted a “work session” on the design approval on June 10, 2020.

III. Argument

A. Standard of Review for Motion to Dismiss

As indicated at Part I-C above, the Defendants have, in effect, filed Rule 12(b)(6) motions to dismiss. A Rule 12(b)(6) motion “tests the sufficiency of the allegations of the complaint. . . .” James F. Flanagan, *South Carolina Civil Procedure* 100 (3d. ed. 2010). Consequently, only the pleading is examined. *Crocker v. Barr*, 295 S.C. 195, 367 S.E.2d 471 (Ct. App. 1988). If material outside the Complaint is considered, the motion becomes a motion for summary judgment and must be addressed pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

B. Statement of Plaintiff’s Claims

1. Appeal pursuant to S.C. Code Section 6-29-930(A)

Section 6-29-930(A) includes the following standard for appeals from a board of architectural review:

The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

The application of this standard of review was summarized in *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361, 362 (Ct. App. 2005) (citations omitted), as follows:

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by evidence. Furthermore, our standard of review of a board of architectural review's decision is the same as that of the trial court.

a. Mistake of Law by DDRC in Addressing Building Height

As indicated above at Part II-A, the *Guidelines* adopt a contextual approach to development. Where height is concerned, Section 5.3.1 of the *Guidelines* states:

As a general rule, and consistent with current zoning provisions, buildings within most of City Center should be *no more than five stories*. . . . [I]t is not the intent of these Guidelines to establish new height standards for development in City Center. It is, however, critical that in applying these Guidelines—as well as other

development regulations—the City be consistent in considering the height of proposed structures as they relate to the *adjacent development context*.

(emphasis added)

The DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, the decision was based on a legal misinterpretation by the staff of the DDRC. This interpretation took the position that the *Guidelines* did not regulate the height of the building. This interpretation was set forth in an email from Lucinda Statler (the City’s Principal Planner/Urban Design) to Thomas Gottshall, President of the University Hill Neighborhood Association. (See Exhibit 1 to Complaint) Part of this latter states:

The DDRC makes decisions as to whether a project meets or does not meet the design guidelines, which are qualitative measures for evaluating projects within the City Center Design District. The underlying [C-3, General Commercial Use] zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the [underlying C-3 General Commercial Use] zoning, the [C-3] zoning prevails. Please refer to Section 5.3.1 *Building Heights*, in the City Center Design Guidelines. “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section provides *non-binding general direction* for development within City Center...”

(emphasis in original) This same interpretation was adopted in the *Staff Report* for the July 2020 meeting, which states: “The building height and mass remain the same [as earlier versions of the

proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance.”

The Commission’s reliance on Statler’s interpretation and on the *Staff Report* was a mistake of law for a number of reasons. The initial problem with this interpretation is that the interpretation conflicts with Section 17-181 of the Columbia City Code, which states:

Within each district, the regulations set forth by this article shall apply uniformly to each class or kind of structure or land. In their interpretation and application, the provisions of this article shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. *Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that imposing the higher standards, shall govern.* Unless deed restrictions, covenants or other contracts directly involve the city as a party in interest, the city shall have no administrative responsibility for enforcing such deed restrictions or covenants.

(emphasis added)

To the extent that the interpretation relies on the concept of “vested rights,” the interpretation conflicts with the definition of vested rights in Columbia City Code, Section 17-2(a), which states: “A vested right is triggered only upon the approval or conditional approval of a site specific development plan.” Section 17-1(b) defines a “site specific development plan” as follows: “Site specific development plan means those documents that comprise a complete application for a zoning permit, certificate of zoning compliance, variance, special exception, planned unit development, sketch plat or plan, or other similar approval that authorizes the

developer or landowner to proceed with investment in grading, installation of utilities, streets and other infrastructure, and to undertake other significant expenditures necessary to prepare for application for a building permit.” An underlying zoning classification of C-3 zoning does not satisfy this definition of site specific development plan.

Another problem with the interpretation concerning height adopted by the DDRC is that it makes *all* the guidelines meaningless. Statler’s letter states: “When the design guidelines seem to conflict with the [underlying] zoning, the zoning prevails.” If this statement is valid, imposing any of the *Guidelines* would be impermissible because the underlying C-3 zoning does not have any limits on such concerns as façade proportion and rhythm, proportion of openings, horizontal rhythms, alignment of architectural elements, wall articulation, and roofs and upper story details—all of which are addressed in the *Guidelines*.

As indicated above in Part II-A of this Order, an overlay is described in Section 6-29-720(c)(5) of the State Enabling Act as a district that “imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district.” It is clear from the content of the *Guidelines* that the *Guidelines* are meant to impose requirements, not relax them. The interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay and the underlying zoning backwards. The design overlay involved herein is adopted to *increase* requirements by imposing *additional* requirements. If the underlying zoning will control, why bother with the time and expense of the overlay?

The general treatment of overlays in land use regulation parallels the language of S.C. Code § 6-29-720(c)(5). For example, John R. Nolan & Patricia E. Sallcin, *Land Use in a Nutshell* 218 (2006) describes an overlay as follows:

Overlay zoning is a flexible zoning technique that allows a municipality either to encourage or to discourage development in certain areas. An overlay zone is defined as a mapped overlay district superimposed on one or more established zoning districts. *A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements.*

(emphasis added)

South Carolina follows the approach of “two sets of zoning requirements” in overlay cases. For example, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) involved an “Airport Overlay District” (AO) which, among other things, restricted certain uses and expansions within the AO District. The church claimed it was entitled to a building permit for a proposed expansion because: (1) an earlier permit included the expansion⁵; and (2) an incorrect approach had been used in determining whether the expansion would increase the “occupant load” of the church’s property. “Occupant load” in the area within the AO District was important because of a concern for a high potential for accidents affecting the public areas near a military airport. The defendants rejected both of the church’s claims.

The church appealed and a master-in-equity ruled in favor of the church. The Court of Appeals reversed the decision of the master-in-equity. In terms of the “occupant load” concern of

⁵ In an opinion filed on September 16, 2020, the Supreme Court reversed the decision of the Court of Appeals and held that the earlier permit included the expansion. Opin. No. 27995. The Supreme Court did not address the overlay issue because “our determination concerning the validity of the original permit resolves this case” *Id.* at fn. 8.

the AO District, the Court held “the evidence in the record clearly supports the Planning Commission’s finding that the [proposed] fellowship hall would increase the occupant load for the site.” 828 S.E.2d at 241. In reaching this decision, the Court followed the general principle that, where an overlay imposes additional requirements, those additional requirements supplement or replace the underlying zoning.

Heilker v. Zoning Board of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) involved the application of a “Highway Corridor Overlay Zoning” scheme adopted by the City of Beaufort. The overlay was concerned with the protection and promotion of aesthetics and safety. The overlay contained new restrictions concerning the outdoor display of certain type of merchandise in the “Highway Corridor” district. The central issue in the case was whether the outdoor displays at issue were: (1) part of the “use” of the land for retail sale, or (2) merely an “activity or practice” incidental to the “use.” If the display was a use, the overlay did not apply; if it was a practice, the restrictions of the overlay applied.

The Zoning Board of Appeals (ZBA) ruled that it was a practice, and Heilker appealed. A special judge reversed the ZBA’s finding, and the Court of Appeals reversed the special judge. As with *Grays Hill Baptist Church*, *Heilker* held that, where an overlay applied, restrictions supercede the underlying zoning.

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the *Guidelines*. As a result, the DDRC failed to follow the general rule of making the parcel within the overlay district “simultaneously subject to two sets of zoning regulations.”

b. Mistake of law in application of “non-binding” precatory standards—The problem of delegation of legislative power and lack of controls of discretion

A fundamental problem plagues the application of a system of non-binding guidelines. As indicated above at Part II-A (footnote 2) of this Order, the planners who drafted the *Guidelines* addressed topics like the height of buildings in terms of “illustrative” “non-binding general direction for development within City Center, with the recommendation that the City’s regulatory plans and codes be amended to reflect the guidance included here.” (*Guidelines*, pp. 5-1, 5-2) However, instead of adopting “regulatory plans and codes,” the City chose to forego exercising its legislative power in favor of simply adopting the *Guidelines* as the ordinance rather than develop and codify a regulatory scheme. See Columbia Code §§ 17-253, 17-655(b)(1).

As a result of this approach, the DDRC and its staff have been authorized to apply “non-binding” guidelines. However, such application presents the issue of whether the *Guidelines* constitute an improper delegation of the City’s legislative power.

The framework for addressing issues concerning a claim of unlawful delegation of legislative power is set forth in *South Carolina State Highway Department v. Harbin*, 86 S.E.2d 466 (S.C. 1955), which held that a provision of the statute authorizing the highway department to suspend or revoke a driver’s license “*for any cause satisfactory to*” the department was an unconstitutional delegation of legislative power. *Id.* at 468 (emphasis added)

Harbin summarized the principles concerning delegation of legislative power to an administrative agency as follows:

The question of delegation of legislative power has confronted the courts with many perplexing problems, particularly during recent years when the complexities of

government have been constantly on the increase. It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board “to fill up the details” by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. “However, it is necessary that the statute declare a legislative policy establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a property regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.”

Id. at 470 (authorities deleted)

The Court’s conclusion concerning the unconstitutionality of the delegation involved in *Hardin* was stated as follows:

When the authority of the State Highway Department to suspend or revoke a license for any cause which it deems satisfactory is considered in the light of the foregoing principles, said provision must be declared invalid as an unlawful delegation of legislative power. It sets up no standard to guide the Department and contains no limitations. As a general rule, “A statute which in effect reposes an absolute, unregulated, an undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers.”

Id. at 370–71 (authority deleted)

In the regulation of land use, the unlawful delegation concern can also be expressed in terms of due process. For example, *Restaurant Row Associate v. Horry County*, 335 S.C. 209, 516 S.E.2d 4426, 445 (1999), stated: “When deciding whether to grant a variance, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939).”

The cited case of *Schloss Poster Advertising Co.* involved an ordinance providing as follows: “Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the city of Rock Hill without having first obtained from the city council a permit to do so.” In effect, the City Council had delegated to itself an unrestrained power to grant or deny permits to construct billboards. In holding that this “delegation” was unconstitutional, the Court noted:

The ordinance before us is in no sense a zoning ordinance as provided in Sections 7390–7398, Code 1932, nor does it prescribe rules or conditions for the issuance of permits for the erection of billboards to which all persons similarly situated may conform. It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them, the right and power to absolutely prohibit the use of property for the erection of billboards.

The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes not uniform rule upon which the special permission is to be granted.

2 S.E.2d at 394

In her email to Thomas Gottshall concerning the application of the *Guidelines*, Lucinda Statler described the decision-making process of the DDRC and its staff as follows:

There are 17 pages of guidelines that pertain to new construction that are considered. The staff evaluations and the DDRC's decisions are based on the *overall determination* as to whether a project substantially meets– or does not meet– the design guidelines. This means that there are likely areas where the project may not be exactly what is recommended, and other areas where they meet and exceed what is recommended. It is an *overall assessment* of the project and of course, there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision, rather than only staff. In the almost 14 years that I have served as staff to this Commission, I would be hard pressed to think of a project that met every single guideline. This would be unattainable for most projects, as there are many factors that determine a development's feasibility. The design review process is built to provide some flexibility in this balancing act.

(Exhibit 1 to Complaint (emphasis added))

This “overall assessment” approach is, in effect, basically a “we know it when we assess it overall” test. Such a test recognizes “no standard to guide [decisions] . . . and contains no limitations.” As a result, there is neither a meaningful standard to guide the exercise of discretion nor a framework to provide a workable basis for judicial review of the exercise of discretion.

As a result, the “overall assessment” approach is virtually the same as the legislative authorization in *Harbin* to suspend or revoke a license “for any cause satisfactory to” the Highway Department. The approach is also effectively the same as the ordinance granting the Rock Hill City Council the power to decide who could erect billboards without any provisions to limit and structure the exercise of discretion. Therefore, to the extent that the DDRC uses this approach, the Complaint has sufficiently pled this claim. See Complaint ¶¶ 23-25.

c. Abuse of Discretion in Applying Guidelines

Paragraphs 26-31 of the Complaint address abuse of discretion by the DDRC in applying the *Guidelines*. These paragraphs contain sufficient details and specificity concerning abuse of discretion and lack of factual basis to withstand a motion to dismiss.

2. Ultra Vires Grant of Power to DDRC to Conduct Site Plan Review.

a. Ultra Vires nature of grant of power to DDRC to conduct Site Plan Review

Article 7 of the State Enabling Act addresses land development regulation by local governments. In contrast, provisions concerning boards of architectural review are contained in Article 5 (“Local Planning – Zoning”) of the State Enabling Act. The scope of Article 7 is very broad, partly because terms like “land development” and “subdivision” are defined very broadly. (See S.C. Code §§ 6-29-1110 (2), –(4)).

Planning commissions play a critical role under Article 7 in all the aspects of land development. Central to their role is the power to approve, or disapprove, plans for development. The phrase “plans for development” is very inclusive because numerous terms— e.g., “sketch plans, preliminary plans, and final plans” – are used to describe the plans involved. (See S.C. Code § 6-29-1150)

Under the Columbia scheme of land of development regulation set forth in Article IV of Chapter 17 (“Planning, Development and Zoning”) of the City Code, the Planning Commission is charged with implementing the land development regulation. As a part of this scheme, terms like “sketch plan,” “site plan,” and “preliminary plat” are used to identify specific types of plans. See Columbia City Code § 17-464. For a category termed “Group Development,”⁶ a system of plan

⁶ There are three categories of “group development” set forth within the definition of “subdivision, development type” in Columbia City Code § 17-464. These are:

Group development means a development such as shopping center, office buildings, industrial sites, mobile home parks and apartment complexes where the site is not subdivided in lots, blocks and streets, but includes two or more units designed or intended for separate occupancy.

Group commercial or industrial development means a single building or combination of buildings containing 25,000 square feet of gross floor area, or two or more buildings containing a combined total of 25,000 square feet gross floor area.

Group housing development means a single lot of record upon which are erected three or more dwelling units and all the structures thereon. This definition shall include apartments, condominiums and townhouses, whether rented or sold.

review termed “site plan review” is established. (See Columbia City Code §§ 17-464, 17-581 through § 17-589).

As indicated in Paragraph 32 of the Complaint, the *Guidelines* for the DD area shifted the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC. This approach to site plan review is *ultra vires* because it conflicts with explicit language in Section 6-29-1150(A) of the State Enabling Act, which addresses the submission of plans or plats to the planning commission. This section states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the *planning commission or designated staff*.” (emphasis added). The shifting of site plan review to the DDRC pursuant to the *Guidelines* conflicts with this clear mandate of Section 6-29-1150(A) concerning the role of the planning commission.

The purpose of the State Enabling Act is to enable or authorize local governments to engage in planning and regulating the use and development of land. As noted in Section 6-29-330(A) of the S.C. Code: “A municipality may exercise the powers granted *under the provisions of this chapter* in the total area within its corporate limits.” (emphasis added).⁷ The phrase “under the provisions of this chapter” indicates that the “powers granted” are defined by and limited by the Enabling Act.

⁷ The State Enabling Act is contained in Title 6, Chapter 29

Thus, the provision in the portion of Section 6-29-1150(A) quoted above imposes an express requirement that local land development regulations “*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the planning commission or designated staff.” (emphasis added) In short, there *must* be: (1) a system for approval or disapproval of plans and plats; and (2) the procedure for this system *must* be undertaken by the planning commission.

The general principle for applying an enabling act was stated by the Rhode Island Supreme Court as follows: Where a local government “purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void.” *Hardy v. Zoning Board of Review of the Town of Conventry*, 321 A.2d 289, 290–29 (R.I. 1974).

The South Carolina Supreme Court applied this principle in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2 777 (2010). At issue was the rezoning of a large parcel of land from the classification AG-15 (agricultural with minimum lot area of three acres) to PD (“planned development district”). This PD district would have 107 dwellings, which was the same number as would be allowed under AG-15. However, the minimum lot size for the PD was reduced to one acre.

Sinkler noted that Section 6-29-720(C)(4) of the Enabling Act explicitly authorizes the use of planned development schemes and quoted the following language:

“[P]lanned development district” or a development project comprised of *housing of different types and densities and of compatible commercial uses*, or shopping

centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development *and is characterized by a unified site design for a mixed-use development.*

690 S.E.2d at 781 (emphasis in original). *Sinkler* also quoted Section 6-29-740, which contains additional details concerning a PD district. This section provides:

In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that *will result in improved design, character, and quality of new mixed use developments* and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. *The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.*

690 S.E.2d at 779 (emphasis in original)

The Supreme Court, relying on the statutory language quoted above, held:

[T]he [zoning] ordinance [with only residential uses] did not meet the parameters for a PD. . . . [H]aving invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act.

Sinkler, 690 S.E.2d at 781, 782. In authorizing the DDRC to undertake site plan review, the City of Columbia, like Charleston County in *Sinkler*, failed “to meet the requirements” of the Enabling Act. Consequently, the authorization was *ultra vires*.

In addition, depending on the details of any specific application, many other provisions of the *Guidelines* are potentially *ultra vires* because these other provisions in the *Guidelines* could overlap with various aspects of the statutorily-mandated site plan review by the City of Columbia Planning Commission. More specifically, depending on the facts involved, potential conflicts could arise in terms of parking, location and screening of service and loading areas, other screening, setbacks, open spaces, and landscaping because these matters should be addressed in site plan review under some circumstances. Compare Columbia City Code §§ 17.464 (Definitions), -491, -492, -511, -531, -581, -582, -583, -586, -587, -588, -589 with *Guidelines* §§ 4.3, 4.4, 5.3.6, 5.4, 5.5, 5.6, 5.10.

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. See, e.g., *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city’s decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of conveyance by Circuit Court); *City of North Charleston v. North Charleston Distric*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342

S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgment that certain contracts entered into by school district were *ultra vires* and, therefore, invalid).

b. Jurisdiction of Circuit Court

Article V, Section 11 of the South Carolina Constitution provides: “The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law.” Because this grant of general jurisdiction supports the filing of this *ultra vires* action in Circuit Courts, it was the basis of all of the South Carolina cases cited above in Part III-B-2-a of this Order, except *O’Brien v. South Carolina ORBIT*, which was filed in the original jurisdiction of the Supreme Court.

C. Standing

1. Statutory standing

Section 6-29-900(A) states, in relevant part, as follows: “A person who may have a *substantial interest* in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county” (emphasis added). Defendant Trinitas asserts that Plaintiff does not adequately plead a substantial interest. This argument is addressed in the discussion of constitutional standing at Part III-C-2 below.

Defendant Trinitas also relies on *Graham v. Lloyd’s of London*, 296 S.C. 249, 255, 371, S.E.2d 801, 804 (Ct. App. 1988), which states the following principle: “In the eye of the common law, the association itself is an ‘airy nothing,’ a ‘nonexistent legal ghost having no capacity to

enjoy legal rights or to suffer legal wrongs.’’ It is important to note that this principle was *not* applied in *Graham* because the common law had been changed by statute. The South Carolina Code contains numerous examples of this change. *See, e.g.*, S.C. Code § 33-31-140 (15)-(27) (defining “entity” and “person”).

Defendant Trinitas also makes assertions attacking the lack of information about certain aspects of Plaintiff association. However, no authority is given concerning why the information is relevant.

The issue of personhood for an association is important because of the fundamental rights of association and petitioning of government. *See, e.g.*, U.S. Const. Amend. 1 (right to “petition the Government for redress of grievances”; *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 928 (2010) (Scalia, J. conc.); *NAACP v. State of Alabama*, 357 U.S. 449 (1958). Consequently, it would not be appropriate to grant Defendants’ motions to dismiss simply on the basis of the common law view of unincorporated associations or on the basis of claims of lack of necessary information that are not supported by authority.

2. Constitutional Standing

In order to grant a motion to dismiss, it must be shown that these allegations are not sufficient to satisfy the requirements of constitutional standing. Paragraphs 4 and 5 of Plaintiff’s complaint state:

4. Plaintiff University Hill Neighborhood Association (Association) is an unincorporated association. The boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly

overlapping historic districts—a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This district is “identified as Architectural District No. 1” and is “bounded by Laurens, Senate, Henderson and Greene Streets. . . .” *Id.* at § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic Districts.

5. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed. Many resident members of the Association live in areas near the proposed Trinitas project. Substantial interests of the Association and of its members are affected by the decision of the DDRC to approve the Trinitas project.

Plaintiffs claim that these allegations place them within the well-established doctrine that associations have standing to bring a suit on behalf of their members. This doctrine has been summarized as follows:

Sometimes, an organization initiates a lawsuit on behalf of a member or members. Like an individual party, the organization must also have standing to file suit. The policy behind permitting associational standing is to allow a group with shared resources to pursue a common, collective interest. *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 713 S.E.2d 287 (2011) (Hearn, J., dissenting); *see also Intl Union, United Auto., Aerospace & Agric. Implement*

Workers of Am. v. Brock, 477 U.S. 274 (1986) (“[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.”). An organization’s mere interest in the litigation is not enough to confer standing. *Beaufort Realty Co.*, 346 S.C. 298, 551 S.E.2d 588; *Carolina Alliance for Fair Emp’t v. S.C. Dep’t of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). An organization has proper standing to bring a suit on behalf of its members only when its members would otherwise have standing to sue in their own right; the interests at stake are germane to the organization’s purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co.*, 346 S.C. 298, 551 S.E.2d 588; *see also Carnival Corp.*, 407 S.C. 67, 753 S.E.2d 846 (finding that the plaintiffs failed to allege a particularized injury either to themselves or their members because they asserted only generalized grievances suffered by the public as a whole).

Jean Hoefer Toal, Amelia Warring Walker & Margaret E. Baker, *Appellate Practice in South Carolina* 128–29 (3d ed. 2016).

Though the DDRC and the City claim that Plaintiff does not satisfy the standard of particularized injury, they do not provide any detailed arguments in support of their claims. Instead, the DDRC Motion to Dismiss incorporates the arguments of Trinitas, and the City’s motion notes that its position “will be more fully argued in a subsequent memorandum and oral argument.” The “subsequent memorandum” has now been filed. However, it has the same problem

as the motion—i.e., the City still fails to recognize how the claim against the City differs from the claim against the DDRC. (See Part I-B above)

Trinitas argues that its Motion to Dismiss should be granted because there is a lack of specific concrete, particularized injury to at least one member of the Plaintiff. Trinitas bases its position upon *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846 (2014) and *Preservation Soc’y of Charleston v. S.C. Dep’t of Health and Envir. Control*, 845 S.E.2d 481 (2020). In particular, Trinitas argues that the association in *Carnival Corp.* did not have associational standing because it did not provide examples of specific individualized harms to members in its complaint. In contrast, argues Trinitas, the association in *Preservation Society* had associational standing because it had provided affidavits showing specific individualized harms.

The distinction stressed by Trinitas does not support its position in the matters before this court. The affidavits in *Preservation Society* had been filed in an administrative proceeding where the plaintiffs in *Preservation Society* were seeking a “contested case hearing.” These affidavits were part of the record on appeal.

As indicated above at Part II-B of this Order, the DDRC conducted four public hearings and one work session in considering the Trinitas applications. The record for these meetings contains documents and testimony which: (1) provide specific evidence of concrete particularized harm, and (2) were sworn to be true. Thus, they are the equivalent of the affidavits which were filed at the administrative level in *Preservation Society*. Consequently, Plaintiff is in the same situation as the associations in *Preservation Society* because testimony and documents, submitted under oath, of individualized harm is in the record of the appeal before this Court.

3. Public Importance Standing

The South Carolina Supreme Court has held that “a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999). The approach for addressing a claim of public importance standing was addressed in *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854, 859 (2017), as follows:

[W]hen deciding whether to confer public importance standing, courts must take these competing policy concerns [of citizen access to courts and a need to achieve judicial economy and freedom from frivolous suits] into consideration, and must also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.

a. Issues Involved

This suit involves three important issues where future guidance is needed. These issues are:

- (1) Whether important aspects of a development within the DD area, like height, are determined by the underlying zoning or by the *Guidelines*;
- (2) Whether the grant by the City of the power of site plan review to the DDRC for development within the DD area was *ultra vires*; and
- (3) Whether the “overall assessment” approach to the application of the precatory, non-binding language of the *Guidelines* constitutes an improper delegation of the City’s legislative power and a denial of due process.

b. Importance of Issues

The DD area of Columbia regulated by the *Guidelines* “consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River.” Columbia City Code, Section § 17-253. Given the size of this area, issues concerning the validity, proper scope, and application of the *Guidelines* effectively determine important aspects of development in the downtown core of Columbia.

In addition, Columbia has many other overlay districts. *See, e.g.*, Columbia City Code §§ 17-306, 17-307, 17-308, 17-309, 17-310, 17-311, 17-312, 17-313, 17-314, 17-315, 17-322, 17-323, 17-324, 17-325, 17-326, 17-681 (historic districts). Important issues concerning the relationship between these overlays and the underlying zoning involved could arise under these schemes.

More broadly, issues concerning overlay schemes and underlying zoning could arise throughout South Carolina. Overlay schemes are authorized by Section 6-27-720(C)(5) of the State Enabling Act and are a generally recognized technique for land use regulation.⁸

c. Need for Future Guidance Concerning Issues

⁸ *See, e.g.*, Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law 93–94 (3d ed. 2013); John R. Nolon, Land Use in a Nutshell 219–22 (2006); Peter W. Salsich, Jr. & Timothy J. Tryniecki, Land Use Regulation 222–23 (3d ed. 2015).

Future guidance in addressing these three issues is needed for the same reasons that these issues are important. More specifically, issues will arise concerning the validity, proper scope, and application of the *Guidelines* and concerning overlays generally because of: (1) the large area covered by the DD overlay, (2) other overlay schemes in Columbia, and (3) overlay schemes in South Carolina.

As indicated above in Part III-B-1-a of this Order, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) and *Heilker v. Zoning Board of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) held that overlay schemes in South Carolina follow the general rule that an overlay zone is “simultaneously subject to two sets of zoning regulation.” Thus, this appeal raises the issue of which approach will be followed in South Carolina: The approach used herein by the DDRC or the approach used in *Grays Hill Baptist Church* and *Heilker*?

Grays Hill Baptist Church involved an airport overlay district. Section 17-307 of the Columbia City Code contains an overlay district termed: “—AP airport height restrictive areas,” which applies in the area around Owens Field Airport. If the approach adopted by the DDRC were applied to the AP overlay, the height restrictions of the overlay would not apply.

The City of Columbia also has overlay corridor districts designed to impose supplemental sign regulations (See Sections 17-310, 17-313, 17-314, 17-315). The concerns underlying these overlay districts are similar to those in *Heilker*. As a result, issues concerning the relationship of the overlay involved vis á vis the underlying zoning could arise in applying these corridor overlays.

IV. Conclusion

For reasons given in this Order, Defendants' Motions to Dismiss are denied. In particular, it is important to note that the position of the DDRC concerning height was a mistake of law and that the grant by the City of the power of site plan review within the DD overlay area to the DDRC was *ultra vires*.

Hon. L. Casey Manning
Fifth Circuit Court



Richland Common Pleas

Case Caption: University Hill Neighborhood Association vs City Of Columbia ,
defendant, et al

Case Number: 2020CP4003475

Type: Order/Other

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2020-10-07 10:26:16 page 33 of 33

Exhibit 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4003475

University Hill Neighborhood Association
PLAINTIFF(S)

City Of Columbia et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

A hearing was held by Webex on September 11, 2020 on Motions to Dismiss filed by City of Columbia, City of Columbia Design and Development Review Commission (DDRC), and Trinitas Ventures, LLC. Dick Harpootlian was present on behalf of Plaintiff University Hill Neighborhood Association, Lyndey R.Z. Bryant on behalf of Trinitas Ventures, LLC, Peter Balthazor on behalf of DDRC, and M. McMullen Taylor on behalf of City of Columbia. The Court entered an Order Denying Defendants' Motions to Dismiss on October 7, 2020. Subsequently, Trinitas Ventures, LLC and DDRC filed a joint Rule 59(e) Motion to Alter or Amend the October 7 Order, and City of Columbia filed a solo Rule 59(e) Motion. Plaintiff filed a Response to Defendants' Rule 59(e), SCRPC, Motions to Alter or Amend Order on November 10, 2020. After consideration of the October 7 Order, the Rule 59(e) Motions from all Defendants, and Plaintiff's Response, the Court DENIES both Rule 59(e) Motions to Alter or Amend.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/18/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

Case Caption: University Hill Neighborhood Association vs City Of Columbia ,
defendant, et al

Case Number: 2020CP4003475

Type: Order/Electronic Form 4

So Ordered

s/L. Casey Manning, 2061

Electronically signed on 2020-11-18 15:35:32 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

University Hill Neighborhood Association,

Appellant,

v.

City of Columbia, City of Columbia Design and
Development Review Committee, and Trinitas
Ventures LLC

Respondents.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2020-CP-40-03475

**TRINITAS VENTURES LLC'S
MOTION TO DISMISS APPEAL**

Trinitas Ventures LLC ("Trinitas") respectfully requests an order dismissing the Notice of Appeal/Petition filed by the University Hill Neighborhood Association ("Appellant") on July 23, 2020. This motion is based on the following grounds:¹

- The Court lacks subject matter jurisdiction over the DDRC's March 12, 2020 Site Plan Approval Decision because Appellant failed to timely appeal. *See* S.C. Code Ann. § 6-29-900(A) ("The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.").
- Appellant lacks standing to appeal either the Site Plan Approval Decision or the Design Approval Decision under S.C. Code Ann. § 6-29-900(A) (requiring the appellant be a "person" with "a substantial interest"). Further, Appellant has failed to establish constitutional standing on its own behalf or on behalf of its members. Appellant has also failed to plead the public interest exception to the standing requirement.
- Appellant has failed to state a claim entitling it to relief under S.C. Code Ann. § 6-29-930 ("[T]he court must determine only whether the decision of the board is correct as a matter of law."). Appellant's assertions as to the overreaching effect of the City of Columbia's Design District Guidelines or the DDRC's exercise of discretion go beyond the permissible scope of an appeal under the applicable statutory framework.

The Appeal should be dismissed with prejudice in its entirety.

¹ Trinitas incorporates by reference the Joint Stipulations filed August 24, 2020, including certain relevant City of Columbia ordinances (included in Exhibit A) and the City Center Design/Development Guidelines, Final Report, September 1, 1998 (Exhibit B). Trinitas does not concede that all ordinances included in Exhibit A are relevant to this motion or the underlying appeal.

BACKGROUND

This case involves Trinitas’ proposal to demolish certain existing buildings and construct an apartment building at the southeast corner of Gervais Street and Pickens Street in downtown Columbia, South Carolina, known as 1600-1620 Gervais Street (Tax Map Numbers 11401-09-01, 11401-09-03, and 11401-09-05) (the “Proposed Construction”). On June 4, 2019, the owner of the real property where the Proposed Construction would be built, Capital Investments, LLC (“Owner”), voluntarily rezoned the property to make it part of the City of Columbia’s City Center Design Development District.² That rezoning subjected the Proposed Construction to the scrutiny of the City of Columbia Design and Development Review Committee (“DDRC”).³

In compliance with applicable ordinances, rules, guidelines, and regulations for the City of Columbia Center Design Development District, Trinitas filed two applications to the DDRC, including: (1) a Certificate of Site Plan Approval,⁴ and (2) a Certificate of Design Approval for New Construction, both on December 3, 2019, under a Letter of Agency from Owner. The DDRC met on January 9, 2020, at which time it conducted a public hearing to consider both applications.⁵ See January 9, 2020 Audio/Video Hearing available in DDRC’s Answer. Appellant appeared through its President, Thomas Gottshaw, and objected to both applications. *Id.* At that time, the DDRC denied both applications orally. *Id.* Shortly thereafter, on January 13 and 14, 2020, the DDRC confirmed its denials of both applications in writing. See DDRC Certified Copy of Proceedings, filed August 24, 2020.

² See City of Columbia Code Section 17-253 (-DD design/development area) and Section 17-311 (supplementary district regulations for –DD design/development area).

³ See *id.* at Section 17-653 (establishing and authorizing the Design and Development Review Commission).

⁴ See *id.* at Section 17-655(b)(2) (issuance of certificate of design approval).

⁵ See *id.* at Sections 17-655(b)(2) (requiring a “duly held public hearing for any project involving the construction of new buildings of greater than 50,000 square feet”).

Pursuant to DDRC Bylaws Section 8, on January 24, 2020, Trinitas filed a petition for rehearing of the DDRC's decisions denying both applications. *See* DDRC Certified Copy of Proceedings, filed August 24, 2020. Trinitas took issue with the DDRC's stated bases for its denials, including the "mass scale and use" of the Proposed Construction which the DDRC determined to be "incompatible" with adjacent historic districts. *Id.* Trinitas asserted the DDRC's decisions were based on a mutual mistake of fact, procedural deficiencies, clerical mistakes, and new evidence which Trinitas could not have reasonably presented at the January 9, 2020 hearing. *Id.* Appellant obtained a copy of Trinitas' petition for rehearing.

On February 7, 2019, the DDRC met in a closed executive session and revoked its prior denials of Trinitas' applications. *See* February 7, 2020 Audio/Video Hearing available in DDRC's Answer. The DDRC placed both applications for rehearing on March 12, 2020. The day before the DDRC's hearing, on March 11, 2020, Appellant submitted a letter in opposition to Trinitas' applications. *See* DDRC Certified Copy of Proceedings, filed August 24, 2020 (letter of UHNA, Historic Columbia, and Bobby Lyles, March 11, 2020). On March 12, 2020, the DDRC conducted a second public hearing on both applications. *See* March 12, 2020 Audio/Video Hearing available in DDRC's Answer. Appellant appeared through its President, Mr. Gottshaw, as well as its legal counsel, and made arguments in opposition to Trinitas' applications. *Id.* After a lengthy hearing, the DDRC approved Trinitas' application for site plan approval (the "Site Plan Approval Decision") and held Trinitas' application for design approval for consideration at a later date. *Id.*

In the meantime, the DDRC conducted a working session to discuss Trinitas' application for design approval, which was held on June 10, 2020. *See* June 10, 2020 Audio/Video Working Group Meeting available in DDRC's Answer. On the day of the working session, Appellant submitted a letter in opposition to the Proposed Construction and, further, appeared at the working

session through its President, Mr. Gottsahw and requested a reduction of the height of the building and suggested certain design changes. *Id.* Following the working session, for a third time, Trinitas' application for design approval was considered by the DDRC at a public hearing on July 9, 2020. See July 9, 2020 Audio/Video Hearing available in DDRC's Answer. Appellant appeared through its President, Mr. Gottshaw, and made arguments in opposition to Trinitas' application. At the July 9, 2020 hearing, Trinitas' application for design approval was approved by the DDRC (the "Design Approval Decision"). *Id.*

On July 23, 2020, Appellant appealed both the Site Plan Approval Decision and Design Approval Decision. Appellant's appeal is brought pursuant to S.C. Code Ann. § 6-29-900 (Supp. 2009).⁶

STATUTORY FRAMEWORK

Article 5 of Chapter 29 of the South Carolina Code deals with local planning and zoning. Sections 6-29-870, *et seq.* apply to any

local government which enacts a zoning ordinance which makes specific provision for the preservation and protection of historic and architecturally valuable districts and neighborhoods or significant or natural scenic areas, or protects or provides, or both, for the unique, special, or desired character of a defined district, corridor, or development area or any combination of it, by means of restriction and conditions governing the right to erect, demolish, remove in whole or in part, or alter the exterior appearance of all buildings or structures within the areas[.]

S.C. Code Ann. § 6-29-870(A) (Supp. 2009). In order to carry out these functions, a local government "may provide for appointment of a board of architectural review or similar body." The City of Columbia established the DDRC pursuant to S.C. Code Ann. § 6-29-870, *et seq.* See City of Columbia Code Section 17-653 (establishing the DDRC pursuant to S.C. Code Ann. § 6-29-890).

⁶ See also City of Columbia Code Sections 17-677 (Appeals) and 17-655(f)(1) (same).

“The board of architectural review has those powers involving the structures and neighborhoods as may be determined by the zoning ordinance. S.C. Code Ann. § 6-29-880 (Supp. 2009). Section 17-653 of the City of Columbia’s ordinances empowers the DDRC to “[a]dminister the design guidelines for the . . . –DD . . . area[.]” City of Columbia Code Section 17-653(b)(9). Further, City Ordinance Section 17-253 provides that “[d]evelopment within the –DD area must comply with design guidelines set forth in th[e] [City] Code and in the publication ‘City Center Design/Development Guidelines, Final Report, September 1, 1998’ LDR International, Inc.” City Ordinance Section 17-253. *See* Joint Stipulations, filed August 24, 2020, at Exhibit B.

“Decisions of the zoning administrator or other appropriate administrative official in matters under the purview of the board of architectural review may be appealed to the board where there is an alleged error in any order, requirement, determination, or decision.” S.C. Code Ann. § 6-29-880. “A person who may have a substantial interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county by filing with the clerk of court a petition in writing setting forth plainly, fully, and distinctly why the decision is contrary to law. The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review.” S.C. Code Ann. § 6-29-900(A); *see also* City of Columbia Code Sections 17-677 (Appeals) and 17-655(f)(1) (same).

After an appeal is filed, “[a]t the next term of the circuit court or in chambers upon ten days’ notice to the parties, the resident presiding judge of the circuit court of the county must proceed to hear and pass upon the appeal on the certified record of the board proceedings. The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the

certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.” S.C. Code Ann. § 6-29-930(A).

ARGUMENTS

I. APPELLANT FAILED TO TIMELY APPEAL THE DDRC’S DECISION GRANTING SITE PLAN APPROVAL.

Appellant characterizes the DDRC’s July 9, 2020 hearing as a “final approval for the construction of ‘Trinitas,’ an eight-story apartment building.” Petition at ¶ 1; *see also* ¶ 3 (describing this case as an “appeal of the DDRC *decision* concerning the Trinitas project”) (emphasis added). This description of the procedural history of the case is misleading and incorrect.⁷ Instead, there are *two* DDRC decisions from which Appellant attempts to appeal:

- First, the Site Plan Approval Decision entered on March 12, 2020. *See* March 12 2020 Audio/Video Hearing available in DDRC’s Answer.
- Second, the Design Approval Decision entered on July 9, 2020. *See* July 9, 2020 Audio/Video Hearing available in DDRC’s Answer.

These are *two separate*, not combined, applications, and were decided by *two different* decisions by the DDRC after *separate public hearings on different dates*. Under S.C. Code Ann. § 6-29-900(A) (Supp. 2009), Appellant was required to appeal the March 12, 2020, Site Plan Approval Decision within thirty days, but it failed to do so. Instead, Appellant waited until July 23, 2020, and appealed both the DDRC’s Site Plan Approval Decision and Design Approval Decision at the same time. Appellant’s failure to timely appeal the DDRC’s Site Plan Approval Decision is fatal.

⁷ The only place in the Notice of Appeal where Appellant even hints at two separate applications, hearings, and decisions are Paragraphs 26 and 28 where Appellant describes the City of Columbia’s Staff Reports for the January, March, and July meetings of the DDRC.

The Court should dismiss Appellant's appeal of the Site Plan Approval Decision because the Court lacks subject matter jurisdiction as a matter of law.

Section 6-29-900(A) of the South Carolina Code of Laws requires a notice of appeal to be filed "within thirty days after the affected party receives actual notice of the board of architectural review." *See also* City of Columbia Code Sections 17-677 (Appeals) and 17-655(f)(1) (same). In *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361 (Ct. App. 2005), the South Carolina Court of Appeals held "the triggering mechanism for filing an appeal is actual notice of the adverse decision, not receipt of the written notice." *Id.* at 186, 621 S.E.2d at 363. Here, Appellant has failed to appeal within thirty days from its actual knowledge of the DDRC's Site Plan Approval Decision, made on March 12, 2020. Like the *Blind Tiger* decision, this Court must strictly enforce the statutory deadline from which to appeal an administrative decision.

On or about March 11, 2020, Appellant submitted a collective letter in opposition to the Proposed Construction. *See* DDRC Certified Copy of Proceedings, filed August 24, 2020 (letter of UHNA, Historic Columbia, and Bobby Lyles). The letter was signed by Appellant through the following representatives:

- Thomas R. Gottshaw, University Hill Neighborhood Association President
- Kathryn Fenner, University Hill Neighborhood Association Vice President
- John Magill, University Hill Neighborhood Association Treasurer
- John Stucker, former University Hill Neighborhood Association President
- April Lucas, member of University Hill Neighborhood Association Executive Council

See id.

Appellant was represented at the DDRC's March 12, 2020 public hearing through its President, Mr. Gottshaw, and its attorney. *See* March 12, 2020 Audio/Video Hearing available in

DDRC's Answer. At the March 12, 2020 hearing, Appellant made arguments in opposition to the Proposed Construction. *See id.* Based on Appellant's involvement and presence at the March hearing, as a stated representative of Appellant as its President, Appellant, had actual knowledge of the DDRC's Site Plan Approval Decision on March 12, 2020. Nevertheless, Appellant failed to appeal the March 12, 2020 Site Plan Approval Decision within thirty days as required by law. S.C. Code Ann. § 6-29-900(A); *see also* City of Columbia Code Sections 17-677 (Appeals) and 17-655(f)(1) (same).

"Service of the notice of intent to appeal is a jurisdictional requirement, and [an appeals court] has no authority to extend or expand the time in which the notice of intent to appeal must be served." *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) (citing *Sroup v. Duke Power Co.*, 216 S.C. 79, 56 S.E.2d 745 (1949); *Wade v. Gore*, 154 S.C. 262, 11 S.E. 470 (1930); *Renneker v. Warren*, 20 S.C. 581 (1884)). This Court lacks jurisdiction over the subject matter of Appellant's Petition to the extent Appellant contests findings and conclusions of the DDRC made more than thirty days before Appellant filed and served its notice of appeal. Here, Appellant's appeal of the DDRC's Site Plan Approval Decision at the March 12, 2020 hearing is untimely and the Court lacks jurisdiction to hear it as a matter of law.

Appellant is not able to file a Rule 60, SCRCP, motion to save the untimeliness of its appeal. In *Sadisco of Greenville, Inc. v. Greenville County Bd. Of Zoning Appeals*, 340 S.C. 57, 530 S.E. 2d 383 (Ct. App. 2000), the Court of Appeals specifically ruled that if it "were to allow a party to file a Rule 60 motion when . . . fail[ing] to timely serve a Notice of Appeal, th[e] Court would be exceeding its jurisdictional limits by allowing a party to extend or expand the time in which a Notice of Appeal may be served." *Id.* at 59, 530 S.E.2d at 384.

Unfortunately, arguments in the Petition concerning purported legal and/or factual issues with the March 12, 2020 Site Plan Approval Decision are interwoven and inescapably intertwined with arguments concerning purported legal and/or factual issues with the July 9, 2020 Design Approval Decision. *See, e.g.*, Petition at ¶¶ 3, 12, 22(3), 37. The only place where these issues are even remotely separated is Paragraphs 32-36. *Id.* at ¶¶ 32-36. Therefore, Trinitas is incapable of responding to the Petition in a way that addresses only the Design Approval Decision, which was timely appealed and, therefore, Trinitas filed an Answer to the Petition on August 24, 2020. Respectfully, Trinitas requests the Court dismiss the Appeal in full for the grounds set forth below in this motion, but if the Appeal is not dismissed in full, the Court should dismiss the Appeal to the extent it relates to the DDRC's Site Plan Approval Decision.

II. APPELLANT LACKS STANDING.

With respect to both the Site Plan Approval Decision (if not dismissed based on timing) and the Design Approval Decision, the Appeal should be dismissed because Appellant lacks standing. “A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing.” *Joseph v. S.C. Dept. of Labor, Licensing, and Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016) (citing *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985)). Standing is defined as “a personal stake in the subject matter of a lawsuit.” *Id.* (quoting *Sea Pines Ass’n for the Prot. Of Wildlife, Inc. v. S.C. Dept. of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (citing *Charleston County Sch. Dist. v. Charleston County Election Comm’n*, 336 S.C. 174, 519 S.E.2d 567 (1999)). “A party seeking to establish standing carries the burden of demonstrating each element.” *Id.*

South Carolina law recognizes three methods through which a party may acquire standing: (1) statutory standing, (2) constitutional standing, and (3) the public importance exception to the

standing requirement. *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 528, 745 S.E.2d 385, 392 (Ct. App. 2013). If standing is not conferred by statute, the party must meet the elements of constitutional standing or successfully prove the existence of a substantial public interest. *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195-98, 669 S.E.2d 337, 339-40 (2008) (turning to constitutional standing only after first considering and rejecting the application of statutory standing). Appellant carries the burden of demonstrating it standing. *Joseph v. S.C. Dept. of Labor, Licensing, and Regulation*, 417 S.C. at 449, 790 S.E.2d at 769 (2016) (citing *Sea Pines Ass'n*, 345 S.C. at 600, 550 S.E.2d at 291 (2001)). In this case, Appellant cannot prove it has standing and the Appeal must be dismissed.

1. Appellant lacks statutory standing under S.C. Code Ann. § 6-29-900(A).

“Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation.” *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). The statute through which Appellant filed this appeal, S.C. Code Ann. § 6-29-900 (2003), provides that a right to appeal a decision of a board of architectural review is given only to a “person” with “a substantial interest” in the decision. S.C. Code Ann. § 6-29-900(A)⁸; *see also* City of Columbia Code Sections 17-677 (Appeals).

Appellant is an unincorporated association. Compl. at ¶ 4. An unincorporated association is not a legal entity separate from its members. “In the eye of the common law, the association itself is an ‘airy nothing,’ a ‘nonexistent legal ghost having no capacity to enjoy legal rights or to suffer legal wrongs.’” *Graham v. Lloyd's of London*, 296 S.C. 249, 255, 371 S.E.2d 801, 804 (Ct. App. 1988). Appellant’s Petition is bereft of any description of Appellant’s membership, how it is

⁸ *See also* S.C. Code Ann. § 6-29-900(B) (giving a separate right to appeal to the property owner whose property is the subject of the decision).

organized, or whether it has the majority approval of its members to bring this appeal. Indeed, at least one resident homeowner of Appellant's association *supported* the Proposed Construction and sent a letter of support to the DDRC on February 12, 2020. *See* DDRC Certified Copy of Proceedings, filed August 24, 2020 (letter of Frank Thorne). In his letter, the homeowner stated: "I understand that the University Hill Neighborhood Association has asked that this construction not be approved. I dissent; UNHA does not speak for all of the neighborhoods residents." *Id.*

Appellant describes its boundaries as "Laurens, Senate, Henderson and Greene Streets[.]" Petition at ¶ 4, a radius of approximately 50 acres (2,200,000 square feet or 0.0789 square miles) and including more than 900 individual households.⁹ Appellant notes that the boundaries of its association "include properties across an intersection from the block where the Trinitas project would be constructed[.]" *Id.* at ¶ 5. Appellant fails to acknowledge that most of its members' houses are further from the Proposed Construction and some reside nearly a mile away. *See id.* (noting, "[m]any" but not all or even most, of the Appellant's resident-members "live in areas near" the Proposed Construction.).

To possess standing, an organization, like Appellant, must alone have suffered a concrete, particularized injury, or at least one of its members must have suffered such an injury, and the other elements of associational standing must be satisfied. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 850-51 (2014). An organization may have associational standing to bring suit on behalf of its members, but only when (1) at least one member would otherwise have standing (statutory, constitutional or otherwise) to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual

⁹ *See* <https://www.exitrec.com/featured-neighborhood-university-hill-in-columbia-sc/> (last accessed August 17, 2020) (noting a total of 911 households in the University Hill neighborhood).

members in the lawsuit.” *Preservation Soc’y of Charleston v. S.C. Dept. of Health and Env’tl. Control.*, App. Case No. 2018-000137, 2020 WL 811729 at *4 (Feb. 19, 2020) (citing *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (citation omitted)).

Here, Appellant makes a feeble attempt to assert the association has a concrete and particularized “substantial” interest to establish standing, but Appellant’s allegations are insufficient as a matter of law. *See* Petition at ¶¶ 4-5 (“Substantial interests of the Association ... are affected by the decisions of the DDRC.”). Appellant fails to articulate what its purported “substantial interests” are or how any of its individual members are substantially affected by the Proposed Construction. *See id.* Appellant’s attempt to establish standing through its members, are likewise insufficient. *See id.* (“Substantial interests of the Association[’s] ... members are affected by the decisions of the DDRC.”). Further, Appellant describes that “many” of its members “live in areas near” the Proposed Construction. *Id.* at ¶ 5. This unspecified and collective allegation as to Appellant’s members’ purported “substantial interest” in the Proposed Construction is insufficient. Instead, Appellant is required to allege a concrete and particularized injury, specific to Appellant or at least one of its members in a “personal and individual way,” which is actual and imminent. *See Carnival Corp.*, 407 S.C. at 75, 753 S.E.2d at 850 (“In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way.”) (citations omitted).

In *Carnival Corp.*, 407 S.C. 67, 73, 753 S.E.2d 846, several neighborhood associations and other organizations brought suit against Carnival, the South Carolina State Ports Authority, and the City of Charleston, seeking an injunction against what they believed to be the unlawful use of a terminal by Carnival’s cruise ship, the *Fantasy*. *Id.* at 72, 753 S.E.2d at 849. The plaintiff-associations’ argument in support of standing was based on their purported concerns with

compliance with land use laws and threats to the quality of life in the area. *Id.* at 72, 753 S.E.2d at 848-49. Specifically, the associations asserted:

[T]he *Fantasy* can be seen above the historic buildings of Charleston and that it disrupts the historic skyline. The thousands of passengers and crew allegedly cause major traffic congestion in the area as well as the closure of public roads. The *Fantasy* allegedly emits noise pollution through music and broadcast announcements and air pollution through particulates produced by its diesel engines. Plaintiffs contend expanded cruise ship operations may jeopardize the Old and Historic District's listing on the National Register of Historic Places.

Id. at 73, 753 S.E.2d at 849.

The lower court dismissed the plaintiff-associations' complaint based on failure to state a claim and did not address the defendants' argument that the associations lacked standing. *Id.* at 73, 753 S.E.2d at 850. On appeal, the Supreme Court held that the plaintiff-associations lacked standing because their allegations of injury were insufficient as a matter of law. *Id.* at 75, 753 S.E.2d at 850 ("Reviewing Plaintiffs' complaint, we conclude Plaintiffs fail to allege a concrete, particularized harm to a legally protected interest and therefore hold Plaintiffs lack standing.").

Indeed, the allegations in the plaintiff-associations' complaint in *Carnival* are more specific than the vague and non-specific allegations of injury in Appellant's Petition. See Petition at ¶¶ 4-5. As noted in the U.S. Supreme Court's decision in *Lujan*: "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not' possess standing." *Carnival Corp.* at 75, 753 S.E.2d at 850 (quoting *Lujan*, 504 U.S. at 573-74, 112 S. Ct. 2130). Like the decision in *Carnival*, and perhaps even more so, Appellant has failed to allege a particularized injury either to itself or its members. Rather, it asserts only generalized grievances suffered by the public as a whole which are insufficient to establish standing.

In contrast, in *Preservation Society*, 2020 WL 811729, the South Carolina Supreme Court held a community historical preservation organization had standing to sue the South Carolina Health and Environmental Control (“DHEC”) and Ports Authority when challenging the propriety of state environmental authorizations issued by DHEC for a project relocating and expanding a passenger cruise facility at a downtown pier terminal. In that case, the association submitted affidavits from individual members “expressing concern over their reduced quality of life arising from the effects upon them *individually*.” *Id.* at *5 (emphasis in original). The Court distinguished *Carnival* where the plaintiffs did not submit affidavits of individualized harm. *See Preservation Society*, 2020 WL 811729 at *4-5. Here, Appellant’s Petition lacks sufficiently specific allegations to support standing and should be dismissed outright. Appellant had an opportunity to allege allegations to show an individualized injury-in-fact, but it failed to do so. *See* Petition at ¶¶ 4-5. It is insufficient for Appellant to merely state that one or more of its members live across the street from the Proposed Construction. *Id.*

Even if some of Appellant’s members live nearby the Proposed Construction, the presence of an injury-in-fact cannot be presumed. *See Town of Arcadia Lakes v. S.C. Dep’t of Health & Envtl. Control*, 404 S.C. 515, 531, 745 S.E.2d 385, 394 (Ct. App. 2013) (“Nonetheless, when ... interests involve property that is privately owned by a party other than the plaintiff, the presence of an injury in fact cannot be assumed.”). Further, many of Appellant’s members undisputedly live nearly a mile away from the Proposed Construction. Petition at ¶ 4 (describing the association’s boundaries as “Laurens, Senate, Henderson and Greene Streets[,]” a radius of approximately 50 acres (2,200,000 square feet or 0.0789 square miles) and including more than 900 individual households).¹⁰ Members of Appellant’s association who reside nearly a mile from the Proposed

¹⁰ Supra at note 8.

Construction cannot have a substantial interest in the Proposed Construction as a matter of law. In *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008), the Supreme Court held that an owner of property about one mile from a tract of land that had been rezoned lacked standing to challenge the rezoning. The Court found that the appellant lacked a concrete and particularized injury, as necessary to confer standing. *Id.* at 196, 669 S.E.2d at 339.

In addition, at least one member of Appellant's association *supports* the Proposed Construction and objected to Appellant's opposition to the Proposed Construction, stating in a letter to the DDRC: "I understand the University Hill Neighborhood Association has asked that this construction not be approved. I dissent; UNHA does not speak for all of the neighborhood's residents." See DDRC Certified Copy of Proceedings, filed August 24, 2020 (letter of Frank Thorne dated Feb. 12, 2020).

Appellant has failed to allege it itself possesses statutory standing and has not established with sufficiently specific allegations that at least one of its members would have statutory standing. In order to prove otherwise, Appellant must show that at least one of its members has a substantial individual and particularized injury-in-fact as a result of the DDRC decisions. Like *Carnival Corp.*, Appellant asserts only "generalized grievances suffered by the public as a whole which are insufficient to establish standing." 407 S.C. at 76, 753 S.E.2d at 851. Like *Carnival Corp.*, the Court should find Appellant lacks standing and dismiss the Appeal on that basis.

2. Appellant lacks constitutional standing as it cannot show it has any concrete and particularized injury which is actual and imminent.

"[C]onstitutional standing is based on Article III of the United States Constitution, which limits the jurisdiction of the federal courts to actual cases or controversies." *Preservation Soc'y of Charleston*, 2020 WL 811729 at *4. To prove a constitutional basis for standing, a party must show it "suffered an 'injury in fact'—an invasion of a legally protected interest which is (a)

concrete and particularized, and (b) ‘actual and imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560-61, 112 S. Ct. 2130 (internal citations omitted). As the Supreme Court has stated, standing requires “a personal stake in the subject matter of the lawsuit, i.e., one must be a real party in interest.” *Evins v. Richland Cnty. Hist. Pres. Comm’n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000).

“In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way.” *Carnival Corp.*, 407 S.C. at 75, 753 S.E.2d at 850 (citations omitted). “[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not’ possess standing.” *Id.* at 77, 753 S.E.2d at 851 (quoting *Lujan*, 504 U.S. at 573-74, 112 S. Ct. 2130). In *Carnival*, the Court held “all members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons . . . and therefore, Plaintiffs fail to establish the first element of [constitutional] standing.”

Appellant, which represents more than 900 individual households over a radius of approximately 50 acres (2,200,000 square feet or 0.0789 square miles), fails to describe how it has itself any concrete and particularized injury which is actual and imminent. It is hard to imagine how an unincorporated association which represents more than 900 individual households in such a large area can have a concrete or particularized injury. As Appellant acknowledges, the Proposed Construction is across the street from only some of its members. Petition at ¶ 5 (“The boundaries of the Association include properties across an intersection from the block where the Trinitas

project would be constructed.”). As with statutory standing, Appellant’s assertion that some of its members live nearby the Proposed Construction is insufficient to assert a particularized and concrete injury-in-fact to at least one of Appellant’s members. Thus, Appellant has failed to establish constitutional standing for either itself or associational standing on behalf of its members.

3. Appellant cannot prove standing under the public importance exception.

In order to have standing under the public importance exception, a party must show the issue is “(1) of public importance, and (2) of imperative and manifest urgency.” *Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). Appellant has neither alleged nor substantiated this third basis for standing. In order to grant standing under the public importance exception, the Court must consider the “competing policy concerns . . . [of] [c]itizens [who] must be afforded access to the judicial process to address alleged injustices [and][,] [o]n the other hand, standing cannot be granted to every individual who has a grievance[.] Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.” *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004). The Court must “determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.” *ATC S.*, 380 S.C. at 198-99, 669 S.E.2d at 341.

In *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (Ct. App. 2000), the Court of Appeals recognized that there is a “public interest involved i[n] the prevention of the unlawful expenditure of money raised by taxation” In *S.C. Pub. Int. Found. v. S.C. Dept. of Transp.*, 421 S.C. at 119, 804 S.E.2d at 859, the Supreme Court held there is a public interest in whether SCDOT may inspect bridges within private, gated communities. Here, there is no public interest in determining whether the Proposed Construction should go forward. Instead, the interest is limited to immediate property owners, and it is questionable whether any members of

Appellant's association have an immediate, substantial interest, since only some of them are "across an intersection from the block where the Trinitas project would be constructed." Petition at ¶ 5.

Upon information and belief, Appellant will argue that the DDRC's authority (or lack thereof)¹¹ to consider and grant site plan and/or design applications under the City of Columbia's Guidelines provides a public interest for which it has standing under the public importance exception, but S.C. Code Ann. § 6-29-900 is not the proper statutory procedure through which to assert such right. Instead, the statute provides standing to only a person with a "substantial interest" in any decision of a board of architectural review to appeal from the decision. To the extent Appellant argues the City of Columbia's and/or DDRC's system for administering the Guidelines is improper, Appellant should have filed a declaratory judgment action.

Appellant lacks statutory and constitutional standing and cannot prove the requisite showings for the public importance exception to standing to apply in this case. Accordingly, the Appeal must be dismissed.

III. APPELLANT HAS FAILED TO STATE A CLAIM.

Pursuant to S.C. Code Ann. § 6-29-930, in an appeal of an architectural review board's decision, "the court must determine only whether the decision of the board is correct as a matter of law. S.C. Code Ann. § 6-29-930. Here, Appellant has asserted the City of Columbia's Guidelines provide an "unusual approach to regulating design" which given too much discretion to the DDRC (*see* Petition at ¶ 24 ("virtually unlimited discretionary decision-making power)) and

¹¹ Trinitas notes that the City of Columbia's City Center Design District Guidelines have been in place since 1998 and the DDRC has been approving design and site plan certificates pursuant to such Guidelines for nearly 25 years. Respondent asserts that Appellant's challenge of the Guidelines is unlikely to succeed given the historical precedent that the Guidelines have served in the City of Columbia.

therefore are unlawful. Petition at ¶¶ 25-26. Appellant also contends the DDRC, through its exercise of discretion in applying the Guidelines, has “displaced the Planning Commission” and, as a result, is ultra vires. Petition at ¶¶ 32-36. These arguments go beyond the authority of this Court in considering an appeal pursuant to S.C. Code Ann. § 6-29-930.

CONCLUSION

Trinitas respectfully requests an order dismissing the Appeal filed by Appellant University Hill Neighborhood Association on July 23, 2020. For the reasons stated above, the Court lacks jurisdiction over the subject matter of the DDRC’s Site Plan Approval Decision because Appellant failed to timely appeal from that decision pursuant to S.C. Code Ann. § 6-29-900(A) (2003), which is a jurisdictional prerequisite, Appellant lacks standing to appeal either on its own or on behalf of its members, and Appellant has failed to state a claim under the applicable statute, S.C. Code Ann. § 6-29-930. The Appeal should be dismissed in its entirety with prejudice.

Respectfully submitted,

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Attorneys for Trinitas Ventures LLC

August 24, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

C/A NO.: 2020-CP-40-03475

University Hill Neighborhood Association,

Plaintiff,

v.

City of Columbia, City of Columbia Design
and Development Review Committee, and
Trinitas Ventures, LLC,

Defendants.

**MOTION TO DISMISS ON BEHALF
OF CITY OF COLUMBIA
DESIGN/DEVELOPMENT REVIEW
COMMISSION**

YOU WILL PLEASE TAKE NOTICE that the Defendant City of Columbia Design/Development Review Commission (hereinafter “Respondent”), through its undersigned counsel, will move for an Order dismissing Plaintiff’s Complaint, in whole or in part, because: (1) the portion of this appeal pertaining to site plan approval was not timely filed; (2) this court is without subject matter jurisdiction to hear certain issues raised in this appeal; and, (3) the Plaintiff lacks standing.

INTRODUCTION

This action is an appeal from the Respondent’s decisions granting (1) site plan approval for new construction; and (2) a certificate of design approval for new construction. The Respondent granted site plan approval to Respondent Trinitas Ventures, LLC (hereinafter “Trinitas”), at the conclusion of a public hearing on March 12, 2020. The Respondent approved Trinitas’s request for a certificate of design approval at a hearing on July 9, 2020.

Plaintiff states its appeal has two parts; the first part involves an appeal from the Respondent’s decision to grant the certificate of design approval, and the second part involves the alleged *ultra vires* nature of the Respondent’s power to grant site plan approval.

The first part of the appeal is brought pursuant to S.C. Code Ann. § 6-29-900(A) which provides for an appeal to the circuit court by a “person who may have a substantial interest in any decision of the board of architectural review” S.C. Code Ann. § 6-29-900(A) (Supp. 2019). Plaintiff alleges the decision to grant the certificate of design approval was incorrect as a matter of law because it was based on mistakes of law and insufficient evidence.

The second part of the appeal takes issue with the Columbia City Council’s legislative decision to provide for site plan review of certain projects to be heard and decided by the Respondent. Plaintiff alleges that site plan review by the Respondent is *ultra vires* because it conflicts with language in the South Carolina Local Government Comprehensive Planning Enabling Act. Plaintiff also alleges the Respondent committed a mistake of law in administering the site plan review to reach its decision to grant approval of the site plan.

**PLAINTIFF DID NOT TIMELY FILE ITS APPEAL FROM THE DECISION
GRANTING SITE PLAN APPROVAL**

An appeal by a “person who may have a substantial interest in any decision of the board of architectural review . . . must [file an appeal] within thirty days after the affected party receives actual notice of the decision of the board of architectural review.” *Id.*

The Respondent held a public hearing on March 12, 2020, concerning Trinitas’s request for site plan approval. At the hearing on this matter, among numerous persons who spoke in favor of or in opposition to the site plan approval was John McGill, the treasurer of the University Hill Neighborhood Association. Mr. McGill stated he lives “in the neighborhood” on Pendleton Street. Mr. McGill addressed parking concerns and his skepticism of the reliability of the traffic study submitted by Trinitas.

At the conclusion of the hearing, the Respondent voted 5-1 in favor of a motion to approve the site plan. Plaintiff had actual notice of the Respondent’s decision on March 12,

2020, at the conclusion of the hearing on the site plan review. Plaintiff was required to file its appeal with the clerk of court within 30 days from March 12, 2020. Plaintiff did not file its appeal until July 23, 2020. Therefore, Plaintiff's appeal concerning the site plan decision was not timely and the issues raised by Plaintiff concerning the *ultra vires* nature of the Respondent's action and the Respondent's administration of site plan review should be dismissed. *See Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361 (Ct. App. 2005) (holding an appeal was untimely where the appellant failed to file an appeal within 30 days after receiving actual notice of the decision of the board of architectural review).

**THIS COURT IS WITHOUT SUBJECT MATTER JURISDICTION TO HEAR AND
DECIDE ANY ISSUES OUTSIDE OF THOSE DECIDED BY THE
DESIGN/DEVELOPMENT REVIEW COMMISSION**

In the second portion of its appeal, the Plaintiff argues that the shifting of site plan review to the Respondent is *ultra vires* because it conflicts with the South Carolina Local Government Comprehensive Planning Enabling Act. This Court is without subject matter jurisdiction to consider this issue.

The Respondent is a board of architectural review authorized pursuant to S.C. Code Ann. § 6-29-870. The enabling statutes give the DDRC the power to administer ordinances designed to preserve and protect "historic and architecturally valuable districts and neighborhoods . . . for the unique, special, or desired character of a defined district . . . by means of restriction and conditions governing the right to erect, demolish, remove in whole or in part, or alter the exterior appearance of all buildings or structures within the areas" *Id.*; *see also* S.C. Code Ann. § 6-29-880 (giving an architectural board "those powers involving the structures and neighborhoods as may be determined by the zoning ordinance"). A statutorily-created board has only those

powers expressly conferred by statute or necessarily implied. *Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1991).

Section 17-653(b)(8) of the City Code grants the Respondent the duty to administer the design guidelines for different protection areas. In this case, the Respondent was administering the guidelines applicable to the –DD area (Design/Development District). *See* City Code § 17-655(b); § 17-231. “Development within the –DD area must comply with design guidelines set forth in this Code and in the publication “City Center Design/Development Guidelines, Final Report, September 1, 1998” City Code § 17-253. These guidelines were adopted by City Council and are made a material part of the –DD are designation. *See* City Code § 17-654(b). The City Center Design/Development Guidelines (hereinafter “Guidelines”) place the responsibility for site plan review with the Respondent. *See* Guidelines § 3.5.4.

In an appeal from a decision of an architectural board, this Court is without subject matter jurisdiction to hear and decide any issues outside of those specifically within the Respondent’s authority to hear. Section 6-29-930(A) provides that “the court must determine **only** whether the **decision** of the board is correct as a matter of law.” S.C. Code Ann. § 6-29-930(A) (Supp. 2019) (emphasis added). Plaintiff is seeking relief from this court that is not authorized by the statute governing appeals from architectural boards. The Respondent’s decision addresses only the application of the zoning ordinance and the Guidelines. The decision does not address any issues regarding the Respondent’s ability to hear site plan reviews. Therefore, this court is limited to determining only whether the Respondent’s decision is correct as to the granting of site plan approval based on the application of the zoning ordinance and the Guidelines.

Plaintiff’s Complaint raises issues that were not part of the Respondent’s decision, and which were not within the Respondent’s limited jurisdiction. This Court is without jurisdiction

to hear and decide matters outside of the decision of the board. *See Norton v. City of Danville*, 602 S.E.2d 126 (Va. 2004) (holding, under similar statutory scheme, that judicial review of board decisions is limited, and a court is not authorized to rule on issues other than the board's specific decision).

The Respondent's powers in this case were limited to those granted to them by the Guidelines via City Council. Pursuant to this authority, the Respondent heard and decided Trinitas's application for site plan review. The Respondent did not decide whether it was the proper entity to perform the site plan review. The Respondent was without power or authority to make any determinations or rule on whether it was the proper entity to perform the site plan review for this project.

Therefore, this Court should dismiss any claims which assert the Respondent exceeded its authority to administer the site plan review.

THE PLAINTIFF LACKS STANDING TO PURSUE THIS APPEAL

For the reasons stated in Trinitas Ventures, LLC's motion to dismiss this appeal, filed August 24, 2020, the Respondent also asserts the Plaintiff lacks standing to bring this appeal and moves to dismiss this appeal based on lack of standing. The Respondent incorporates herein the arguments asserted by Trinitas Ventures, LLC, in its motion to dismiss this appeal regarding the Plaintiff's lack of standing.

**INCORPORATION HEREIN OF ADDITIONAL GROUNDS FOR DISMISSAL AS
STATED BY OTHER RESPONDENTS/DEFENDANTS IN THIS MATTER**

To the extent applicable, and not inconsistent with any arguments made herein, the Respondent incorporates herein any other grounds for dismissal of all or any portion of this

appeal as stated by any other Respondent/Defendant, whether raised by motion or in a responsive pleading in this matter.

Respectfully Submitted,

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August 24, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	C/A NO.: 2020-CP-40-03475
	)	
University Hill Neighborhood	)	
Association,	)	
	)	CITY OF COLUMBIA'S MOTION TO
Plaintiff,	)	DISMISS PURSUANT TO RULE 12(b)(6)
	)	
vs.	)	
	)	
	)	
City of Columbia, City of Columbia	)	
Design and Development Review	)	
Committee, and Trinitas Ventures,	)	
LLC,	)	
Defendants.	)	

PLEASE TAKE NOTICE that ten days after service thereof, or as soon thereafter as counsel may be heard, the Defendant City of Columbia ("City"), will move before the Presiding Judge of the Court of Common Pleas, Fifth Judicial Circuit, Richland County, to dismiss Plaintiff's cause(s) of action against the City pursuant to Rule 12(b)(6), SCRPC. The grounds for this Motion are listed below.

1. The City respectfully asks this Court to dismiss Plaintiff's claims against the City because there is no private right of action under S.C. Code Ann. § 6-29-1150(A).
2. The City respectfully asks this Court to dismiss Plaintiff's claims against the City because Plaintiff fails to set forth facts sufficient to establish associational standing.
3. To the extent Plaintiff claims that the City must defend the decision of the Columbia Design and Development Review Commission ("DDRC"), the City is not a proper party as it relates to an appeal of a DDRC decision.

For these reasons, which will be more fully argued in a subsequent memorandum in support and oral argument, the City respectfully requests that this Court dismiss all causes of

action against the City for failure to state a claim that entitles Plaintiff to relief as against the City.

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August 24, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

University Hill Neighborhood Association,

Plaintiff,

v.

City of Columbia, City of Columbia Design
and Development Review Committee, and
Trinitas Ventures, LLC,

Defendant.

C/A No.: 2020-CP-40-03475

BRIEF OF PLAINTIFF/APPELLANT

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STATEMENT OF THE CASE

1. PARTIES

This appeal involves two decisions by the City of Columbia Design and Development Review Commission (DDRC) that granted final approvals for the construction of “Trinitas,” an eight-story, 750 feet tall apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) DDRC, a “Board of Architectural Review” established pursuant to S.C. Code §§ 6-29-880 et seq. and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), the real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein.

Plaintiff University Hill Neighborhood Association (Association) is an unincorporated association. The boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic districts in Columbia. One is a local City of Columbia Historical District; the other is a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This local district is “identified as Architectural District No. 1” and is “bounded by Laurens, Senate, Henderson and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District, named University Neighborhood Historic District, by the National Register of Historic Districts. U.S. Dept. of the Interior, National Park Service, certified Aug. 8, 2004.

2. PROCEDURAL HISTORY

The DDRC conducted four public hearings to address the initial application and subsequent revised applications for design approval and for site plan approval filed by Trinitas. At the regular January 2020 public hearing, both applications were denied. (Exhibit 6, at pp. 43–46, filed as Supplement to Record on Appeal by DDRC, Apr. 20, 2021 [hereinafter Supplement to Record]. (See Appendix for Contents of Record) Subsequently, these denials were rescinded at a special called meeting on February 7. (Supplement to Record, Exhibit 7, at pp. 15–16). At the regular March hearing, the DDRC granted site plan approval for the project (Supplement to Record, Exhibit 8, at pp. 76–77). Design approval was granted by the DDRC at the regular July public hearing (Supplement to Record, Exhibit 10, at pp. 18–19).

In addition to these four public hearings, the DDRC conducted a “work session” on the design approval on June 10, 2020 (*See* Supplement to Record, Exhibit 9).

On July 23, 2020, the Association filed a complaint/appeal in Circuit Court. The DDRC, Trinitas, and the City each filed an answer and a Motion to Dismiss. The motions to dismiss were denied. (Order filed Oct. 7, 2020) The denial of these motions was appealed. The Court of Appeals dismissed the appeal on the ground that the order was not immediately appealable. (Appellate Case No. 2020-001586, Order filed Jan. 14, 2021).

3. FACTS

The site for the proposed Trinitas apartment building is within an “overlay” district within the City of Columbia. Overlay districts are explicitly permitted under Section 6-29-720(C)(5) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 [hereinafter Enabling Act], which describes an overlay zone as a district that “*imposes* a set of requirements *or*

relaxes a set of requirements by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. . . .” (emphasis added).

The overlay district herein is termed the “City Center Design/Development District of Columbia, South Carolina” and is referred to as “-DD area” in Sections 17-253 and 17-655(b)(2) of the Columbia City Code.¹ As indicated in Argument Three below, an overlay district like the -DD area is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists.

The City Council of Columbia did not adopt a zoning ordinance to govern decisions in the -DD area. Instead, it simply adopted a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [*Guidelines*].² This result was accomplished by adopting the *Guidelines* by reference in Columbia City Code § 17-253 (referring to “City Center Design/Development Guidelines”) and § 17-655(b)(2) (referring to “requirement set forth in design guidelines adopted by the city council”).

This approach was chosen even though the *Guidelines*: (1) were prepared by planning experts to guide the drafting of an ordinance, and (2) explicitly state that the *Guidelines* are “non-binding” and are not meant to serve as an ordinance. Instead, as noted in Section 3.5.2, “*It is through the Zoning Ordinance that the Design Development Guidelines will be implemented. . . .*”

¹ The Parties have filed a “Joint Stipulation Regarding City of Columbia Ordinances.” [“Joint Stipulation”] Exhibit A of the Joint Stipulation contains selected portions of the City of Columbia Code of Ordinances, Chapter 17, Planning, Land Development and Zoning. (See Appendix for Contents of Record)

² See Exhibit B to Joint Stipulation, *supra* note 1.

(emphasis added) As an example of this process, in discussing “Building Heights” at page 5-2, the *Guidelines* state: “This section provides *non-binding* general direction for development within City Center, with the recommendation that the *City’s regulatory plans and codes be amended* to reflect the guidance included here.” (emphasis added).

As a result of this use of a planning guide as an ordinance, design in the -DD area is based on precatory terms like “non-binding” and “should” rather than mandatory terms like “must” and “shall.” For example, Section 5.1 of the *Guidelines*, which addresses the design of private development in the -DD overlay district, states: “The guidelines in this chapter are *illustrative rather than prescriptive*.” (emphasis added)

4. SUMMARY OF ARGUMENTS

It is important to distinguish among the Association’s three distinct challenges to the approvals of the Trinitas project. Argument One of this appeal concerns provisions of the *Guidelines* that require “site plan review” within the -DD area to be done by the DDRC rather than the City of Columbia Planning Commission. The site plan review part of the Complaint: (1) asserts that the shifting by the City of the site plan review to the DDRC was *ultra vires*, and (2) relies on the general jurisdiction of the Circuit Court. Thus, it is not governed by the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A).

Argument Two asserts that, because the *Guidelines* were intended to guide the drafting of an ordinance rather than to serve as an ordinance, the adoption of the non-binding *Guidelines* as the ordinance was an unlawful delegation of the legislative power of the City of Columbia. Jurisdiction on this claim is based on the general jurisdiction of the Circuit Court.

The site plan review claim and the unlawful delegation claim were combined with the appeal pursuant to Section 6-29-900(A) for three reasons. First, the facts concerning all three of the Association's claims are interconnected in the record concerning the appeal of the decisions pursuant to Section 6-29-900(A). Second, combining these two claims enables Trinitas, a real party in interest in terms of the Section 6-29-900(A) appeal, to assert its interests in these two claims. Third, the Association was motivated to assert the *ultra vires* claim and the unlawful delegation claim at this point in time, rather than earlier, because there was no harm to substantial interests of the Association and its members until the DDRC approved the site plan and the design for the Trinitas project.

Argument Three involves an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. Argument Three asserts that the DDRC abused its discretion in approving the height of the Trinitas apartment building because it made a mistake of law in deciding that the height of the proposed Trinitas project should be determined by the underlying zoning rather than the -DD overlay.

Argument Four addresses the standing of the Association to bring the three challenges summarized above.

5. STANDARD OF REVIEW

The Standard of Review for Arguments One and Two involves matters of law and statutory interpretation. Therefore, the standard of review is de novo. *South Carolina Public Interest Foundation v. Calhoun County Council*, 432 S.C. 492, 854 S.E. 2d 836, 837 (2021) (“[T]he interpretation of a statute is a question of law for the Court to review de novo.”)

The Standard of Review for Argument Three is set forth in Section 6-29-930(A) of the South Carolina Code:

The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

The application of this standard of review was summarized in *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361, 362 (Ct. App. 2005) (citations omitted), as follows:

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by *committing errors of law* or bases its decision on findings of fact that are not supported by evidence. Furthermore, our standard of review of a board of architectural review's decision is the same as that of the trial court.

(emphasis added) Argument Three asserts that the DDRC abused its discretion by committing an error of law in its decision that the underlying zoning controlled the determination of the height of the building.

ARGUMENTS

1. THE AUTHORIZATION BY THE CITY OF COLUMBIA TO GRANT THE COLUMBIA DESIGN AND DEVELOPMENT REVIEW COMMISSION (DDRC) THE POWER TO CONDUCT SITE PLAN REVIEW WAS ULTRA VIRES BECAUSE THIS AUTHORIZATION CONFLICTED WITH THE MANDATORY LANGUAGE IN SECTION 6-29-1150(A) OF THE SOUTH CAROLINA CODE STATING: “THE LAND DEVELOPMENT REGULATIONS ADOPTED BY THE GOVERNING AUTHORITY MUST INCLUDE A SPECIFIC PROCEDURE FOR THE SUBMISSION AND APPROVAL OR DISAPPROVAL [OF PLANS] BY THE PLANNING COMMISSION OR DESIGNATED STAFF.”

Site Plan Review by DDRC Conflicts with the Enabling Act

Title 6, Chapter 29 of the South Carolina Code contains the Enabling Act. Article 7 (titled as “Local Planning – Local Development”) of the Enabling Act addresses land development regulation by local governments. In contrast, provisions concerning boards of architectural review like the DDRC are contained in Article 5 (“Local Planning – Zoning”) of the Enabling Act. The scope of Article 7 is very broad, largely because terms like “land development” and “subdivision” are defined very broadly. (*See* S.C. Code §§ 6-29-1110(2), –(4)).

Planning commissions play a critical role under Article 7 in all the aspects of land development. Central to their role is the power to approve, or disapprove, plans for development. The phrase “plans for development” is very inclusive because numerous terms—e.g., “sketch plans, preliminary plans, and final plans”—are used to describe the plans involved. (*See* S.C. Code § 6-29-1150)

Under the Columbia scheme of land of development regulation set forth in Article IV of Chapter 17 (“Planning, Development and Zoning”) of the City Code, the Planning Commission is charged with implementing the land development regulations. As a part of this scheme, terms like “sketch plan,” “site plan,” and “preliminary plat” are used to identify specific types of plans.

Columbia City Code § 17-464. For a category termed “Group Development,”³ a system of plan review termed “site plan review” is established. (See Columbia City Code §§ 17-464, 17-581 through § 17-589).

Section 3.5.4 of the *Guidelines* for the -DD area shifts the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC.⁴ This

³ There are three categories of “group development” set forth within the definition of “subdivision, development type” in Columbia City Code § 17-464. These are:

Group development means a development such as shopping center, office buildings, industrial sites, mobile home parks and apartment complexes where the site is not subdivided in lots, blocks and streets, but includes two or more units designed or intended for separate occupancy.

Group commercial or industrial development means a single building or combination of buildings containing 25,000 square feet of gross floor area, or two or more buildings containing a combined total of 25,000 square feet gross floor area.

Group housing development means a single lot of record upon which are erected three or more dwelling units and all the structures thereon. This definition shall include apartments, condominiums and townhouses, whether rented or sold.

⁴ Section 3.5.4 of the *Guidelines* states:

Within City Center, the D/DRC and Design/Development Review staff *will* assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

approach to site plan review is *ultra vires* because it conflicts with explicit language in Section 6-29-1150(A) of the Enabling Act, which addresses the submission of plans or plats to the planning commission. This section addresses “Submission of plan or plat to planning commission” and states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the *planning commission or designated staff*.” (emphasis added). The shifting of site plan review to the DDRC pursuant to the *Guidelines* conflicts with this clear mandate of Section 6-29-1150(A) concerning the role of the planning commission.⁵

The purpose of the Enabling Act is to enable or authorize local governments to engage in planning and regulating the use and development of land. As noted in Section 6-29-330(A) of the S.C. Code: “A municipality may exercise the powers granted *under the provisions of this chapter* in the total area within its corporate limits.” (emphasis added). The phrase “under the provisions of this chapter” indicates that the “powers granted” are both defined by and limited by the Enabling Act.

Thus, the portion of Section 6-29-1150(A) quoted above imposes an express requirement that local land development regulations “*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the planning commission or designated staff.” (emphasis added) In short, the section imposes the following two requirements: (1) There *must* be

(emphasis added). This section is one of the rare instances where the *Guidelines* use a mandatory term like “will” rather than a precatory term like “should.”

⁵ When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the DDRC stated that the question of the validity of the grant of this power is “out of our hands.” (Supplement to Record, Exhibit 8, at pp.14–16).

a system for approval or disapproval of plans and plats; and (2) this system *must* be undertaken by the planning commission.

The general principle for applying an enabling act was stated by the Rhode Island Supreme Court as follows: Where a local government “purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void.” *Hardy v. Zoning Board of Review of the Town of Coventry*, 321 A.2d 289, 290–29 (R.I. 1974).

The South Carolina Supreme Court applied this principle in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2 777 (2010). At issue was the rezoning of a large parcel of land from the classification AG-15 (agricultural with minimum lot area of three acres) to PD (“planned development district”). This PD district would have 107 dwellings, which was the same number as would be allowed under AG-15. However, the minimum lot size for the PD was reduced to one acre.

Sinkler noted that Section 6-29-720(C)(4) of the Enabling Act explicitly authorizes the use of planned development schemes and quoted the following language:

“[P]lanned development district” or a development project comprised of *housing of different types and densities and of compatible commercial uses*, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development *and is characterized by a unified site design for a mixed-use development*.

690 S.E.2d at 781 (emphasis in original). *Sinkler* also quoted Section 6-29-740, which contains additional details concerning a PD district. This section provides:

In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that *will result in improved design, character, and quality of new mixed use developments* and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. *The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.*

690 S.E.2d at 779 (emphasis in original)

The Supreme Court, relying on the statutory language quoted above, held:

[T]he [zoning] ordinance [with only residential uses] did not meet the parameters for a PD. . . . [H]aving invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act.

Sinkler, 690 S.E.2d at 781, 782.

In authorizing the DDRC to undertake site plan review, the City of Columbia, like Charleston County in *Sinkler*, failed “to meet the requirements” of the Enabling Act. Consequently, this grant of power to the DDRC was *ultra vires* and is, therefore, invalid.

Remedy for Ultra Vires Act

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. *See, e.g., South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *Sinkler v. Boyd, supra* (holding circuit court properly invalidated rezoning); *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city’s decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of conveyance by Circuit Court); *City of North Charleston v. North Charleston District*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgement that certain contracts entered into by school district were *ultra vires* and, therefore, invalid).

Jurisdiction

Article V, Section 11 of the South Carolina Constitution provides: “The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law.” Because this grant of general jurisdiction supports the filing of this *ultra vires*

action in Circuit Court, it was the basis of all of the South Carolina ultra vires cases cited above, except *O'Brien v. South Carolina ORBIT*, which was filed in the original jurisdiction of the Supreme Court.

2. The Adoption of the guidelines AS AN ORDINANCE was an unlawful delegation of THE legislative power of the City of Columbia to the DDRC.

As indicated above at Part C of the Statement of the Case, the drafters of the *Guidelines* viewed the *Guidelines* as “illustrative” rather than prescriptive. *Guidelines* § 5.1 at p. 5-1. The drafters also stated that “it is not the intent of these Guidelines to establish new height standards for City Center.” *Guidelines*, § 5.3 at p. 5-3. Instead, the purpose of the *Guidelines* was to provide “non-binding general direction for development within City Center, with the recommendation that the City’s regulatory plans and codes be amended to reflect the guidance included here.” *Guidelines* § 5.3.1, at p. 5-2 (emphasis added). Thus, the intent of the *Guidelines* was that “the Design Development Guidelines will be implemented” by amending the regulatory “Zoning Ordinance.” See *Guidelines* § 3.5.2 (emphasis added)

However, despite this explicit language concerning the need for “regulatory plans and codes” in a “Zoning Ordinance,” the City Council chose to bypass the necessary steps of drafting and adopting an ordinance. Instead, the Council simply adopted the non-binding *Guidelines* as the ordinance. As indicated above in Part 3 of the Statement of the Case, this outcome was achieved by adopting the *Guidelines* by reference. See Columbia City Code §§ 17-253, 17-655(b)(1). As a result of this approach, the DDRC and its staff have been authorized to apply a scheme of “illustrative” “non-binding” guidelines. Such an open-ended authorization constitutes an improper delegation of the City’s legislative power.

A. Unlawful Delegation

The framework for addressing issues of unlawful delegation of legislative power is set forth in *South Carolina State Highway Department v. Harbin*, 86 S.E.2d 466 (S.C. 1955), which held that a provision of the statute authorizing the highway department to suspend or revoke a driver's license "*for any cause satisfactory to*" the department was an unconstitutional delegation of legislative power. *Id.* at 468 (emphasis added).

Harbin summarized the principles concerning delegation of legislative power to an administrative agency as follows:

The question of delegation of legislative power has confronted the courts with many perplexing problems, particularly during recent years when the complexities of government have been constantly on the increase. It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board "to fill up the details" by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. "However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a property regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration."

Id. at 470 (authorities deleted)

The Court's conclusion concerning the unconstitutionality of the delegation involved in *Hardin* was stated as follows:

When the authority of the State Highway Department to suspend or revoke a license for any cause which it deems satisfactory is considered in the light of the foregoing principles, said provision must be declared invalid as an unlawful delegation of legislative power. *It sets up no standard to guide the Department and contains no limitations.* As a general rule, "A statute which in effect reposes *an absolute, unregulated, an undefined discretion* in an administrative body bestows arbitrary powers and is an *unlawful delegation of legislative powers*. We have held invalid municipal ordinances attempting to vest such arbitrary powers in municipal authorities."

Id. at 370–71 (emphasis added) (authorities deleted).

In the regulation of land use, the unlawful delegation concern can also be expressed in terms of due process. For example, *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 516 S.E.2d 442, 445 (1999), stated: "When deciding whether to grant a variance, a local board must be *guided by standards which are specific* in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939)." (emphasis added) Because the ordinance at issue was sufficiently specific, the decision at issue in *Restaurant Row Associates* was upheld.

The cited case of *Schloss Poster Advertising Co.* involved an ordinance providing as follows: "Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the city of Rock Hill without having

first obtained from the city council a permit to do so.” In effect, the City Council had delegated to itself an unrestrained power to grant or deny permits to construct billboards. In holding that this “delegation” was unconstitutional, the Court noted:

The ordinance before us is in no sense a zoning ordinance as provided in Sections 7390-7398, Code 1932, nor does it prescribe rules or conditions for the issuance of permits for the erection of billboards to which all persons similarly situated may conform. *It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them,* the right and power to absolutely prohibit the use of property for the erection of billboards.

The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes no uniform rule upon which the special permission is to be granted.

2 S.E.2d at 394 (emphasis added).

Application of the Precatory, Illustrative, Non-binding *Guidelines* by the DDRC

In an email to Thomas Gottshall, the President of the University Hill Neighborhood Association, concerning the application of the *Guidelines*, Lucinda Statler, the Principal Planner/Urban Design for the City, stressed that Section 5.3.1 of the *Guidelines* stated: “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center. . . .” (emphasis in original)

In this email, Ms. Statler described the decision-making process of the DDRC and its staff as follows:

There are 17 pages of guidelines that pertain to new construction that are considered. The staff evaluations and the DDRC's decisions are based on the *overall determination* as to whether a project *substantially meets*—or does not meet—the design guidelines. This means that there are likely areas where the project may not be exactly what is recommended, and other areas where they meet and exceed what is recommended. It is an *overall assessment* of the project and of course, there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision, rather than only staff. *In the almost 14 years that I have served as staff to this Commission, I would be hard pressed to think of a project that met every single guideline.* This would be unattainable for most projects, as there are many factors that determine a development's feasibility. The design review process is built to provide some flexibility in this balancing act.

(Exhibit 1 to Complaint (emphasis added))

This “overall assessment - overall determination - substantially meets - cannot meet every single guideline” approach of “general direction” to “non-binding guidelines,” is, in effect, a “we know it when we see it” test. Such a test is contrary to the holding of *Harbin* because it sets up “no standard to guide [decisions] . . . and contains no limitations.” As in the ordinance in *Schloss Poster Advertising Co.*, the *Guidelines* do “not profess to prescribe regulations.”

As a result of this approach, there is neither a meaningful standard to guide the exercise of discretion nor a framework to provide a workable regulatory framework for judicial review of the

exercise of discretion. For example, even though there has never been a “project that met every single guideline,” the *Guidelines* contain no standards to guide the DDRC in assessing whether and how much guidelines can be waived or softened in deciding whether a project “substantially meets” the design guidelines.

If there are no meaningful standards or limits, reliance on the “Commission making the decision” does not resolve the problem of improper delegation. There is no reason to simply assume that the Commission possesses the extreme wisdom necessary for such unlimited discretion. The treatment of the Trinitas project illustrates the human fallibility of the Commission. At the January 9, 2020, meeting the Commission rejected the staff recommendation of approval with restrictions and voted to deny the requests for design approval and for site plan approval of the Trinitas project. Subsequently, a special meeting was called for February 7 to receive legal advice and to consider rescinding the January denials of approval. At the February 7 meeting, the Commission went into executive session to receive legal advice relating to a pending, threatened, or potential claim. The Commission then moved out of executive session and moved to rescind its own decision to deny design approval and site plan approval.

The lack of any meaningful standard to limit and structure discretion is reflected in the following comments by Lyndey Bryant, counsel for Trinitas, at the March 21, 2020, DDRC Hearing:

As to building height, the guidelines clearly express a *nonbinding general direction* for buildings within the city center expressly recognizing that zoning ordinances are the primary legal vehicle for expressing regulations concerning the height of building. Although there is a recommendation that buildings not exceed five stories,

there is a specific preference in the guidelines at Section 5.3.1, which says, low profile office buildings, commercial buildings and residences will not yield the density, urban scale and character which is desired for the city center and should therefore be discouraged. *In other words, the opposite proposition also holds true.*

(Supplement to Record, Exhibit 8, at pp. 47–48 (emphasis added)). At this hearing, Ms. Bryant also noted: “The guidelines are illustrative rather than prescriptive, and do not set forth detailed or rigid standards.” (Supplement to Record, Exhibit 8, at p. 41) This assessment of the contradictory, standardless nature of the *Guidelines* by counsel for Trinitas is virtually the same as the claim of the Association that the City Council has delegated its legislative power to the DDRC.

Because “the opposite proposition also holds true,” the nonbinding height guidelines in the *Guidelines* are not sufficiently “specific . . . to prevent the ordinance from being invalid and arbitrary.” Because the *Guidelines* do not bind the DDRC in any meaningful way, the “overall determination”—“substantially meets” approach is virtually the same as the legislative authorization in *Harbin* to suspend or revoke a license “for any cause satisfactory to” the Highway Department. Because this approach “does not profess to prescribe regulations,” it must rely on the standardless application of non-binding standards. Thus, it is effectively the same as the ordinance in *Schloss Poster Advertising Co., supra*, granting the Rock Hill City Council the power to decide who could erect billboards without any standard to limit the exercise of the Council’s discretion.

3. THE DDRC ABUSED ITS DISCRETION BY MAKING A MISTAKE OF LAW IN DECIDING THAT THE HEIGHT OF THE PROPOSED BUILDING WAS DETERMINED BY THE UNDERLYING ZONING RATHER THAN THE -DD OVERLAY.

A. The DDRC interpretation of the height restrictions in the *Guidelines*

Chapter 5 of the *Guidelines* contains the “Guidelines for Private Development.” The Introduction to this chapter notes:

The key emphasis of the guidelines in the chapter is to reinforce the exiting fabric of City Center by ensuring that new projects are developed within the rhythm of the existing development pattern. *This “contextual” approach* to evaluating the design of new projects is *fundamental to the implementation* of the *Guidelines*.

(emphasis added) Thus, the *Guidelines* view context approach as fundamental to design review.

Where height is concerned, Section 5.3.1 of the *Guidelines* states:

As a general rule, and consistent with current zoning provisions, buildings within most of City Center should be *no more than five stories*. . . . [I]t is not the intent of these Guidelines to establish new height standards for development in City Center. It is, however, *critical* that in applying these Guidelines—as well as other development regulations—the City be consistent in considering the height of proposed structures as they relate to the *adjacent development context*.

(emphasis added)

The DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, even though the “contextual approach” to evaluating the design of new projects is “*critical*” and “*fundamental*” to the implementation of the *Guidelines*, the decision was based

on a legal misinterpretation by the staff of the DDRC that the contextual approach of the *Guidelines* did not regulate the height of the building. The basis of this interpretation was set forth in an email from Lucinda Statler (the City’s Principal Planner/Urban Design) to Thomas Gottshall, President of the University Hill Neighborhood Association. (See Exhibit 1 to Complaint) Part of this email states:

The DDRC makes decisions as to whether a project meets or does not meet the design guidelines, which are qualitative measures for evaluating projects within the City Center Design District. The underlying [C-3, General Commercial Use] zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the [underlying C-3 General Commercial Use] zoning, the [C-3] zoning prevails. Please refer to Section 5.3.1 *Building Heights*, in the City Center Design Guidelines. “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center”

(emphasis in original) This same interpretation was adopted in the *Staff Report* for the July 2020 meeting. This report states: “The building height and mass remain the same [as earlier versions of the proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance.”

In addition, at the June 10, 2020, “work session,” the Staff of the DDRC stated that it wanted to “ensure that we all understand that the DDRC can’t require a reduction in the allowable height or the allowable building envelope that’s permitted by zoning.” The Chairman of the DDRC

replied to this statement as follows: “Right. And I appreciate that. Understand that.” (Supplement to Record, Exhibit 9, at pp. 69–70.).

The DDRC interpretation was a mistake of law.

The DDRC interpretation was a mistake of law for four reasons. First, it is contrary to provisions in the Enabling Act and the Columbia City Code concerning the approach to conflicts between requirements. Second, the DDRC analysis is contrary to the treatment of “vested rights” in the Columbia City Code. Third, the interpretation ignores the explicit intent in the *Guidelines* concerning the role of the *Guidelines*. Fourth, the DDRC interpretation that the height restrictions are determined by the underlying zoning, rather than the -DD overlay, is fallacious. Fifth, the DDRC interpretation conflicts with the Enabling Act and with the treatment of overlay districts by the courts.

The DDRC interpretation of the *Guidelines* is contrary to provisions in the Enabling Act and in the Columbia Zoning Code concerning conflicts between requirements.

The Commission’s reliance on the staff’s interpretation was a mistake of law because the interpretation conflicts with provisions in the Enabling Act and in the Columbia City Code concerning conflicts between requirements.

Section 6-29-960 of the Enabling Act states the following approach to be used when requirements conflict:

When the regulations made under the authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other more restrictive standards than are required in or

under another statute, or local ordinance or regulation, the regulations made under authority of this chapter govern. When the provisions of another statute require more restrictive standards than are required by the regulations made under authority of this chapter, the provisions of that statute govern.

Section 17-181 of the Columbia City Code states:

Within each district, the regulations set forth by this article shall apply uniformly to each class or kind of structure or land. In their interpretation and application, the provisions of this article shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. *Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that imposing the higher standards, shall govern.* Unless deed restrictions, covenants or other contracts directly involve the city as a party in interest, the city shall have no administrative responsibility for enforcing such deed restrictions or covenants.

(emphasis added)

Article V of the Columbia City Code addresses “Historic Preservation and Architectural Review.” Section 17-675 contains the following specific provision concerning conflicts in requirements where design review is involved:

The most restrictive regulations of the zoning ordinance or any other ordinance of the city or those included in this division shall prevail. However, if the commission finds it desirable to impose less restrictive requirements than the zoning ordinance,

such deviation shall be referred to the zoning board of adjustment for review as a special exception.

The *Guidelines* provide two standards for determining the permissible height of a building. First, the *Guidelines* adopt “a general rule [that] . . . buildings within most of the City Center should be no more than five stories.” *Guidelines* § 5.3.1 Second, indicated at Part A of this Argument, the *Guidelines* note that a “contextual approach is fundamental to the implementation of the Guidelines” and that this approach is “critical that in applying these Guidelines . . . the City be consistent in considering the height of proposed structures as they relate to the adjacent development context.” The adjacent development is mostly one, two, and three story buildings.⁶ The only exception to this pattern is a hotel, which is: (1) across a wide, very busy street and (2) is outside the -DD district.⁷ Based on these two quantitative measures of adjacent development, the maximum height would either be three stories or five stories.

These two *Guidelines* standards for determining height are more restrictive than the underlying zoning of 75 feet. Given the requirements that the “more restrictive” standards shall govern, the more restrictive *Guideline* approach should have determined the height rather than the less restrictive underlying zoning.

⁶ See “Analysis of Application of Certificate of Design Approval for Trinitas,” Record, Exhibit 3, at pp. 50, 135.

⁷ *Id.*

The DDRC analysis of “vested rights” conflicts with the approach to vested rights in the Columbia Zoning Code.

To the extent that the staff interpretation relies on the concept of “vested rights,” the interpretation conflicts with the definition of vested rights in Columbia City Code, Section 17-2(a). This section states: “A vested right is triggered only upon the approval or conditional approval of a site specific development plan.” Section 17-1(b) defines a “site specific development plan” as follows: “Site specific development plan means those documents that comprise a complete application for a zoning permit, certificate of zoning compliance, variance, special exception, planned unit development, sketch plat or plan, or other similar approval that authorizes the developer or landowner to proceed with investment in grading, installation of utilities, streets and other infrastructure, and to undertake other significant expenditures necessary to prepare for application for a building permit.” An underlying zoning classification of C-3 zoning does not satisfy this definition of site-specific development plan.

The DDRC interpretation ignores the explicit intent of the *Guidelines* concerning the role of the *Guidelines*

As indicated above in Part 3 of the Statement of the Case, Section 5.3 states that the intent was not to establish new height standards in the *Guidelines*. Instead, the intent of the *Guidelines* was for the City to undertake a process so that “the City’s regulatory plans and codes [would] be amended to reflect the guidance included” in the *Guidelines*. The interpretation of the DDRC ignores this explicit statement of intent in the *Guidelines*.

As a result, the DDRC interpretation completely distorts the role of the underlying zoning in relation to the -DD overlay. If the intent of the *Guidelines* had been followed, there would have

been “regulatory plans and codes . . . to reflect the guidance” in the *Guidelines*. However, the City chose not to follow this explicit intent expressed in the *Guidelines*.

The DDRC interpretation is fallacious.

Another problem with the interpretation concerning height adopted by the DDRC is that the “logic” of the argument makes *all* the guidelines meaningless. Statler’s email states: “When the design guidelines seem to conflict with the [underlying] zoning, the zoning prevails.” If this general statement is valid, imposing any of the *Guidelines* would be impermissible because the underlying C-3 zoning does not have any limits on such concerns as façade proportion and rhythm, proportion of openings, horizontal rhythms, alignment of architectural elements, wall articulation, roofs, and upper story details. *See* Chapter 5 of the *Guidelines*.

The distinction between “qualitative measures” and “quantitative measures” in the Statler email has two flaws. First, the email does not provide a reason for regarding the distinction as relevant to the question of whether the *Guidelines* or the underlying zoning should determine height. Second, the *Guidelines* contain quantitative measures for concerns other than height. For example, Section 5.3.3 address “Proportion of Openings” as follows:

Maintain the predominant difference between upper story openings and street level storefront openings (windows and doors). Usually, there is a much greater window area (*70 percent*) at the storefront level for pedestrians to have a better view of the merchandise displayed behind as opposed to upper stories which have smaller window openings (*40 percent*).

Whenever an infill building is proposed between two adjacent commercial structures, the characteristic rhythm, proportion and spacing of existing door and window openings should be maintained.

(emphasis added) Despite the quantitative nature of this guideline, the DDRC uses it rather than the underlying zoning to address the proportion of openings.

The DDRC interpretation conflicts with the Enabling Act and with doctrine concerning overlay districts.

As indicated above at Part C of the Statement of the Case, an overlay is described in Section 6-29-720(C)(5) of the Enabling Act as a district that “*imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district.*” (emphasis added) It is clear from the content of the *Guidelines* that the *Guidelines* are meant to impose requirements, not relax them. The legal interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay like that involved herein and the underlying zoning backwards. The -DD design overlay involved herein is adopted to *increase* requirements by imposing *additional* requirements. If the underlying zoning will control where there is a conflict, there is no reason to bother with the time and expense of applying the increased requirements of the overlay.

The general treatment of overlays in land use regulation parallels the language of S.C. Code § 6-29-720(C)(5). For example, John R. Nolan & Patricia E. Sallcin, *Land Use in a Nutshell* 218 (2006) describes an overlay as follows:

Overlay zoning is a flexible zoning technique that allows a municipality either to encourage or to discourage development in certain areas. An overlay zone is defined as a mapped overlay district superimposed on one or more established

zoning districts. *A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements.*

(emphasis added)

South Carolina follows this approach of “two sets of zoning requirements” in overlay cases. For example, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) involved an “Airport Overlay District” (AO) which, among other things, restricted certain uses and expansions within the AO District. The church claimed it was entitled to a building permit for a proposed expansion because: (1) an earlier permit included the expansion;⁸ and (2) an incorrect approach had been used in determining whether the expansion would increase the “occupant load” of the church’s property. “Occupant load” in the area within the AO District was important because of a concern for a high potential for accidents affecting the public areas near a military airport. The defendants rejected both of the church’s claims.

The church appealed, and a master-in-equity ruled in favor of the church. The Court of Appeals reversed the decision of the master-in-equity. In terms of the “occupant load” concern of the AO District, the Court held “the evidence in the record clearly supports the Planning Commission’s finding that the [proposed] fellowship hall would increase the occupant load for the site.” 828 S.E.2d at 241. In reaching this decision, the Court followed the general principle that,

⁸ In an opinion filed on September 16, 2020, the South Carolina Supreme Court reversed the decision of the Court of Appeals and held that the earlier permit included the expansion. *Grays Hill Baptist Church v. Beaufort County*, 431 S.C. 630, 850 S.E.2d 29 (2020). The Supreme Court did not address the overlay issue because “our determination concerning the validity of the original permit resolves this case” *Id.* at 850 S.E.2d 32, fn. 8.

where an overlay imposes additional requirements, those additional requirements supplement or replace the underlying zoning.

Heilker v. Zoning Board of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) involved the application of a “Highway Corridor Overlay Zoning” scheme adopted by the City of Beaufort. The overlay was concerned with the protection and promotion of aesthetics and safety and contained new restrictions concerning the outdoor display of certain types of merchandise in the “Highway Corridor” district. The central issue in the case was whether the outdoor displays at issue were: (1) part of the “use” of the land for retail sale, or (2) merely an “activity or practice” incidental to the “use.” If the display was a use, the overlay did not apply; if it was an activity or practice, the restrictions of the overlay applied.

The Zoning Board of Appeals (ZBA) ruled that it was a practice, and Heilker appealed. A special judge reversed the ZBA’s finding, and the Court of Appeals reversed the special judge. *Heilker* adopted the same approach as *Grays Hill Baptist Church* and held that, where an overlay applied, the restrictions in the overlay supersede the underlying zoning.

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the height requirements in the *Guidelines*. (See Part B-1 of this Argument for discussion of height requirement in the *Guidelines*.) As a result, the DDRC failed to follow the general rule of making the parcel within the overlay district “simultaneously subject to two sets of zoning regulations.” This error of law constitutes an abuse of discretion.

4. The University Hill Neighborhood Association **HAS STANDING**

A. Associational Standing

1. Doctrine

The doctrine of associational standing was recently summarized by the Supreme Court as follows:

[A]n organization has associational standing to bring suit on behalf of its members when (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Preservation Society of Charleston v. South Carolina Dep't of Health & Env'tl. Control, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020)

The associations in *Preservation Society* were:

[seeking] a contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston. Petitioners maintain they have standing to see this hearing as "affected persons" under section 44-1-60 (G) of the South Carolina Code (2018). The ALC concluded Petitioners did not have standing and granted summary judgment to Respondents.

Id. at 483.

The decision focused on the first standing requirement—i.e., on whether any member of the petitioning organizations had standing “as individuals under the statutory term of” affected persons. In addressing this issue, the Court noted:

Petitioners are community and neighborhood organizations comprised primarily of members who own property near the proposed passenger cruise facility. . . . [T]he court of appeals acknowledged Petitioners presented affidavits from individual members expressing concern over their reduced quality of life arising from the effects upon them *individually*, such as pollution and health effects, traffic congestion, property values, effects on their businesses in the area, and effects on the historical integrity of the area where they resided. . . . Nevertheless, the court of appeals, relying on *Carnival Corp.*, agreed with the ALC that the claims of possible environmental and personal harm were purely speculative or were merely generalized grievances equally affecting the public as a whole.

Id. at 488.

The Supreme Court concluded that the associations’ “allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative.” *Id.* at 489. The proximity of the members of the associations to the terminal involved play a role in this conclusion. The court noted:

While geographic proximity may not be a determinative factor in every case, it is highly relevant to our analysis in this case. Here members would suffer the

environmental consequences Petitioners allege the project will create, such as breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution.

Id. at 489–90.

Statutory Standing—“Substantial Interest”

Section 6-29-900(A) of the Enabling Act addresses standing to appeal from a design decision by an architectural review board as follows: “A person who may have a *substantial interest* in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court” (emphasis added)

Citizens for Quality Rural Living, Ins., v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (S.C. Ct. App. 2019) addressed the issue of standing in the context of an appeal from a decision by a planning commission. The Court held that Section 6-29-1150 of the Enabling Act granted “any party in interest” a right to appeal from a decision of a planning commission. In terms of the meaning of the term “party in interest,” the court adopted the approach of *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013), which defined “a real party in interest for purposes of standing as ‘a party with a real, material, or *substantial interest* in the outcome of the litigation (quoting *Hill v. S.C. Dep’t of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E. 2d 612, 623 (2010)).” 825 S.E. 2d at 727, n.6 (emphasis added). *Citizens for Quality Rural Living* also noted that the association involved had a substantial interest, and thus standing, because “its *members include persons who own property and live in the immediate vicinity of the proposed subdivision.*” *Id.* (emphasis added)

Plaintiff University Hill Neighborhood Association is an unincorporated association. As indicated above in Part 3 of the Statement of Case, the boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic district—a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This district is “identified as Architectural District No. 1” and is “bound by Laurens, Senate, Henderson, and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic Districts. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed.

Numerous residents of the University Hill Neighborhood testified under oath at public hearings concerning the Trinitas project that: (1) they lived within the boundaries of the University Hill Neighborhood Association, and (2) they as individuals and the neighborhood area as a whole would experience substantial negative impacts from the proposed project. These testifying

residents include the following: Tom Gottshall,⁹ John McGill,¹⁰ Beth Richardson,¹¹ Catherine Fenner,¹² April Lucas,¹³ Douglas Carlisle,¹⁴ John Stucker,¹⁵ and Bobby Lyles.¹⁶

⁹ Supplemental Record, Exhibit 6, at pp. 17-20 (noting, inter alia, that the proposed project is “adjacent to our neighborhood” and that, as a result of students in the proposed projects, hundreds of students will be “moving . . . through our neighborhood at night.”; Supplemental Record, Exhibit 8, at pp. 43-46, 48-50 (noting that the project did not meet *Guidelines*, that the project “is to be marketed to students”); Supplemental Record, Exhibit 9, at pp. 9-11 (emphasizing objections to height as violating *Guidelines*). Mr. Gottschall also submitted written materials to the DDRC. *See* Record, Exhibit 1, at p. 4; Record, Exhibit 2, at p. 9; Record, Exhibit 3, at p. 46; Record, Exhibit 4, at p. 22; Record, Exhibit 5, at p. 86.

¹⁰ Supplemental Record, Exhibit 6, at pp. 23-25 (noting investment in homes in neighborhood, size of proposed building, and negative impacts of auto, bike, and pedestrian traffic).

¹¹ Supplemental Record, Exhibit 6, at pp. 25-26 (noting size of proposed building and reasons why residents of proposed project are likely to be mostly students, expressing concern for “overloading the neighborhood,” and describing significant investments in homes in the neighborhood).

¹² Supplemental Record, Exhibit 6, at pp. 26-27 (noting concern for negative impacts of students returning to campus area from Five Points late at night and concern that project will “smother our historic neighborhood”); Exhibit 8, at pp. 59-61 (referring to “people staggering home” in early hours of the day).

¹³ Supplemental Record, Exhibit 6, at pp. 27-28 (noting problems resulting from students returning from Five Points and “banging on our doors at 2:30 in the morning”).

¹⁴ Supplemental Record, Exhibit 6, at pp. 30-31 (giving reasons to believe students will reside in proposed project and describing specific problems from drunken students “who have trooped through the neighborhood”).

¹⁵ Supplemental Record, Exhibit 6, at pp. 41-43 (expressing concern for negative impact of auto and pedestrian traffic by students).

Among their concerns were an increase in vehicular and pedestrian traffic through the neighborhood. Because Trinitas is a “university centric developer,”¹⁷ it is likely that students will reside in the proposed project. As a result, pedestrian traffic from students going to and from class would flow through the neighborhood. In addition, because of topography and a railroad track, the route for these students and other young adults living in the proposed project returning from the bars in Five Points to the proposed Trinitas project would be through the University Hill neighborhood. These people “moving . . . through our neighborhood at night”¹⁸ would inevitably include some drunken and rowdy students who will, like many young people before them, engage in things like the following:

- conduct involving “damage and vandalism and just altogether bad behavior in the small hours of the morning,”¹⁹
- “people banging on our doors at 2:30 in the morning,”²⁰
- “people staggering home at” 5:00 am,²¹ and

¹⁶ Supplemental Record, Exhibit 8, at pp. 57-59 (stating that he was a resident of the Heritage and president of the homeowners’ association and expressing concern that the scale of the proposed project would “overload” the neighborhood).

¹⁷ Testimony of Linda Irving, Trinitas’s representative, Supplemental Record, Exhibit 6, at p. 29; Supplemental Record, Exhibit 8, at p. 6.

¹⁸ Testimony of Tom Gottschall, Supplemental Record, Exhibit 6, at pp. 17-20.

¹⁹ Testimony of John McGill, Supplemental Record, Exhibit 6, at pp. 23-25.

²⁰ Testimony of April Lucas, Supplemental Record, Exhibit 6, at pp. 27-28.

²¹ Testimony of Catherine Fenner, Supplemental Record, Exhibit 8, at pp. 59-61.

- students who have appeared “to be dead,” engaged in yelling and “waking me up” at 2:30 in the morning, and “urinating in my driveway.”²²

The residents also expressed concern for the visual impact of a large, monolithic building looming over the area.

The University owns two properties adjacent to the proposed building. Representatives of the University of South Carolina also gave testimony concerning the negative impacts of the proposed Trinitas project on the historical and residential character of the University Hill Neighborhood and concerning the negative impact on joint plans between the University and the neighborhood.²³ Representatives of Historic Columbia gave testimony objecting to failure to follow the *Guidelines* and negative impact on historical character of the area.²⁴ The evidence also

²² Testimony of Douglas Carlisle, Supplemental Record, Exhibit 6, at pp. 30-31.

²³ Derek Bruner, Supplemental Record, Exhibit 6, at pp. 22-23 (indicating negative impact on University Hill neighborhood from “student presence adjacent to and throughout their neighborhood,” stressing conflicts with University’s master plan, and noting that “height and scale and the mass” does not balance with neighborhood); see Letter from Bruner to Lucinda Statler, Record, Mar. 4, 2020, Exhibit 3, at p. 44; Dan D’Alberto, Supplemental Record, Exhibit 8, at pp. 56-57 (noting the plans of the University and stressing that the University “is in lockstep with University Hill Neighborhood in that we agree with the letter they submitted.”).

²⁴ Robin Waites, Supplemental Record, Exhibit 6, at pp. 20-22 (describing historical character of area and negative impact of scale of proposed building, and objecting to violation of *Guidelines*); John Sherer, Supplemental Record, Exhibit 8, at pp. 50-53 (describing factual errors in the Trinitas presentation, stressing the negative impact of the “view shed” of the project, and noting that the church building south of the project is historic).

includes a detailed written review of the historic importance of the buildings and surrounding area in the vicinity of the Trinitas project.²⁵

Conclusion

The evidence in the record on appeal contains sworn testimony concerning the harmful impacts on the members of the University Hill Neighborhood Association. As in *Preservation Society* and *Citizens for Quality Living*, their neighborhood is adjacent to the block where the project would be built. As a result, they have “geographic proximity” and “live in the immediate vicinity of the proposed” building. In addition, their concerns for increased traffic are the same as the concerns of the members of the associations in these two cases. As in *Preservation Society*, the residents of the University Hill Neighborhood are concerned about “traffic congestion, property values . . . and effects on the historical integrity of the area where they resided.” 845 S.E.2d at 488. Like the residents in *Citizens for Quality Living*, the residents are concerned about the traffic and “incompatibility of the subdivision with the surrounding” community. 825 S.E.2d at 721.

In addition, at the March 12, 2020, Hearing, Linda Irving, speaking as “Trinitas’s representative,”²⁶ recognized the importance of considering the negative impacts on the neighborhood. Ms. Irving stated: “The site is not within the bounds of a historic district or within a residential neighborhood, though *their proximity must absolutely be factored heavily.*”²⁷

²⁵ Testimony and written analysis of Patrick Hubbard, Record, Exhibit 8, at pp. 53-56, 167-69, 206-09; *see* “Analysis of Application of Certificate of Design Approval for Trinitas,” Record, Exhibit 3, at pp. 50, 135.

²⁶ Supplemental Record, Exhibit 8, at p. 6.

²⁷ Supplemental Record, Exhibit 8, at p. 35. (emphasis added)

Given the testimony of residents in the immediate vicinity of the project and of representatives of the University of South Carolina and Historic Columbia, combined with the admission by the Trinitas representative that the proximity of historic districts and residential neighborhoods “must be absolutely factored heavily,” the Association and its members have shown a substantial interest in the decisions of the DDRC concerning the Trinitas project.

Public Importance Standing

The South Carolina Supreme Court has held that “a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999). The approach for addressing a claim of public importance standing was addressed in *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854, 859 (2017), as follows:

[W]hen deciding whether to confer public importance standing, courts must take these competing policy concerns [of citizen access to courts and a need to achieve judicial economy and freedom from frivolous suits] into consideration, and must also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.

1. Issues Involved

This suit involves three important issues where future guidance is needed. These issues are:

- (1) Whether important aspects of a development within the -DD area, like height, are determined by the underlying zoning or by the overlay *Guidelines*;
- (2) Whether the grant by the City of the power of site plan review to the DDRC for development within the -DD area was *ultra vires*; and

- (3) Whether the “overall determination” approach to the application of the precatory, non-binding language of the *Guidelines* constitutes an improper delegation of the City’s legislative power and a denial of due process.

Importance of Issues

The -DD area of Columbia regulated by the *Guidelines* “consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River.” Columbia City Code, § 17-253. Given the size of this area, issues concerning the validity, proper scope, and application of the *Guidelines* effectively determine important aspects of development in the downtown core of Columbia.

In addition, Columbia has many other overlay districts. *See, e.g.*, Columbia City Code §§ 17-306, 17-307, 17-308, 17-309, 17-310, 17-311, 17-312, 17-313, 17-314, 17-315, 17-322, 17-323, 17-324, 17-325, 17-326, 17-681 (historic districts). Important issues concerning the relationship between these overlays and the underlying zoning involved could arise under these schemes.

More broadly, issues concerning overlay schemes and underlying zoning could arise throughout South Carolina. Overlay schemes are authorized by Section 6-29-720(C)(5) of the Enabling Act and are a generally recognized technique for land use regulation.²⁸

²⁸ *See, e.g.*, Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation* Law 93–94 (3d ed. 2013); John R. Nolon, *Land Use in a Nutshell* 219–22 (2006); Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation* 222–23 (3d ed. 2015).

Need for Future Guidance

Future guidance in addressing these three issues is needed for the same reasons that these issues are important. More specifically, issues will arise concerning the validity, proper scope, and application of the *Guidelines* and concerning overlays generally because of: (1) the large area covered by the -DD overlay, (2) other overlay schemes in Columbia, and (3) overlay schemes in South Carolina.

As indicated above in Argument Three, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) and *Heilker v. Zoning Board of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) held that overlay schemes in South Carolina follow the general rule that an overlay zone is “simultaneously subject to two sets of zoning regulation.” Thus, this appeal raises the issue of which approach will be followed in South Carolina: The approach used herein by the DDRC or the approach used in *Grays Hill Baptist Church* and *Heilker*?

Grays Hill Baptist Church involved an airport overlay district. Section 17-307 of the Columbia City Code contains an overlay district termed: “—AP airport height restrictive areas,” which applies in the area around Owens Field Airport. If the approach adopted by the DDRC were applied to the AP overlay, the height restrictions of the overlay would not apply.

The City of Columbia also has overlay corridor districts designed to impose supplemental sign regulations (see Columbia City Code, §§ 17-310, 17-313, 17-314, 17-315). The concerns underlying these overlay districts are similar to those in *Heilker*. As a result, issues concerning the relationship of the overlay involved vis á vis the underlying zoning could arise in applying these corridor overlays.

CONCLUSION

For the reasons stated in this Brief, this Court should:

- (1) hold that the Association has standing,
- (2) hold that the decision by the City of Columbia to grant the authority to conduct site plan review to the DDRC was ultra vires and, therefore, void,
- (3) hold that the adoption of the *Guidelines* as an ordinance was an unlawful delegation of the legislative power of the City and, therefore, void, and
- (4) hold that, because the DDRC abused its discretion by making a mistake of law in deciding that the height of the proposed building was determined by the underlying zoning rather than the -DD overlay, the design approval of the Trinitas proposal by the DDRC is invalid.

APPENDIX: RECORD ON APPEAL

Brief of Plaintiff/Appellant

I. Joint Stipulations Regarding City of Columbia Ordinances [Joint Stipulation]

- A. Exhibit A: Selected Portions of City of Columbia Code of Ordinances
- B. City of Columbia Center Design Development Guidelines [*Guidelines*]

II. Certified Record of the Proceedings (Documents) [Record]

- A. Exhibit One – January 9, 2000, DDRC Meeting
- B. Exhibit Two – February 7, 2000, DDRC Meeting
- C. Exhibit Three – March 12, 2000, DDRC Meeting
- D. Exhibit Four – June 10, 2000, DDRC Meeting (work shop meeting)
- E. Exhibit Five – July 10, 2000, DDRC Meeting

III. Supplement to Certified Record on Appeal (Transcripts of Hearings, filed April 20, 2021)

[Supplement to Record] (Page citations are to pages on upper right corner of pages)

- A. Exhibit 6 – January 9, 2020, DDRC Meeting
- B. Exhibit 7 – February 7, 2020, DDRC Meeting
- C. Exhibit 8 – March 12, 2020, DDRC Meeting
- D. Exhibit 9 – June 10, 2020, DDRC Meeting
- E. Exhibit 10 – July 10, 2020, DDRC Meeting

Respectfully submitted,

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July 12, 2021

Columbia, South Carolina.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

University Hill Neighborhood Association,

Appellant,

v.

City of Columbia, City of Columbia Design and
Development Review Committee, and Trinitas
Ventures LLC

Respondents.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO. 2020-CP-40-03475

**BRIEF OF RESPONDENTS CITY OF COLUMBIA, CITY OF COLUMBIA
DESIGN/DEVELOPMENT REVIEW COMMITTEE, AND TRINITAS VENTURES LLC**

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PROCEDURAL BACKGROUND

This case involves Trinitas Ventures LLC's ("Trinitas") proposal to demolish existing buildings and construct an apartment building at the southeast corner of Gervais Street and Pickens Street, known as 1600-1620 Gervais Street (the "Proposed Construction"). The Proposed Construction is within the City Center Design/Development District ("City Center -DD"), and therefore, Trinitas was required to file applications for a certificate of site plan approval and certificate of design approval with the City of Columbia's ("City") Design/Development Review Committee ("DDRC"). The DDRC is a board of architectural review authorized by the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. § 6-29-310, *et seq.* ("Enabling Act"); see S.C. Code Ann. § 6-29-870 through -930.

From January 2020 through July 2020, the DDRC held four public hearings and one public work session to consider Trinitas' applications related to the Proposed Construction. On March 20, 2020, the DDRC approved Trinitas' application for a Certificate of Site Plan Review (the "Site Plan Approval Decision"). On July 9, 2020, the DDRC approved Trinitas' application for a Certificate of Design Approval (the "Design Approval Decision"). Both before and during the process of review and approval for the Proposed Construction, Trinitas worked with members of the community, City's staff, and the DDRC to address concerns about the Proposed Construction and changed its plan and design to answer those concerns.

At every stage of the DDRC's consideration of Trinitas' applications, an association of a nearby neighborhood, University Hill Neighborhood Association ("Appellant"), opposed the Proposed Construction. Appellant has made it clear that its objection is not to site plan or design of the Proposed Construction, but, instead to what Appellant's members perceive to be a "student housing" project. To block what it perceives to be an undesirable *use*, which is not in the purview

of the DDRC, Appellant reaches beyond its geographic boundaries to uncompromisingly complain about the *height* of the Proposed Construction. Yet, Appellant cannot dispute that the Proposed Construction is on one of the City's busiest corridors, is just blocks away from the tallest buildings in the City, and is merely five feet taller than the University of South Carolina School of Law which is across Pickens street from the Proposed Construction and within the City Center –DD.

As part of its effort to halt the Proposed Construction, the Association filed a notice of appeal challenging the DDRC's Design Approval Decision. Appellant also challenges the DDRC's authority to conduct site plan review and the DDRC's application of City's design *Guidelines*. Appellant contends that these claims were filed within the general jurisdiction of the Court. Respondents filed Motions to Dismiss on August 24 and 25, 2020. The Court denied these motions by order filed October 17, 2020. Pursuant to S.C. Code Ann. § 6-29-930(A), this matter is now before the Court on a hearing on the merits.

SUMMARY OF ARGUMENTS

Appellant makes three distinct challenges, which are summarized on pages 4 and 5 of Appellant's Brief. For the following reasons, all three challenges fail as a matter of law.

First, Appellant asserts that City's delegation of site plan review to the DDRC (instead of City's Planning Commission) was in violation of the Enabling Act and, therefore, *ultra vires*. Appellant's Brief at pp. 7-13. Appellant asks the Court to hold that this decision by the City is void. *Id.* at p. 42. The relief requested by Appellant is moot as City has, since December 15, 2020, delegated site plan review to the Planning Commission. See **Exhibit 1**. Appellant did not timely appeal the DDRC's Site Plan Approval Decision within thirty days of the decision, as required by

S.C. Code Ann. § 6-29-900(A). As a consequence, Trinitas has a vested right¹ in the DDRC's Site Plan Approval Decision which cannot be retroactively invalidated or set aside by the Court.

Second, Appellant argues that City ordinance Section 17-253 is an unlawful delegation of legislative power to the DDRC. Appellant's Brief at pp. 14-19. Appellant's argument fails because, irrespective of the intent of its drafters, the *Guidelines* form a part of City's ordinances. See Columbia, S.C., Code of Ordinances § 17-253.² The *Guidelines*, when read together with City's ordinances and the context in which they were created, set forth specific standards as to height which the DDRC is authorized to enforce. See *Guidelines* at § 5.3.1.³ Although the *Guidelines* state a general rule that "most" buildings in the City Center –DD should be within two to five floors, the *Guidelines* also expressly acknowledge that there can be exceptions. See *id.* The DDRC's discretion to allow such exceptions is explicitly constrained by "City's comprehensive plan and zoning ordinance[s]." *Id.*⁴ When read together, the *Guidelines* and zoning ordinances are not invalid or arbitrary, nor do they give the DDRC unfettered discretion as to building height.

Third, Appellant asserts that the DDRC abused its discretion in authorizing the height of the Proposed Construction. Appellant's Brief at pp. 20-29. The same reasons that cause Appellant's unlawful delegation argument with respect to the *Guidelines* to fail also undermine Appellant's argument as to the DDRC's alleged abuse of discretion. While Section 5.3.1 of the

¹ See Columbia, S.C., Code of Ordinances § 17-2 ("Establishment and conditions of a vested right").

² "Development within the [City Center] –DD area **must comply** with design guidelines set forth in this Code and in the publication 'City Center Design/Development Guidelines, Final Report, September 1, 1998 [the *Guidelines*].'" (Emphasis added.)

³ Section 5.3.1 of the *Guidelines* is the only section that Appellant claims is an unlawful delegation of legislative authority. Appellant's Brief at pp. 16-19. Nevertheless, Appellant sweepingly requests this Court to "hold that the adoption of the *Guidelines* as an ordinance was an unlawful delegation of the legislative power of the City and, therefore, void." *Id.* at p. 42. In other words, Appellant seeks to set aside the entirety of the *Guidelines*, which have been part of City's urban planning and development strategy since 1998. The Court should find that Appellant's request is overreaching, unsupported, and fails as a matter of law.

⁴ See also Columbia, S.C., Code of Ordinances § 17-275 at note c ("Buildings between the height of 50 and 75 feet may be allowed[.]").

Guidelines states a preference for “most” development to be within two to five floors, the *Guidelines* allow “exceptions.” As to building height, “[t]he City’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings,” and “it is not the intent of the[] *Guidelines* to establish height standards for development in City Center.” See *Guidelines* at § 5.3.1. The DDRC correctly decided that the Proposed Construction, which exceeds five stories but meets City’s zoning ordinances as to height, was permissible, particularly within the context of adjacent buildings. The DDRC’s conclusion was not an error of law or unsupported by facts and should accordingly be affirmed.

STATEMENT OF FACTS

Trinitas is under contract to purchase real property located at 1600-1620 Gervais Street where it intends to demolish existing buildings and construct an apartment building.⁵ On June 4, 2019, the owner of the real property, Capital Investments, LLC (“Owner”), with Trinitas’ support, voluntarily rezoned the property to make it part of the City Center -DD.⁶ The Proposed Construction is subject to the scrutiny of the DDRC⁷ only because of that voluntary zoning change. In compliance with applicable ordinances and *Guidelines* for the City Center -DD, Trinitas filed two applications to the DDRC: (1) a Certificate of Site Plan Approval,⁸ and (2) a Certificate of Design Approval for New Construction, both on December 3, 2019, under a Letter of Agency from

⁵ Appellant repeatedly characterizes the Proposed Construction as “student housing,” but the Proposed Construction was approved by City as an apartment complex not limited to students. See S.C., Code of Ordinances § 17-464 (“group housing development”). The Proposed Construction is not private dormitory housing. *Id.* at § 17-321 (defining “private dormitory”).

⁶ See City of Columbia Code § 17-253 (-DD design/development area) and § 17-311 (supplementary district regulations for -DD design/development area).

⁷ See *id.* at § 17-653 (establishing and authorizing the Design/Development Review Commission).

⁸ See *id.* at § 17-655(b)(2) (issuance of certificate of design approval).

Owner. The DDRC's consideration of these applications is governed by City ordinances, specifically, Sections 17-253, 17-653(b)(9), 17-674, 17-653(b)(9).

A. January 9, 2020 Public Hearing

The DDRC first held a public hearing regarding the Proposed Construction on January 9, 2020.⁹ *See* Trans. (Jan. 9, 2020). Trinitas presented evidence that the Proposed Construction met all requirements of the City Center -DD for site plan and design approval. *Id.* at 4:20-16:16, 28:23-30:11, 31:35-40:6. Appellant opposed the Proposed Construction and presented testimony through its President, Thomas Gottshaw (*id.* at 17:8-20:14, 28:11-15), Vice President, Catherine Fenner (*id.* at 26:7-27:1), and several of its members, including: Beth Richardson (*id.* at 25:4-26:5), April Lucas (*id.* at 27:9-28:7), Douglas Carlisle (*id.* at 30:18-31:22), Bobby Lyles (*id.* at 40:17-41:3), and John Stucker (*id.* at 41:14-43:4). The majority of these members objected to the anticipated use of the Proposed Construction by expressing their concern that it would be “student housing.”

Even though City's staff recommended approval of Trinitas' applications, the DDRC denied both applications “[b]ased on the . . . mass and scale and use of the building being incompatible with the adjacent University Hill and University . . . [and] adjacent historic districts” *See* Trans. (Jan. 9, 2020) at 43:7-44:7 (motion on application for design approval), and 44:11-46:17 (motion on application for site plan approval) (emphasis added). Trinitas timely filed a petition for rehearing, asserting the DDRC's decisions were invalid, in part, because they were decided on inappropriate considerations of “use” of the Project. *See* February DDRC004-008 (asserting anticipated “use” of the Proposed Construction was not within the DDRC's purview).

⁹ *See id.* at § 17-655(b)(2) (requiring a “duly held public hearing for any project involving the construction of new buildings of greater than 50,000 square feet”).

B. February 7, 2020 Public Hearing

At a public hearing on February 7, 2020, the DDRC met in a closed executive session to receive legal advice and, following executive session, moved to revoke its prior denials of Trinitas' applications. *See* Trans. (Feb. 7, 2020). The motion passed and the DDRC placed both applications for rehearing on March 12, 2020. *Id.* The day before the DDRC's rehearing, Appellant and others, submitted letters in opposition to the Proposed Construction. *See* March DDRC046-049. Several members of the public also submitted letters in support of the Proposed Construction. *Id.* at 43, 45.

C. March 12, 2020 Public Hearing

1. Application for Certificate of Site Plan Approval

During the DDRC's March 12, 2020, hearing, the DDRC re-considered Trinitas' applications. First, the DDRC heard evidence regarding Trinitas' application for a Certificate of Site Plan Approval. *See* March DDRC161-208. City employee Jonathan Chambers informed the DDRC that the Proposed Construction met all applicable City ordinances, regulations, and *Guidelines* as to site plan review, and stated that City recommended approval of Trinitas' application subject to certain "standard" staff comments. *See* Trans. (Mar. 12, 2020) at 3:13-16.

Trinitas made an extensive presentation to the DDRC in support of its application for a Certificate of Site Plan Approval. *See* Trans. (Mar. 12, 2020), at 3:24-14:15. The factors to be considered by the DDRC for site plan approval are: (1) exterior surface treatment, (2) arrangement and location of buildings and structures, (3) other pertinent factors affecting the appearance and efficient functioning of the district. *See* Columbia, S.C., Code of Ordinances § 17-674(c). Trinitas explained how the Proposed Construction met all requirements.

Letters submitted by Appellant's members did not address any of the factors pertinent to site plan review. Instead, the letters regarded *design* of the Proposed Construction, which was not

an appropriate consideration by the DDRC for site plan approval. Appellant's members, including John McGill (Trans. (Mar. 12, 2020), at 16:5-18:12) and Catherine Fenner (*id.* at 20:15-21:6) raised questions during the DDRC's hearing about the accuracy of certain data in a traffic study supporting Trinitas' application. *Id.* at 16:5-18:12, 20:15-21:6. None of these individuals submitted any competing traffic analyses or reports. *Id.* In response to Appellant's members' concerns, City employee Jonathan Chambers and Trinitas explained to the DDRC that the traffic engineer retained by Trinitas reinvestigated parking and submitted an amended report with updated figures which addressed Appellant's concerns. *Id.* at 18:16-20:12, 21:9-13.

Patrick Hubbard, in his individual capacity and not, as he is now, counsel for Appellant, objected to the DDRC's authority to conduct site plan review. Trans. (Mar. 12, 2020), at 14:19-15:16; *see also* March DDRC050-62. He asserted that City's delegation of site plan review to the DDRC (instead of City's Planning Commission) violated the Enabling Act. *See id.* However, Mr. Hubbard expressly acknowledged: "I don't expect you necessarily to rule on what you can and cannot do; I just wanted to make a point that I do have a fundamental objection." *See* Trans. (Mar. 12, 2020), at 15:14-16. DDRC's Chairman responded: "I read that in the documents that were given to us and, you're right, it's out of our hands. . . . We're charged with it, so just like we can't comment on building use, we can't say we won't review the site plan." *Id.* at 15:17-19, 15:25-16:2. No individual on behalf of Appellant objected to the DDRC's authority to consider site plan approval.

The DDRC made a motion to grant Trinitas' Certificate for Site Plan Approval, which passed by a majority vote. Trans. (Mar. 12, 2020), at 28:22-29:20.

2. Application for Certificate of Design Approval

As to Trinitas' application for a Certificate of Design Approval,¹⁰ City employee Lucinda Statler stated to the DDRC: "Staff finds that the proposal substantially meets the [nineteen] applicable City Center [-DD] [*Guidelines*] and recommends approval conditional upon items being reviewed and approved by staff or by the commission at the commission's discretion." Trans. (Mar. 12, 2020), at 32:11-15. Trinitas also presented evidence to show that the Proposed Construction, which had been revised to take into consideration comments made at the prior public hearings, met the *Guidelines* and should be approved by the DDRC. *Id.* at 33:6-43:6.

Appellant's President, Thomas Gottshaw, made arguments against the Proposed Construction's design. See Trans. (Mar. 12, 2020), at 43:11-46:14. He specifically took issue with "mass, scale, compatibility with neighboring structures, and the context" of the Proposed Construction. *Id.* at 44:17-20.¹¹ Mr. Gottshaw asserted the Proposed Construction was not "compatible" with neighboring buildings. *Id.* at 44:23-46:8. The DDRC asked Mr. Gottshaw to explain "more about specific design elements of which [Appellant is] concerned with rather than just in general height and mass." *Id.* at 49:8-12. In response, Mr. Gottshaw stated: "we're not thrilled, frankly, with the façade itself," including "a glass corner."¹² *Id.* at 49:18-19. He also expressed concern regarding the alleged lack of any setback.¹³ *Id.* at 50:6-7.

Trinitas responded to Mr. Gottshaw's objections by confirming that City ordinance Section 17-276 (C3 zoning, applicable for the Proposed Construction), allowed Trinitas to reduce setback to zero on Gervais Street. *Id.* at 52:14-53:3. As Trinitas explained to the DDRC, the Proposed

¹⁰ March DDRC161-208 (filed Aug. 24, 2020).

¹¹ A representative of Historic Columbia, John Shearer, also objected to Trinitas' application for design approval "based on . . . scale and on mass and height." *Id.* at 51:5-6. Historic Columbia did not appeal the DDRC's Design Approval Decision as to the Proposed Construction.

¹² Appellant is not challenging the façade or glass corner of the Proposed Construction in this case.

¹³ Appellant is not challenging the setback of the Proposed Construction in this case.

Construction includes an eight foot, four inch (8'4") setback, despite Mr. Gottshaw's unsupported protestations that the building had no setback whatsoever. *Id.* After further discussion as to the height, wall articulation, set back, and other elements from Trinitas, the DDRC held Trinitas' application for Certificate of Design Approval for consideration at a later date. *Id.* at 76:2-23.

D. June 10, 2020 Public Work Session

The DDRC conducted a work session on June 10, 2020 to discuss Trinitas' application for a Certificate of Design Approval. *See* Trans. (June 10, 2020); *see also* DDRC001-26. Several community members submitted letters in support of the Proposed Construction. *See* June DDRC019-21. Appellant submitted a letter in opposition, *see* June DDRC022-23, and attended the work session through its President, Mr. Gottshaw. He requested a reduction of the height of the building and suggested certain design changes related to window glazing and brick design on the façade at the rear of the building.¹⁴ Trans. (June 10, 2020), at 9:19-11-12; 50:13-20.

Trinitas reminded the DDRC of the prior comments and suggested changes made by City's staff and the DDRC. Trans. (June 10, 2020), at 12:18-22:2, 24:27:8. Trinitas explained how it had taken all prior comments and suggested changes into consideration and was presenting another amended design for the DDRC's consideration. *Id.* As to height, Trinitas explained that it made changes to the design in order to minimize the effect of the building's height. *Id.* at 24:10-25:23.

The DDRC members discussed certain design concerns and suggestions, including adding a corner entrance on Pickens and Gervais Streets (*id.* at 23:5-24:4, 28:4-31:2, 44:10-22), updating lighting at the main entrance on Gervais Street (*id.* at 27:11-28:2), and extending the brick around the back of the building (*id.* at 33:22-42:19). DDRC's Chairman stated: "I'm not suggesting

¹⁴ Other than contesting the height of the Proposed Construction, Appellant is not challenging any of these other design elements in this case.

changing the height of the building. I hope that's clear." *Id.* at 31:24-25.¹⁵ In response to all of the DDRC's suggestions, Trinitas agreed to take comments into consideration for a proposed amended application for design approval. *See id.* DDRC's Chairman concluded the work session by commenting: "I think [the Proposed Construction has] come a long way since . . . the January hearing[.] . . . [I] appreciate the effort." *Id.* at 47:7-9.

E. July 9, 2020 Public Hearing

Trinitas' application for a Certificate of Design Approval was considered by the DDRC for a third time at a virtual public hearing on July 9, 2020. *See* Trans. (July 9, 2020); *see also* July DDRC001-88. City employee Lucinda Statler reminded the DDRC: Trinitas "made a number of revisions, some substantial, to address concerns discussed at the March hearing and the subcommittee in June." Trans. (July 9, 2020), at 3:2-4. Further, Ms. Statler said:

[W]hile the ... *[G]uidelines* do make some recommendations about height, as well as some about use, these are specifically defined measurable allowances determined by the zoning ordinance. The ... *[G]uidelines* are intended to work with the zoning to focus on the qualitative aspects of a project within those defined parameters. Staff finds that the proposal substantially meets the ... *[G]uidelines* and recommends approval of [Trinitas'] request.

Id. at 3:7-11.

Trinitas addressed specific concerns raised by Appellant and the DDRC in prior hearings. *Id.* at 3:13-10:13; *see also* July DDRC015-87. Trinitas informed the DDRC that it had made numerous changes to the Proposed Construction. *See* Trans. (July 9, 2020), at 3:13-10:13; *see also* July DDRC015-87.¹⁶ DDRC's Chairman acknowledged: "I generally agree that the comments that

¹⁵ *See also id.* at 47:2-9 ("I would reiterate that I think, if, you know, the DDRC, the *Guidelines* have 'should', not 'shall' language about building height. I think it would be probably more in keeping with the neighborhood if it were five stories, but it's certainly not – it's within your rights to build to this height.").

¹⁶ Specifically, Trinitas: (1) increased the depth of the building's façade at the elevator and stair bays and increased the depth of certain windows, as recommended by City staff; (2) added more glazing to windows on the Gervais and Pickens Street sides of the building, as requested by Appellant's

were made by commission members seem to have been well incorporated into these revised images, so thank you for working with us on that.” See Trans. (July 9, 2020), at 10:19-23; see also *id.* at 17:10-18:2 (“[T]his applicant’s been through ... three or four different revisions ... and I do think that each of these revisions has been an improvement.”).

Appellant also attended the July 2020 hearing through its President, Mr. Gottshaw, who opposed Trinitas’ application for a Certificate of Design Approval based on the number of floors and height of the building. *Id.* at 15:16-16:17. He further testified that as “to height, mass and scale, [the proposed construction] [is] not in context with the adjoining buildings.” *Id.* at 16:2-4.

After hearing all the evidence, the DDRC made a motion to approve Trinitas’ application for a Certificate of Design Approval:

Upon hearing and considering all of the evidence, testimony and documents presented to the DDRC, I move to grant a certificate of design approval for the application for new construction at 1600 Gervais, because the applicant meets applicable design guidelines. Specifically, it meets the following sections of 5.3, building mass and organization which are 5.3.1 building height, in which it is stated “The city’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.” And as staff has pointed out, it actually is within 5 feet of the gable of the building, the law school across the street. 5.3.3 proportionate openings; 5.3.5 wall articulation; and it meets, additionally, sections 5.7.1 storefront composition, and 5.7.2 exterior walls, 5.8.3 windows. So, on that basis I recommend that we approve the certificate of design – grant the certificate of design approval.

Id. at 18:5-21. The motion was approved by the DDRC (the “Design Approval Decision”). *Id.*

representatives and recommended by the DDRC; (3) continued brick siding up to the top floor, as requested by Appellant’s representatives and recommended by City Staff; (4) extended the brick siding at the top floor and across the bays, as recommended by the City Staff; (5) extended the brick around the corner at the public right of way along to the back side of the building and add design elements, as requested by Appellant’s representatives and recommended by City Staff and the DDRC; and (6) incorporated a second entrance at the corner of Pickens and Gervais, as requested by Appellant’s representatives and recommended by the DDRC.

STANDARD OF REVIEW

A. Review standard of claim for unlawful delegation of authority.

Appellant contends that this Court's review of its claims against the City for improper delegation of site plan review to DDRC and unlawful delegation of legislative power through the *Guidelines* involve matters of law and statutory interpretation which this court should review *de novo*. Appellant's Brief at p. 4. Respondents agree.¹⁷

B. Appellate review standard from decision of a board of architectural review.

In an appeal from a municipality's board of architectural review, "[t]he findings of fact by the board of architectural review are final and conclusive . . . and the court may not take additional evidence." S.C. Code Ann. § 6-29-930(A). "In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law." *Id.*

A strong presumption exists in favor of the validity and application of zoning ordinances. *Petersen v. City of Clemson*, 312 S.C. 162, 439 S.E.2d 317 (Ct.App.1993). A reviewing court should not disturb the findings of a municipal board unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority. *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999); *Hartman v. City of Columbia*, 268 S.C. 44, 232 S.E.2d 15 (1977); *Historic Charleston Foundation v. Krawcheck*, 313 S.C. 500, 443 S.E.2d 401 (Ct.App.1994). A court should refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952). "In the event the judge determines

¹⁷ As set forth in this brief, the Court should not reach the issue of unlawful delegation of site plan review because Appellant's requested relief is moot, Appellant has no private right of action on such claim, and Appellant failed to preserve its arguments for review.

that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing.” S.C. Code Ann. § 6-29-930(A).

ARGUMENTS

I. APPELLANT LACKS STANDING.

A. Appellant lacks standing to bring its claims against the City of Columbia.

Appellant bears the burden of establishing that it has standing to bring each asserted cause of action. *See Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000) (deciding whether plaintiff had standing to challenge certain sections of an ordinance); *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 28, 416 S.E.2d 641, 645 (1992) (examining whether plaintiffs had standing to bring a particular cause of action). Appellant has failed to establish it has standing to bring its claims against the City.

“An organization has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co. v. Beaufort Cty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). As an unincorporated association, Appellant must show that “its members will suffer an individualized injury; a mere interest in a problem is not enough.” *Id.* Plaintiff must allege that particular members have or will imminently suffer an injury in fact that is concrete and specific, fairly traceable to the challenged action of the City, and likely to be redressed by a favorable decision. *Id.* Appellant failed to demonstrate that it has or will suffer particularized harm that is fairly traceable to the City’s delegation of site plan review to the DDRC.

Appellant fails to articulate any injury that it suffered as a result of the City’s delegation of site plan review or of the City’s alleged unlawful delegation of legislative power to the DDRC.

Appellant's arguments address standing under S.C. Code Ann. § 6-29-900(A) concerning an appeal of a DDRC decision. *See* Appellant's Brief, p. 30-37. Appellant concedes this statute does not apply to Appellant's claims against *the City*.¹⁸ Further, Appellant's asserted injuries involving potential traffic impacts and nuisance activities are merely "generalized grievances suffered by the public as a whole which are insufficient to establish standing." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014). Appellant makes no effort to demonstrate how these purported injuries are fairly traceable to City's alleged procedural error and unlawful delegation of legislative power.

The case of *Beaufort Realty Co.*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001), is instructive. The plaintiff appealed a decision by Beaufort's board of zoning appeals, asserting an alleged procedural error in approving and filing subdivision plats. *Id.* at 300, 551 S.E.2d at 589. The Court noted that it is "substantially more difficult to establish standing where a challenge to the government action is brought by one who is not the object of the action, but rather seeks to challenge government action or inaction because of alleged illegality." *Id.* at 301, 551 S.E.2d at 589. The Court went on to affirm that the plaintiff lacked standing, ruling that concern of future harm "falls far short of the standard of 'concrete and particularized and . . . actual or imminent' harm" *Id.* at 303, 551 S.E.2d at 590. Moreover, the Court found the plaintiff failed to show that its alleged injuries were fairly traceable to the filing of subdivision plats. *Id.* at 303, 551 S.E.2d at 590 ("Mere filing of plats in itself does not work any injury on the [plaintiff's] members or the public at large.").

¹⁸ *See* Appellant's Brief at p. 4 ("It is important to distinguish among the Association's three distinct challenges[.] Argument one of this appeal concerns provisions of the *Guidelines* that require 'site plan review' within the -DD area to be done by the DDRC[.] ... Thus, it is not governed by the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A).").

Like the plaintiff in *Beaufort Realty*, Appellant faces a “substantially more difficult” task of establishing standing on its claims against the City because it was not the applicant before the DDRC, Trinitas was. Appellant fails to demonstrate any concrete and particularized, actual or imminent harm, nor does it show that any such harm was caused by the City’s delegation of site plan review or the City’s alleged unlawful delegation of legislative authority. Indeed, it seems quite difficult for Appellant to establish that a site plan approved by the DDRC would be different in substance than a site plan approved by the Planning Commission such that a DDRC-approved site plan harms it in a specific way. To establish standing, it “must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.” *Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008).

Similarly, it would be exceedingly difficult for Appellant to show that the DDRC’s application of the *Guidelines* caused it or its members any harm when the remedy Appellant seeks – striking the *Guidelines* as invalid – would not alter the outcome of the DDRC’s Design Approval Decision. Without the *Guidelines*, the DDRC must approve new construction if a proposed building’s height is allowed under the site’s underlying zoning designation, which is exactly what the DDRC concluded in this case. It is undisputed that the Proposed Construction is within the allowable height restrictions set forth by City’s zoning ordinances.¹⁹

Nor can Appellant succeed in arguing that the “public importance” exception to standing should apply as to its claims against the City. In order to have standing under the public importance exception, a party must show that the issues raised are: “1) of public importance, and 2) of imperative and manifest urgency.” *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). “The key to the public importance analysis is whether a resolution is

¹⁹ Columbia, S.C., Code of Ordinances § 17-275 at note c (“Buildings between the height of 50 and 75 feet may be allowed[.]”). The Proposed Construction is 75 feet.

needed for future guidance.” *ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). As stated below, Appellant’s *ultra vires* claim against the City is moot; therefore, Appellant cannot show that a ruling on its *ultra vires* claim is “of imperative and manifest urgency” in need of future guidance. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 478 (2006) (“Even assuming that this issue presents a matter of public importance, no imperative or manifest urgency exists in light of Friends’ producing the requested documents[.]”).

Appellant’s unlawful delegation claim similarly fails to meet the “public importance” exception to standing. Appellant merely argues that the issue is important because of the size of the City Center -DD, along with the fact that the City has established other overlay zoning districts and issues concerning overlay zoning could arise throughout South Carolina. Appellant’s Brief at p. 39. As the Court in *ATC South* put it, “[o]f course zoning is a matter of public importance, but the same may be said of most legislative and executive actions.” 380 S.C. at 199, 669 S.E.2d at 341. Simply the fact that overlay zoning districts exist within the City and the State does not, in and of itself, warrant invocation of the “public importance” exception. Appellant has not shown how its unlawful delegation claim is of “imperative and manifest urgency” in need of future guidance, thereby justifying Appellant to stand in the shoes of a party that does have standing.

B. Appellant lacks standing to appeal the DDRC’s decisions.

As to Appellant’s appeal of the Design Approval Decision, the DDRC and Trinitas previously moved to dismiss the appeal on the basis that Appellant lacks standing under S.C. Code Ann. § 6-29-900(A) (requiring appellant be a “person” with “a substantial interest”).²⁰ Respondents also argued Appellant failed to meet the public interest exception to the standing requirement. The Court denied Respondents’ Motions to Dismiss, finding Appellant had

²⁰ Respondents incorporate their prior arguments on these issues into this brief and request that the Court dismiss the appeal on the basis of lack of standing.

sufficiently pled allegations which, if proven, would provide it with standing to assert the claims in this appeal. Now, Appellant attempts to prove the basis for standing and falls short. As a consequence, Appellant's appeal should be dismissed.

Appellant makes no attempt to claim that the organization itself has any concrete and particularized "substantial" interest to establish standing. Instead, Appellant seeks to establish its standing through its members, describing that "[n]umerous residents" live near the Proposed Construction and "would experience substantial negative impacts from the proposed project." Appellant's Brief at p. 33. The purported "negative impacts" described by Appellant's members are insufficient to establish standing. *Id.* at p. 34. The referenced testimony is simply Appellant's members' "concerns" that the Proposed Construction may "be marketed to students," speculation that students would "mov[e] . . . through our neighborhood at night" causing purported damage, and conjecture regarding anticipated increases in traffic. *Id.* (citations omitted).

The Association offers nothing more than mere speculation, which is insufficient to establish standing. *See Town of Arcadia Lakes v. S.C. Dept. of Health and Env't'l Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013) (for proof of standing requiring the "injury in fact" to be "concrete and particularized," "actual and imminent," not "conjectural" or "hypothetical") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 583, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)) (emphasis added). *See also Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981) ("damages can[not] be left to conjecture, guess or speculation"); *Zellers v. NexTech Northeast, LLC*, 533 Fed. Appx. 192 (4th Cir. 2013) (stating "testimony must be based on 'more than subjective belief or unsupported speculation.'").

In *Carnival Corp.*, the Supreme Court held that several associations lacked standing to bring nuisance and zoning claims challenging Carnival's alleged unlawful use of a Terminal by

the its cruise ship, the *Fantasy*. The plaintiffs sought injunctive relief based on ten claims—seven of which were based on alleged violations of Charleston’s city ordinances. 407 S.C. at 73, 753 S.E.2d at 849. The plaintiff-organizations alleged the *Fantasy*’s operations harmed them in a number of ways: (1) the *Fantasy* could be seen above buildings, disrupting the historic skyline, (2) thousands of passengers and crew would allegedly cause traffic congestion in the area as well as the closure of public roads, (3) the *Fantasy* would allegedly emit noise and air pollution, and (4) expanded cruise ship operations would potentially jeopardize the Old and Historic District’s listing on the National Register of Historic Places. *Id.* at 73, 753 S.E.2d at 849.

The Supreme Court held the plaintiff-organizations failed to establish standing: “[W]e conclude Plaintiffs fail to allege a concrete, particularized harm to a legally protected interest and therefore hold Plaintiffs lack standing.” *Id.* at 75, 753 S.E.2d at 850. “Rather, they assert only generalized grievances suffered by the public as a whole which are insufficient to establish standing.” *Id.* at 76, 750 S.E.2d at 851. “All members of the public suffer from and are inconvenienced by traffic congestion, pollution, noises, and obstructed views, and Plaintiffs have not alleged they suffer these harms in any personal, individual way. In short, these allegations are simply complaints about inconveniences suffered broadly by all persons residing in or passing through the City of Charleston [.]” *Id.* at 77, 750 S.E.2d at 852.

Here, the only grounds for standing put forward by Appellant are speculative and conclusory “concerns” about potential heavier traffic through the neighborhood,²¹ hypothetical future damage caused by students, and obstructed views.²² Appellant’s Brief at pp. 34-35. Like *Carnival Corp.*, these “concerns” are merely “generalized grievances suffered by the public as a whole which are insufficient to establish standing.” 407 S.C. at 76, 753 S.E.2d at 851. Two

²¹ Appellant’s Brief at p. 34; *id.* at p. 34 at notes 9, 10, 11, 12, 13, 14, 15; *id.* at p. 35 at note 16.

²² *Id.* at p. 36 (“concern for the visual impact of a large, monolithic building looming over the area”).

residents that own homes within the Association's boundaries testified about investing in their home, but did not offer any evidence that the Proposed Construction would negatively impact or diminish the value of their investment.²³

In addition to the authorities previously cited in Respondents' Motions to Dismiss, the recent Court of Appeals' decision in *Charleston Development Co., LLC v. Younesse Alami*, No. 2018-001766, Op. No. 5826 (Ct. App. June 23, 2021), further supports dismissal of Appellant's case. There, certain property owners in Charleston alleged neighboring property owners' *illegal* short-term rental businesses violated certain Charleston ordinances and damaged the plaintiffs' *legal* short-term rental businesses. The plaintiffs claimed the defendants' unlicensed short-term rental businesses competed unfairly with the plaintiffs' businesses, displaced residents and drove up the cost of housing, and constituted a nuisance. On summary judgment, the trial court found plaintiffs lacked standing. Relying on *Carnival Corp.*, the Court of Appeals affirmed.

The Court of Appeals held the plaintiffs were not "specially damaged . . . because the damages alleged in [the plaintiffs'] complaint were not particular to [the plaintiffs], and there was no evidence [that the plaintiffs] suffered damages separate and apart from the public." Instead, "the damages alleged to have been suffered by [the plaintiffs] (assuming arguendo they could ever be proven with any specificity) are not particular to [the plaintiffs] and are not separate and apart from generalized damages that affect the community at large so [the plaintiffs] have no standing." The Court further affirmed the lower court's decision that the plaintiffs had not proven that the public importance exception to standing should apply. For the same reasons, the same grounds warrant dismissal of Appellant's appeal for lack of standing.

²³ Testimony by the University of South Carolina and Historic Columbia, referenced on page 36 of Appellant's Brief, is irrelevant, as neither entity appealed either of the DDRC's decisions.

Appellant relies on *Preservation Soc’y of Charleston v. S.C. Dep’t of Health & Envtl. Control*, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020). Appellant’s Brief at pp. 30-31. In that case, the plaintiff-associations were seeking a contested case hearing in the ALC to challenge certain environmental authorizations issued by DHEC. *Id.* at 205, 845 S.E.2d at 483. The associations’ members presented affidavits to the ALC “expressing concern over their reduced quality of life arising from the effects upon them *individually*, such as pollution and health effects, traffic congestion, property values, effects on their businesses in the area, and the effects of the historical integrity of the area where they resided.” *Id.* at 214, 845 S.E.2d at 488 (emphasis in original). The Court noted that “a member . . . stated in her affidavit that smoke emitting from cruise ships already physically impacted her and required her to retreat indoors . . . and that a larger facility, which would be much closer to her home, would only increase this adverse effect.” *Id.* “Others attested to soot on and in their homes.” *Id.* Here, none of Appellant’s members’ testimony arises to the level of specificity in *Preservation Soc’y of Charleston*.

Moreover, Appellant has failed to establish standing under the public interest exception to bring its appeal against the DDRC and Trinitas. Appellant does not even address the public interest exception with respect to its *appeal* of the DDRC’s Design Approval Decision. *See* Appellant’s Brief at pp. 38-40 (asserting that public importance exists only with respect to unlawful delegation of site plan review and height approval under the *Guidelines*, not whether the Design Approval Decision was an error of law). There is no public interest in determining whether the DDRC’s approval of the *design* of the Proposed Construction, particularly its height, was appropriate.

II. APPELLANT'S CHALLENGE TO CITY'S SITE PLAN REVIEW PROCESS FAILS AS A MATTER OF LAW.

A. Appellant's challenge to City's delegation of site plan review to the DDRC is moot.

Appellant sets out a claim against City, not the DDRC or Trinitas, that purports to rely on the general jurisdiction of the Court. Appellant's Brief at p. 4. Appellant concedes that this claim "is not governed by the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A)." *Id.* Appellant argues that the City's City Center Overlay Zoning Ordinance, § 17-253, conflicts with S.C. Code Ann. § 6-29-1150 of the Enabling Act, and therefore, is *ultra vires*. Appellant's argument is moot and its claim should be dismissed as a matter of law.

Section 17-253 states: "Development within the [City Center] -DD area must comply with [the *Guidelines*]." Columbia, S.C., Code of Ordinances § 17-253 (enacted Nov. 18, 1999). Within the *Guidelines*, Section 3.5.4 states: "within the City Center, the D/DRC and . . . staff will assume responsibility for site plan review." Appellant asserts that this delegation of site plan review to the DDRC violates S.C. Code Ann. § 6-29-1150(A), which provides that "land development regulations . . . must include a specific procedure for the submission and approval of [site plans] by the planning commission or designated staff." Appellant's Brief at pp. 8-9. Appellant asks the Court to "hold that the decision by the City . . . to grant the authority to conduct site plan review to the DDRC was *ultra vires* and, therefore, void." *Id.* at p. 42. Appellant did not ask to reverse the DDRC's Site Plan Approval Decision, nor could it, because reversal of the DDRC's approval of Trinitas' Certificate of Site Plan Approval is a remedy found only under the statutory process for appealing DDRC decisions. *See* S.C. Code Ann. § 6-29-900.²⁴

²⁴ Appellant failed to timely appeal the Site Plan Approval Decision. *See* S.C. Code Ann. § 6-29-900(A) ("The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review."); *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement, and [an appeals court] has no

On December 15, 2020, City Council enacted an amendment to Section 17-253 that, in effect, eliminated its prior delegation of authority to the DDRC for approval of site plans. *See* City Ord. No. 2020-100 (Dec. 15, 2020) (attached as **Exh. 1**). Consequently, there is no justiciable controversy as to Appellant’s *ultra vires* claim. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 25–26, 630 S.E.2d 474, 477 (2006) (“A justiciable controversy exists when there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract.”).

“The general rule is that the repeal or amendment of a zoning ordinance during an appeal renders the appeal moot.” *Peterson Outdoor Advert. Corp. v. Beaufort Cty.*, 291 S.C. 533, 535, 354 S.E.2d 563, 564 (1987). “A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.” *Id.* Appellant’s requested relief of voiding the City’s grant of authority for site plan review to the DDRC would have no practical legal effect since the City no longer delegates site plan review to the DDRC. Thus, Appellant’s *ultra vires* claim against the City should be dismissed as moot.

Further, none of the recognized exceptions to mootness apply here. First, our courts recognize that a mooted action that is nonetheless capable of repetition, yet evading review, may still be reviewed by this Court. *Friends of Hunley, Inc.*, 369 S.C. at 26–27, 630 S.E.2d at 478. While it may be possible that Appellant’s *ultra vires* claim is capable of repetition, Appellant cannot successfully argue that its claim will evade review. *See id* at 26–27, 630 S.E.2d at 478 (“In evaluating whether a moot issue is capable of repetition, yet evading review the Court does not

authority to extend or expand the time in which the notice of intent to appeal must be served.”) (citations omitted). The DDRC made the Site Plan Approval Decision on March 12, 2020. Appellant did not file this case until more than four months later on July 23, 2020.

require that the complaining party be subject to the action again. However, the action must be one which will truly evade review.”). In the unlikely event that the City reinstates its prior delegation of site plan review to the DDRC, as long as any person with standing can bring an action challenging the City’s delegation of authority, then the action does not evade review. *Id.* at 26–27, 630 S.E.2d at 478 (“Although Friends admits that the current situation is capable of repetition, it does not evade review. Should another person bring an action against Friends for a violation of FOIA and Friends fails to produce the requested documents, the Court will have the opportunity to review the issue.”).

“In determining whether a moot issue should be reviewed under the public importance exception, the issue must present a question of imperative and manifest urgency requiring the establishment of a rule for future guidance in ‘matters of important public interest.’” *Sloan v. Greenville County*, 361 S.C. 568, 570, 606 S.E.2d 464, 465–66 (2004). There is no question of “imperative and manifest urgency” that warrants judicial review of Appellant’s *ultra vires* claim. The City eliminated its delegation of authority to the DDRC in December 2020. In light of the City’s action, Appellant cannot show any “imperative and manifest urgency” that demands review by this Court. *See Friends of Hunley, Inc.*, 369 S.C. at 27–28, 630 S.E.2d at 478 (“Sloan does not present a ‘question of imperative and manifest urgency.’ Because Friends produced the requested documents, Sloan has been afforded the intended benefit of FOIA. Even assuming that this issue presents a matter of public importance, no imperative or manifest urgency exists in light of Friends’ producing the requested documents and conceding that it is presently a public body under FOIA.”).

“Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.” *S.C. Pub. Int. Found. v. S.C. Dep’t of Transp.*,

421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017). Here, a ruling on Appellant’s *ultra vires* claim would not affect future events relating to the parties, nor would there be any collateral consequences for the parties. City’s ordinance amending § 17-253 has prospective effect. *State v. Hilton*, 406 S.C. 580, 585, 752 S.E.2d 549, 551 (Ct. App. 2013) (“Absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature.”). It cannot be applied retroactively to invalidate Trinitas’ Certificate of Site Plan Approval. *State v. Brown*, 402 S.C. 119, 127, 740 S.E.2d 493, 496 (2013) (“A statute is not to be applied retroactively unless that result is so clearly compelled as to leave no room for doubt.”).

An ordinance cannot have retroactive effect if it impairs vested rights. *Gatewood v. S.C. Dep’t of Corr.*, 416 S.C. 304, 320–21, 785 S.E.2d 600, 609 (Ct. App. 2016); *see also* § 20:77. Validity and construction of retroactive ordinances, 6 MCQUILLIN MUN. CORP. § 20:77 (3d ed.) (“The “vested rights doctrine” provides that a zoning ordinance may not retroactively deprive a property owner's use of property.”). Trinitas has a vested right in its approved site plan. Columbia, S.C., Code of Ordinances at § 17-2(a); S.C. Code Ann. § 6-29-1530. Appellant did not appeal the DDRC’s Site Plan Approval Decision. Because no exceptions to mootness apply to Appellant’s *ultra vires* claim, this claim should be dismissed.

B. Appellant has no private right of action under S.C. Code Ann. § 6-29-1150(A).

Appellant argues the DDRC’s Site Plan Approval Decision violates the underlined portion of Section 6-29-1150(A) of the Enabling Act:

(A) The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff. These procedures may include requirements for submission of sketch plans, preliminary plans, and final plans for review and approval or disapproval. Time limits, not to exceed sixty days, must be set forth for action on plans or plats, or both, submitted for approval or disapproval.

Failure of the designated authority to act within sixty days of the receipt of development plans or subdivision plats with all documentation required by the land development regulations is considered to constitute approval, and the developer must be issued a letter of approval and authorization to proceed based on the plans or plats and supporting documentation presented. The sixty-day time limit may be extended by mutual agreement. ...

Notice of Appeal at ¶ 3, ¶ 33 (emphasis added); Appellant's Brief at p. 9. The Enabling Act does not provide Appellant with a private right of action and Appellant's challenge should be dismissed.

"In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011). "Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute." *Id.* Within S.C. Code Ann. § 6-29-1150, there is no expressly stated private right of action to challenge any failure of local governments to provide a procedure for site plan review by a planning commission.

"Where not expressly provided, a private right of action may be created by implication if the legislation was enacted for the special benefit of the private party." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009). "If the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party." *Id.* A statute that labels violations as a misdemeanor and imposes fines further supports the conclusion that a statute does not create a private cause of action by implication. *Id.* at 122, 678 S.E.2d at 433-434.

The intent and purpose of the Enabling Act is as follows:

The public health, safety, economy, good order, appearance, convenience, morals, and general welfare require the harmonious, orderly, and progressive development of land within the municipalities and counties of the State. In furtherance of this general intent, the regulation of land development by municipalities, counties, or consolidated political subdivisions is authorized for the following purposes, among others:

(1) to encourage the development of economically sound and stable municipalities and counties;

(2) to assure the timely provision of required streets, utilities, and other facilities and services to new land developments;

(3) to assure the adequate provision of safe and convenient traffic access and circulation, both vehicular and pedestrian, in and through new land developments;

(4) to assure the provision of needed public open spaces and building sites in new land developments through the dedication or reservation of land for recreational, educational, transportation, and other public purposes; and

(5) to assure, in general, the wise and timely development of new areas, and redevelopment of previously developed areas in harmony with the comprehensive plans of municipalities and counties.

These stated purposes benefit the general public, generally. Although Appellant may benefit from enforcement of this statute, it was intended for protection of the public as a whole. *See Dorman v. Aiken Commc'ns, Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990).

Furthermore, the Enabling Act provides a criminal penalty for violation of zoning and subdivision regulations. S.C. Code Ann. § 6-29-950 (“A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor.”); *id.* at § 6-29-1140 (“submission for filing or the recording of a subdivision plat or other land development plan without proper approval as required by this chapter is declared a misdemeanor and, upon conviction, is punishable as provided by law.”). The Legislature’s provision of criminal penalties for violation of the Enabling Act supports the lack of intent to create civil liability. *See Dema*, 383 S.C. at 122, 678 S.E.2d at 433-434. Therefore, no implied private right of action exists for Appellant to challenge the City’s delegation of site plan review to DDRC as violating S.C. Code Ann. § 6-29-1150.

C. Appellant failed to preserve the *ultra vires* issue for judicial review.

Appellant attended all hearings relating to the Proposed Construction and never raised any issue regarding City’s assignment of site plan review from Planning Commission to the DDRC. Appellant’s argument is therefore not preserved for judicial review. A party must raise an issue in

a timely matter in order to preserve the issue for appeal. “It is an axiomatic rule of law that issues may not be raised for the first time on appeal.” *Talley v. S.C. Higher Educ. Tuition Grants Committee*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) (citation omitted). *See also Hoffman v. Powell*, 298 S.C. 338, 340 n. 2, 380 S.E.2d 821, 822, n. 2 (1989) (refusing to consider an issue which “was not raised below,” stating: “it will not be considered for the first time on appeal”) (citation omitted); *Adams v. B&D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) (“An issue not raised before the trial court will not be addressed on appeal”) (citations omitted).

When attorney Pat Hubbard appeared before the DDRC to raise issues with respect to delegation of site plan approval by City to the DDRC, he was not representing Appellant. *See* March DDRC135-147 (filed Aug. 24, 2020). He is now counsel for Appellant in this case. Mr. Hubbard’s arguments were not made by *Appellant* and therefore Appellant failed to preserve these issues for this appeal. “As a general rule, a party cannot rely on issues raised by someone else[.]” *S.C. Jur. Appeal & Error* § 71 (Feb. 2021). *See also State v. Carriker*, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) (“[T]he appellant may not utilize the objection of another defendant to gain review.” (citing 4 C.J.S. *Appeal and Error* § 251 (1957))).

In *Brock v. Bd. of Adjustment and Appeals of City of Rock Hill*, 308 S.C. 539, 543, 419 S.E.2d 773, 776 (1992), certain neighbors sought review of a decision by the City of Rock Hill’s Board of Adjustment and Appeals renewing a permit for a shelter for battered women. On appeal, the City and Board raised certain issues which were not raised by the neighborhood-appellant. *Id.* at 543, 419 S.E. 2d at 776. On subsequent appeal, only the appellant-neighborhood remained. At that time the neighborhood attempted to raise the legal issues which had been briefed by the City and Board. The Supreme Court refused to hear the arguments, stating: “While the issue was raised and briefed by the Board of Adjustment and the City of Rock Hill, neither of which appealed the

decision of the Appeals Court, the petitioner did not raise this issue below. Therefore, petitioner may not raise the issue for the first time before this Court.” *Id.* (citations omitted).

Because Appellant failed to raise the alleged issue of improper delegation of authority to review site plan decisions, instead attempting to adopt Mr. Hubbard’s opposition before the DDRC, Appellant failed to preserve this issue and the issue should be disregarded.

D. The DDRC never decided the issue of improper delegation of site plan review.

The DDRC’s powers were limited to a determination of whether a certificate of site plan approval should have been issued. The DDRC was without power or authority to make any determinations regarding the legality of City’s assignment of site plan review to the DDRC and whether such assignment violated the Enabling Act. This was recognized by both Mr. Hubbard and the DDRC at the March 12, 2020 public hearing. Trans. (Mar. 12, 2020), at 15:14-16; 15:17-19, 15:25-16:2. Appellant also concedes: “The Chair of the DDRC ruled that the DDRC **could not and would not** address this issue.” Notice of Appeal at ¶ 35 (emphasis added).

It is improper for this Court, in an appeal, to hear and determine issues that were outside the DDRC’s jurisdiction and likewise outside of this Court’s appellate jurisdiction under S.C. Code Ann. § 6-29-930(A) (determining whether the DDRC’s decision was correct as a matter of law). The Court’s authority to review decisions of the DDRC does not include review of constitutional issues. *See Norton v. City of Danville*, 602 S.E. 2d 126 (Va. 2004) (holding, under similar statutory scheme, that judicial review of board decisions is limited, and a court is not authorized to rule on issues other than the board’s decision). The DDRC does not have authority to determine its own authority and this Court is without jurisdiction to hear and decide matters outside of the DDRC’s decision in any appeal. Therefore, the Court should refuse to hear Appellant’s assertion that City’s assignment of site plan review from the Planning Commission to the DDRC was *ultra vires*.

III. THE GUIDELINES DO NOT CONSTITUTE AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER FROM CITY TO THE DDRC.

Appellant suggests the *Guidelines* are an improper delegation of the City's legislative powers to the DDRC because the *Guidelines* were adopted "as an ordinance." Appellant's Brief at p. 13. Appellant argues that the intent of the drafters was "a recommendation that the City's regulatory plans and codes be amended to reflect the guidelines included here." *Id.* There is no legal or binding mandate as a result of the drafter's "recommendation" to the City and Appellant makes no attempt to argue otherwise. Indeed, Appellant's scant two paragraph analysis is entirely devoid of any legal authority. "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (citations omitted). Appellant's argument should also be deemed abandoned.

Even if Appellant's argument were properly presented for judicial review, it is erroneous. Irrespective of the drafters' "intent" that City enact a separate ordinance instead of merely adopt the *Guidelines* by reference, City's ordinances in fact mandate compliance with the *Guidelines*. Columbia, S.C. Code of Ordinances, § 17-253 ("Development within the –DD area **must comply** with design guidelines set forth in this Code and in the [*Guidelines*].") (emphasis added). Appellant fails to articulate why City's adoption of the *Guidelines* in this manner is unlawful or void.

Appellant also argues that the *Guidelines* provide nothing but "mere vague suggestions that provide no meaningful limit on the exercise of administrative discretion." Notice of Appeal at ¶ 25(b); Appellant's Brief at p. 14 ("the DDRC and its staff have been authorized to apply a scheme of 'illustrative' 'non-binding' guidelines. Such an open-ended authorization constitutes an improper delegation of the City's legislative power."); *id.* at p. 17 ("[T]here is neither a meaningful

standard to guide the exercise of discretion nor a framework to provide a workable regulatory framework for judicial review of the exercise of discretion.”).

In its Notice of Appeal and earlier response to Motions to Dismiss filed by the Respondents, Appellant conceded that the *Guidelines* can be interpreted in a constitutional manner. See Resp. to Mtn. to Dismiss at p. 14 (“One way to address the delegation of legislative power problem is to construe the *Guidelines* in a way that suitably constrains the exercise of discretion in a constitutional manner. The Complaint proposes such an approach in ¶ 25(b) and applies the approach at ¶¶ 26-31.”). Appellant’s earlier position is now directly contrary to the position that it takes in its effort to challenge the DDRC’s Design Review Decision in its Brief. Appellant should be judicially estopped from reversing course. See *Cothran v. Brown*, 357 S.C. 210, 215 S.E.2d 629, 631 (2004) (“Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.”) (citation omitted).

The problem with Appellant’s inconsistent positions is amplified by the fact that Appellant’s position relies on an assumption that is unsupported by the record. Appellant assumes the DDRC adopted an interpretation of the *Guidelines* proposed in an electronic email from a City staff member to Appellant’s President. See July DDRC049-050. There is nothing in the record that supports this assumption. Instead, the DDRC’s decision was based on the *Guidelines* and City’s zoning ordinances, all of which contain suitable constraints that limit the exercise of discretion by the DDRC. The DDRC’s decision demonstrates that it was guided by those constraints.

S.C. Code Ann. § 5-7-30 provides a broad grant of authority to local governments to enact ordinances and regulation for the promotion of general welfare under general police powers. It has long been accepted by our state’s courts that local governments have the power to regulate

aesthetics, and aesthetic considerations are clearly a legitimate interest for local governments. See *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 397 S.E.2d 662 (1990) (finding the state may legitimately exercise its police powers to advance aesthetic values); *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 593 S.E.2d 462 (2004) (stating aesthetic and environmental concerns, among others, are factors properly left to the sound discretion of municipalities in the decision to provide services; *Taylor v. Town of Plaistow*, 872 A. 2d 769 (N.H. 2005) (stating a municipality may exercise its zoning power to advance aesthetic purposes because the preservation or enhancement of the visual environment may promote the general welfare).

“A local board exercising its discretion ‘must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary.’” *Rockville Haven, LLC v. The Town of Rockville*, No. 09-CP-10-4417, 2010 WL 6997515 (Ct. Com. Pl. Mar. 5, 2010) (quoting *Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 633 (1997)).

[I]t is necessary that [a] statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoy a procedure under which, by appeal or otherwise, both public interest and private rights shall have due consideration.

S.C. State Highway Dept. v. Harbin, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955) (quotation omitted). “The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition.” *Id.*

Here, City’s ordinances and the *Guidelines* were designed to “[p]rotect the beauty of the city and improve the quality of its environment through . . . conservation, maintenance and enhancement of . . . structures . . . which constitute or reflect distinctive features of the economic, social, cultural, or architectural history of the city[.]” Columbia, S.C., Code of Ordinances § 17-

651(1); *see also* S.C. Code Ann. § 6-29-870 (giving architectural boards the power to restrict the alteration of the exterior appearance of structures). City’s *Guidelines* “promote the public welfare, strengthen cultural and educational life of the city, and make the city a more attractive and desirable place in which to live and work. *Id.* at § 17-651(5). The ordinances and *Guidelines* must be interpreted consistently with this purpose. *See McMaster v. Columbia Bd. of Zoning Appeals*, 395 S.C. 499, 505, 719 S.E.2d 660, 663 (2011) (“The validity of a particular zoning ordinance must be considered not in the abstract, but in connection with the locality and surrounding circumstances.”).

Even though the *Guidelines* are discretionary in nature, they are not lacking in specificity such that the DDRC is given unfettered discretion in making design decisions, specifically as to height. The Supreme Court has noted: “There are many instances where it is impossible or impracticable to lay down criteria or standards without destroying the flexibility necessary to enable the administrative officers to carry out the legislative will.” *Harbin*, 226 S.C. at 594, 86 S.E.2d at 470. It is difficult to think of a more apt circumstance where flexibility should be provided to administrative officers than the case at bar; the DDRC’s job is to approve of *design* applications for proposed construction. Design is inherently subjective. In fact, because of this context, City’s ordinance requires the DDRC to be comprised of individuals from relevant disciplines. *See Columbia, S.C., Code of Ordinances* at § 17-653(c). Such a requirement provides additional protection against arbitrary enforcement of regulations. *See Riel v. City of Bradford*, 485 F. 3d 736, 755 (3d Cir. 2007) (finding the fact that an architectural review board was comprised of nine individuals, at least one of whom was a real estate broker, architect, city inspector, and other individuals knowledgeable about historic preservation, “guards against applicants being subjected to the whim or caprice of one single official.”).

Appellant cherry picks terms like “illustrative,” “should,” and “non-binding,” from the *Guidelines* for arguing that the *Guidelines* are “literally non-binding” and conflict with the nondelegation-of-legislative power doctrine. Notice of Appeal at ¶ 25(b); Appellant’s Brief at p. 13. Appellant distorts the language of the *Guidelines*, inaccurately construes the legislative intent behind the *Guidelines*, and ignores the DDRC’s role in reviewing construction pursuant to the *Guidelines*, and therefore should be rejected. Appellant isolates words from the *Guidelines* and misuses them without context in contradiction to applicable law: “Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and given effect, if it can be done by any reasonable construction.” *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 623, 611 S.E.2d 297, 302 (Ct. App. 2005); *McMaster*, 395 S.C. at 505, 719 S.E.2d at 663 (“ordinance[s] must be considered not in the abstract, but in connection with the locality and surrounding circumstances.”).

A review of the *Guidelines* demonstrates that they both “declare a legislative policy” and “establish primary standards for carrying [that policy] out.” *Harbin*, 226 S.C. at 594, 86 S.E.2d at 470. Chapter 5 addresses design considerations for construction of new buildings. As recognized in Section 5.1, “City Center is a complex area with a variety of development settings” and corresponding design styles.” Therefore, “[t]he *Guidelines* are ‘illustrative rather than prescriptive’ and ‘aim to engender creative approaches and solutions within a workable framework, rather than laying out detailed and rigid standards.’” *Id.* In order to achieve the *Guidelines*’ overall objectives, the DDRC is required to “ensure that new projects are developed within the rhythm of the existing development pattern” by considering buildings on a case-by-case basis and within “context” of surrounding buildings. *Id.* Although the *Guidelines* are clear that “no predetermined architectural style or design theme is required,” a new building is required to be “compatible with [both] its

function and [its] surroundings.” *Id.* at § 5.2. “[P]rojects should be sympathetic and compatible with surrounding buildings in terms of mass, scale, height, façade, rhythm, placement of doors and windows, color, and use of materials[.]” *Id.*

As to height, the *Guidelines* contain the following provisions which “lay down an intelligible principle to which the administrative officer or body must conform.” *Harbin, supra.*

[T]he minimum height for any new building . . . should typically be two stories, even if the building contains only one functional story[.] Low profile office buildings, commercial buildings, and residences will not yield the density, urban scale, and character desired for City Center, and should, therefore, be discouraged. As a general rule, and consistent with current zoning provisions, buildings within most of City Center should be no more than five stories. There are, however, exceptions. . . . As noted above, it is not the intent of these Guidelines to establish new height standards for development in City Center. It is, however, critical that in applying these Guidelines—as well as other development regulations—the City be consistent in considering the height of proposed structures as they relate to the adjacent development context. Building height should be considered on a case-by-case basis[.]

Guidelines at § 5.3.1.

Appellant attempts to compare the foregoing section of City’s *Guidelines* to the standards struck down in *Harbin*, 226 S.C. 585, 86 S.E.2d 466, and *Schloss Poster Advertising Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939). Appellant’s Brief at pp. 14-16. In *Harbin*, a statute authorized the highway department to suspend or revoke a driver’s license “for any cause satisfactory to” the department. The Supreme Court rejected this standard, finding “[i]t sets up no standard to guide the Department and contains no limitations.” 226 S.C. at 595, 86 S.E.2d at 471. In *Schloss*, an ordinance prohibited a person from “erect[ing] or maintain[ing] any billboard . . . without having first obtained from the city council a permit to do so.” 190 S.C. at 92, 2 S.E.2d at 393. The Court noted that the ordinance “in no way controls or guides the discretion vested” in the city council. By failing to “prescribe rules or conditions for the issuance of permits for the erection of billboards . . . it commits to the unrestrained will of the city authorities, for any reason deemed

satisfactory to them, the right and power to absolutely prohibit the use of property for the erection of billboards.” 2 S.E.2d at 394.

In stark contrast, Section 5.3.1 of the *Guidelines* specifically states that buildings are, “as a general rule,” to be between two and five stories. The *Guidelines* expressly contemplate that “exceptions” to the general rule as to height may be permitted by the DDRC. *Id.* Although Section 5.3.1. “provides [only] non-binding general direction,” the DDRC’s discretion, if any, as to building heights within City Center is expressly constrained by Section 5.3.1 of the *Guidelines* to be “consistent with current zoning provisions.” *Id.* “The City’s comprehensive plan and zoning ordinances are the primary legal vehicles for expressing regulations concerning the height of buildings.” *Id.* As a consequence, Appellant’s argument that the DDRC is given unfettered discretion as to height is not correct. Even if the general rules as to building height set forth in the *Guidelines* can be excepted by the DDRC in particular cases, the DDRC is still constrained by City’s zoning ordinances as to height and the *Guidelines*’ requirement that the DDRC consider new buildings “within the rhythm of the existing development pattern” and “context” of surrounding buildings. *Guidelines* at § 5.1.

Although the Proposed Construction does exceed the five story “general rule” in Section 5.3.1 of the *Guidelines*, it is undisputedly within the height requirements of City’s zoning ordinance. Columbia, S.C., Code of Ordinances at § 17-275 at note c (“Buildings between the height of 50 and 75 feet may be allowed[.]”). Further, the DDRC also considered the Proposed Construction within the “rhythm of the existing development pattern” and “context” of surrounding buildings. During the DDRC’s March 2020 public hearing, City staff prepared and presented a “map to show the [Proposed Construction’s] relationship to the City Center [-DD].” Trans. (Mar. 12, 2020), at 30:3-17; see March DDRC19. The map shows that both the University

of South Carolina School of Law, across Pickens Street (which is also within the City Center - DD), and the Hilton Garden Inn, across Gervais Street, both immediately adjacent to the Proposed Construction, are 60-80 feet tall, and which are the most recently-constructed buildings in the City Center -DD. “U of SC law school across Pickens is 58 feet to the top of the third floor and 70 feet to the roof pitch. The Hilton Garden Inn is just under 75 feet.” Trans. (Mar. 12, 2020), at 31:21-23. The Proposed Construction is 75 feet tall and within the rhythm and context of its surroundings.

Appellant’s selected and distorted use of the terms “precatory,” “non-binding,” “illustrative,” and otherwise, does not render the *Guidelines* unconstitutionally vague or unenforceable. Instead, the *Guidelines*, when considered as a whole with City’s other ordinances, as this Court is required to do, provide such standards as are required to guide the DDRC and define its discretion. The *Guidelines* are not invalid on the basis that they are an unlawful delegation of legislative power as Appellant asserts. That Appellant seeks to have this Court strike down the entirety of the *Guidelines* based on the singular argument that Section 5.3.1 is unconstitutionally vague is confusing as the *Guidelines* protect the City Center –DD (and Appellant’s neighborhood) by requiring certain elements of design by the DDRC which otherwise would not exist if the *Guidelines*, as a whole, were struck down.

IV. APPELLANT’S CHALLENGES TO THE DDRC’S APPLICATION OF THE GUIDELINES AS TO BUILDING HEIGHT FAIL AS A MATTER OF LAW.

A. Appellant’s complaints about the Design Approval Decision focus solely on City’s staff interpretations of the *Guidelines*, not the DDRC’s decision.

Appellant focuses its challenge as to the DDRC’s application of the *Guidelines* not on the DDRC’s Design Approval Decision itself, but, instead on statements made by an employee of the City of Columbia, Lucinda Statler. Notice of Appeal, ¶¶ 3(a)(1), 21-22, 24, 26, 28, 31; *id.* at Exhibit 1; Appellant’s Brief, pp. 16-17, 21-22, 25-26. When addressing questions presented in an appeal,

“the court must determine *only* whether the *decision of the board [of architectural review]* is correct as a matter of law.” S.C. Code Ann. § 6-29-930(A) (emphasis added.) The appeal is fatally defective in that it improperly and exclusively focuses on alleged legal errors contained in a City employee’s email, *not* the actual decision of the DDRC. The appeal should be dismissed.

Appellant claims that the DDRC’s Design Approval Decision “was based on two fundamental mistakes of law[,]” including “erroneous legal interpretations of the *Guidelines*” and the “view that, because of the use of precatory rather than mandatory terms, DDRC decisions can lawfully be based simply on a virtually unlimited discretionary decision-making power to make ‘the overall determination as to whether a project substantially meets—or does not meet—the design guidelines.’” Notice of Appeal at ¶ 3(a)(1); *see also* Appellant’s Brief at pp. 20-29. Legal interpretations to which Appellant assigns mistake were not made *by the DDRC* in its Design Approval Decision, but instead, a City employee in an email to Appellant’s President. *See* Appellant’s Brief at pp. 16-17, 21-22, 25-26. Appellant claims the DDRC “based [its decision] on a legal misinterpretation by the staff of the DDRC.” *Id.* at pp. 2-21. However, nothing in the DDRC’s Design Approval Decision states that it was based on the positions or conclusions of Ms. Statler’s email or any recommendation in the City’s *Staff Report*.

Instead, the DDRC’s Design Approval Decision was based on “all of the evidence, testimony and documents presented to the DDRC” during four public hearings and one public work session *See* Trans. (July 9, 2020), at 18:5-21. In making its decision, the DDRC concluded:

[Trinitas] meets applicable . . . *Guidelines*[,] . . . [s]pecifically, . . . the following sections of 5.3, building mass and organization, which are 5.3.1 building height, in which it is stated: “The city’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.”

Id. The Design Approval Decision made only one reference to City’s staff, and it was unrelated to interpretation of the *Guidelines*: “[A]s staff has pointed out, [the Proposed Construction] actually is within 5 feet of the gable of the building, the law school across the street.” *Id.*

Nowhere does Appellant suggest any error of law in the DDRC’s Design Approval Decision made on July 9, 2020. Appellant’s appeal of the DDRC’s Design Approval Decision should fail because it fails to identify any part of the actual decision that contains an error of law.

B. The DDRC did not abuse its discretion in applying City’s *Guidelines*.

Appellant asserts that the DDRC’s Design Approval Decision was incorrect as a matter of law and should be reversed because the DDRC abused its discretion in applying City’s *Guidelines*. See Notice of Appeal at ¶¶ 21-31; Appellant’s Brief at pp. 16-29. “An abuse of discretion occurs when a . . . decision is controlled by an error of law or is without evidentiary support.” *Micronics, Inc. v. S.C. Dep’t of Rev.*, 345 S.C. 506, 510, 548 S.E.2d 223, 225 (Ct. App. 2001) (citation omitted). The DDRC’s Design Approval Decision was not based on an error of law and was supported by evidence. It should be upheld.

1. The DDRC’s Design Approval Decision was not the result of an error of law.

Appellant has failed to carry its burden of proving the Design Approval Decision was the product of an error of law. Absent such a showing, the Court should defer to the decision of the DDRC. *Gurganious v. City of Beaufort*, 317 S.C. 481, 487, 454 S.E.2d 912, 916 (Ct. App. 1995). Appellant contends that “overlay district[s] like the –DD area [are] designed to impose design requirements in addition to the underlying zoning that already exists.” Notice of Appeal at ¶ 2; see also *id.* at ¶¶ 3(a)(1), 9, 22(1)); Appellant’s Brief at pp. 2-3, 27-29. However, Appellant’s argument considers overlay districts in the abstract, ignores plain and unambiguous language in the *Guidelines*, and is inconsistent with case law regarding interpretation of municipal ordinances.

A “board of architectural review has those powers involving the structures and neighborhoods as may be determined by the zoning ordinance.” S.C. Code Ann. § 6-29-880. City ordinance Section 17-653 empowers the DDRC to administer the *Guidelines*. See Columbia, S.C. Code of Ordinances §§ 17-653(b)(9), 17-253. Since 1998, nearly twenty-five years ago, the DDRC has interpreted and applied City’s *Guidelines* to new construction within the City Center -DD. A strong presumption exists in favor of the validity and application of the of the *Guidelines* by the DDRC. *Petersen v. City of Clemson*, 312 S.C. 162, 439 S.E.2d 317 (Ct.App.1993). A court should refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Talbot v. Myrtle Beach Bd. of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952).

In interpreting the *Guidelines*, the Court is controlled by legislative interpretation principles. “The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *Mikell v. Cty. of Charleston*, 386 S.C. 153, 160, 687 S.E.2d 326, 330 (2009). “When interpreting an ordinance, the legislative intent must prevail if it can be reasonably discovered in the language used.” *Id.* “An ordinance must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.” *Charleston Cty. Parks & Recreation Comm’n v. Somers*, 319 S.C. 65, 68, 459 S.E.2d 841, 843 (1995). “In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation.” *City of Myrtle Beach v. Juel P. Corp.*, 344 S.C. 43, 47, 543 S.E.2d 538, 540 (2001).

Appellant’s interpretation and legal position is singularly focused on the following general guidance contained in the *Guidelines*: “As a general rule, . . . buildings within most of City Center should be no more than five stories.” *Guidelines* at § 5.3.1. However, as previously noted, this “general rule” is within the explicit context of “current zoning provisions.” *Id.* The *Guidelines*

make clear: “[I]t is not the intent of these *Guidelines* to establish new height standards for development in City Center.” *Id.* Appellant’s argument makes the *Guidelines* more restrictive than applicable zoning ordinances and ignores the clearly-stated legislative intent which compels an opposite conclusion. Appellant’s argument both ignores and distorts the language of the *Guidelines* and is inconsistent with statutory interpretation principles which this Court is bound to follow.

Appellant’s argument relies heavily on Section 6-29-960 of the Enabling Act and City’s ordinance Section 17-181. *See* Appellant’s Brief at pp. 22-23. The Enabling Act states:

When the regulations made under authority of this chapter ... require a lower height of building or smaller number of stories, ... or impose other more restrictive standards than are required in or under another statute, or local ordinance or regulation, the regulations made under authority of this chapter govern. When the provisions of another statute require more restrictive standards than are required by the regulations made under authority of this chapter, the provisions of that statute govern.

S.C. Code Ann. § 6-29-960. Section 17-181 provides: “Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that imposing the higher standards, shall govern.” Appellant’s reliance on these authorities is misplaced. It is clear that both are intended to serve as a gap filler in statutory interpretation only when ordinances are in conflict and neither ordinance expresses deference to the other.

In determining whether there is a conflict, the Court must determine whether “conditions, express or implied, are inconsistent or irreconcilable[.]” *City of North Charleston v. Harper*, 306 S.C. 153, 156-157, 410 S.E.2d 569, 571 (1991) (citations omitted). Where two ordinances deal with the same issue, one in a general and the other in a more specific and definite manner, the more specific prevails. *Capco of Summerville v. J.H. Gayle Constr. Co., Inc.*, 368 S.C. 137, 628 S.E.2d 38 (2006). *See also Wooten ex rel. Wooten v. S.C. Dep’t of Transp.*, 333 S.C. 464, 468, 511 S.E.2d

355, 357 (1999) (specific statutory provision prevails over a more general one); *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp.*, 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (same).

Here, Appellant takes the position that Section 5.3.1 of the *Guidelines* is *more specific and definite* as to height restrictions than any other City ordinance or provision of the Enabling Act and, therefore, the *Guidelines*' "general rule" should control. This is the very section Appellant also claims is so unclear and unspecific that it should be declared unconstitutionally vague. See Appellant's Brief at pp. 17-19. While a party may assert inconsistent alternative statements of a particular claim, "there is no authority for the proposition that within a statement of a given claim a party may assert as fact two assertions that directly contradict each other. Such clashing factual assertions, stated in the context of the same claim . . . may be deemed judicial admissions." *Nat'l Western Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 175 F. Supp.2d 489 (S.D.N.Y. 2000). Here, Appellant's position is internally at odds. Section 5.3.1 of the *Guidelines* is somehow both "standardless" (Appellant's Brief at p. 19) and "more restrictive than the underlying zoning of 75 feet" (Appellant's Brief at p. 24). Appellant cannot have it both ways.

Even setting aside the obvious internal inconsistency with Appellant's arguments, the *Guidelines* are clear that, at least as to height, the *Guidelines* do not "establish new height standards" and, instead, "[t]he City's comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings." *Guidelines* at § 5.3.1. In other words, in allowing exceptions to the general rule that buildings be between two and five stories, Section 5.3.1 of the *Guidelines* explicitly defers height restrictions to those set forth in City's zoning ordinances. Thus, the general gap filler interpretation rules set forth in Section 6-29-960 of the Enabling Act and City Ordinance Section 17-181 are inapplicable.

Appellant's argument is also flawed because it ignores the plain language of the *Guidelines* and City ordinances that control the DDRC in this instance. When considering the "mass and organization" of a proposed building within the City Center, the DDRC is guided by Section 5.3 of the *Guidelines*, which explicitly states: "The height and scale of new buildings within City Center should complement existing structures while providing a sense of human scale and proportion." *Guidelines*, § 5.3. Further, "the City [should] be consistent in considering the height of proposed structures as they relate to the adjacent development context. Building height should be considered on a case-by-case basis[.]" *Id.* at § 5.3.1. In making the Design Approval Decision, the DDRC considered surrounding buildings and recognized: "[the Proposed Construction] actually is within 5 feet of the gable of the building, the law school across the street." *See Trans.* (July 9, 2020), at 18:5-21.

The DDRC's Design Approval Decision was not an error of law because it referenced *both* City's zoning ordinance and Section 5.3.1 of the *Guidelines*. *See Trans.* (July 9, 2020), at 18:5-21. The applicable City zoning ordinance, City Code Section 17-275, allows for buildings in the C-3 zoning section to be between 50 and 75 feet. Columbia, S.C., Code of Ordinances § 17-275 at note c ("Buildings between the height of 50 and 75 feet may be allowed[.]"). Since the height of the structure at issue is undisputedly within this limit, the Proposed Construction is compliant with City's zoning ordinance and therefore is also compliant with the *Guidelines*.

As further evidence that the Proposed Construction complies with City's ordinances and *Guidelines*, Respondents direct the Court's attention to City's express preference for larger, denser, new construction within the City Center -DD. *See* Columbia, S.C., Code of Ordinances § 17-253 ("The -DD area is intended to protect the area identified as 'City Center' which is undergoing redevelopment and revitalization from incompatible land uses and influences which do not

complement or promote the high-intensity mixed use character of the area.”); *see also Guidelines* at § 5.3.1 (“Low profile office buildings, commercial buildings, and residences will not yield the density, urban scale, and character desired for City Center, and should therefore be discouraged.”).²⁵ This stated preference supports the DDRC’s decision to approve Trinitas’ Certificate of Design and directs that the Court find the DDRC’s Design Approval Decision not erroneous as a matter of law.

“The burden is on the appellant to show not only error, but also prejudice.” *Snyder’s Auto World, Inc. v. George Coleman Motor Co., Inc.*, 315 S.C. 183, 434 S.E.2d 310 (Ct. App. 1993) (citing *Cartee v. Cartee*, 295 S.C. 103, 366 S.E.2d 269 (Ct. App. 1998)). Here, Appellant has failed to show legal error and cannot show prejudice for the same reasons that it cannot establish standing. The DDRC’s Design Approval Decision should be upheld as not based on any abuse of discretion and lack of prejudice to Appellant.

2. The DDRC’s Design Approval Decision is supported by evidence.

In its Notice of Appeal, Appellant contended there is insufficient evidence to support the DDRC’s Design Approval Decision. Notice of Appeal at ¶ 3(a)(2); *see also id.* at ¶ 27 (“As a result, the record is far too incomplete to support the approval by the DDRC.”). Appellant appears to have abandoned this argument which is not included in its Appellant’s Brief. *See Brooks v. S.C. Comm’n on Indigent Defense & Office of Indigent Defense*, 419 S.C. 319, 797 S.E.2d 402 (Ct. App. 2017) (stating that issues and rulings not challenged in an appellant’s brief are deemed

²⁵ Appellant distorts Trinitas’ statement at the March 2020 DDRC public hearing. *See* Appellant’s Brief at pp. 18-19. This statement had nothing to do with legal interpretation principles concerning the *Guidelines*, as Appellant suggests. Instead, Trinitas was making the point that the *Guidelines* express a disfavor of “low office buildings, commercial buildings, and residences” because they do not “yield the density, urban scale, and character desired for City Center.” *Guidelines* at § 5.3.1. Instead, as Trinitas pointed out: “the opposite proposition also holds true.” In other words, the *Guidelines* favor, and therefore encourage, tall office buildings, commercial buildings, and residences, such as the Proposed Construction, because such buildings “will . . . yield the density, urban scale, and character desired for City Center.” *Id.*

abandoned). Nevertheless, based on a review of the extensive record supporting the DDRC's Design Approval Decision, Appellant's argument, even if preserved for review, should be rejected.

"Where the city council of a municipality has acted after considering all of the facts, the court should not disturb the finding unless such action is arbitrary, unreasonable, or an obvious abuse of its discretion." *Bob Jones Univ., Inc. v. City of Greenville*, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963). "[It] is well settled that courts reviewing the decisions of boards and other administrative agencies may look to written documents as well as records of proceedings as sufficient formats for final decisions." *Austin v. Bd. of Zoning Appeals*, 362 S.C. 29, 34, 606 S.E.2d 209, 212 (Ct. App. 2004). *See also Seabrook Island Prop. Owners Ass'n v. Marshland Tr., Inc.*, 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004) (providing the Board's discretion in approving proposed construction is "constrained only by reasonableness and good faith").

The record on appeal compels an affirmation of the DDRC's decision. The DDRC took into consideration exactly the factors required by the *Guidelines* and zoning ordinances. Section 17-674(d) required the DDRC to follow "the requirements set forth in the [*Guidelines*] adopted by the city council[.]" Columbia, S.C., Code of Ordinances, § 17-674(d)(1). In making the Design Approval Decision, the DDRC explicitly concluded that the Proposed Construction met §§ 5.3, 5.3.1, 5.3.3, 5.3.5, 5.7.1, 5.7.2, and 5.8.3, of the *Guidelines*. *See* Trans. (July 9, 2020), at 18:5-21.

Appellant believes that "[t]he comments in the staff report should contain reasons for" certain conclusions, but Appellant misstates the applicable legal standard. As set forth previously, in an appeal pursuant to S.C. Code Ann. § 6-29-930(A), the Court is to consider whether *the DDRC's decision* was correct as a matter of law. City's Staff Report had no bearing on the DDRC's Design Approval Decision. Nevertheless, even assuming Appellant contends the DDRC failed to justify certain conclusions, Appellant's protestation is unsupported and should be rejected.

First, Appellant contends the DDRC's Design Approval Decision lacks evidentiary support for "[n]ot following the five-story maximum rule." Notice of Appeal at ¶ 29-30. However, the DDRC explicitly stated in its Design Approval Decision that the "general rule" in Section 5.3.1 of the *Guidelines* was not a requirement and was predicated upon consistency with the zoning regulations. *See* Trans. (July 9, 2020), at 18:5-21. Therefore, the DDRC *did* explain its reason for allowing the Proposed Construction even though it was more than five stories. The DDRC explained that while a five story building was the *preference* of the *Guidelines*, it was not a rule.

Second, Appellant contends the DDRC's Design Approval Decision lacks evidentiary support for "[c]onsidering only the two tallest buildings and ignoring the remaining buildings on the block with the proposed site and buildings in the adjacent area." Notice of Appeal at ¶ 29-30. The *Guidelines* state that "height and scale of new buildings within City Center should complement existing structures." *Guidelines* at Section 5.3. "[I]n considering the height of proposed structures," the DDRC is to consider "structures as they relate to the adjacent development context. Building height should be considered on a case-by-case basis." *Guidelines* at Section 5.3.1. City staff prepared and presented a "map to show the [Proposed Construction's] relationship to the City Center [-DD]." Trans. (Mar. 12, 2020), at 30:3-17; *see* March DDRC19. The map shows that both the University of South Carolina School of Law, across Pickens Street, and within the City Center –DD, and the Hilton Garden Inn, across Gervais Street, both immediately adjacent to the Proposed Construction are 60-80 feet tall.²⁶

Appellant asserted at the January 2020, March 2020, and July 2020 hearings that the DDRC should consider smaller buildings when considering context, including the historic Horry-Guignard House, Taylor House and Stables, and residential buildings within the University Hill

²⁶ "U of SC law school across Pickens is 58 feet to the top of the third floor and 70 feet to the roof pitch. The Hilton Garden Inn is just under 75 feet." Trans. (Mar. 12, 2020), at 31:21-23.

Neighborhood. These buildings are *not* within the City Center -DD, like the University of South Carolina School of Law, but, instead, are located in a nearby historic district, with a separate set of design guidelines and height restrictions. These buildings are also not immediately adjacent to the Proposed Construction. The University of South Carolina School of Law and Hilton Garden Inn are. Further, Appellant's historic neighborhood begins more than a block away from the Proposed Construction and extends many city blocks away from the Proposed Construction.

In any event, proposed buildings put forth by Appellant *were considered* by the DDRC as set out in the record on appeal. The DDRC simply chose to conclude that other, taller and newer, buildings, were more relevant. As noted by City's staff: "Locating larger scale buildings, particularly multifamily residential structures, along commercial corridors such as Gervais Street is consistent with recommendation for infill development along corridors in the city's comprehensive plan[.]" Trans. (Mar. 12, 2020), at 31:24-32:3. "As well, larger scale buildings create a sense of enclosure along the street edge, an appropriate condition for major gateway corridor within the downtown street grid." *Id.* at 32:7-10. The evidence in the record before the DDRC was that the Proposed Construction was complementary and consistent in mass, scale, and height with several buildings adjacent to the Proposed Construction.

Third, Appellant contends the DDRC "fail[ed] to consider the difference in mass and scale that results from the open space around the law school and the Hilton Garden Inn vis a vis the proposed Trinitas building which will have virtually no open space to reduce the impact of two solid cubes that join to form an eight story-solid mass." Notice of Appeal at ¶ 29-30. However, the DDRC *did* consider evidence submitted by Appellant on this issue. The DDRC concluded in its Design Approval Decision that the Proposed Construction met Section 5.3, requiring that "[t]he .

. . scale of new buildings . . . should complement existing structures while providing a sense of human scale and proportion.” See Trans. (July 9, 2020), at 18:5-21 (citing Section 5.3).

Finally, Appellant contends the DDRC erred by “[n]ot considering the impact of wall articulation and the pitched roof of the law school on its mass.” Notice of Appeal at ¶ 29-30. However, the DDRC *did* consider Appellant’s objections on this issue, discussed thoroughly with Trinitas during the June 2020 work session the Proposed Construction’s wall articulation, materials, storefront openings, windows, and other design elements, to mitigate the effect of the height of the building. After multiple public hearings and an extensive working session, the DDRC concluded that the Proposed Construction met Sections 5.3.3 (proportionate openings), 5.3.5 (wall articulation), 5.7.1 (storefront composition), 5.7.2 (exterior walls), and 5.8.3 (windows). See Trans. (July 9, 2020), at 18:5-21. The DDRC considered the wall articulation and pitched roof of the University of South Carolina School of Law and concluded that its height of 70 feet was consistent and complementary to the Proposed Construction. *Id.*

Appellant’s allegations that the DDRC’s Design Approval Decision was not supported by evidence is simply not true. Instead, Appellant’s protestations are a mere complaint that the DDRC did not *agree* with Appellant’s opposition to the Proposed Construction and, instead, exercised its discretion under the *Guidelines* to approve the design of the Proposed Construction. The DDRC’s Design Approval Decision was based on substantial evidence in the record from three public hearings (January, March, and July 2020) and one public work session (June 2020). The evidence and documents in the record speak for themselves and the DDRC’s decisions should be affirmed.

The DDRC’s Design Approval Decision was not an abuse of discretion based on an error of law because it was a reasonable interpretation of City’s ordinances. A decision of a board of architectural review is to be given “great deference,” such that it must remain “undisturbed if the

propriety of that decision is even “fairly debatable.” *Gurganious*, 317 S.C. at 485, 454 S.E.2d at 915 (quotation omitted). The DDRC’s Design Approval Decision was “not arbitrary,” but instead “b[ore] a sufficient relation to the . . . general plan of development.” *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987). The Design Approval Decision should be affirmed by this Court.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this honorable Court:

- (1) find Appellant lacks standing to bring any of the challenges at issue in this case;
- (2) find Appellant’s challenge to City’s delegation of site plan approval to the DDRC (instead of Planning Commission) is moot and, further, fails because Appellant does not have a private right of action to challenge City’s delegation of site planning approval and Appellant did not properly preserve this issue for judicial review;
- (3) find Appellant’s challenge to City’s adoption of the *Guidelines* as an unlawful delegation of legislative authority fails as a matter of law;
- (4) affirm the DDRC’s Design Approval Decision based on an appropriate and reasonable application of the City Center –DD *Guidelines* and City ordinances.

Respondents respectfully request that the Court dismiss all claims in Appellant’s complaint and notice of appeal.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted:

s/M. McMullen Taylor

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Attorneys for Trinitas Ventures LLC

July 21, 2021.

Exhibit 1



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**COLUMBIA CITY COUNCIL MEETING AGENDA
TUESDAY, DECEMBER 1, 2020**

The Columbia City Council will conduct a meeting on Tuesday, December 1, 2020 at 2:00 p.m. in the Video Conferencing Technology, www.columbiasc.gov, Columbia, SC 29201.

CALL TO ORDER

INVOCATION

ADOPTION OF THE AGENDA

APPROVAL OF MINUTES

1. Council is asked to approve the October 20, 2020 and November 5, 2020 Council Meeting Minutes.

CITY COUNCIL DISCUSSION / ACTION

2. COVID-19 Update - The Honorable Mayor Stephen K. Benjamin
 - COVID-19 Situational Report - Mr. Harry Tinsley, Emergency Management Director
3. Update from Central SC Alliance - Mrs. Tracy McMillin, Interim President and CEO

CONSENT AGENDA ITEMS 4 THROUGH 21

4. Council is asked to approve a Contract for the King Street Asbestos Abatement and Demolition Project, as requested by the Community Development Department. Award to AAA Utility and Construction, LLC in an amount not to exceed \$58,850.00. The contractor is located in Columbia, SC.

Funding: Source: Community Development Control - Professional Services, King/Lyon Street Redevelopment (2519999-636600, 9100930018-636600). The original budget amount is \$60,000.00.

5. Council is asked to approve the Fiscal Year 2020/2021 Contract Extension for Cornerstone On Demand Automated Recruiting Software Solutions, as requested by the Human Resources Department. Award to Cornerstone On Demand, Inc., in the amount of \$63,133.91. The firm is located in Santa Monica, CA.

Funding Source: Program Management Office - Software Licenses (6218950-627510). The original budget amount is \$70,000.00.



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**COLUMBIA CITY COUNCIL MEETING AGENDA
TUESDAY, DECEMBER 1, 2020**

6. Council is asked to approve a Professional Services Agreement for Fiscal Year 2020/2021 for Employee Technology Training, as requested by the Community Development Department. Award to Fast Forward in an amount not to exceed \$100,000.00. This firm is located in Columbia, SC.

Funding Source: Community Development (1014320-636600) and Special Projects (5518415-636600). The original budget amount is \$100,000.00.

7. Council is asked to approve the Purchase of five Chevrolet Tahoes, as requested by the Columbia Police Department. Award to Love Chevrolet, using the SC State Contract in the amount of \$189,902.00. The vendor is located in Columbia, SC.

Funding Source: Capital Replacement - Auto, Trucks, Heavy Equipment - Capital (6308972-658500). The original budget amount is \$189,902.00.

8. Council is asked to approve the Renewal of Fiscal Year 2020/2021 Records Management System Workstation Software Annual Maintenance, as requested by the Columbia Police Department. Award to Tritech Software Systems, a CentralSquare Company, in the amount of \$206,381.30. The vendor is located in Lake Mary, FL.

Funding Source: Police Administrative Services - Maintenance & Service Contract (1012402-638200). The original budget amount is \$206,381.30

9. Council is asked to approve the Purchase of Banner 5.2 Upgrade, Software Licenses, and Maintenance Support, as requested by the Budget and Program Management Office. Award to Hansen Banner, LLC, in the amount of \$822,370.00. The vendor is located in Carlsbad, CA.

Funding Source: Technology Contingency - Professional Services (5518408-636600) \$811,070.00; Technology Contingency - Software Licenses (5518408-627510) \$4,300.00; Technology Contingency - Maintenance & Service Contracts (5518408-638200) \$7,000.00. The original budget amount is \$822,370.00.

10. Council is asked to approve the Purchase of Parts and Labor for Reconditioning of the Aqua Guard Self-Cleaning Bar Filter Screen for the Metro Wastewater Treatment Plant, as requested by Columbia Water. Award to Parkson Corporation, as a Sole Source in the amount of \$146,000.00. The vendor is located in Fort Lauderdale, FL.

Funding Source: Utilities Metro Wastewater Plant - Special Projects (5516208-638500). The original budget amount is \$146,000.00.



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TUESDAY, DECEMBER 1, 2020**

11. Council is asked to approve Contract Amendment #4 for Project SD8386; Harlem Heights Watershed Improvements, as requested by Columbia Water. Award to Woolpert, Incorporated in the amount of \$159,035.00. The firm is located in Columbia, SC.

Funding Source: Stormwater Improvement Capital Project Control/Capital Project Costs (5534210-SD8386-638305). The original budget amount was \$491,299.00. The budget amount for this amendment is \$159,035.00. The total revised budget amount is \$650,334.00.

Woolpert, Incorporated is the prime and will provide project management, public coordination, permitting, utility coordination, and hydraulic modeling services at 41.49% (\$269,849.00) of the revised total contract amount.

The following subconsultants will provide additional services:

4D Engineering, a Minority Business Enterprise (W) of Lexington, SC, will provide site design and construction management services at 43.34% (\$281,835.00) of the revised total contract amount.

P J Noble and Associates, a Minority Business Enterprise of Columbia, SC, will provide public involvement and meeting facilitation services at 7.27% (\$47,300.00) of the revised total contract amount.

Chao & Associates, a Minority Business Enterprise of Columbia, SC, will provide field survey and data collection services at 5.30% (\$34,450.00) of the revised total contract amount.

Schnabel Engineering of Columbia, SC, will provide geotechnical services at 2.60% (\$16,900.00) of the revised total contract amount.

12. Council is asked to approve the Purchase of the Muffin/Channel/Auger/Screenings Washer/Honey Monster, Separation Systems, Repair Services, Installation, and Maintenance, as requested by Columbia Water. Award to JWC Environmental Inc., as a Sole Source in the amount of \$211,887.75. The vendor is located in Costa Mesa, CA.

Funding Source: Utilities Metro Wastewater Plant-Equipment repair/Service Supply; (5516208-631800); Utilities Metro Wastewater Plant-Machinery and Equipment-Capital (5516208-658300); Utilities Metro Wastewater Plant-Maintenance and Service Contract (5516208-638200). The original budget amount is \$220,000.00.

13. Council is asked to approve an Agreement for Project SS7568; Saluda River Force Main Extension Project, as requested by Columbia Water. Award to Stantec Consulting Services, Inc. in the amount of \$446,350.00. The firm is located in Columbia, SC.

Funding Source: Water and Sewer Capital Projects - Capital Project Costs (5529999-SS756801-658650). The original budget amount is \$446,350.00.



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TUESDAY, DECEMBER 1, 2020**

This is a Mentor Protégé Program Project. Stantec Consulting Services, Inc. is the mentor and will provide project management, pipeline design, and permitting services at 79.99% (\$357,050.00) of the total contract amount. Chao & Associates, a Minority Business Enterprise of Columbia, SC, is the protégé and will provide surveying and design decision assistance at 20.01% (\$89,300.00) of the total contract amount.

14. ANNEXATION, COMPREHENSIVE PLAN MAP AMENDMENT, AND ZONING MAP AMENDMENT for 1314 Rosewood Drive; TMS# 11208-02-10

Ordinance No: 2020-096 Annexing and Incorporating 1314 Rosewood Drive, Richland County TMS #11208-02-10 into Columbia Compass: Envision 2036 adopted by Ordinance No.: 2020-028 on August 4, 2020

Council District: 3

Proposal: Request recommendation to assign land use classification of Community Activity Corridor (AC-2) and assign zoning of General Commercial District (C-3) within a Flood Protective Area (-FP) for a pending annexation. The property is currently classified as Mixed Residential (High Density) and zoned HI (Pending GC) by Richland County.

Applicant: Realty Haven, LLC

Staff Recommendation: Approval

PC Recommendation: 10/05/2020; Approval (8-0)

First reading approval was given on November 17, 2020.

15. ANNEXATION, COMPREHENSIVE PLAN MAP AMENDMENT, AND ZONING MAP AMENDMENT for 1.45-acre portion of 940 Gracern Road; TMS# 07301-02-01(p)

Ordinance No: 2020-097 Annexing and Incorporating 1.45-acre portion of 940 Gracern Road, Richland County TMS#07301-02-01(pt) into Columbia Compass: Envision 2036 adopted by Ordinance No.: 2020-028 on August 4, 2020

Council District: 2

Proposal: Request to annex, assign land use classification of Employment Campus (EC) and assign zoning of General Commercial (C-3) at the time of annexation. The property is currently classified as Mixed Residential (High Density) and zoned RS-LD by Richland County.

Applicant: American Home Renovations, LLC

Staff Recommendation: Approval

PC Recommendation: 05/04/2020; Approval (7-0)



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TUESDAY, DECEMBER 1, 2020**

First reading approval was given on November 17, 2020.

16. FUTURE LAND USE MAP AMENDMENT for parcels affected by annexation or modification of land use occurred between February 13 and November 17, 2020.

Ordinance No: 2020-094 Amending the Columbia Compass: Envision 2036 Map to assign or amend land use classifications for parcels where annexation or modification of future land use occurred between February 13, 2020 and November 17, 2020

City Council Districts: All

Proposal: Amend the Future Land Use Map of Columbia Compass: Envision 2036 to assign or amend land use classifications for parcels where annexation or modification of future land use occurred or will occur between February 13 and November 17, 2020.

Applicant: City of Columbia

Staff Recommendation: Approval

PC Recommendation: 09/14/2020; Approval (8-0)

First reading approval was given on November 17, 2020.

17. UNIFIED DEVELOPMENT ORDINANCE - Revise Effective Date of Ordinance

Ordinance No.: 2020-099 Amending the effective date of Ordinance No.: 2020-022 repealing and replacing Chapter 17, Planning, Land Development and Zoning of the City of Columbia, South Carolina

Proposal: Revising the effective date of Ordinance to March 31, 2021.

Applicant: Rachel Bailey, Zoning Administrator

Staff Recommendation: Approval

PC Recommendation: 10/05/20; Approval (8-0)

First reading approval was given on November 17, 2020.

18. Ordinance No.: 2020-095 Providing for an Installment Plan of Finance for Certain Downtown City Projects; Approving Columbia Facilities Corporation and its Activities, Including the Issuance by the Corporation of not exceeding \$57,250,000 Principal Amount of Its Installation Purchase Revenue Bonds, in One Or More Series, Tax-Exempt or Taxable; Authorizing the Execution and Delivery of a Base Lease and Conveyance Agreement and an Installment Purchase and Use Agreement Each Between the City of



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TUESDAY, DECEMBER 1, 2020**

Columbia, South Carolina and The Corporation; Approving the Form and Terms of a Trust Agreement Between the Corporation and a Corporate Trustee Named Therein, in Connection with such Bonds; Approving the Form of a Preliminary Official Statement and Other Documents With Respect to the Marketing and Sale of Such Bonds; Delegating Authority to the Mayor, the City Manager and the Assistant City Manager for Finance and Economic Services, or any Two of Them Acting Together, to Approve and Determine Certain Matters; and Other Matters Relating Thereto

First reading approval was given on November 17, 2020.

19. Ordinance No.: 2020-102 Granting an encroachment to Clear Dot Charter School Columbia for the use of the right of way area of the 2000 block of Marion Street adjacent to 2015 Marion Street, Richland County TMS#09016-10-10 for the installation and maintenance of pollinator flower beds

First reading approval was given on November 17, 2020.

20. Ordinance No.: 2020-103 Granting an encroachment to Choice Hotels for the use of the right of way areas of the 1000 block of Lady Street and 1200 block of Park Street adjacent to its building at 1000 Lady Street, 1010 Lady Street, 1014 Lady Street and 1218 Park Street, Richland County TMS#09013-09-01, 09013-09-02, 09013-09-04, and 09013-09-22 for the installation and maintenance of sidewalks, driveways, parking, landscaping and irrigation

First reading approval was given on November 17, 2020.

21. Ordinance No.: 2020-105 Authorizing the City Manager to execute a Contract of Sale between the City of Columbia and T.E.O., LLC for the sale of approximately 9.90 acres being known as Parcel C, located on the North Side (N/S) of Farrow Road, Richland County TMS #11612-04-01

First reading approval was given on November 17, 2020.

ORDINANCES - SECOND READING

22. Ordinance No.: 2020-106 Approving the Use of Certain Funds of the City of Columbia, South Carolina in order to Acquire, Construct, Equip and Develop Land and Improvements within the Bull Street Facilities and Pay Certain Costs Associated with the Development Thereof; and Other Matters Relating Thereto - Bull Street Parking Facility I/Construction and Development



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**COLUMBIA CITY COUNCIL MEETING AGENDA
TUESDAY, DECEMBER 1, 2020**

First reading approval was given on November 17, 2020.

ZONING/PLANNING MATTERS - FIRST READING

23. ZONING TEXT AMENDMENT to Amend §17-253 - -DD (design/development)/City Center Design/Development Guidelines to delete Section 3.5.4 (Site Plan Review).

Ordinance No: 2020-100 Amending Chapter 17, Planning, Land Development and Zoning of the 1998 Code of Ordinances of the City of Columbia, South Carolina, Sec. 17-253 -- DD design/development area

Proposal: Amend Sec. 17-253 of the Columbia Code of Ordinances (-DD design/development) to amend the City Center Design/Development Guidelines to delete Section 3.5.4 (Site Plan Review).

Applicant: Councilman Daniel Rickenmann, Columbia City Council

Staff Recommendation: Approval

PC Recommendation: 11/02/2020; Approved (8-0)

The public hearing was held on November 17, 2020 and first reading was deferred.

ORDINANCES - FIRST READING

24. Ordinance No.: 2020-107 Consenting to the Inclusion of Property in a Multi-County Industrial/Business Park (Gable Oaks Affordable Housing, 5530 Randall Avenue and 901 Colleton Street, Richland County TMS #11705-03-01 and 11706-11-03)

RESOLUTIONS

25. Resolution No.: R-2020-100 Authorizing the Purchase of 6249 Yorkshire Drive, Columbia, SC 29209 identified as Lot 13, Block I, Yorkshire; Richland County TMS#16416-03-08 n/f Walter Ray Burns, as Trustee under the Revocable Trust Agreement of Walter Ray Burns dated April 29, 2019; Project Name: Yorkshire Stormwater Improvements; CIP Project #SD8468; CF#250-515
26. Resolution No.: R-2020-104 Authorizing the City Manager to execute an Encroachment License Agreement (NS #1276367) between the City of Columbia and Dominion South Carolina, Inc. for the Richtex, Phase II Pipeline Project on Peebles Street, Richland County TMS#09303-05-41



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**COLUMBIA CITY COUNCIL MEETING AGENDA
TUESDAY, DECEMBER 1, 2020**

OTHER MATTERS

27. Council is asked to approve the installation of one speed hump on Holly Street between Rosewood Drive and Burney Drive, as requested by the Public Works Department.

This request has been approved by the Columbia Fire Department and the Columbia Police Department.

28. Council is asked to approve a four-way stop at the intersection of Claremont Drive and Kenilworth Road, as requested by the Public Works Department.

This request has been approved by the Columbia Police Department and the Columbia Fire Department.

29. Council is asked to approve the Proposed Meeting Schedule for Year 2021.

CITY COUNCIL COMMITTEE REPORTS / REFERRALS

PUBLIC INPUT

EXECUTIVE SESSION

30. Receipt of legal advice related to matters covered by attorney-client privilege pursuant to S.C. Code §30-4-70(a)(2)

*COVID-19
Hate Crimes Ordinance*

31. Receipt of legal advice relating to a pending, threatened or potential claim pursuant to S.C. Code §30-4-70(a)

*Salley v. Officer Myers
Strom v. City of Columbia
LJ, Inc. v. City of Columbia*

32. Discussion of matters relating to proposed location or expansion of services to encourage location or expansion of industries or other businesses pursuant to S.C. Code §30-4-70(a)(2)

*Project Richmond
Project Cross*

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TUESDAY, DECEMBER 1, 2020**

-
33. Discussion of negotiations incident to proposed contractual arrangements pursuant to S.
C. Code §30-4-70(a)(2)

*Public Art Project
Segra Naming Rights
The COMET
2221 Devine*

ADJOURNMENT

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CITY COUNCIL

November 17, 2020 at 2:00pm

Virtual Meeting Using Video Conferencing Technology, Columbia, SC

Zoning Text Amendment Case Summary

Amend §17-253- -DD (design/development)/City Center Design/Development Guidelines

Proposal: Amend Sec. 17-253 of the Columbia Code of Ordinances (-DD design/development) to amend the City Center Design/Development Guidelines to delete Section 3.5.4 (Site Plan Review).

Pertinent Sections: Chapter 17, Article III, Division 8, Amend §17-253- -DD (design/development) and City Center Design/Development Guidelines

Applicant: Councilman Daniel Rickenmann, Columbia City Council

Staff Recommendation: Approval

PC Recommendation: 11/02/2020; Approval (8-0)

ZPH, 1st Reading: 11/17/2020; Pending

2nd Reading: 12/01/2020; Pending

PROPOSED ZONING TEXT SUMMARY

This request is to amend the City Center Design Guidelines to remove the provision that delegates Site Plan Review within the -DD area from the Planning Commission to the Design/Development Review Commission (D/DRC). This will provide a clear demarcation of review roles: design review for the D/DRC and site development review with the Planning Commission.

Sec. 17-253. - -DD design/development area.

The -DD area is intended to protect the area identified as "City Center" which is undergoing redevelopment and revitalization from incompatible land uses and influences which do not complement or promote the high-intensity mixed use character of the area. It is also the intent that new developments within the -DD area are coordinated to ensure that the land use, pedestrian environment, urban design, open space, signs, street scape and traffic circulation are sensitive to and implement the overall objectives and concept of the applicable redevelopment plan. Development within the -DD area must comply with design guidelines set forth in this Code and in the publication "City Center Design/Development Guidelines, Final Report, September 1, 1998," LDR International, Inc. Consultants, and any amendments thereto.

The -DD area consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River. Any lot of record which fronts or abuts Elmwood, Pickens or Blossom within the area described above shall be deemed to fall within the -DD area.

STAFF RECOMMENDATION

Staff recommends City Council approval of the changes to the Official Zoning Code.

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23.a

Sec. 17-253. - DD design/development area.

The -DD area is intended to protect the area identified as "City Center" which is undergoing redevelopment and revitalization from incompatible land uses and influences which do not complement or promote the high-intensity mixed use character of the area. It is also the intent that new developments within the -DD area are coordinated to ensure that the land use, pedestrian environment, urban design, open space, signs, street scape and traffic circulation are sensitive to and implement the overall objectives and concept of the applicable redevelopment plan. Development within the -DD area must comply with design guidelines set forth in this Code and in the publication "City Center Design/Development Guidelines, Final Report, September 1, 1998," LDR International, Inc. Consultants, and any amendments thereto.

The -DD area consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River. Any lot of record which fronts or abuts Elmwood, Pickens or Blossom within the area described above shall be deemed to fall within the -DD area.

ELECTRONICALLY FILED - 2021 Jul 21 3:45 PM - RICHLAND - COMMON PLEAS - CASE#2020CP4003475
Attachment: TA-2020-0004_DDGuidelinesPKT_LK4003475
DD-253-21\$ p.d.m.a - AT : 4039

Gulab M. Hammond
CITY CLERK
7.13.2021

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CHAPTER 4: GUIDELINES FOR PUBLIC DEVELOPMENT

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Proponents of new construction, demolition, or placement of signs within these districts must obtain a "certificate of design approval" from the Landmarks Commission. For minor projects, certificates can be issued by City staff, but major projects must go before a public hearing of the Commission. Appeals of staff decisions are heard by the Commission, and appeals of Commission decisions are heard by "a court of competent jurisdiction."

The Landmarks Commission evaluates projects for compliance with the provisions of the City's *Urban Design and Historic Preservation (Landmarks) Regulations* (Section 6-0811 of the City Code). These provisions describe a series of non-binding design criteria that generally outline the desired characteristics of projects. For the Gervais Street Historic Commercial District, the City has also adopted design guidelines "to be used in an advisory capacity only."

As discussed earlier in this report, the current functions of the Landmarks Commission would be absorbed by the newly-created Design/Development Review Commission. The D/DRC would continue to administer the existing Landmarks Ordinance and new design guidelines provisions in the zoning ordinance. In doing so, the Commission would essentially "wear two different hats" in reviewing projects in the five preservation districts for compliance with Landmarks Ordinance and the City Center Design/Development Guidelines, respectively. The Landmarks ordinance would take precedence over the Design/Development Guidelines if in conflict.

3.5.4 ~~Site Plan Review~~

Site plan review in Columbia is handled by the City's Planning Department, which has authority to approve site plans for building projects of 25,000 square feet or less; larger projects must go before the City's Planning Commission. Once applications are accepted, the Planning Department has 10 days to review the project, including evaluation of the site plan and preparation of a staff report for the Planning Commission. The Commission may then approve, approve with conditions, or deny the project. Planning Commission decisions are appealable to the circuit court, not the City Council.

Within City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

CERTIFIED
A TRUE COPY
Erika M. Hammond
CITY CLERK 7.13.2024

Attachment: TA-2020-0004_DDGuidelinesPKT (6304 : TA - Amend §17-253--DD guidelines to remove site plan review)

THE STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CA NO. 2020-CP-40-03475

University Hill Neighborhood Association

Plaintiffs/Appellant,

vs.

City of Columbia, City of Columbia Design and
Development Review Commission, and Trinitas Ventures,
LLC,

Defendants/Respondents.

REPLY BRIEF OF PLAINTIFF/APPELLANT

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ARGUMENTS

1. SEVERAL OF RESPONDENTS ARGUMENTS FAIL TO RECOGNIZE THE DISTINCTION BETWEEN ADJUDICATION VIS À VIS PUBLIC HEARINGS.

Various arguments in the Brief of Respondents fail to distinguish between deciding on the basis of adjudication and deciding on the basis of a public hearing. For example, in footnote 23 on page 19, Respondents argue:

“Testimony by the University of South Carolina and Historic Columbia, referenced on page 36 of Appellant’s Brief, is irrelevant, as neither entity appealed either of the DDRC’s decisions.”¹

Respondents provide no authority for this assertion.

Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008) addressed the issue of the due process rights of a landowner’s request to subdivide his property. The court stressed that adjudication is very different from decisions by discretionary zoning boards and commissions. *See* 656 S.E.2d at 350–351. It is generally accepted that “the purpose of holding a public hearing is for the government to obtain public testimony or comment on a particular matter.”² Given this goal, it is absurd to say that a person’s testimony only counts if that person appeals.

¹ For additional examples, see footnote 11 (“A representative of Historic Columbia, John Shearer, also objected to Trinitas’ application for design approval quote based on . . . scale and on mass and height.” *Id.* at 51:5-6. Historic Columbia did not appeal the DDRC’s Design Approval Decision as to the Proposed Construction.”); page 15 (reliance on *Powell ex rel. Kelly v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), which was decided within the context of adjudication); pages 26–28 (relying on adjudicative concepts of preservation of issue to challenge position of appellants).

² New Hampshire Municipal Association, *Running a Smooth Public Hearing*, p. 2, available at <https://www.nhmunicipal.org/town-city-article/running-smooth-public-hearing>.

2. THE AUTHORIZATION BY THE CITY OF COLUMBIA TO GRANT THE COLUMBIA DESIGN AND DEVELOPMENT REVIEW COMMISSION (DDRC) THE POWER TO CONDUCT SITE PLAN REVIEW WAS ULTRA VIRES BECAUSE THIS AUTHORIZATION CONFLICTED WITH THE MANDATORY LANGUAGE IN SECTION 6-29-1150(A) OF THE SOUTH CAROLINA CODE STATING: “THE LAND DEVELOPMENT REGULATIONS ADOPTED BY THE GOVERNING AUTHORITY MUST INCLUDE A SPECIFIC PROCEDURE FOR THE SUBMISSION AND APPROVAL OR DISAPPROVAL [OF PLANS] BY THE PLANNING COMMISSION OR DESIGNATED STAFF.”

Respondents make four arguments concerning the issue of whether the grant of power to the DDRC was ultra vires:

- (1) The issue is moot,
- (2) The Association does not have standing under S.C. Code § 6-29-1150,
- (3) Appellant failed to preserve the issue, and
- (4) The DDRC never decided the issue.

As indicated below, none of these arguments is valid.

A. Mootness

Section 3.5.4 of the *Guidelines* provides/includes the following provision: “Within the City Center, the D/DRC and the Design/Development Review staff will assume responsibility for site plan review.” Respondents argue that, because the City has deleted Section 3.5.4 of the *Guidelines*, the site plan issue is moot.

An initial problem with the mootness argument results from § 6-29-930 of the South Carolina Code. This section provides:

The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and *the court may not take additional evidence*. In the

event the judge determines that the certified record is insufficient for review, the *matter must be remanded to the board of architectural review for rehearing.*

(emphasis added). *See, e.g., Austin v. Board of Zoning Appeals*, 362 S.C. 29, 606 S.E.2d 209, 214–15 (Ct. App. 2004) (Circuit court did not abuse its discretion in refusing to supplement the record.).

It is well established that South Carolina courts are “not allowed to take judicial notice of a municipal ordinance. Instead, the ordinance must be proved before the lower court or tribunal. *Steinberg v. South Carolina Power Co.*, 165 S.C. 367, 163 S.E. 881 (1932).” *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 686 S.E.2d 683, 688 n.5 (2009) (Beatty, J., dissenting). Because the ordinance attached to Respondents’ Brief as an exhibit is not a part of the record herein, it cannot be considered unless a remand is granted.

Even if the deletion of Section 3.5.4 were properly before this court, this ordinance amendment does **not** moot the site review issue. Eliminating the single sentence granting the DDRC the responsibility for site plan review does not eliminate the ultra vires problem. In fact, it makes the situation worse because the process of site plan review by the planning commission involves matters that are also authorized for review by the DDRC under the *Guidelines*.

The Columbia City Code provisions concerning site review of “group developments”³ by the City of Columbia Planning Commission involve a number of concerns, including the following:

- (1) Procedures and requirements for specific plans and constructions drawings (§ 17-582);
- (2) Off-street parking (§ 17-583);
- (3) Water and Sewer Service (§ 17-584);

³ See Columbia Zoning Ordinance § 17-464 (establishing three types of “group development”).

- (4) Storm Drainage (§ 17-585);
- (5) Parking areas, driveways, and internal streets (§ 17-586);
- (6) Building setbacks (§ 17-587);
- (7) Internal design and spacing (§ 17-588); and
- (8) Screening (§ 17-589).

Even though Section 3.5.4 has been deleted from the *Guidelines*, there are other sections of the *Guidelines* which implement Section 3.5.4 by addressing the site plan review concerns listed above. These sections require the DDRC to approve concerns that would ordinarily be addressed by the planning commission pursuant to the Ordinance provisions listed in the preceding paragraph.

- (1) Subsection 5.4.1 of the *Guidelines* sets out a scheme to determine setbacks, which are also regulated by the planning commission.⁴
- (2) Subsection 5.4.2 addresses “building orientation,” which is also involved in planning commission review.⁵
- (3) Section 5.5 addresses “open spaces,” which are also a matter for planning commission review.⁶
- (4) Section 5.10 addresses parking and screening, which are also reviewed by the planning commission.⁷

Given this overlap of review authority by both the planning commission and the DDRC, there is a substantial likelihood that an application receiving a decision by the planning

⁴ Columbia City Code § 17-587.

⁵ See *id.* § 17-582.

⁶ *Id.* §§ 17-582, 17-588.

⁷ See *id.* §§ 17-582, 17-583, 17-586, & 17-589.

commission on a particular concern will conflict with a decision by the DDRC on the same concern. Such a result is obviously undesirable.

This problem of overlap of review by both the DDRC and the Planning Commission was identified at page 18 of Plaintiff's Memorandum in Opposition to Motion to Dismiss. Thus, Respondents were on notice that Section 3.5.4 was not the only section involving an ultra vires grant of power.

B. Section 6-29-1150

Section 6-29-1150 is not relevant to the ultra vires argument. As indicated at page 12 of the Brief of Plaintiff/Appellant, jurisdiction is based upon Article V, Section 11 of the South Carolina Constitution.

C. Failure to Preserve Ultra Vires Issue

As indicated in footnote 1 in Argument 1 of this Reply Brief, this is a flawed argument because it fails to distinguish between decisions based on adjudication vis à vis public hearings.

D. Refusal of DDRC to Address Issue

This is a puzzling argument. The parties agree that the "DDRC does not have authority to determine its own authority. . . ." ⁸ This lack of authority is the reason that jurisdiction on this issue is based upon Article V, Section 11 of the South Carolina Constitution rather than on S.C. Code § 6-29-1150.

⁸ Brief of Respondents p. 28.

3. THE ADOPTION OF THE GUIDELINES AS AN ORDINANCE WAS AN UNLAWFUL DELEGATION OF THE LEGISLATIVE POWER OF THE CITY OF COLUMBIA TO THE DDRC.

Argument 2 in the Association's Brief sets forth reasons to support the argument that unlawful delegation is involved. The Association's response to the Brief of Respondents will be addressed first by considering points where there is no disagreement and second by addressing Respondents' arguments.

A. Points of Agreement

There is no dispute that the *Guidelines* were not designed to be used as an ordinance. Section 5.3.1 explicitly states: "This section provides non-binding general direction for development within City Center, with the recommendation that the City's regulatory plans and codes be amended to reflect the guidance included here."

There is also agreement that the *Guidelines* are contradictory and non-binding. The attorney for Trinitas noted the contradictory nature of the *Guidelines* in her testimony to the DDRC:

As to the building height, the guidelines clearly express a *nonbinding general direction* for buildings within the city center expressly recognizing that zoning ordinances are the primary legal vehicle for expressing regulations concerning the height of [a] building. Although there is a recommendation that buildings not exceed five stories, there is a specific preference in the guidelines at Section 5.3.1, which says, low profile office buildings, commercial buildings and residences will not yield the density, urban scale and character which is desired for the city center

and should therefore be discouraged. *In other words, the opposite proposition also holds true.*

(Supplement to Record, Exhibit 8, at pp. 47–48 (emphasis added))

At this hearing Ms. Bryant also noted: “The guidelines are illustrative rather than prescriptive, and do not set forth detailed or rigid standards.” (Supplement to Record, Exhibit 8, at p. 41) This assessment of the contradictory, standardless nature of the *Guidelines* by counsel for Trinitas is virtually the same as the claim of the Association that the City Council has delegated its legislative power to the DDRC.

B. Respondents’ Arguments

1. Statler Email

Respondents argue that the email from Lucinda Statler is irrelevant because reliance on the email “assumes the DDRC adopted an interpretation” described by Statler.⁹ There are two flaws with Respondents’ argument.

First, Statler has “almost 14 years” of experience serving on staff for the DDRC. Her email summarizes what that experience reveals about how the DDRC operates in applying the –DD overlay.

Second, the staff recommendations to the DDRC use the same standard of “substantially meets” the Guidelines.¹⁰ Given the “barebones” nature of the motion to grant design approval for

⁹ Brief of Respondents p. 30.

¹⁰ See Record, Exhibit 1, at 19; Exh. 5 at 15; Supplemental Record, Exhibit 6 at 3; Exhibit 10 at 3.

the Trinitas project,¹¹ there is no reason to believe that the “substantially meets” standard played no role in the approval.

2. Fallacious and Vague Assertions

Respondents argue that, because Section 17-253 states that development “must comply with design guidelines,” the *Guidelines* are binding and must be followed. However, this phrase, by itself, cannot make non-binding guidelines binding.

Respondents also refer to S.C. Code § 5-7-30, which contains a “broad grant of authority to local government.”¹² However, the authority to use zoning is addressed in the Enabling Act, not Section 5-7-30.

Respondents also refer to the general public concern for aesthetics¹³ and the purpose of the “City’s ordinances and the *Guidelines* to ‘[p]rotect the beauty and improve the quality of its environment.’” Such references are beside the point because “a decision based solely on . . . [ordinance] objectives gives rise to an unconstitutionally vague application of the ordinance and renders City Council’s decision arbitrary and capricious and an abuse of discretion.” *Peterson Outdoor Advertising v. City of Myrtle Beach*, 327 S.C. 30, 489 S.E.2d 630, 633 (1997).

¹¹ See Supplemental Record, Exhibit 10 at 18. The motion was as follows:

Upon hearing and considering all of the evidence, testimony and documents presented to the DDRC, I moved to grant a certificate of design approval for the application for new construction at 1600 Gervais, because the applicant meets the applicable design guidelines. Specifically, it meets the following sections of section 5.3, building mass and organization which are 5.3.1 building height, in which is stated, quote, The city’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings. And as staff has pointed out, it actually is within 5 feet of the gable of the building, the law school across the street. 5.3.3 proportionate openings; 5.3.5 wall articulation; and it meets, additionally, sections 5.7.1 storefront composition, and 5.7.2 exterior walls, 5.8.3 windows. So, on that basis I recommend that we approve the certificate of design—grant the certificate of design approval.

¹² Brief of Respondents at 30.

¹³ *Id.* at 30–32.

Finally, Respondents argue that “the *Guidelines*, when considered as a whole with City’s other ordinances, as this Court is required to do, provide such standards as are required to guide the DDRC and define its discretion.”¹⁴ However, Respondents do not provide any specificity as to which “other ordinances” are involved. The only specific “other” ordinance identified by Respondents is Section 17-275, which provides the underlying zoning for the –DD overlay. As indicated at Argument 3 of the Brief of Plaintiff/Respondent and at Argument 4 in this Reply Brief, the DDRC made a mistake of law in assessing the role of Section 17-275.

3. Expertise of DDRC

Respondents adopt Lucinda Statler’s argument that the expertise of the DDRC members can be a substitute for clear, consistent, binding guidelines.¹⁵ This argument is addressed in Argument 3 of the Brief of Plaintiff/Appellant at page 18.

4. THE DDRC ABUSED ITS DISCRETION BY MAKING A MISTAKE OF LAW IN DECIDING THAT THE HEIGHT OF THE PROPOSED BUILDING WAS DETERMINED BY THE CURRENT UNDERLYING ZONING RATHER THAN THE CURRENT –DD OVERLAY ZONING.

A. Points of Agreement

The parties agree that the *Guidelines* adopt a contextual approach to design in which “new projects should be developed within the existing rhythm of the existing development patterns” in terms of concerns like mass, scale, and height.¹⁶ *Guidelines* §§ 5.1, 5.2. There is also no disagreement concerning the concern in the *Guidelines* that “the City should be consistent in considering the height of proposed structures as they relate to the adjacent development

¹⁴ *Id.* at 36.

¹⁵ *Id.* at 32.

¹⁶ Brief of Plaintiff/Appellant at pp. 20, 24; Brief of Respondents at pp. 35, 42–43.

context. . . .” *Guidelines* § 5.3.1 at p. 5-3. The parties also agree the *Guidelines* state that, though there may be exceptions, as a general rule, “buildings within the City Center should be no more than five stories.”¹⁷ *Guidelines* § 5.3.1 at p. 5-2.

Finally, there is no disagreement that the *Guidelines* state: (1) that “zoning should be consistent with current zoning provisions” and (2) that “the City’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.” *Guidelines* § 5.3.1 at p. 5-2. However, as indicated in Part B below, the term “current zoning regulations” requires further analysis because there are two separate “current zoning regulations” involved.

B. “Current Zoning Regulations”

The *Guidelines* state that, “consistent with current zoning provisions, buildings should be no more than five stories.” When the City Council adopted the *Guidelines* as a part of its zoning code by reference in Columbia City Code Section 17-253 and Section 17-655(b)(2), the *Guidelines* became a part of Columbia’s “zoning ordinance.” As a result, the *Guidelines* are now a part of Columbia’s “current zoning regulations.” If the *Guidelines* were not part of today’s current zoning regulations, the DDRC could not apply them in the –DD overlay area.

Under today’s “current zoning regulations,” the site of the proposed Trinitas project is subject to two distinct zoning schemes: (1) the regulations for the underlying zoning category of C-3 and (2) the –DD overlay zoning regulations of the *Guidelines*. Thus, the question in this litigation is: Should the determination of height be based on the current underlying zoning regulations or on the current overlay–DD regulations?

¹⁷ Brief of Plaintiff/Appellant at p. 24; Brief of Respondents at p. 35.

As indicated at pages 21–22 of the Brief of Plaintiff/Appellant, the DDRC adopted the following position: (1) the height should be determined by the current underlying C-3 zoning regulations, and (2) the current –DD overlay zoning regulations had no role in determining the appropriate height. The Association’s position is that this approach was a mistake of law and was, therefore, an abuse of discretion.

C. Respondents’ Arguments

The Brief of Plaintiff/Appellant contains five separate arguments in support of its position that the current overlay zoning should have been used rather than the current underlying C-3 zoning. These arguments are:

- (1) The DDRC interpretation of the *Guidelines* is contrary to provisions in the Enabling Act and in the Columbia Zoning Code that adopt a preference for the least restrictive alternative in situations involving conflicts between requirements.
- (2) The DDRC analysis of “vested rights” conflicts with the approach to vested rights in the Columbia Zoning Code.
- (3) The DDRC interpretation ignores the explicit intent of the *Guidelines* concerning the role of the *Guidelines*.
- (4) The DDRC interpretation is fallacious.
- (5) The DDRC interpretation conflicts with the Enabling Act and with doctrine concerning overlay districts.

Respondents only respond to the first of the Association’s arguments. There is no response to the other four arguments for the position that the provisions in the *Guidelines* for the overlay district should prevail over the underlying C-3 zoning.

Respondents argue that the concern for adopting the least restrictive alternative does not apply because the “DDRC’s Design Approval Decision was not an error of law because it referenced *both* City’s zoning ordinance and Section 5.3.1 of the *Guidelines*.” Brief of Respondents at p. 42 (emphasis in original).

This claim concerning the approval by the DDRC is a gross distortion of the Record. The Record makes it clear that the DDRC had been told by staff that it could not apply the *Guidelines* because height was to be determined by the underlying C-3 zoning. For example, at the June 10, 2020, “work session,” the staff of the DDRC stated that it wanted to “ensure that we all understand that the DDRC can’t require a reduction in the allowable height or the allowable building envelope that’s permitted by zoning.” The chairman of the DDRC replied to this statement as follows: “Right. And I appreciate that. Understand that.” (Supplement to Record, Exhibit 9, at pp. 69–70).

In addition, the motion to approve the height incorporates this understanding about the allowable building envelope. As to height and mass, the motion stated the following:

“It meets the following sections of section 5.3, building mass and organization which are 5.3.1 building height, in which is stated, quote, *The city’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.*

Supplemental Record, Exhibit 10 at p. 18 (emphasis added) Given exchanges between staff and the DDRC like that quoted in the preceding paragraph, it is clear that the reference to the quote from Section 5.3.1 was intended to implement the understanding that “the DDRC can’t require a reduction in the allowable building envelope that’s permitted by [the underlying C-3] zoning.”

Respondents concede that the DDRC approval of the height was based on the current underlying zoning, not the current overlay zoning. The Brief of Respondents makes this clear at page 42, which includes the following:

The applicable City zoning ordinance, City Code Section 17-275, allows for buildings in the C-3 zoning section to be between 50 and 75 feet. Columbia, S.C., Code of Ordinances § 17-275 at note c (“Buildings between the height of 50 and 75 feet may be allowed[.]”). Since the height of the structure at issue is undisputedly within this limit, the Proposed Construction is compliant with [the] City’s zoning ordinance and therefore is also compliant with the *Guidelines*.

As indicated at page 24 of the Brief of Plaintiff/Appellant, the maximum height under the overlay zoning scheme in the *Guidelines* is either three stories or five stories. Respondents agree with this point. See Brief of Respondents p. 35 (noting “general rule” that buildings “be between two and five stories”). Both measures conflict with the higher height limit imposed by the underlying C-3 zoning. Consequently, in order to satisfy S.C. Code § 6-29-960 and sections 17-181 and 17-675 of the Columbia Zoning Code, the more restrictive approach of the current overlay scheme in the *Guidelines* should govern.

5. THE UNIVERSITY HILL ASSOCIATION HAS STANDING.

A. Associational Standing

Respondents primarily rely on two cases in their challenge to the Association’s standing: *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 753 S.E.2d 846 (2014) and *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

Carnival Corp. involved a suit brought by two neighborhood associations, a historic preservation society, and the Coastal Conservation Society. The alleged injuries involved were essentially public nuisance claims. 753 S.E.2d at 851. Because the plaintiffs lacked the special injury required for bringing a public nuisance claim, the court held that the plaintiffs lacked standing. *Id.* at 852. The court also held that public importance standing did not apply because of the nature of the claims involved and because the claims could be brought by persons who could show the required injuries, the public importance exception did not apply. *Id.* at 853.

Beaufort Realty Co. involved a challenge to a decision by the County Zoning Administrator that plats filed for a subdivision were exempt from the need for approval. The court held that the League did not have standing because there was no evidence of harm to individual members and that a “severe concern” for potential harm was, by itself, inadequate to satisfy the standard of concrete particular harm. 551 S.E.2d at 590.

There are two common themes in these two cases. First, generalized harm to the public cannot satisfy the standing requirement for public nuisance. Second, a plaintiff must show evidence of more than speculative likelihood of injury to members.

The Association relies primarily on the following two cases: *Preservation Society of Charleston v. South Carolina Dep’t of Health & Environmental Control*, 430 S.C. 200, 845 S.E.2d 481 (2020) and *Citizens for Quality Rural Living, Inc.*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019).

Preservation Society of Charleston addressed the procedural issue of whether the organizational plaintiffs had standing to request a “contested case hearing.” As indicated more fully in the Brief of Plaintiff/Appellant at pages 30–32, the court held that the plaintiffs had standing because: (1) the organizations had members who owned property near the “proposed

passenger cruise facility” at issue; and (2) the associations’ allegations of potential harm to members in the nearby neighborhoods “through affidavits and other filings, are not speculative.” 845 S.E.2d at 488–89. The harms were not speculative because, given the proximity to the facility, the members would be exposed to adverse health effects and increases in traffic and noise.

Citizens for Quality Rural Living, like *Preservation Society of Charleston*, focused on: (1) the fact that plaintiffs owned property in a defined neighborhood that was in the immediate vicinity of the proposed subdivision at issue in the case, and (2) members of the neighborhood “will be impacted by the additional traffic” and by the incompatibility of the subdivision with the surrounding rural community. 825 S.E.2d at 723, 730.

All four cases focus on a common concern: Is there evidence to show a reasonable likelihood of specific, serious injury to plaintiffs not experienced by the general public? In *Carnival Corp.* and *Beaufort Realty*, there was no such evidence. In *Preservation Society of Charleston* and *Citizens for Quality Rural Living*, such evidence had been shown.

The Record herein contains considerable evidence that members of the Association have satisfied the requirement of showing likelihood of substantial injury different from that suffered by the general public. For example, as indicated in detail in the Brief of Plaintiff/Appellant at pages 33–36, members of the Association gave detailed sworn testimony concerning a pattern of severe neighborhood disruption by students returning from Five Points as they entered the University Hill neighborhood at its southeast corner (Laurens and Greene Streets) and proceeded to cross the neighborhood on their way to the U.S.C. campus and housing.

This disruption is likely to be substantially increased if the Trinitas project is built. It is undisputed that Trinitas is a “university centric developer” and that students were a “target

audience.”¹⁸ Given the number of units in the proposed apartment project and the likelihood that students would choose to go through the University Hill Neighborhood because it would be the most direct route to the project, it is virtually certain that the problems suffered in the past would be severely exacerbated.

B. Public Importance Standing

As indicated at pages 38–39 in Argument 4 in the Brief of Plaintiff/Appellant, there are three important recurring issues where future guidance is needed:

- (1) Whether important aspects of a development within the –DD area, like height, are determined by the current underlying zoning regulations or by the current overlay zoning regulations contained in the *Guidelines*;
- (2) Whether the grant by the City of the power of site plan review to the DDRC for development within the –DD area was *ultra vires*; and
- (3) Whether the “overall determination” approach to the application of the precatory non-binding language of the *Guidelines* constitutes an improper delegation of the City’s legislative power and a denial of due process.

As indicated at page 40 of the Brief of Plaintiff/Appellant, there is a need for future guidance on these issues.

Respondents’ claim that the *ultra vires* issue concerning site plan review is moot is addressed above at Part A of Argument 2 of this Reply Brief. As indicated in the discussion in Part A, the deletion of Section 3.5.4 of the *Guidelines* has resulted in a situation where, because both the DDRC and the Planning Commission could be required to address the same concerns,

¹⁸ See testimony of Linda Irving, Trinitas’s representative, Supplemental Record, Exhibit 6, at p. 29; Supplemental Record, Exhibit 8, at p. 6.

applicants could be required to do conflicting things. Thus, the *ultra vires* issue has even greater “imperative and manifest urgency” than before. See *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009).

CONCLUSION

For the reasons stated in the Brief of Plaintiff/Appellant and in this Reply Brief, this court should:

- (1) hold that the Association has standing,
- (2) hold that the decision by the City of Columbia to grant the authority to conduct site plan review to the DDRC was *ultra vires* and, therefore, void,
- (3) hold that the adoption of the *Guidelines* as an ordinance was an unlawful delegation of legislative power of the City and, therefore, void, and
- (4) hold that, because the DDRC abused its discretion by making a mistake of law and deciding that the height of the proposed building was determined by the current underlying zoning regulations rather than by the current –DD overlay regulations contained in the *Guidelines*, the design approval of the Trinitas proposal by the DDRC is invalid.

APPENDIX: RECORD ON APPEAL

Brief of Plaintiff/Appellant

- I. Joint Stipulations Regarding City of Columbia Ordinances [Joint Stipulation]
 - A. Exhibit A: Selected Portions of City of Columbia Code of Ordinances
 - B. City of Columbia Center Design Development Guidelines [*Guidelines*]
- II. Certified Record of the Proceedings (Documents) [Record]
 - A. Exhibit One – January 9, 2000, DDRC Meeting
 - B. Exhibit Two – February 7, 2000, DDRC Meeting
 - C. Exhibit Three – March 12, 2000, DDRC Meeting
 - D. Exhibit Four – June 10, 2000, DDRC Meeting (workshop meeting)
 - E. Exhibit Five – July 10, 2000, DDRC Meeting
- III. Supplement to Certified Record on Appeal (Transcripts of Hearings, filed April 20, 2021)
[Supplement to Record] (Page citations are to pages on upper right corner of pages)
 - A. Exhibit 6 – January 9, 2020, DDRC Meeting
 - B. Exhibit 7 – February 7, 2020, DDRC Meeting
 - C. Exhibit 8 – March 12, 2020, DDRC Meeting
 - D. Exhibit 9 – June 10, 2020, DDRC Meeting
 - E. Exhibit 10 – July 10, 2020, DDRC Meeting

(signature page to follow)

Respectfully submitted,

s/Richard A. Harpootlian

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July 30, 2021
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

CA NO: 2020-CP-40-03475

University Hill Neighborhood Association

Plaintiffs/Appellant

vs.

City of Columbia, City of Columbia Design
and Development Review Commission, and
Trinitas Ventures, LLC

Defendants/Respondents

ORDER

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Parties

This case involves two decisions by the City of Columbia Design and Development Review Commission (DDRC) that granted final approvals for the construction of “Trinitas,” an eight-story, 750 feet tall apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) DDRC, a “Board of Architectural Review” established pursuant to S.C. Code §§ 6-29-880 et seq and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), the real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein.

Plaintiff University Hill Neighborhood Association (Association) is an unincorporated association. The boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic districts in Columbia. One is a local City of Columbia Historical District; the other is a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This local district is “identified as Architectural District No. 1” and is “bounded by Laurens, Senate, Henderson and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District, named University Neighborhood Historic District, by the National Register of Historic Districts. U.S. Dept. of the Interior, National Park Service, certified Aug. 8, 2004.

B. Procedural History

The DDRC conducted four public hearings to address the initial application and subsequent revised applications for design approval and for site plan approval filed by Trinitas. At the regular January 2020 public hearing, both applications were denied. (Exhibit 6, at pp. 43–46, filed as Supplement to Record on Appeal by DDRC, Apr. 20, 2021 [hereinafter Supplement to Record]). Subsequently, these denials were rescinded at a special called meeting on February 7. (Supplement to Record, Exhibit 7, at pp. 15–16). At the regular March hearing, the DDRC granted site plan approval for the project (Supplement to Record, Exhibit 8, at pp. 76–77). Design approval was granted by the DDRC at the regular July public hearing (Supplement to Record, Exhibit 10, at pp. 18–19).

In addition to these four public hearings, the DDRC conducted a “work session” on the design approval on June 10, 2020 (See Supplement to Record, Exhibit 9).

On July 23, 2020, the Association filed a complaint/appeal in Circuit Court. The DDRC, Trinitas, and the City each filed an answer and a Motion to Dismiss. The motions to dismiss were denied. (Order filed Oct. 7, 2020) The denial of these motions was appealed. The Court of Appeals dismissed the appeal on the ground that the order was not immediately appealable. (Appellate Case No. 2020-001586, Order filed Jan. 14, 2021).

On September 13, 2021, the DDRC and Trinitas filed a Petition for Writ of Mandamus pursuant to 245(B) SCACR, or, in the alternative, Petition for Certification pursuant to Rule 245(A) SCACR. University Hill Neighborhood Association file a Return to this filing.

On September 30, 2021, the parties in this action requested the Supreme Court to hold in abeyance all deadlines associated with the Petition for Writ of Mandamus and Petition for Certification. The Court granted the request. The parties informed the Supreme Court that on October 14, 2021, Circuit Court Judge Casey L. Manning held a final merits hearing to consider

all issues in the case. The Circuit Court requested proposed orders from the parties by November 4, 2021.

Due to these continuing developments in the case, the parties again requested the Supreme Court to hold all current deadlines in abeyance until the Circuit Court issues an order. Petitioners contend that while an order by the Circuit Court may resolve the Petition for Mandamus, such an order may not resolve the Petition for Certification. By letter of October 15, 2021, the Clerk of the Supreme Court advised the parties that this matter will be continued to be held in abeyance until November 12, 2021, and that the Court should be notified of the status of this matter at that time.

C. Facts

The site for the proposed Trinitas apartment building is within an “overlay” district within the City of Columbia. Overlay districts are explicitly permitted under Section 6-29-720(C)(5) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 [hereinafter Enabling Act], which describes an overlay zone as a district that “*imposes a set of requirements or relaxes a set of requirements by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. . . .*” (emphasis added).

The overlay district herein is termed the “City Center Design/Development District of Columbia, South Carolina” and is referred to as “-DD area” in Sections 17-253 and 17-655(b)(2) of the Columbia City Code.¹ As indicated in Argument Three below, an overlay district like the

¹ The Parties have filed a “Joint Stipulation Regarding City of Columbia Ordinances.” [“Joint Stipulation”] Exhibit A of the Joint Stipulation contains selected portions of the City of Columbia Code of Ordinances, Chapter 17, Planning, Land Development and Zoning.

-DD area is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists.

The City Council of Columbia did not draft a zoning ordinance to govern decisions in the -DD area. Instead, it simply adopted a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [*Guidelines*].² This result was accomplished by adopting the *Guidelines* by reference in Columbia City Code § 17-253 (referring to “City Center Design/Development Guidelines”) and § 17-655(b)(2) (referring to “requirements set forth in design guidelines adopted by the city council”).

This approach was chosen even though the *Guidelines*: (1) were prepared by planning experts to guide the drafting of an ordinance, and (2) explicitly state that the *Guidelines* are “non-binding” and are not meant to serve as an ordinance. To this end, Section 3.5.2 of the *Guidelines* states, “*It is through the Zoning Ordinance that the Design Development Guidelines will be implemented. . . .*” (emphasis added) As an example of this non-binding process, the discussion of “Building Heights” at page 5-2 of the *Guidelines* states: “This section provides *non-binding* general direction for development within City Center, with the recommendation that the *City’s regulatory plans and codes be amended* to reflect the guidance included here.” (emphasis added).

As a result of this use of a planning guide as an ordinance, design in the -DD area is based on precatory terms like “non-binding” and “should” rather than mandatory terms like “must” and “shall.” For example, Section 5.1 of the *Guidelines*, which addresses the design of private development in the -DD overlay district, states: “The guidelines in this chapter are *illustrative rather than prescriptive*.” (emphasis added)

² See Exhibit B to Joint Stipulation, *supra* note 1.

D. Summary of Challenges to Approvals

It is important to distinguish among the Association's three distinct challenges to the approvals of the Trinitas project. One challenge concerns provisions of the *Guidelines* that require "site plan review" within the -DD area to be done by the DDRC rather than by the City of Columbia Planning Commission. The site plan review part of the Complaint: (1) asserts that the shift by the City of the site plan review to the DDRC was *ultra vires*, and (2) relies on the general jurisdiction of the Circuit Court. Thus, it is not governed by the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A).

Another challenge asserts that, because the *Guidelines* were intended to guide the drafting of an ordinance rather than to serve as an ordinance, the adoption of the non-binding *Guidelines* as the ordinance was an unlawful delegation of the legislative power of the City of Columbia. Jurisdiction on this claim is based on the general jurisdiction of the Circuit Court.

The Association asserts that the site plan review claim and the unlawful delegation claim were combined with the appeal pursuant to Section 6-29-900(A) for three reasons. First, the facts concerning all three of the Association's claims are interconnected in the record concerning the appeal of the decisions pursuant to Section 6-29-900(A). Second, combining these two claims enables Trinitas, a real party in interest in terms of the Section 6-29-900(A) appeal, to assert its interests in these two claims. Third, the Association was motivated to assert the *ultra vires* claim and the unlawful delegation claim at the point in time when the Complaint was filed, rather than earlier, because there was no harm to substantial interests of the Association and its members until the DDRC approved the site plan and the design for the Trinitas project.

The third challenge involves an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. This challenge asserts that the DDRC abused its discretion in approving the height of the Trinitas apartment building because it made a mistake of law in deciding that the

height of the proposed Trinitas project should be determined by the underlying zoning rather than the -DD overlay zoning.

The Association claims it has standing to bring the three challenges summarized above. The Defendants/Respondents dispute this claim.

E. Standard of Review

The Standard of Review for Arguments One and Two involves matters of law and statutory interpretation. Therefore, the standard of review is de novo. *South Carolina Public Interest Foundation v. Calhoun County Council*, 432 S.C. 492, 854 S.E. 2d 836, 837 (2021) (“[T]he interpretation of a statute is a question of law for the Court to review de novo.”)

The Standard of Review for Argument Three is set for the in Section 6-29-930(A) of the South Carolina Code:

The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

The application of this standard of review was summarized in *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361, 362 (Ct. App. 2005) (citations omitted), as follows:

In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by *committing errors of law* or bases its decision on findings of fact that are not supported by evidence. Furthermore, our

standard of review of a board of architectural review's decision is the same as that of the trial court.

(emphasis added) This third challenge asserts that the DDRC abused its discretion by committing an error of law in its decision that the underlying zoning controlled the determination of the height of the building.

The determination of whether standing requirements are satisfied is a matter for the court addressing the issues. *See, e.g., Preservation Society of Charleston v. South Carolina Department of Health and Environmental Control*, 430 S.C. 200, 845 S.E.2d 481, 489 (S.C. 2020) (Based on review of evidence involved, the Court concluded: "We find Petitioner's allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative").

II. SITE PLAN REVIEW CHALLENGE

A. Site Plan Review by DDRC

Title 6, Chapter 29 of the South Carolina Code contains the Enabling Act. Article 7 (titled as “Local Planning – Local Development”) of the Enabling Act addresses land development regulation by local governments. In contrast, provisions concerning boards of architectural review like the DDRC are contained in Article 5 (“Local Planning – Zoning”) of the Enabling Act. The scope of Article 7 is very broad, largely because terms like “land development” and “subdivision” are defined very broadly. (See S.C. Code §§ 6-29-1110(2), –(4)).

Planning commissions play a critical role under Article 7 in all the aspects of land development. Central to their role is the power to approve, or disapprove, plans for development. The phrase “plans for development” is very inclusive because numerous terms—e.g., “sketch plans, preliminary plans, and final plans”—are used to describe the plans involved. (See S.C. Code § 6-29-1150)

Under the Columbia scheme of land of development regulation set forth in Article IV of Chapter 17 (“Planning, Development and Zoning”) of the City Code, the Planning Commission is charged with implementing the land development regulations. As a part of this scheme, terms like “sketch plan,” “site plan,” and “preliminary plat” are used to identify specific types of plans. Columbia City Code § 17-464. For a category termed “Group Development,”³ a system of plan

³ There are three categories of “group development” set forth within the definition of “subdivision, development type” in Columbia City Code § 17-464. These are:

review termed “site plan review” is established. (See Columbia City Code §§ 17-464, 17-581 through § 17-589).

Section 3.5.4 of the *Guidelines* for the -DD area shifts the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC.⁴ This approach to site plan review is *ultra vires* because it conflicts with explicit language in subsection

Group development means a development such as shopping center, office buildings, industrial sites, mobile home parks and apartment complexes where the site is not subdivided in lots, blocks and streets, but includes two or more units designed or intended for separate occupancy.

Group commercial or industrial development means a single building or combination of buildings containing 25,000 square feet of gross floor area, or two or more buildings containing a combined total of 25,000 square feet gross floor area.

Group housing development means a single lot of record upon which are erected three or more dwelling units and all the structures thereon. This definition shall include apartments, condominiums and townhouses, whether rented or sold.

⁴ Section 3.5.4 of the *Guidelines* states:

Within City Center, the D/DRC and Design/Development Review staff *will* assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

(emphasis added). This section is one of the rare instances where the *Guidelines* use a mandatory term like “will” rather than a precatory term like “should.”

6-29-1150(A) of the Enabling Act, which addresses the submission of plans or plats to the planning commission. This subsection addresses “Submission of plan or plat to planning commission” and states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the *planning commission or designated staff*.” (emphasis added). The shifting of site plan review to the DDRC pursuant to the *Guidelines* conflicts with this clear mandate that the planning commission must approve or disapprove plans.⁵

The purpose of the Enabling Act is to enable or authorize local governments to engage in planning and in regulating the use and development of land. As noted in Section 6-29-330(A) of the S.C. Code: “A municipality may exercise the powers granted *under the provisions of this chapter* in the total area within its corporate limits.” (emphasis added). The phrase “under the provisions of this chapter” indicates that the “powers granted” are both defined by and limited by the Enabling Act.

Thus, the portion of Section 6-29-1150(A) quoted above imposes an express requirement that local land development regulations “*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the planning commission or designated staff.” (emphasis added) Thus, the section imposes the following two requirements: (1) There *must* be a system for approval or disapproval of plans and plats; and (2) this system *must* be undertaken by the planning commission.

⁵ When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the DDRC stated that the question of the validity of the grant of this power is “out of our hands.” (Supplement to Record, Exhibit 8, at pp.14–16).

The Rhode Island Supreme Court stated the general principle for applying an enabling act as follows: Where a local government “purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void.” *Hardy v. Zoning Board of Review of the Town of Coventry*, 321 A.2d 289, 290–29 (R.I. 1974).

The South Carolina Supreme Court applied this principle in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010). At issue was the rezoning of a large parcel of land from the classification AG-15 (agricultural with minimum lot area of three acres) to PD (“planned development district”). This PD district would have 107 dwellings, which was the same number as would be allowed under AG-15. However, the minimum lot size for the PD was reduced to one acre.

Sinkler noted that Section 6-29-720(C)(4) of the Enabling Act explicitly authorizes the use of planned development schemes and quoted the following language:

“[P]lanned development district” or a development project comprised of *housing of different types and densities and of compatible commercial uses*, or shopping centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development *and is characterized by a unified site design for a mixed-use development*.

690 S.E.2d at 781 (emphasis in original). *Sinkler* also quoted Section 6-29-740, which contains additional details concerning a PD district. This section provides:

In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that *will result in improved design, character, and quality of new mixed use developments* and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. *The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.*

690 S.E.2d at 779 (emphasis in original)

The Supreme Court, relying on the statutory language quoted above, held:

[T]he [zoning] ordinance [with only residential uses] did not meet the parameters for a PD. . . . [H]aving invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold *the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act.*

Sinkler, 690 S.E.2d at 781, 782 (emphasis added).

In authorizing the DDRC to undertake site plan review, the City of Columbia, like Charleston County in *Sinkler*, failed “to meet the requirements” of the Enabling Act. Consequently, this grant of power to the DDRC was *ultra vires* and is, therefore, invalid because the authorization did not satisfy “the terms of the Enabling Act.”

B. Arguments of Defendants/Respondents

Defendants/Respondents make five arguments concerning the issue of whether the grant of power to the DDRC was ultra vires:

- (1) The issue is moot,
- (2) The Association does not have standing under S.C. Code §6-29-1150,
- (3) Appellant failed to preserve the issue, and
- (4) The DDRC never decided the issue.
- (5) This court lacks jurisdiction.

As indicated below, none of these arguments is valid.

1. Mootness

Section 3.5.4 of the Guidelines provides/includes the following provision: “Within the City Center, the DDRC and the Design/Development Review staff will assume responsibility for site plan review.”⁶ Respondents argue that, because the City has deleted Section 3.5.4 of the *Guidelines*, the site plan issue is moot.

⁶ Section 3.5.4 provides as follows:

3.5.4 Site Plan Review

Site plan review in Columbia is handled by the City’s Planning Department, which has authority to approve site plans for building projects of 25,000 square feet or less; larger projects must go before the City’s Planning Commission. Once applications are accepted, the Planning Department has 10 days to review the project, including evaluation of the site plan and preparation of a staff report for

This ordinance amendment does **not** moot the site review issue because eliminating the grant of the responsibility for site plan review to the DDRC does not eliminate the ultra vires problem. In fact, it makes the situation worse because the process of site plan review by Planning Commission involves matters that are also authorized for review by the DDRC under the *Guidelines*.

a. Planning Commission Site Plan Review

The Columbia City Code provisions concerning site review of “group developments”⁷ by the City of Columbia Planning Commission involve a number of concerns, including the following:

- (1) Procedures and requirements for specific plans and constructions drawings (§ 17-582);
- (2) Off-street parking (§ 17-583);
- (3) Water and Sewer Service (§ 17-584);

the Planning Commission. The Commission may then approve, approve with conditions, or deny the project. Planning Commission decisions are appealable to the circuit court, not the City Council.

Within City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

⁷ See Columbia Zoning Ordinance § 17-464 (establishing the three types of “group development” quoted in note 3 *supra*).

- (4) Storm Drainage (§ 17-585);
- (5) Parking areas, driveways, and internal street (§ 17-586);
- (6) Building setbacks (§ 17-587);
- (7) Internal design and spacing (§ 17-588); and
- (8) Screening (§17-589).

b. DDRC Site Plan Review

Even though Section 3.5.4 has been deleted from the *Guidelines*, there are other sections of the *Guidelines* which implement the now-deleted Section 3.5.4 by addressing the same site plan review concerns that are addressed by the Planning Commission. More specifically, these sections provide for DDRC approval of the following:

- (1) Subsection 5.4.1 of the *Guidelines* sets out a scheme to determine setbacks, which are also regulated by the Planning Commission.⁸
- (2) Subsection 5.4.2 addresses “building orientation,” which is also involved in Planning Commission review.⁹
- (3) Section 5.5 addresses “open spaces,” which are also a matter for Planning Commission review.¹⁰
- (4) Section 5.10 addresses parking and screening, which are also reviewed by the Planning Commission.¹¹

⁸ Columbia City Code §17-587.

⁹ *See id.* § 17-582.

¹⁰ *Id.* §§ 17-582, 17-588.

¹¹ *See id.* §§ 17-582, 17-583, 17-586, & 17-589.

c. Conclusion

This overlap of review authority by both the Planning Commission and the DDRC conflicts with the Enabling Act.

d. Likelihood of Conflicts in Site Plan Review

Because of the overlap, the Association asserts that there is also a substantial likelihood that an application receiving a decision by the Planning Commission on a particular concern will conflict with a decision by the DDRC on the same concern. Such a result is obviously undesirable. At oral argument, Defendants/Respondents argued that the argument concerning overlap was speculative and hypothetical. However, given the number of important areas of overlap, the concerns for overlap appears to be justified.

This problem of overlap of review by both the DDRC and the Planning Commission was identified at page 18 of Plaintiff's Memorandum in Opposition to Motion to Dismiss. This Memorandum was filed on September 2, 2020. Thus, Respondents were on notice that Section 3.5.4 was not the only section involving an ultra vires grant of power.

2. Section 6-29-1150

Section 6-29-1150 is not relevant to the ultra vires argument. Jurisdiction is based upon Article V, Section 11 of the South Carolina Constitution.

3. Failure to Preserve Ultra Vires Issue

Various arguments in the Brief of Respondents fail to distinguish between deciding on the basis of adjudication and deciding on the basis of a public hearing. For example, in footnote 23 on page 19, Defendants/Respondents argue:

“Testimony by the University of South Carolina and Historic Columbia, referenced on page 36 of Appellant’s Brief, is irrelevant, as neither entity appealed either of the DDRC’s decisions.”¹²

Respondents provide no authority for this assertion.

Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008) addressed the issue of the due process rights of a landowner’s request to subdivide his property. The court stressed that adjudication is very different from decisions by discretionary zoning boards and commissions. See 656 S.E.2d at 350–51. It is generally accepted that “the purpose of holding a public hearing is for the government to obtain public testimony or comment on a particular matter.”¹³ Given this goal, it is absurd to say that a person’s testimony only counts if that person appeals.

4. Failure of DDRC to Address Issue

This is a puzzling argument. The parties agree that the “DDRC does not have authority to determine its own authority. . . .” Brief of Respondents, p. 28. When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the

¹² For additional examples, see footnote 11 at page 8 of Brief of Defendants/Respondents (“A representative of Historic Columbia, John Shearer, also objected to Trinitas’ application for design approval quote based on . . . scale and on mass and height.” *Id.* at 51:5-6. Historic Columbia did not appeal the DDRC’s Design Approval Decision as to the Proposed Construction.”); page 15 (reliance on *Powell ex rel. Kelly v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), which was decided within the context of adjudication); pages 26–28 (relying on adjudicative concepts of preservation of issue to challenge position of appellants).

¹³ New Hampshire Municipal Association, Running a Smooth Public Hearing, p. 2, available at <https://www.nhmunicipal.org/town-city-article/running-smooth-public-hearing>.

DDRC states that the question of the validity of the grant of this power is “out of our hands.” (Supplement to Record, Exhibit 8, at pp. 14–16). This lack of authority is the reason jurisdiction on this issue is based upon Article V, Section 11 of the South Carolina Constitution rather than on S.C. Code §6-29-1150.

5. Jurisdiction

The Defendants/Respondents have challenged the jurisdiction of this court to address the site plan issue. Article V, Section 11 of the South Carolina Constitution provides: “The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law.” Because this grant of general jurisdiction supports the filing of this *ultra vires* action in Circuit Court, it was the basis of all of the South Carolina *ultra vires* cases cited in Part C below, except *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008), which was filed in the original jurisdiction of the Supreme Court.

C. Remedy for Ultra Vires Act

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. See, e.g., *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *Sinkler v. Boyd, supra* (holding circuit court properly invalidated rezoning); *O’Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city’s decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of

conveyance by Circuit Court); *City of North Charleston v. North Charleston District*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgement that certain contracts entered into by school district were *ultra vires* and, therefore, invalid). Because the grant of power to the DDRC to address site plan review was *ultra vires*, that grant of power is invalid.

III. MISTAKE OF LAW IN DECIDING THAT THE HEIGHT OF THE PROPOSED BUILDING WAS DETERMINED BY THE UNDERLYING C-3 ZONING RATHER THAN THE -DD OVERLAY ZONING

A. The Height Restrictions in the *Guidelines*

Chapter 5 of the *Guidelines* contains the “Guidelines for Private Development.” The Introduction to this chapter notes:

The key emphasis of the guidelines in the chapter is to reinforce the exiting fabric of City Center by ensuring that new projects are developed within the rhythm of the existing development pattern. *This “contextual” approach* to evaluating the design of new projects is *fundamental to the implementation* of the *Guidelines*.

(emphasis added) Thus, the *Guidelines* view this contextual approach as fundamental to design review. Where height is concerned, Section 5.3.1 of the *Guidelines* states:

As a general rule, and consistent with current zoning provisions, buildings within most of City Center *should be no more than five stories*. . . . [I]t is not the intent of these Guidelines to establish new height standards for development in City Center. It is, however, *critical* that in applying these Guidelines—as well as other development regulations—the City be consistent in considering the height of proposed structures as they relate to the *adjacent development context*.

(emphasis added)

The Association argues that the DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, even though height “should be no more than five stories

and the DDRC should use the “contextual approach” to evaluating the design of new projects is “critical” and “fundamental” to the implementation of the *Guidelines*, the decision was based on a mistaken legal interpretation by the staff of the DDRC that the five-story guideline and the contextual approach of the *Guidelines* did not regulate the height of the building. The basis of this interpretation was set forth in an email from Lucinda Statler (the City’s Principal Planner/Urban Design) to Thomas Gottshall, President of the University Hill Neighborhood Association. (See Exhibit 1 to Complaint) Part of this email states:

The DDRC makes decisions as to whether a project meets or does not meet the design guidelines, which are qualitative measures for evaluating projects within the City Center Design District. The underlying [C-3, General Commercial Use] zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the [underlying C-3 General Commercial Use] zoning, the [C-3] zoning prevails. Please refer to Section 5.3.1 *Building Heights*, in the City Center Design Guidelines. “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center”¹⁴

(emphasis in original) This interpretation was adopted in the *Staff Report* for the July 2020 meeting. This report states: “The building height and mass remain the same [as earlier versions of

¹⁴ Similar language is contained in Lucinda Statler’s comments at the July 2020 DDRC meeting. (Supplemental Record, Exhibit 10 at 2–3)

the proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance.” (Record, Exhibit 5 at 5)

The Brief of Defendants/Respondents argues that nothing in the DDRC’s Design Approval Decision states that it was based on positions or conclusions of staff or on staff recommendations. The Record does not support this argument.

The Record makes it clear that the DDRC had been told by the staff that it could not apply the *Guidelines* because height was to be determined by the underlying C-3 zoning. For example, the DDRC “Staff Comments” consistently stated that the underlying C-3 zoning controlled the decision on height.¹⁵ In addition, at the June 10, 2020, “work session,” the staff of the DDRC stated that it wanted to “ensure that we all understand that the DDRC can’t require a reduction in the allowable height or the allowable building envelope that’s permitted by zoning.” The chairman of the DDRC replied to this statement as follows: “Right. And I appreciate that. Understand that.” (Supplement to Record, Exhibit 9, at pp. 69–70).

The motion to approve the height incorporates this understanding about the allowable building envelope. As to height and mass, the motion stated the following:

“It meets the following sections of section 5.3, building mass and organization which are 5.3.1 building height, in which is stated, quote, *The city’s comprehensive*

¹⁵ The written comments from the staff at the July meeting included the following:

While the building is 8 stories, its total height is 75’, meeting the C-3 zoning requirement. The U of SC law school, across Pickens Street, is 58’ to the top of the third floor, and 70’ to the roof pitch; the Hilton Garden Inn is just under 75’.

...

The building height and mass remain the same, consistent with the allowable envelope provided by the Zoning ordinance.

(Record, July DDRC 011)

plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.”

Supplemental Record, Exhibit 10 at p. 18 (emphasis added). Given exchanges between staff and the DDRC like that quoted in the preceding paragraph, it is clear that the reference to the quote from Section 5.3.1 was intended to implement the understanding that “the DDRC can’t require a reduction in the allowable building envelope that’s permitted by [the underlying C-3] zoning.”

In addition Defendants/Respondents concede that the DDRC approval of the height was based on the current underlying zoning, not the current overlay zoning. The Brief of Defendants/Respondents makes this clear at p. 42, which includes the following:

The applicable City zoning ordinance, City Code Section 17-275, allows for buildings in the C-3 zoning section to be between 50 and 75 feet. Columbia, S.C., Code of Ordinances § 17-275 at note c (“Buildings between the height of 50 and 75 feet may be allowed[.]”). Since the height of the structure at issue is undisputedly within this limit, the Proposed Construction is compliant with [the] City’s zoning ordinance and therefore is also compliant with the *Guidelines*.

B. The DDRC Interpretation Was a Mistake of Law

Because the DDRC interpretation was a mistake of law, approval based on this mistake was an abuse of discretion.

1. Provisions in the Enabling Act and in the Columbia Zoning Code Concerning Conflicts Between Requirements

The Commission's reliance on the staff's interpretation was a mistake of law because the interpretation conflicts with provisions in the Enabling Act and in the Columbia City Code concerning conflicts between requirements.

Section 6-29-960 of the Enabling Act states the following approach to be used when requirements conflict:

When the regulations made under the authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other more restrictive standards than are required in or under another statute, or local ordinance or regulation, the regulations made under authority of this chapter govern. When the provisions of another statute require more restrictive standards than are required by the regulations made under authority of this chapter, the provisions of that statute govern.

Section 17-181 of the Columbia City Code states:

Within each district, the regulations set forth by this article shall apply uniformly to each class or kind of structure or land. In their interpretation and application, the provisions of this article shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. *Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that*

imposing the higher standards, shall govern. Unless deed restrictions, covenants or other contracts directly involve the city as a party in interest, the city shall have no administrative responsibility for enforcing such deed restrictions or covenants.

(emphasis added)

Article V of the Columbia City Code addresses “Historic Preservation and Architectural Review.” Section 17-675 contains the following specific provision concerning conflicts in requirements where design review is involved:

The most restrictive regulations of the zoning ordinance or any other ordinance of the city or those included in this division shall prevail. However, if the commission finds it desirable to impose less restrictive requirements than the zoning ordinance, such deviation shall be referred to the zoning board of adjustment for review as a special exception.

The *Guidelines* provide two standards for determining the permissible height of a building. First, Section 5.3.1 of the *Guidelines* adopts “a general rule [that] . . . buildings within most of the City Center should be no more than five stories.” *Guidelines* § 5.3.1. Second, Section 5.3.1 notes that a “contextual approach is fundamental to the implementation of the Guidelines” and that this approach is “critical that in applying these Guidelines . . . the City be consistent in considering the height of proposed structures as they relate to the adjacent development context.” The adjacent

development is mostly one, two, and three story buildings.¹⁶ The only exception to this pattern is a hotel, which is: (1) across a wide, very busy street and (2) is outside the -DD district.¹⁷ Based on these two quantitative measures of adjacent development, the maximum height would either be three stories or five stories.

These two *Guidelines* standards for determining height are more restrictive than the underlying zoning of 75 feet. Given the requirements that the “more restrictive” standards shall govern, the more restrictive *Guideline* approach should have determined the height rather than the less restrictive underlying zoning.

2. The DDRC analysis of “vested rights” conflicts with the Columbia Zoning Code

To the extent that the staff interpretation relies on the concept of “vested rights,” the interpretation conflicts with the definition of vested rights in Columbia City Code, Section 17-2(a). This section states: “A vested right is triggered only upon the approval or conditional approval of a site specific development plan.” Section 17-1(b) defines a “site specific development plan” as follows: “Site specific development plan means those documents that comprise a complete application for a zoning permit, certificate of zoning compliance, variance, special exception, planned unit development, sketch plat or plan, or other similar approval that authorizes the developer or landowner to proceed with investment in grading, installation of utilities, streets and other infrastructure, and to undertake other significant expenditures necessary to prepare for

¹⁶ See “Analysis of Application of Certificate of Design Approval for Trinitas,” Record, Exhibit 3, at pp. 50, 135.

¹⁷ *Id.*

application for a building permit.” An underlying zoning classification of C-3 zoning does not satisfy this definition of site-specific development plan.

3. The DDRC Interpretation Is Fallacious

Another problem with the interpretation concerning height adopted by the DDRC is that the “logic” of the argument makes *all* the guidelines meaningless. Statler’s email states: “When the design guidelines seem to conflict with the [underlying] zoning, the zoning prevails.” If this general statement were valid, imposing any of the *Guidelines* would be impermissible because the underlying C-3 zoning does not have any limits on such concerns as façade proportion and rhythm, proportion of openings, horizontal rhythms, alignment of architectural elements, wall articulation, roofs, and upper story details. See Chapter 5 of the *Guidelines*.

The distinction between “qualitative measures” and “quantitative measures” in the Statler email has two flaws. First, the email does not provide a reason for regarding the distinction as relevant to the question of whether the *Guidelines* or the underlying zoning should determine height. Second, the *Guidelines* contain quantitative measures for concerns other than height. For example, Section 5.3.3 address “Proportion of Openings” as follows:

Maintain the predominant difference between upper story openings and street level storefront openings (windows and doors). Usually, there is a much greater window area (*70 percent*) at the storefront level for pedestrians to have a better view of the merchandise displayed behind as opposed to upper stories which have smaller window openings (*40 percent*).

Whenever an infill building is proposed between two adjacent commercial structures, the characteristic rhythm, proportion and spacing of existing door and window openings should be maintained.

(emphasis added) Despite the quantitative nature of this guideline, the DDRC used it rather than the underlying zoning to address the proportion of openings. (Supplemental Record, Exhibit 10 at 10–11)

4. The DDRC Interpretation Conflicts with the Enabling Act and with Doctrine Concerning Overlay Districts

The *Guidelines* state: (1) that “zoning should be consistent with *current zoning provisions*” and (2) that “the City’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of building.” (emphasis added) (*Guidelines* § 5.3.1 at p. 5-2). The term “current zoning provisions” requires further analysis because there are two separate “current zoning provisions” involved.

When the City Council adopted the *Guidelines* as a part of its zoning code by reference in Columbia City Code Section 17-253 and Section 17-655(b)(2), the *Guidelines* became a part of Columbia’s “current zoning provisions.” As a result, the *Guidelines* are now a part of Columbia’s “current zoning provisions.” If the *Guidelines* were not part of today’s current zoning provisions, the DDRC could not apply them in the -DD overlay area.

The result of the adoption by reference is that, under today’s current zoning provisions, the site of the proposed Trinitas project is subject to two distinct zoning schemes: (1) the regulations for the underlying zoning category of C-3 and (2) the -DD overlay zoning provisions of the *Guidelines*. Thus, the question in this litigation is: Should the determination of height be based on the current underlying zoning provisions or on the current overlay -DD provisions?

As indicated above at Part I-C, an overlay is described in Section 6-29-720(C)(5) of the Enabling Act as a district that “*imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district.*” (emphasis added) It is clear from the content of the

Guidelines that the *Guidelines* are meant to impose requirements, not relax them. The legal interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay like that involved herein and the underlying zoning backwards. The -DD design overlay involved herein is adopted to *increase* requirements by imposing *additional* requirements in order to address design concerns. If the underlying zoning will control where there is a conflict with the additional requirements of the overlay zoning, there is no reason to bother with the time and expense of applying the increased requirements of the overlay.

The general treatment of overlays in land use regulation parallels the language of S.C. Code § 6-29-720(C)(5). For example, John R. Nolan & Patricia E. Sallcin, *Land Use in a Nutshell* 218 (2006) describes an overlay as follows:

Overlay zoning is a flexible zoning technique that allows a municipality either to encourage or to discourage development in certain areas. An overlay zone is defined as a mapped overlay district superimposed on one or more established zoning districts. *A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements.*

(emphasis added)

South Carolina follows this approach of “two sets of zoning requirements” in overlay cases. For example, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) involved an “Airport Overlay District” (AO) which, among other things, restricted certain uses and expansions within the AO District. The church claimed it was entitled to a building

permit for a proposed expansion because: (1) an earlier permit included the expansion;¹⁸ and (2) an incorrect approach had been used in determining whether the expansion would increase the “occupant load” of the church’s property. “Occupant load” in the area within the AO District was important because of a concern for a high potential for accidents affecting the public areas near a military airport. The defendants rejected both of the church’s claims.

The church appealed, and a master-in-equity ruled in favor of the church. The Court of Appeals reversed the decision of the master-in-equity. In terms of the “occupant load” concern of the AO District, the Court held “the evidence in the record clearly supports the Planning Commission’s finding that the [proposed] fellowship hall would increase the occupant load for the site.” 828 S.E.2d at 241. In reaching this decision, the Court followed the general principle that, where an overlay imposes additional requirements, those additional requirements supplement or replace the underlying zoning.

Heilker v. Zoning Board of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) involved the application of a “Highway Corridor Overlay Zoning” scheme adopted by the City of Beaufort. The overlay was concerned with the protection and promotion of aesthetics and safety and contained new restrictions concerning the outdoor display of certain types of merchandise in the “Highway Corridor” district. The central issue in the case was whether the outdoor displays at issue were: (1) part of the “use” of the land for retail sale, or (2) merely an

¹⁸ In an opinion filed on September 16, 2020, the South Carolina Supreme Court reversed the decision of the Court of Appeals and held that the earlier permit included the expansion. *Grays Hill Baptist Church v. Beaufort Country*, 431 S.C. 630, 850 S.E.2d 29 (2020). The Supreme Court did not address the overlay issue because “our determination concerning the validity of the original permit resolves this case” *Id.* at 850 S.E.2d 32, fn. 8.

“activity or practice” incidental to the “use.” If the display was a use, the overlay did not apply; if it was an activity or practice, the restrictions of the overlay applied.

The Zoning Board of Appeals (ZBA) ruled that it was a practice, and Heilker appealed. A special judge reversed the ZBA’s finding, and the Court of Appeals reversed the special judge. *Heilker* adopted the same approach as *Grays Hill Baptist Church* and held that, where an overlay applied, the restrictions in the overlay supersede the underlying zoning.

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC ignored the legal effect of the adoption of the *Guidelines* by reference. As a result, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the height requirements in the *Guidelines* even though the *Guidelines* constitute the overlay part of current zoning. (See Part III-B-1 above for discussion of height requirement in the *Guidelines*.) Because the DDRC failed to follow the general rule of making the parcel within the overlay district “simultaneously subject to two sets of zoning regulations,” the DDRC made an error of law. This error constitutes an abuse of discretion.

5. Arguments of Defendants/Respondents

The Brief of Defendants/Respondents relies on generic rules of statutory instruction rather than the explicit provisions in the Enabling Act and the Columbia City Codes. Underlying their approach is a failure to appreciate the legal effect in terms of “current zoning” of the adoption of the *Guidelines* by reference. As a result, their arguments do not address the question of whether the underlying C-3 zoning or the overlay zoning of the *Guidelines* should prevail.

They also fail to address the problems concerning vested rights under the City Zoning Code and the fallacious nature of the argument concerning the flaw in the quantitative/qualitative distinction. Many courts have noted that where an important point is not addressed in a party's argument, the point is deemed to have been abandoned. *E.g.*, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); *Finch v. Finch*, 442 S.W.3d 209, 233 (Mo. App. 2014)

Defendants/Respondents also argue that the Association's positions on the role of the *Guidelines* as to the overlay zoning is inconsistent with its position on the issue of unlawful delegation. To the extent that consistency is a problem, both sides have this problem.

If the adoption of the *Guidelines* by reference was not an improper delegation, the *Guidelines* provide the legal framework for the overlay zoning. As a result, Defendants/Respondents cannot logically claim that the height provisions in Section 5.3.1 of the *Guidelines* are not more restrictive than the underlying C-3 zoning. Because these provisions are more restrictive, the Section 6-29-960 of the Enabling Act and Sections 17-181 and 16-675 of the City Code are applicable.

IV. STANDING

A. Associational Standing

1. Doctrine

The doctrine of associational standing was recently summarized by the Supreme Court as follows:

[A]n organization has associational standing to bring suit on behalf of its members when (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020). The associations in *Preservation Society* were:

[seeking] a contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston. Petitioners maintain they have standing to seek this hearing as “affected persons” under section 44-1-60 (G) of the South Carolina Code (2018). The ALC concluded Petitioners did not have standing and granted summary judgment to Respondents.

Id. at 483.

The Supreme Court decision focused on the first standing requirement—i.e., on whether any member of the petitioning organizations had standing as individuals under the statutory term of “affected persons.” In addressing this issue, the Court noted:

Petitioners are community and neighborhood organizations comprised primarily of members who own property near the proposed passenger cruise facility. . . . [T]he court of appeals acknowledged Petitioners presented affidavits from individual members expressing concern over their reduced quality of life arising from the effects upon them *individually*, such as pollution and health effects, traffic congestion, property values, effects on their businesses in the area, and effects on the historical integrity of the area where they resided. . . . Nevertheless, the court of appeals, relying on *Carnival Corp.*, agreed with the ALC that the claims of possible environmental and personal harm were purely speculative or were merely generalized grievances equally affecting the public as a whole.

Id. at 488.

The Supreme Court concluded that the associations’ “allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative.” *Id.* at 489. The proximity of the members of the associations to the terminal involved play a role in this conclusion. The court noted:

While geographic proximity may not be a determinative factor in every case, it is highly relevant to our analysis in this case. Here members would suffer the environmental consequences Petitioners allege the project will create, such as

breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution.

Id. at 489–90.

Defendants/Respondents primarily rely on two cases in their challenge to the Association’s standing: *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014) and *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

Carnival Corp. involved a suit brought by two neighborhood associations, a historic preservation society, and the Coastal Conservation Society. The alleged injuries involved were essentially public nuisance claims. 753 S.E.2d at 851. Because the plaintiffs lacked the special injury required for bringing a public nuisance claim, the court held that the plaintiffs lacked standing. *Id.* at 852. The court also held that public importance standing did not apply because of the nature of the claims involved and because the claims could be brought by persons who could show the required injuries, the public importance exception did not apply. *Id.* at 853.

Beaufort Realty Co. involved a challenge to a decision by the County Zoning Administrator that plats filed for a subdivision were exempt from the need for approval. The court held that the League did not have standing because there was no evidence of harm to individual members and that a “severe concern” for potential harm was, by itself, inadequate to satisfy the standard of concrete particular harm. 551 S.E.2d at 590.

The Association relies primarily on the following two cases: *Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control*, 430 S.C. 200, 845 S.E.2d 481 (2020) and *Citizens for Quality Rural Living, Inc.*, 426 S.C. 97, 825 S.E.2d 721 (Ct. App. 2019).

Preservation Society of Charleston addressed the procedural issue of whether the organizational plaintiffs had standing to request a “contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston.” 845 S.E.2d at 483. As indicated above, the court held that the plaintiffs had standing because: (1) the organizations had members who owned property near the “proposed passenger cruise facility” at issue; and (2) the associations’ allegations of potential harm to members in the nearby neighborhoods “through affidavits and other filings, are not speculative.” 845 S.E.2d at 488–89. The harms were not speculative because, given the proximity to the facility, the members would be exposed to adverse health effects and increases in traffic and noise.

Citizens for Quality Rural Living, like *Preservation Society of Charleston*, focused on: (1) the fact that plaintiffs owned property in a defined neighborhood that was in the immediate vicinity of the proposed subdivision at issue in the case, and (2) members of the neighborhood “will be impacted by the additional traffic” and by the incompatibility of the subdivision with the surrounding rural community. 825 S.E.2d at 723, 730.

All four cases focus on a common concern: Is there evidence to show a reasonable likelihood of specific, serious injury to individuals in the association that are not experienced by the general public? In *Carnival Corp.* and *Beaufort Realty*, there was no such evidence. In *Preservation Society of Charleston* and *Citizens for Quality Rural Living*, such evidence had been shown. As indicated in Part IV-A-2 below, members of the Association have satisfied the requirement of showing likelihood of substantial injury different from that suffered by the general public.

2. Standing—“Substantial Interest”

Section 6-29-900(A) of the Enabling Act addresses standing to appeal from a design decision by an architectural review board as follows: “A person who may have a *substantial interest* in *any* decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from *any* decision of the board to the circuit court” (emphasis added)

Citizens for Quality Rural Living, Ins., v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (S.C. Ct. App. 2019) addressed the issue of standing in the context of an appeal from a decision by a planning commission. The Court held that Section 6-29-1150 of the Enabling Act granted “any party in interest” a right to appeal from a decision of a planning commission. In terms of the meaning of the term “party in interest,” the court adopted the approach of *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013), which defined “a real party in interest for purposes of standing as ‘a party with a real, material, or *substantial interest* in the outcome of the litigation (quoting *Hill v. S.C. Dep’t of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E. 2d 612, 623 (2010)).” 825 S.E. 2d at 727, n.6 (emphasis added). *Citizens for Quality Rural Living* also noted that the association involved had a substantial interest, and thus standing, because “its *members include persons who own property and live in the immediate vicinity of the proposed subdivision.*” *Id.* (emphasis added)

Plaintiff University Hill Neighborhood Association is an unincorporated association. As indicated above in Part I-C of the Statement of Case, the boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic district—a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.”

Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This district is “identified as Architectural District No. 1” and is “bound by Laurens, Senate, Henderson, and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic Districts. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed. Given these boundaries, it is clear that this association, like the associations in *Preservation Society of Charleston* and *Citizens for Quality Living*, contains individuals who live in a defined area in proximity to a proposed use.

The record herein shows that these individuals will suffer non-speculative harm from the Trinitas proposal. Numerous residents of the University Hill Neighborhood testified under oath at public hearings concerning the Trinitas project that: (1) they lived within the boundaries of the University Hill Neighborhood Association, and (2) they as individuals and the neighborhood area as a whole would experience substantial negative impacts from the proposed project. These

testifying residents include the following: Tom Gottshall,¹⁹ John McGill,²⁰ Beth Richardson,²¹ Catherine Fenner,²² April Lucas,²³ Douglas Carlisle,²⁴ John Stucker,²⁵ and Bobby Lyles.²⁶

¹⁹ Supplemental Record, Exhibit 6, at pp. 17-20 (noting, inter alia, that the proposed project is “adjacent to our neighborhood” and that, as a result of students in the proposed projects, hundreds of students will be “moving . . . through our neighborhood at night.”; Supplemental Record, Exhibit 8, at pp. 43-46, 48-50 (noting that the project did not meet *Guidelines*, that the project “is to be marketed to students”); Supplemental Record, Exhibit 9, at pp. 9-11 (emphasizing objections to height as violating *Guidelines*). Mr. Gottschall also submitted written materials to the DDRC. See Record, Exhibit 1, at p. 4; Record, Exhibit 2, at p. 9; Record, Exhibit 3, at p. 46; Record, Exhibit 4, at p. 22; Record, Exhibit 5, at p. 86.

²⁰ Supplemental Record, Exhibit 6, at pp. 23-25 (noting investment in homes in neighborhood, size of proposed building, and negative impacts of auto, bike, and pedestrian traffic).

²¹ Supplemental Record, Exhibit 6, at pp. 25-26 (noting size of proposed building and reasons why residents of proposed project are likely to be mostly students, expressing concern for “overloading the neighborhood,” and describing significant investments in homes in the neighborhood).

²² Supplemental Record, Exhibit 6, at pp. 26-27 (noting concern for negative impacts of students returning to campus area from Five Points late at night and concern that project will “smother our historic neighborhood”); Exhibit 8, at pp. 59-61 (referring to “people staggering home” in early hours of the day).

²³ Supplemental Record, Exhibit 6, at pp. 27-28 (noting problems resulting from students returning from Five Points and “banging on our doors at 2:30 in the morning”).

²⁴ Supplemental Record, Exhibit 6, at pp. 30-31 (giving reasons to believe students will reside in proposed project and describing specific problems from drunken students “who have trooped through the neighborhood”).

²⁵ Supplemental Record, Exhibit 6, at pp. 41-43 (expressing concern for negative impact of auto and pedestrian traffic by students).

Among their concerns were an increase in vehicular and pedestrian traffic through the neighborhood. Because Trinitas is a “university centric developer,”²⁷ it is likely that students will reside in the proposed project. As a result, pedestrian traffic from students going to and from class would flow through the neighborhood. In addition, because of topography and a railroad, the route for these students and other young adults living in the proposed project returning from the bars in the “Five Points” area of Columbia to the proposed Trinitas project would be through the University Hill neighborhood. These people “moving . . . through our neighborhood at night”²⁸ would inevitably include some drunken and rowdy students who will, like many young people before them, engage in things like the following:

- conduct involving “damage and vandalism and just altogether bad behavior in the small hours of the morning,”²⁹
- “people banging on our doors at 2:30 in the morning,”³⁰
- “people staggering home at” 5:00 am,³¹ and

²⁶ Supplemental Record, Exhibit 8, at pp. 57-59 (stating that he was a resident of the Heritage and president of the homeowners’ association and expressing concern that the scale of the proposed project would “overload” the neighborhood).

²⁷ Testimony of Linda Irving, Trinitas’s representative, Supplemental Record, Exhibit 6, at p. 29; Supplemental Record, Exhibit 8, at p. 6.

²⁸ Testimony of Tom Gottschall, Supplemental Record, Exhibit 6, at pp. 17-20.

²⁹ Testimony of John McGill, Supplemental Record, Exhibit 6, at pp. 23-25.

³⁰ Testimony of April Lucas, Supplemental Record, Exhibit 6, at pp. 27-28.

³¹ Testimony of Catherine Fenner, Supplemental Record, Exhibit 8, at pp. 59-61.

- students who have appeared “to be dead,” engaged in yelling and “waking me up” at 2:30 in the morning, and “urinating in my driveway.”³²

The residents also expressed concern for the visual impact of a large, monolithic building looming over the area.

The University of South Carolina owns two properties adjacent to the proposed building. Representatives of the University of South Carolina also gave testimony concerning the negative impacts of the proposed Trinitas project on the historical and residential character of the University Hill Neighborhood and concerning the negative impact on joint plans between the University and the neighborhood.³³ Representatives of Historic Columbia gave testimony objecting to failure to follow the *Guidelines* and negative impact on historical character of the area.³⁴ The evidence also

³² Testimony of Douglas Carlisle, Supplemental Record, Exhibit 6, at pp. 30-31.

³³ Derek Bruner, Supplemental Record, Exhibit 6, at pp. 22-23 (indicating negative impact on University Hill neighborhood from “student presence adjacent to and throughout their neighborhood,” stressing conflicts with University’s master plan, and noting that “height and scale and the mass” does not balance with neighborhood); see Letter from Bruner to Lucinda Statler, Record, Mar. 4, 2020, Exhibit 3, at p. 44; Dan D’Alberto, Supplemental Record, Exhibit 8, at pp. 56-57 (noting the plans of the University and stressing that the University “is in lockstep with University Hill Neighborhood in that we agree with the letter they submitted.”).

³⁴ Robin Waites, Supplemental Record, Exhibit 6, at pp. 20-22 (describing historical character of area and negative impact of scale of proposed building, and objecting to violation of *Guidelines*); John Sherer, Supplemental Record, Exhibit 8, at pp. 50-53 (describing factual errors in the Trinitas presentation, stressing the negative impact of the “view shed” of the project, and noting that the church building south of the project is historic).

includes a detailed written review of the historic importance of the buildings and surrounding area in the vicinity of the Trinitas project.³⁵

Defendants/Respondents argue that this detailed factual testimony is “speculative,” “conclusory,” and “hypothetical.” However, the number of specific points made in the sworn testimony before the DDRC are, like the record in *Preservation Society*, “not speculative” and affect the residents “individually.”

3. Conclusion

The evidence in the record on appeal contains sworn testimony concerning the harmful impacts on the members of the University Hill Neighborhood Association. As in *Preservation Society* and *Citizens for Quality Living*, their neighborhood is adjacent to the block where the project would be built. As a result, they have “geographic proximity” and “live in the immediate vicinity of the proposed” building. In addition, their concerns for increased traffic are the same as the concerns of the members of the associations in these two cases. As in *Preservation Society*, the residents of the University Hill Neighborhood are concerned about “traffic congestion, property values . . . and effects on the historical integrity of the area where they resided.” 845 S.E.2d at 488. Like the residents in *Citizens for Quality Living*, the residents are concerned about the traffic and “incompatibility of the subdivision with the surrounding” community. 825 S.E.2d at 721.

³⁵ Testimony and written analysis of Patrick Hubbard, Record, Exhibit 8, at pp. 53-56, 167-69, 206-09; see “Analysis of Application of Certificate of Design Approval for Trinitas,” Record, Exhibit 3, at pp. 50, 135.

In addition, at the March 12, 2020, Hearing, Linda Irving, speaking as “Trinitas’s representative,”³⁶ recognized the importance of considering the negative impacts on the neighborhood. Ms. Irving stated: “The site is not within the bounds of a historic district or within a residential neighborhood, though *their proximity must absolutely be factored heavily*.”³⁷

Given the testimony of residents in the immediate vicinity of the project and of representatives of the University of South Carolina and Historic Columbia, combined with the admission by the Trinitas representative that the proximity of historic districts and residential neighborhoods “must be absolutely factored heavily,” the Association and its members have shown a substantial interest in the decisions of the DDRC concerning the Trinitas project.

B. Public Importance Standing

The South Carolina Supreme Court has held that “a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.” *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). The approach for addressing a claim of public importance standing was addressed in *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854, 859 (2017), as follows:

[W]hen deciding whether to confer public importance standing, courts must take these competing policy concerns [of citizen access to courts and a need to achieve judicial economy and freedom from frivolous suits] into consideration, and must

³⁶ Supplemental Record, Exhibit 8, at p. 6.

³⁷ Supplemental Record, Exhibit 8, at p. 35. (emphasis added)

also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.

1. Issues Involved

This suit involves three important issues where future guidance is needed. These issues are:

- (1) Whether important aspects of a development within the -DD area, like height, are determined by the underlying zoning or by the overlay zoning of the *Guidelines*;
- (2) Whether the grant by the City of the power of site plan review to the DDRC for development within the -DD area was *ultra vires*; and
- (3) Whether the “overall determination” approach to the application of the precatory, non-binding language of the *Guidelines* constitutes an improper delegation of the City’s legislative power and a denial of due process.

2. Importance of Issues

The -DD area of Columbia regulated by the *Guidelines* “consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River.” Columbia City Code, § 17-253. Given the size of this area, issues concerning the validity, proper scope, and application of the *Guidelines* effectively determine important aspects of development in the downtown core of Columbia.

In addition, Columbia has many other overlay districts. *See, e.g.*, Columbia City Code §§ 17-306, 17-307, 17-308, 17-309, 17-310, 17-311, 17-312, 17-313, 17-314, 17-315, 17-322, 17-323, 17-324, 17-325, 17-326, 17-681 (historic districts). Important issues concerning the relationship between these overlays and the underlying zoning involved could arise under these schemes.

More broadly, issues concerning overlay schemes and underlying zoning could arise throughout South Carolina. Overlay schemes are authorized by Section 6-29-720(C)(5) of the Enabling Act and are a generally recognized technique for land use regulation.³⁸

3. Need for Future Guidance

Future guidance in addressing these three issues is needed for the same reasons that these issues are important. More specifically, issues will arise concerning the validity, proper scope, and application of the *Guidelines* and concerning overlays generally because of: (1) the large area covered by the -DD overlay, (2) other overlay schemes in Columbia, and (3) overlay schemes in South Carolina.

As indicated above in Part III, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) and *Heilker v. Zoning Board of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) held that overlay schemes in South Carolina follow the general rule that an overlay zone is “simultaneously subject to two sets of zoning regulation.” Thus, this appeal raises the issue of which approach will be followed in South Carolina: The approach used herein by the DDRC or the approach used in *Grays Hill Baptist Church* and *Heilker*?

Grays Hill Baptist Church involved an airport overlay district. Section 17-307 of the Columbia City Code contains an overlay district termed: “—AP airport height restrictive areas,”

³⁸ See, e.g., Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* 93–94 (3d ed. 2013); John R. Nolon, *Land Use in a Nutshell* 219–22 (2006); Peter W. Salsich, Jr. & Timothy J. Tryniecki, *Land Use Regulation* 222–23 (3d ed. 2015).

which applies in the area around Owens Field Airport. If the approach adopted by the DDRC were applied to the AP overlay, the height restrictions of the overlay would not apply.

The City of Columbia also has overlay corridor districts designed to impose supplemental sign regulations (see Columbia City Code, §§ 17-310, 17-313, 17-314, 17-315). The concerns underlying these overlay districts are similar to those in *Heilker*. As a result, issues concerning the relationship of the overlay involved vis á vis the underlying zoning could arise in applying these corridor overlays.

4. Agreement on Public Importance

On September 13, 2021, Trinitas and the DDRC filed a Petition for Writ of Mandamus Pursuant to 245(B), SCACR, or, in the alternative, Petition for Certification Pursuant to Rule 245(A), SCACR.³⁹ At pages 10–17 of this filing, Trinitas and the DDRC argue: (1) that “[t]his case involves issues of significant public interest,”⁴⁰ and (2) that “this case has the potential to affect every board of architectural review established by governmental bodies throughout the state and all applicants who file applications through those boards.”⁴¹ Given these statements, the parties are in agreement that this case satisfies the public important test for standing.

³⁹ The City did not join in this filing. However, the attorney for the City indicated in a letter dated September 22, 2021, that “the City of Columbia does not oppose the petition.”

⁴⁰ Page 10.

⁴¹ Page 17.

V. IMPROPER DELEGATION OF LEGISLATIVE POWER

As indicated above at Part I-C, the drafters of the *Guidelines* viewed the *Guidelines* as “illustrative” rather than prescriptive. *Guidelines* § 5.1 at p. 5-1. The drafters also stated that “it is not the intent of these Guidelines to establish new height standards for City Center.” *Guidelines*, § 5.3 at 5-3. Instead, the purpose of the *Guidelines* was to provide “*non-binding* general direction for development within City Center, *with the recommendation that the City’s regulatory plans and codes be amended to reflect the guidance included here.*” *Guidelines*, § 5.3.1 at p. 5-2 (emphasis added). Thus, the intent of the *Guidelines* was that “*the Design Development Guidelines will be implemented*” by amending the regulatory “Zoning Ordinance.” See *Guidelines* § 3.5.2 (emphasis added).

However, despite this explicit language concerning the need for “regulatory plans and codes” in a “Zoning Ordinance,” the City Council chose to bypass the necessary steps of drafting and adopting an ordinance. Instead, the Council simply adopted the non-binding *Guidelines* as the ordinance. As indicated above in Part I-C, this outcome was achieved by adopting the *Guidelines* by reference. See Columbia City Code §§ 17-253, 17-655(b)(1). The Association argues that a result of this approach, the DDRC and its staff have been authorized to apply a scheme of “illustrative” “non-binding” guidelines and that such an open-ended authorization constitutes an improper delegation of the City’s legislative power.

A. Unlawful Delegation

The framework for addressing issues of unlawful delegation of legislative power is set forth in *South Carolina State Highway Department v. Harbin*, 86 S.E.2d 466 (S.C. 1955), which held that a provision of the statute authorizing the highway department to suspend or revoke a driver’s

license “*for any cause satisfactory to*” the department was an unconstitutional delegation of legislative power. *Id.* at 468 (emphasis added).

Harbin summarized the principles concerning delegation of legislative power to an administrative agency as follows:

The question of delegation of legislative power has confronted the courts with many perplexing problems, particularly during recent years when the complexities of government have been constantly on the increase. It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board “to fill up the details” by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. “However, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration.”

Id. at 470 (authorities deleted)

The Court’s conclusion concerning the unconstitutionality of the delegation involved in *Harbin* was stated as follows:

When the authority of the State Highway Department to suspend or revoke a license for any cause which it deems satisfactory is considered in the light of the foregoing

principles, said provision must be declared invalid as an unlawful delegation of legislative power. *It sets up no standard to guide the Department and contains no limitations.* As a general rule, “A statute which in effect reposes *an absolute, unregulated, an undefined discretion* in an administrative body bestows arbitrary powers and is *an unlawful delegation of legislative powers*. We have held invalid municipal ordinances attempting to vest such arbitrary powers in municipal authorities.”

Id. at 370–71 (emphasis added) (authorities deleted)

In the regulation of land use, the unlawful delegation concern can also be expressed in terms of due process. For example, *Restaurant Row Associate v. Horry County*, 335 S.C. 209, 516 S.E.2d 4426, 445 (1999), stated: “When deciding whether to grant a variance, a local board must be *guided by standards which are specific* in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939).” (emphasis added) Because the ordinance at issue was sufficiently specific, the decision at issue in *Restaurant Row Associates* was upheld.

The cited case of *Schloss Poster Advertising Co.* involved an ordinance providing as follows: “Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the city of Rock Hill without having first obtained from the city council a permit to do so.” In effect, the City Council had delegated to itself an unrestrained power to grant or deny permits to construct billboards. In holding that this “delegation” was unconstitutional, the Court noted:

The ordinance before us is in no sense a zoning ordinance as provided in Sections 7390–7398, Code 1932, nor does it prescribe rules or conditions for the issuance of

permits for the erection of billboards to which all persons similarly situated may conform. *It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them,* the right and power to absolutely prohibit the use of property for the erection of billboards.

The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes not uniform rule upon which the special permission is to be granted.

2 S.E.2d at 394 (emphasis added).

B. Association's Argument

In an email to Thomas Gottshall, the President of the University Hill Neighborhood Association, concerning the application of the *Guidelines*, Lucinda Statler, the Principal Planner/Urban Design for the City, stressed that Section 5.3.1 of the *Guidelines* stated: “The City’s Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center. . . .” (emphasis in original)

In this email, Ms. Statler described the decision-making process of the DDRC and its staff as follows:

There are 17 pages of guidelines that pertain to new construction that are considered. The staff evaluations and the DDRC’s decisions are based on the *overall determination* as to whether a project substantially meets—or does not meet—the design guidelines. This means that there are likely areas where the

project may not be exactly what is recommended, and other areas where they meet and exceed what is recommended. It is an *overall assessment* of the project and of course, there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision, rather than only staff. *In the almost 14 years that I have served as staff to this Commission, I would be hard pressed to think of a project that met every single guideline.* This would be unattainable for most projects, as there are many factors that determine a development's feasibility. The design review process is built to provide some flexibility in this balancing act.

(Exhibit 1 to Complaint (emphasis added))

The Association argues that this “overall assessment-overall determination-substantially meets-cannot meet every single guideline” approach of “general direction” to “non-binding guidelines,” is, in effect, a “we know it when we see it” test. As such, argues the Association, the test is contrary to the holding of *Harbin* because it sets up “no standard to guide [decisions] . . . and contains no limitations” and, as in the ordinance in *Schloss Poster Advertising Co.*, the *Guidelines* do “not profess to prescribe regulations.”

The Association argues that, as a result of this approach, there is neither a meaningful standard to guide the exercise of discretion nor a framework to provide a workable regulatory framework for judicial review of the exercise of discretion. For example, even though there has never been a “project that met every single guideline,” the *Guidelines* contain no standards to guide the DDRC in assessing whether and how much guidelines can be waived or softened in deciding whether a project “substantially meets” the design guidelines.

The Association also questions the expertise of the Commission because there is no reason to simply assume that the Commission possesses the extreme wisdom necessary for such unlimited discretion. The treatment of the Trinitas project is claimed to illustrate the human fallibility of the Commission. At the January 9, 2020, meeting, the Commission rejected the staff recommendation of approval with restrictions and voted to deny the requests for design approval and for site plan approval of the Trinitas project. Subsequently, a special meeting was called for February 7 to receive legal advice and to consider rescinding the January denials of approval. At the February 7 meeting, the Commission went into executive session to receive legal advice relating to a pending, threatened, or potential claim. The Commission then moved out of executive session and moved to rescind its own decision to deny design approval and site plan approval.

The Association also argues that the lack of any meaningful standard to limit and structure discretion is reflected in the following comments by Lyndey Bryant, counsel for Trinitas, at the March 21, 2020, DDRC Hearing:

As to building height, the guidelines clearly express a *nonbinding general direction* for buildings within the city center expressly recognizing that zoning ordinances are the primary legal vehicle for expressing regulations concerning the height of buildings. Although there is a recommendation that building not exceed five stories, there is a specific preference in the guidelines at Section 5.3.1, which says, low profile office buildings, commercial buildings and residences will not yield the density, urban scale and character which is desired for the city center and should therefore be discouraged. *In other words, the opposite proposition also holds true.*

(Supplement to Record, Exhibit 8, at pp. 47–48 (emphasis added). At this hearing, Ms. Bryant also noted: “The guidelines are illustrative rather than prescriptive, and do not set forth detailed or rigid

standards.” (Supplement to Record, Exhibit 8, at p. 41) The Association asserts that this assessment of the contradictory, standardless nature of the *Guidelines* by counsel for Trinitas is virtually the same as the claim of the Association that the City Council has delegated its legislative power to the DDRC.

C. Argument of Defendants/Respondents

The Defendants/Respondents argue that the *Guidelines* contain numerous specific policies and standards that are sufficient to structure decisions concerning design. They also argue that the expertise of the members of the DDRC helps guard against abuse.

D. A “Perplexing” Problem

As noted in *Harbin*, the “question of delegation of legislative power has confronted the courts with many perplexing problems. . . .” 86 S.E.2d at 470. *Harbin* also notes:

The difficulty is in the application of these general principles, for there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated to an administrative agency. The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegations of its own legislative power is not capable of precise definition.

86 S.E.2d at 470.

This challenge is particularly perplexing in the case at issue. On the one hand, there are “standards” and “policies.” On the other hand, the *Guidelines* explicitly state that these standards and policies are nonbinding. Moreover, a ruling in favor of the Association’s claim would result

in a situation where the City would have virtually no design controls for the downtown area of Columbia.

It is important to note that the Association is challenging two specific approvals: (1) site plan approval and (2) design approval. This court has determined that the Association has standing to challenge these approvals and that both approvals are invalid. As a result, the Association has prevailed in terms of the approvals of the Trinitas project.

The Supreme Court has noted that, where a court addressing an appeal has disposed of the issues involved, it “need not address remaining issues when disposition of prior issue is dispositive.” *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591, 598 (1999); *accord, e.g., Whiteside v. Cherokee County School District No. One*, 311 S.C. 335, 428 S.E.2d 886, 889 (1993). This principle has been applied in zoning cases. *E.g., Heilker v. Zoning Board of Appeals*, 346 S.C. 401, 552 S.E.2d 42, 48 (2001). Because the issues of site plan approval and design approval have been resolved in the Association’s favor, the best approach for the perplexing issue of nondelegation in this case is to adopt the approach of these cases and not address the delegation of legislative authority issue.

VI. CONCLUSION

For the reasons stated in this Brief, this Court holds:

- (1) the Association has standing,
- (2) because the decision by the City of Columbia to grant the authority to conduct site plan review to the DDRC was ultra vires and, therefore, void, the approval of the site plan is reversed,
- (3) because the DDRC abused its discretion by making a mistake of law in deciding that the height of the proposed building was determined by the underlying zoning rather than the -DD overlay, the design approval of the Trinitas proposal by the DDRC is invalid, and, therefore, is reversed, and
- (4) it is not necessary or useful to address the issue of whether the adoption of the *Guidelines* as an ordinance was an unlawful delegation of the legislative power of the City.

Hon. L. Casey Manning
Fifth Circuit Court

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

University Hill Neighborhood Association,

Appellant,

v.

City of Columbia, City of Columbia Design and
Development Review Committee, and Trinitas
Ventures LLC

Respondents.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO. 2020-CP-40-03475

ORDER

This case involves Trinitas Ventures LLC's ("Trinitas") proposal to construct an apartment building at the southeast corner of Gervais Street and Pickens Street, known as 1600-1620 Gervais Street (the "Proposed Construction"). The City of Columbia's ("City") Design/Development Review Committee ("DDRC")¹ granted Trinitas' applications for a certificate of site plan approval and certificate of design approval on March 20, 2020, and July 9, 2020.

University Hill Neighborhood Association ("Appellant") challenges the DDRC's decisions. The issues presented to the Court for final resolution are:

- I. Whether Appellant has standing to bring any of its challenges.
- II. Whether City's delegation of site plan review from Planning Commission to the DDRC was an *ultra vires* act in violation of the Enabling Act.
- III. Whether City's ordinance § 17-235 is an unlawful delegation of legislative power.
- IV. Whether the DDRC abused its discretion in approving the height of the Proposed Construction, one of nineteen design elements considered by the DDRC in approving Trinitas' application for a certificate of design approval.

¹ The DDRC is a board of architectural review authorized by the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. § 6-29-310, *et seq.* ("Enabling Act"); *see* S.C. Code Ann. § 6-29-870 through -930.

Appellant’s objections to the Proposed Construction as a “student housing” project are not appropriately before the Court. It is undisputed that “use” of the Proposed Construction is not within the DDRC’s purview, having already been approved by City’s zoning department.

FINDINGS OF FACT FROM RECORD ON APPEAL

1. Trinitas is the purchaser on a contract for real property located at 1600-1620 Gervais Street. Trinitas intends to demolish existing buildings and construct an apartment building.

2. Trinitas filed two applications to the DDRC on December 3, 2019: (1) a Certificate of Site Plan Approval, and (2) a Certificate of Design Approval for New Construction.

3. The DDRC held a public hearing on January 9, 2020. Trinitas presented evidence that the Proposed Construction met all requirements for site plan and design approval.² Appellant opposed the Proposed Construction and presented testimony through its officers³ and members.⁴ Appellant’s representatives testified about their concerns that the Proposed Construction would be “student housing,” which is not within the DDRC’s purview.⁵

4. City recommended approval of Trinitas’ applications. However, the DDRC denied the applications “[b]ased on the . . . mass and scale and use of the building being incompatible with the adjacent University Hill and University . . . [and] adjacent historic districts.”⁶ Trinitas timely filed a petition for rehearing, asserting the DDRC’s decisions were invalid, in part, because they were decided on improper considerations of “use.”⁷

² Trans. (Jan. 9, 2020), 4:20-16:16, 28:23-30:11, 31:35-40:6.

³ *Id.* at 17:8-20:14, 28:11-15, 26:7-27:1.

⁴ *Id.* at 25:4-26:5, 27:9-28:7, 30:18-31:22, 40:17-41:3, and 41:14-43:4.

⁵ Calling the Proposed Construction as “student housing” is not supported by the record. The Proposed Construction was approved as an apartment complex not limited to students. *See* Columbia, S.C., Code of Ordinances § 17-464 (“group housing development”). It is not private dormitory housing. *Id.* at § 17-321.

⁶ *See* Trans. (Jan. 9, 2020), 43:7-44:7 (motion on application for design approval), and 44:11-46:17 (motion on application for site plan approval) (emphasis added).

⁷ *See* February DDRC004-008 (asserting “use” was not within the DDRC’s purview).

5. At its public hearing on February 7, 2020, the DDRC met in closed executive session to receive legal advice and, afterward, revoked its denials of the applications.

6. Trinitas' applications were scheduled for rehearing by the DDRC on March 12, 2020. First, the DDRC heard evidence regarding Trinitas' application for a Certificate of Site Plan Approval.⁸ City informed the DDRC that the Proposed Construction met all ordinances, regulations, and *Guidelines* as to site plan review and recommended approval subject to certain "standard" staff comments.⁹ Trinitas further explained to the DDRC how the Proposed Construction met all factors required for site plan review by City Ordinance Section 17-674(c), including: (1) exterior surface treatment, (2) arrangement and location of buildings and structures, (3) other pertinent factors affecting the appearance and efficient functioning of the district.¹⁰

7. Letters submitted by Appellant to the DDRC did not address factors pertinent to site plan review. Instead, the concerns regarded design. Appellant also raised questions concerning the accuracy of data in a traffic study supporting Trinitas' application.¹¹ No competing traffic analysis or report was submitted. City and Trinitas explained a traffic engineer reinvestigated parking and submitted an amended report with figures addressing Appellant's questions.¹²

8. Patrick Hubbard, appearing individually and not, as he is now, counsel for Appellant, objected to DDRC's authority to approve site plan applications.¹³ Mr. Hubbard acknowledged: "I don't expect you necessarily to rule on what you can and cannot do[.]"¹⁴ DDRC

⁸ See March DDRC161-208.

⁹ See Trans. (Mar. 12, 2020), 3:13-16.

¹⁰ See *id.* at 3:24-14:15.

¹¹ *Id.* at 16:5-18:12, 20:15-21:6.

¹² *Id.* at 18:16-20:12, 21:9-13.

¹³ Trans. (Mar. 12, 2020), 14:19-15:16; March DDRC050-62.

¹⁴ Trans. (Mar. 12, 2020), at 15:14-16.

responded: “We’re charged with it, so just like we can’t comment on building use, we can’t say we won’t review the site plan.”¹⁵ Appellant did not object to DDRC’s authority for site plan review.

9. The DDRC granted Trinitas’ Certificate for Site Plan Approval by a majority vote (“Site Plan Approval Decision”).¹⁶ Appellant did not appeal the Site Plan Approval Decision.

10. On March 12, 2020 the DDRC also reconsidered Trinitas’ application for a Certificate of Design Approval.¹⁷ City stated: “Staff finds that the proposal substantially meets the applicable City Center [*Guidelines*] and recommends approval conditional upon items being reviewed and approved by staff or by the commission at the commission’s discretion.”¹⁸ Trinitas presented evidence that the Proposed Construction, which was revised since the January 2020 meeting, taking into consideration prior comments and suggestions, met all *Guidelines*.¹⁹

11. Appellant’s President objected to the Proposed Construction’s “mass, scale, compatibility with neighboring structures, and the context.”²⁰ DDRC asked Appellant to explain “specific design elements of which [Appellant is] concerned ... rather than just in general height and mass.”²¹ Appellant’s President stated: “we’re not thrilled, frankly, with the façade itself,” including “a glass corner,”²² and expressed concern regarding the lack of any setback.²³

12. Trinitas confirmed that Section 17-276 (C3 zoning, applicable for the Proposed Construction), allowed it to reduce setback to zero.²⁴ Nevertheless, as Trinitas explained, the

¹⁵ *Id.* at 15:17-19, 15:25-16:2.

¹⁶ *Id.* at 28:22-29:20

¹⁷ March DDRC161-208 (filed Aug. 24, 2020).

¹⁸ Trans. (Mar. 12, 2020), 32:11-15.

¹⁹ *Id.* at 33:6-43:6.

²⁰ *Id.* at 44:17-20. Historic Columbia also objected to Trinitas’ application “based on . . . scale and on mass and height.” *Id.* at 51:5-6. Historic Columbia did not appeal the DDRC’s Design Approval Decision.

²¹ *Id.* at 49:8-12.

²² *Id.* at 49:18-19. Appellant is not challenging the façade or glass corner of the Proposed Construction.

²³ *Id.* at 50:6-7. Appellant is not challenging the setback of the Proposed Construction.

²⁴ *Id.* at 52:14-53:3.

Proposed Construction did include an eight foot, four inch (8'4") setback. After further discussion as to the height, wall articulation, set back, and other elements of the Proposed Construction, the DDRC held the application for Certificate of Design Approval for consideration at a later date.²⁵

13. The DDRC conducted a work session on June 10, 2020 on Trinitas' application for a Certificate of Design Approval.²⁶ At the work session, Appellant requested a reduction of the height as well as design changes related to window glazing and brick design on the façade.²⁷

14. During the work session, Trinitas reminded the DDRC of recommendations made by City, DDRC, and Appellant²⁸ and explained that it was presenting an amended design for DDRC's consideration. The new design included changes to minimize the effect of the building's height, one of Appellant's stated concerns.²⁹

15. Following public comment, the DDRC discussed certain design concerns and suggestions, including adding a corner entrance on Pickens and Gervais Streets,³⁰ updating lighting at the main entrance,³¹ and extending the brick features around the back of the building.³² DDRC's Chairman stated: "I'm not suggesting changing the height of the building."³³

16. Trinitas' application for a Certificate of Design Approval was considered for a third time by the DDRC at a virtual public hearing on July 9, 2020.³⁴ City reminded the DDRC: Trinitas

²⁵ *Id.* at 76:2-23.

²⁶ Trans. (June 10, 2020); DDRC001-26.

²⁷ *Id.* at 9:19-11:12; 50:13-20. Appellant is not challenging design elements other than height.

²⁸ *Id.* at 12:18-22:2, 24:27:8.

²⁹ *Id.* at 24:10-25:23.

³⁰ *Id.* at 23:5-24:4, 28:4-31:2, 44:10-22.

³¹ *Id.* at 27:11-28:2.

³² *Id.* at 33:22-42:19.

³³ *Id.* at 31:24-25. *See also id.* at 47:2-9 ("I would reiterate that ... the *Guidelines* have 'should', not 'shall' language about building height. I think it would be probably more in keeping with the neighborhood if it were five stories, but it's certainly not – it's within your rights to build to this height.").

³⁴ *See* Trans. (July 9, 2020); *see also* July DDRC001-88.

“made a number of revisions, some substantial, to address concerns discussed at the March hearing and the subcommittee in June.”³⁵ City informed the DDRC:

[W]hile the design guidelines do make some recommendations about height, as well as some about use, these are specifically defined measurable allowances determined by the zoning ordinance. The design guidelines are intended to work with the zoning to focus on the qualitative aspects of a project within those defined parameters. Staff finds that the proposal substantially meets the [C]ity [C]enter [-DD] ... [G]uidelines and recommends approval of [Trinitas'] request.³⁶

17. During the July 2020 hearing, Trinitas addressed concerns raised in prior hearings.³⁷ DDRC's Chairman acknowledged: “I generally agree that the comments that were made by commission members seem to have been well incorporated into these revised images[.]”³⁸

18. Appellant also attended the July 2020 public hearing through its President, who opposed Trinitas' application for a Certificate of Design Approval based on the number of floors and height of the building.³⁹ He testified: “with regard to height, mass and scale, [the proposed construction] [is] not in context with the adjoining buildings.”⁴⁰

19. After hearing all the evidence presented at the July 2020 public hearing, and having previously considered written submissions and argument presented at the January 2020, February 2020, March 2020, and June 2020 meetings, the DDRC approved Trinitas' application for a Certificate of Design Approval.

20. The DDRC's Design Approval Decision is as follows:

Upon hearing and considering all of the evidence, testimony and documents presented to the DDRC, I move to grant a certificate of design approval for the application for new construction at 1600 Gervais, because the applicant meets applicable design guidelines. Specifically, it meets the following sections of 5.3,

³⁵ *Id.* at 3:2-4.

³⁶ *Id.* at 3:7-11.

³⁷ *Id.* at 3:13-10:13; *see also* July DDRC015-87.

³⁸ *See* Trans. (July 9, 2020), 10:19-23; *see also id.* at 17:10-18:2 (“[T]his applicant's been through ... three or four different revisions ... and I do think that each of these revisions has been an improvement.”).

³⁹ *Id.* at 15:16-16:17.

⁴⁰ *Id.* at 16:2-4.

building mass and organization which are 5.3.1 building height, in which it is stated “The city’s comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.” And as staff has pointed out, it actually is within 5 feet of the gable of the building, the law school across the street. 5.3.3 proportionate openings; 5.3.5 wall articulation; and it meets, additionally, sections 5.7.1 storefront composition, and 5.7.2 exterior walls, 5.8.3 windows. So, on that basis I recommend that we approve the certificate of design – grant the certificate of design approval.⁴¹

(The “Design Approval Decision”). The motion passed by majority vote of DDRC members.

21. Appellant appealed the Design Approval Decision on July 23, 2020.

STANDARD OF REVIEW

A. Review standard of claim for unlawful delegation of authority.

Appellant contends it initiated the claims that are issues (II) and (III) within the Court’s general jurisdiction. It admits that it did not appeal the DDRC’s Site Plan Approval Decision pursuant to S.C. Code Ann. § 6-29-900(A). Because issues (II) and (III) involve matters of law and statutory interpretation, the appropriate standard of review is *de novo*. Respondents agree with this standard of review for the Court’s consideration of Issues (II) and (III). *S.C. Public Interest Foundation v. Calhoun County Council*, 432 S.C. 492, 496, 854 S.E.2d 836, 837 (2021) (“[I]nterpretation of a statute is a question of law for the Court to review *de novo*.”).

B. Appellate review standard from decision of a board of architectural review.

As to Appellant’s appeal of the DDRC’s Design Approval Decision, “[t]he findings of fact by the board of architectural review are final and conclusive . . . and the court may not take additional evidence.” S.C. Code Ann. § 6-29-930(A). “In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter

⁴¹ *Id.* at 18:5-21.

of law.” *Id.* A strong presumption exists in favor of the validity and application of zoning ordinances. *Petersen v. City of Clemson*, 312 S.C. 162, 439 S.E.2d 317 (Ct. App. 1993).

A reviewing court should not disturb the findings of a municipal board unless the board has acted arbitrarily or in an obvious abuse of discretion, or unless the board has acted illegally or in excess of its lawfully delegated authority. *Bannum v. City of Columbia*, 335 S.C. 202, 516 S.E.2d 439 (1999); *Hartman v. City of Columbia*, 268 S.C. 44, 232 S.E.2d 15 (1977). A court should refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Talbot v. Myrtle Beach Board of Adjustment*, 222 S.C. 165, 72 S.E.2d 66 (1952). “In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing.” S.C. Code Ann. § 6-29-930(A).

CONCLUSIONS OF LAW

I. APPELLANT LACKS STANDING TO BRING ANY OF ITS CHALLENGES.

A. Appellant lacks standing as to its two claims against the City.

Appellant brings multiple challenges in this action. First, based on the general jurisdiction of the court, Appellant alleges City improperly delegated site plan review to the DDRC and that City’s adoption of allegedly “non-binding” *Guidelines* was an unlawful delegation of legislative power. Second, Appellant appeals the DDRC’s Design Approval Decision, asserting the DDRC abused its discretion in approving the height of the Proposed Construction.

Appellant bears the burden of establishing that it has standing to bring each claim asserted against each of the Respondents. *See Quality Towing, Inc. v. City of Myrtle Beach*, 340 S.C. 29, 34, 530 S.E.2d 369, 371 (2000). Therefore, the Court will begin by evaluating whether Appellant has met its burden of proof as to standing for its claims against the City. As discussed herein, this Court finds Appellant has failed to establish standing as to its first two claims.

Appellant references section 6-29-900(A) in arguing it has standing as to its claims against the City.⁴² However, this statute does not apply to Appellant's claims against the City because Appellant's claims against the City do not relate to DDRC's Design Approval Decision, from which it appeals pursuant to Section 6-29-900(A), but rather to past legislative decisions. Thus, Appellant must demonstrate standing, if at all, under the principle of constitutional standing or via the public importance exception. *Freemantle v. Preston*, 398 S.C. 186, 728 S.E.2d 40 (2012).

Constitutional standing requires Appellant to demonstrate: (1) a concrete and particularized injury that is actual and imminent; (2) the injury is fairly traceable to the challenged action; and, (3) it is likely that the injury will be redressed by a favorable decision. Appellant has failed to establish it has constitutional standing against the City. *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001).

“An organization has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* at 301, 551 S.E.2d at 589. Appellant must show that “its members will suffer an individualized injury; a mere interest in a problem is not enough.” *Id.* Appellant must allege that particular members have or will imminently suffer an injury in fact that is concrete and specific, fairly traceable to the challenged action of the City, and likely to be redressed by a favorable decision. *Id.*

Appellant alleges it (or its members) will be injured by an exacerbation of vehicular traffic and students walking through the neighborhood from the Proposed Construction. Appellant also alleges injury due to the height of the Proposed Construction. However, Appellant's “injuries”

⁴² Under this section, a party with a “substantial interest” in a decision by an architectural board may appeal to the circuit court. S.C. Code Ann. § 6-29-900(A).

involving height and potential traffic impacts are merely “generalized grievances suffered by the public as a whole which are insufficient to establish standing.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014). The City is named as a defendant based on alleged improper delegation of site plan review to the DDRC and alleged unlawful delegation of legislative power. These are decisions taken by City at some point in the distant past. Appellant’s allegations of nuisance-like effects from the Proposed Construction are not sufficient to show that Appellant, or any of its members, suffered injury as a result of the City’s past legislative actions.

Further, Appellant has not demonstrated how its alleged injuries are fairly traceable to its claims of procedural error and unlawful delegation of legislative power by City to DDRC. As an illustration, Appellant asserts City erred by giving no meaningful standards to the DDRC for its review of the height of new buildings in the City Center. However, increased traffic, assuming it occurs and injuries Appellant asserts in this case, are not fairly traceable to City’s legislative decisions regarding design standards for height requirements in Section 5.3.1 of the *Guidelines*.

The Court of Appeals’ decision in *Beaufort Realty* is instructive. In that case, a plaintiff appealed from a decision by a board of zoning appeals concerning alleged procedural error in approving and filing subdivision plats. *Id.* at 300, 551 S.E.2d at 589. The Court noted it is “substantially more difficult to establish standing where a challenge to the government action is brought by one who is not the object of the action, but rather seeks to challenge government action or inaction because of alleged illegality.” *Id.* at 301, 551 S.E.2d at 589. The Court affirmed the plaintiff lacked standing, ruling that concern of future harm “falls far short of the standard of ‘concrete and particularized and . . . actual or imminent’ harm” *Id.* at 303, 551 S.E.2d at 590. Moreover, the Court found the plaintiff failed to show its alleged injuries were fairly traceable to

the filing of subdivision plats. *Id.* at 303, 590. “Mere filing of plats in itself does not work any injury on the League’s members or the public at large.” *Id.*

Like the plaintiff in *Beaufort Realty*, Appellant faces a “substantially more difficult” task of establishing standing because it was not the applicant before the DDRC. Appellant has failed to demonstrate concrete and particularized actual or imminent harm, with any causal connection to City’s delegation of site plan review or City’s alleged unlawful delegation of legislative authority.

To establish standing, it “must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.” *Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 444, 665 S.E.2d 237, 241 (Ct. App. 2008). It is not likely that Appellant’s alleged injuries would be redressed by a favorable decision. Appellant’s proposed remedy concerning its *ultra vires* claim against City is for the site plan review to be conducted by the Planning Commission. Appellant has not established that the site plan approved by the DDRC would be different in substance than a site plan approved by the Planning Commission.

More significantly, as discussed in Section II, below, Appellant did not appeal the Site Plan Approval Decision. Therefore, Trinitas has a vested right in the decision which cannot be reversed by the Court. Appellant’s alleged injuries would not be redressed by a favorable court ruling in this case. Instead, the remedy would simply send site plan review to a different review body (the Planning Commission). It is speculative to assume site plan review would somehow have been different for the Proposed Construction had it been reviewed by Planning Commission in the first instance. Further, even if such proof had been provided by Appellant (which it was not), the Court cannot reverse the Site Plan Approval Decision because Appellant did not appeal that decision.

Likewise, the remedy sought by Appellant for the alleged unlawful delegation of legislative power – striking the *Guidelines* as invalid – would not redress Appellant’s alleged design “injury.”

Without the *Guidelines*, the DDRC has no choice but to approve the Proposed Construction, or any building's height, as allowed pursuant to the underlying zoning designation. This outcome is exactly what the DDRC did in the Design Approval Decision. Therefore, the Court finds Appellant has failed to meet the requirements for constitutional standing as to its claims against City.

The Court also finds that the “public importance” exception to standing does not apply to either of Appellant’s claims against the City. In order to have standing under the public importance exception, a party must show the issues raised are: “(1) of public importance, and (2) of imperative and manifest urgency.” *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009). “The key to the public importance analysis is whether a resolution is needed for future guidance.” *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008).

Appellant cannot show that a ruling on its *ultra vires* claim is “of imperative and manifest urgency” in need of future guidance. See *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 478 (2006) (“Even assuming that this issue presents a matter of public importance, no imperative or manifest urgency exists in light of Friends’ producing the requested documents and conceding that it is presently a public body under FOIA.”). More importantly, site plan review has already been delegated to the Planning Commission. The remedy sought by Appellant is moot as the relief it seeks has been obtained. Therefore, there is no imperative reason for this Court to weigh in after the remedy Appellant seeks has been provided through legislative action.

Appellant’s unlawful delegation claim with respect to the *Guidelines* themselves also fails to meet the “public importance” test. Appellant merely argues that the issue is important because of the size of the City Center, along with the fact that the City has established other overlay zoning districts and issues concerning overlay zoning could arise throughout South Carolina. As the Court in *ATC South* put it, “[o]f course zoning is a matter of public importance, but the same may be said

of most legislative and executive actions.” *ATC South, Inc.*, 380 S.C. at 199, 669 S.E.2d at 341. Merely the fact that overlay zoning districts exist within the City and throughout the State does not, in and of itself, warrant invocation of the “public importance” exception. Appellant has not shown how the unlawful delegation claim is of “imperative and manifest urgency” in need of future guidance, thereby justifying Appellant to stand in the shoes of a party that would have standing.

B. Standing as to claims regarding the DDRC decision.

This Court will now evaluate whether Appellant has standing to pursue its appeal of the DDRC’s Design Approval Decision. Appellant claims it possesses standing based on S.C. Code Ann. § 6-29-900(A). This provision provides a right to appeal to any “person who may have a substantial interest in any decision” of an architectural review board. “Substantial” is not defined in the statute, and this Court “must interpret the term in accordance with its usual and customary meaning.” *Travelscape, LLC v. S.C. Dep’t of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011).

“Substantial” means “of real worth and importance;” “actually existing; real;” “true;” and “synonymous with material.” *Black’s Law Dictionary* 1428 (6th ed. 1990). A person with a substantial interest is one who is a real party in interest. *See Sea Pines Ass’n for the Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (stating a real party in interest has a real, material, or substantial interest in the subject matter of the action). In other words, a party must have a personal stake in the subject matter of the litigation. *Powell v. Bank of Am.*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008). The principles of associational standing also apply to Appellant’s claims concerning the DDRC’s design decision. *See Beaufort Realty Co., supra*. This Court finds Appellant and its members have no more real, individualized, or substantial interest in the DDRC’s Design Approval Decision than anyone else in the City.

The DDRC's job is entirely design related. In this matter, the DDRC was called upon to review Trinitas' application for a Certificate of Design Approval. The *Guidelines* applied by the DDRC in reviewing this matter do not require the DDRC to consider or address traffic, noise, or any of the nuisance injuries generally alleged by Appellant. The Design Approval Decision correctly did not address any of these issues. Therefore, the only alleged injury that is relevant to this Court's analysis of standing pursuant to section 6-29-900(A) is the design itself which was approved by the DDRC and whether that design gives Appellant a personal stake in the matter.

Appellant argues only that the DDRC abused its discretion in approving the height of the Proposed Construction. The Proposed Construction undisputedly will not be located within Appellant's neighborhood; instead, it is more than a City block north and west of the corner of Appellant's neighborhood. In this Court's view, the height of the Proposed Construction is not an injury different in character from the manner in which the design would be of interest to anyone else in the general public. *See Carnival Corp.*, 407 S.C. at 77, 750 S.E.2d at 852 (stating all members of the public suffer from and may be inconvenienced by obstructed views and that such generalized grievances are insufficient to establish standing).

In other words, Appellant's members do not have standing to sue in their own right concerning the design of the Proposed Construction. *See Beaufort Realty Co.*, 346 S.C. at 301, 551 S.E.2d at 589 (stating the first element of associational standing is that the organization's members would otherwise have standing to sue in their own right). Therefore, this Court finds Appellant, as an unincorporated association, has not shown a substantial interest in the decision sufficient to establish standing as to its appeal of the DDRC's Design Approval Decision.

Even if this Court were to find that Appellant's other "concerns" were relevant to whether Appellant has standing to appeal the DDRC's Design Approval Decision, this Court would be

constrained to find that the speculative and conclusory “concerns” about the potential for heavier foot and vehicular traffic are “generalized grievances suffered by the public as a whole which are insufficient to establish standing.” *Carnival Corp.*, 407 S.C. at 76, 753 S.E.2d at 851.

The second element for associational standing concerns whether the interests at stake are germane to the organization’s purpose. *Id.* Appellant has never explained to the Court its organization’s purpose. The organization is an unincorporated association. As some clue to Appellant’s purpose, Appellant states there are three issues for the Court to address: (1) whether future development will be guided by the underlying zoning or the *Guidelines*; (2) whether the grant of site plan review was ultra vires; and, (3) whether there was an unlawful delegation of legislative power. Appellant has not explained how its purposes are germane to any of these issues. This Court cannot assume Appellant’s purpose is to litigate zoning issues for the public’s benefit. Further, there is evidence in the record that Appellant does not speak for all residents of its neighborhood. *See* March DDRC043.⁴³

The Court finds that Appellant has reached out of its neighborhood boundaries to challenge a design decision for a project that is neither within nor immediately adjacent to the neighborhood. There is no evidence that the design interests of a project outside of the bounds of Appellant’s neighborhood would be germane to its speculated purposes of protecting its own aesthetic character. Therefore, the Court finds Appellant lacks standing.

Finally, this Court finds Appellant has not established standing for its appeal of the DDRC’s Design Approval Decision under the public importance exception. There is no public importance in the height of the Proposed Construction (the only design issue challenged by

⁴³ “I’m writing to express my strong support of the proposed construction at 1600-1620 Gervais. I understand that the University Hill Neighborhood Association has asked that this construction not be approved. I dissent; UHNA does not speak for all of the neighborhood’s residents.”

Appellant). There is further no public importance in the DDRC's decisions with respect to the Proposed Construction's windows, wall articulations, or other design considerations addressed by the DDRC. Moreover, Appellant fails to argue any public interest exception concerning the design of the Proposed Construction. Appellant argues only that public importance exists with respect to the unlawful delegation of legislative power and the alleged *ultra vires* site plan review. *See Brooks v. S.C. Comm'n on Indigent Defense & Office of Indigent Defense*, 419 S.C. 319, 797 S.E.2d 402 (Ct. App. 2017) (issues and rulings not challenged in an appellant's brief are deemed abandoned).

As to its unlawful delegation argument, Appellant claims that future guidance is needed on the issue of interpretation as to overlay zones. Specifically, Appellant seeks to have this Court determine whether height restrictions of an overlay would prevail when compared with underlying zoning regulations. However, this is an issue that does not need to be decided by the Court in this case. The DDRC has not decided the -DD overlay's height restrictions do not apply whatsoever, as Appellant improperly contends. Instead, the DDRC applied the standards in the *Guidelines* and found that a permissible exception to the standards was warranted based on the adjacent development context and underlying zoning ordinances. Future guidance is not needed.

This Court finds Appellant has not established a public importance exception to the standing requirement as to its appeal of the DDRC's Design Approval Decision. The issue of a board of architectural review's design decision is a very local concern and a far cry from the statewide concerns that are sometimes found to meet the exception. *See, e.g., Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing a public interest in the prevention of unlawful expenditure of money raised by taxation); *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 804 S.E.2d 854 (2017) (recognizing a public interest in the use of state funds to inspect private roads).

Because Appellant lacks standing to bring any of its challenges, the Court dismisses the Complaint and affirms the DDRC's Design Approval Decision. For the following additional reasons, even if Appellant had standing to bring any of the three challenges, all of Appellant's claims, including its appeal of the DDRC's Design Approval Decision, fail as a matter of law.

II. APPELLANT'S CHALLENGE TO CITY'S SITE PLAN REVIEW PROCESS FAILS AS A MATTER OF LAW.

A. Appellant's challenge to City's delegation of site plan review to the DDRC is moot.

Appellant sets out a claim against City (and only City) asserting the City Center Overlay Zoning Ordinance, § 17-253, conflicts with S.C. Code Ann. § 6-29-1150 of the Enabling Act, and therefore, is *ultra vires*. Appellant's argument is moot and is hereby rejected.

Appellant asserts City's delegation of site plan review to the DDRC violates S.C. Code Ann. § 6-29-1150(A) ("the land development regulations adopted by the governing authority must include a specific procedure for the submission and approval of [site plans] by the planning commission or designated staff."). Appellant asks the Court to "hold that the decision by the City . . . to grant the authority to conduct site plan review to the DDRC was *ultra vires* and . . . void." Appellant did not ask to reverse the DDRC's Site Plan Approval Decision for Trinitas' Proposed Construction, nor could it. Reversal of the Site Plan Approval Decision is a remedy found only under the process for appealing DDRC decisions, § 6-29-900.⁴⁴ Appellant undisputedly did not appeal the Site Plan Approval Decision.

Appellant's *ultra vires* contention is moot. On December 15, 2020, City Council enacted an amendment to Section 17-253 that, in effect, eliminated its prior delegation of authority to the

⁴⁴ Appellant did not appeal the Site Plan Approval Decision. See S.C. Code Ann. § 6-29-900(A) ("The appeal must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review."); *Mears v. Mears*, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement, and [an appeals court] has no authority to extend or expand the time in which the notice of intent to appeal must be served.") (citations omitted).

DDRC for approval of site plans within the City Center Overlay District. *See* City Ord. No. 2020-100 (Dec. 15, 2020). Consequently, there is no justiciable controversy as to Appellant’s claim. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. at 25–26, 630 S.E.2d at 477.

“The general rule is that the repeal or amendment of a zoning ordinance during an appeal renders the appeal moot.” *Peterson Outdoor Advert. Corp. v. Beaufort Cty.*, 291 S.C. 533, 535, 354 S.E.2d 563, 564 (1987). “A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.” *Id.* Appellant’s requested relief of voiding the City’s grant of authority for site plan review to the DDRC would have no practical effect since the City no longer delegates site plan review to the DDRC.

City’s ordinance amending § 17-253 has prospective effect only. *State v. Hilton*, 406 S.C. 580, 585, 752 S.E.2d 549, 551 (Ct. App. 2013) (“Absent a specific provision or clear legislative intent to the contrary, statutes are to be construed prospectively rather than retroactively, unless the statute is remedial or procedural in nature.”). It cannot be applied retroactively to invalidate the Site Plan Approval Decision. *State v. Brown*, 402 S.C. 119, 127, 740 S.E.2d 493, 496 (2013).

An ordinance cannot have retroactive effect if it impairs vested rights. *Gatewood v. S.C. Dep’t of Corr.*, 416 S.C. 304, 320–21, 785 S.E.2d 600, 609 (Ct. App. 2016). Validity and construction of retroactive ordinances, 6 MCQUILLIN MUN. CORP. § 20:77 (3d ed.) (“The “vested rights doctrine” provides that a zoning ordinance may not retroactively deprive a property owner’s use of property.”). Trinitas has a vested right in its approved site plan because Appellant did not appeal the DDRC’s Site Plan Approval Decision. Columbia, S.C., Code of Ordinances at § 17-2(a); S.C. Code Ann. § 6-29-1530. The Court finds no exceptions to mootness apply to Appellant’s *ultra vires* claim and, therefore, this claim is dismissed.

B. Appellant has no private right of action under S.C. Code Ann. 6-29-1150(A).

Appellant argues the DDRC's Site Plan Approval Decision violates Section 6-29-1150(A) of the Enabling Act, which states in relevant part: "The land development regulations adopted by the governing authority must include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff." In addition to being moot, for the reasons set forth above, the Enabling Act does not provide Appellant with a private right of action. Therefore, Appellant's challenge is rejected on this additional ground.

"In determining whether a statute creates a private cause of action, the main factor is legislative intent." *Georgetown Cty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011). "Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute." *Id.* Within S.C. Code Ann. § 6-29-1150, there is no expressly stated private right of action to challenge any failure of local governments to provide a procedure for site plan review by a planning commission.

"Where not expressly provided, a private right of action may be created by implication if the legislation was enacted for the special benefit of the private party." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009). "If the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party." *Id.* The Enabling Act was passed for the "public health, safety, economy, good order, appearance, convenience, morals, and general welfare require the harmonious, orderly, and progressive development of land within the municipalities and counties of the State." Its stated purposes benefit the general public, *generally*. Although Appellant may benefit, *in general*, from enforcement of the statute, it was intended for protection of the public as

a whole and no private right of action was provided. *Dorman v. Aiken Commc'ns, Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990).

Furthermore, a statute that labels violations as a misdemeanor and imposes fines further supports the conclusion that a statute does not create a private cause of action by implication. *Dema* at 122, 678 S.E.2d at 433-434. The Enabling Act provides a criminal penalty for violation of zoning and subdivision regulations. S.C. Code Ann. § 6-29-950 (“A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor.”); *id.* at § 6-29-1140 (“submission for filing or the recording of a subdivision plat or other land development plan without proper approval as required by this chapter is declared a misdemeanor and, upon conviction, is punishable as provided by law.”). The Legislature’s provision of criminal penalties for violation of the Enabling Act supports the lack of intent to create civil liability. *Dema*, 383 S.C. at 122, 678 S.E.2d at 433-434. Therefore, no implied private right of action exists for Appellant to challenge the City’s delegation of site plan review to DDRC as violating S.C. Code Ann. § 6-29-1150.

III. THE GUIDELINES DO NOT CONSTITUTE AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER FROM CITY TO THE DDRC.

Appellant suggests the *Guidelines* are an improper delegation of the City’s legislative powers because the *Guidelines* were adopted “as an ordinance.” Appellant argues that the intent of the drafters was “a recommendation that the City’s regulatory plans and codes be amended to reflect the guidelines included here.” However, there is no legal or binding mandate as a result of the drafter’s “recommendation” to the City and Appellant makes no attempt to argue otherwise.

Even if Appellant’s argument were properly presented for judicial review, it is erroneous. Irrespective of the drafters’ “intent” that City enact a separate ordinance instead of merely adopt the *Guidelines* by reference, City’s ordinances do mandate compliance with the *Guidelines*. Columbia, S.C. Code of Ordinances, § 17-253 (“Development within the –DD area must comply