RECEIVED
Oct 17 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT

The Honorable L. Casey Manning
Fifth Circuit Judge

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,

---

FINAL BRIEF OF APPELLANT CITY OF COLUMBIA

M. McMullen Taylor, S.C. Bar No. 72848
City of Columbia
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
(803) 737-4242
m.taylor@columbiasc.gov

Counsel for Appellant City of Columbia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

State Statutes

Municipal Ordinances

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in in finding that the Association has standing, or meets the public importance exception, to bring its claims against the City of Columbia?

II. Did the Circuit Court err in concluding that the Association's *Ultra Vires* Claim was not moot?

III. Did the Circuit Court err in reversing the DDRC's site plan approval as the remedy for the Association's Ultra Vires Claim against the City of Columbia?

IV. Did the Circuit Court err in declining to decide the Association's Unlawful Delegation Claim against the City of Columbia?

V. Does the City's adopted Guidelines amount to an unlawful delegation of legislative power from City Council to the DDRC?

STATEMENT OF THE CASE

This appeal arises from a proposal by Trinitas Ventures LLC ("Trinitas") to demolish existing buildings and construct a 75-foot high, 8-story, 276-unit apartment building on three parcels at the southeast corner of Gervais Street and Pickens Street ("Project"). (Amended R. pp. 821 – 822; p. 853). All three parcels – 1600 Gervais Street, 1616 Gervais Street, and 1620 Gervais Street - are zoned C-3, which allow for building height to be between 50 and 75 feet. COLUMBIA MUNICIPAL CODE, § 17-275 (Amended R. pp. 632 – 633); (Amended R. pp. 821 – 822; p. 853). The Property is also located within the City of Columbia's ("City") –DD Design/Development overlay zoning district, more commonly known as the City Center Overlay Zoning District. COLUMBIA MUNICIPAL CODE, § 17-253; (Amended R. p. 631).

Development within the City Center Overlay Zoning District is subject to review by the City of Columbia Design and Development Review Commission ("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 -900. Based on this state authority, in 1999, City Council created the DDRC and established a requirement for the DDRC to review development proposals within architectural design and historic preservation overlay zoning districts, including the City Center Zoning Overlay District, for the purpose of issuing a "certificate of design approval." COLUMBIA MUNICIPAL CODE, § 17-653(b)(9); (Amended R. p. 670) and § 17-655(b); (Amended R. p. 673). "Development within the [City Center Overlay Zoning District] must comply with design guidelines set forth in the City's zoning ordinance and in the publication "City Center Design/Development Guidelines, Final Report, September 1, 1998," LDR International, Inc. Consultants and any amendments thereto." *Id.* at § 17-253; (Amended R. p. 631). In an effort to "streamline the overall development review process," the City Center Design and Development Guidelines ("Guidelines") stated that the DDRC was authorized to also review and approve site plans within the City Center Overlay Zoning District, thus creating an exception to the City's ordinance charging the Planning Commission to review and approve site plans. GUIDELINES, § 3.5.4; (Amended R. p. 736) and COLUMBIA MUNICIPAL CODE, § 17-581; (Amended R. p. 665). Thus, at the time Trinitas proposed its Project to the City, it was required to obtain two types of approvals from the DDRC: 1) a certificate of design approval, and 2) a certificate of site plan approval. On March 12, 2020, the DDRC approved Trinitas' site plan for its Project. (Amended R. p. 1336, p. 28, line 22 – p. 29, line 20). On July 9, 2020, the DDRC approved a certificate of design approval for Trinitas' Project.

On July 23, 2020, the University Hill Neighborhood Association ("Association") filed a Complaint described as an "appeal involving a decision by the City of Columbia Design and Development Review Commission granting final approval for construction of [the Project]." (Amended R. p. 101 – 123). The appeal was framed as two parts. The first part was an appeal pursuant to the appeal process set forth in S.C. Code Ann. § 6-29-900 concerning DDRC decisions. The Association failed to bring an appeal of the DDRC decision on March 12, 2020 to approve Trinitas' site plan within the required 30-day time period; therefore, the DDRC decision to approve a certificate of design approval was the only appeal that the circuit court had subject matter jurisdiction to review. *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."). The Association asserted that the DDRC: 1) erred as a matter of law by misinterpreting the Guidelines ; 2) erred as a matter of law by exercising unlimited discretionary decision-making power; and 3) lack of sufficient evidence to support its decision. (Amended R. pp. 102 – 103). In its second part, the Association brought a separate cause of action against the City of Columbia challenging the City's delegation of site plan approvals within the City Center Overlay Zoning District from the Planning Commission to the DDRC as violating S.C. Code Ann. § 6-29-1150(A). (Amended R. p. 104). This latter action against the City, not the DDRC, was based upon the Circuit Court's general jurisdiction granted under article V, section 11 of the South Carolina Constitution. (Amended R. p. 297 - 298). The Association argued that, in authorizing the DDRC to undertake site plan review for development within the City Center Overlay Zoning District, the City of Columbia ... failed to meet the requirements of the Enabling Act, thus making

the City's grant of power to the DDRC an *ultra vires* act and is, therefore, invalid ("*Ultra Vires* Claim"). (Amended R. p. 297).

On August 24, 2020, the City, DDRC, and Trinitas each answered the Association's Appeal/Complaint, and the DDRC filed exhibits 1 – 5 of the record on appeal. (Amended R. pp. 124 – 142). The parties entered a Joint Stipulation agreeing to the authenticity of multiple sections of the City's zoning and land development ordinances. (Amended R. pp. 616 – 617). Also on August 24 and 25, 2020, all Respondents/Defendants filed motions to dismiss. (Amended R. pp. 250 – 276). The City moved to dismiss the Association's claims against it for lack of standing and lack of a private right of action under S.C. Code Ann. § 6-29-1150(A) of the Enabling Act. Trinitas moved to dismiss the Association's appeal of the DDRC decision for: 1) lack of subject matter jurisdiction to decide any appeal of the DDRC's approval of Trinitas' site plan because the Association failed to timely appeal the site plan approval; and 2) lack of standing to appeal the DDRC's decision-making concerning the Project. Similarly, the DDRC moved to dismiss the Association's appeal for lack of standing and lack of subject matter jurisdiction to appeal the DDRC's site plan approval. Following a hearing held before the Honorable L. Casey Manning on September 11, 2020, the Court denied all motions to dismiss on October 7, 2020. In its Order denying these motions to dismiss, the court repeated Plaintiff's legal conclusions alleged within its Complaint, and concluded that "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." (Amended R. p. 32). The Respondents/Defendants filed a motion to reconsider, which was denied on November 19, 2020. (Amended R. p. 34).

On December 3, 2020, the City, DDRC, and Trinitas filed a Notice of Appeal to the Court of Appeals, seeking review of the circuit court's Order Denying Motions to Dismiss due to the impermissible conclusions of law found within the Order. The Association moved to dismiss Appellants' appeal as interlocutory and thus not immediately appealable. The Court of Appeals granted the Association's Motion to Dismiss on January 14, 2021. Remittitur was sent by the Court of Appeals on February 8, 2021.

On February 11, 2021, Trinitas requested the circuit court schedule a final merits hearing. The Association's counsel, Richard A. Harpootlian, a lawyer-legislator, invoked protection under this Court's Administrative Order RE: Lawyer-Legislator Protection During the Legislative Session. Mr. Harpootlian did not consent to a merits hearing being scheduled until after July 31, 2021. In anticipation of the July 31, 2021 expiration of Mr. Harpootlian's protection, the parties agreed to a Consent Order establishing a briefing and hearing schedule, which was filed with the circuit court on June 28, 2021 and entered by Judge Manning on July 12, 2021.

The Association filed its brief on July 12, 2021. In its brief, the Association asked the circuit court to "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." (Amended R. p. 327). It also shifted to the City an argument originally made against the DDRC that 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." (Amended R. p. 116, p. 289). The Association argued that the City's adoption of the Guidelines was an unlawful delegation of the legislative power of the City to the DDRC, and therefore, void ("Unlawful Delegation Claim"). (Amended R. p. 289, pp. 298 – 304, p. 327).

The City, DDRC, and Trinitas filed a joint brief on July 21, 2021. In their brief, the City argued that: 1) the Association lacked standing to bring its claims against the City; 2) Association's *Ultra Vires* Claim was mooted because City Council enacted an amendment to Section 17-253 that eliminated its prior delegation of authority to the DDRC for approval of site plans within the City Center Overlay Zoning District; 3) no private right of action existed under the Enabling Act to bring its *Ultra Vires* Claim; and 4) the Guidelines do not constitute an unlawful delegation of legislative power from the City to the DDRC. (Amended R. pp. 330 – 394). The Association filed a reply brief on July 30, 2021. Under the Consent Order, a merits hearing was to be held on or after August 9, 2021. The parties contemplated a hearing to be scheduled the week of August 9, 2021.

On August 4, 2021, this Court issued Administrative Order RE: Lawyer-Legislator Protection During Public Hearings and Committee Meetings on Redistricting and the American Rescue Plan. Counsel for Trinitas attempted to confer with counsel for the Association; however, the Association's counsel did not respond. Trinitas requested the circuit court schedule a hearing based on counsel's prior consent to a hearing during the week of August 9, 2021. Judge Manning communicated to Trinitas, DDRC and the City that he was unable to schedule a hearing due to the lawyer-legislator protection held by the Association's counsel.

On September 13, 2021, Trinitas and the DDRC filed with the South Carolina Supreme Court a Petition for Writ of Mandamus requiring the circuit court to schedule a final merits hearing based on the Association's counsel's consent to a hearing the week of August 9, 2021. On September 28, 2021, counsel for all parties in this matter conferred by telephone with Judge Manning and consented to a final merits hearing for Thursday, October 14, 2021 before Judge

Manning. As requested by the court, University Hill and the City/DDRC/Trinitas submitted proposed orders on November 4, 2021. (Amended R. p. 419 – 506). On December 7, 2021, the circuit court entered University Hill's proposed order rejecting the City's arguments concerning standing and mootness. (Amended R. p. 37 – 93). Ignoring the fact that Association failed to timely appeal the DDRC's site plan approval, the Court concluded that "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." (Amended R. p. 92). The City, DDRC and Trinitas moved for reconsideration on December 17, 2021. (Amended R. p. 507 – 525). On March 8, 2022, counsel for the Association emailed to Judge Manning a proposed order denying the Motion to Reconsider. (Amended R. p. 94). On March 10, 2022, Judge Manning entered the Association's proposed order denying reconsideration. (Amended R. pp. 95 – 99). This appeal followed.

STATEMENT OF THE FACTS

In 2020, Trinitas Ventures LLC ("Trinitas") sought approval from the DDRC to demolish existing buildings and construct a 75-foot high, 8-story, 276-unit apartment building on three parcels at the southeast corner of Gervais Street and Pickens Street ("Project"). "). (Amended R. pp. 821 – 822; p. 853). All three parcels – 1600 Gervais Street, 1616 Gervais Street, and 1620 Gervais Street - are zoned C-3, which allow for building height to be between 50 and 75 feet. COLUMBIA MUNICIPAL CODE, § 17-275. (Amended R. pp. 632 – 633); (Amended R. pp. 821 – 822; p. 853). The Property is also located within the City Center Overlay Zoning District. (Amended R. p. 631). Development within the City Center Overlay Zoning District is subject to review by the City of Columbia Design/Development Review Commission ("DDRC"). "No zoning permit or building

permit shall be issued for any construction, reconstruction, alteration, repair or demolition of any structure ... within the [City Center Overlay Zoning District] unless a certificate of design approval has been issued therefore under the terms of the design guidelines as adopted by the city council." COLUMBIA MUNICIPAL CODE, § 17-655(b)(1); (Amended R. pp. 673 – 674). "Development within the [City Center Overlay Zoning District] must comply with design guidelines set forth in the City's zoning ordinance and in the publication 'City Center Design/Development Guidelines, Final Report, September 1, 1998, LDR International, Inc. Consultants' and any amendments thereto." ("Guidelines"). COLUMBIA MUNICIPAL CODE, § 17-253 (emphasis added); (Amended R. p. 631). Chapters 4 through 6 of the Guidelines contain design guidelines for public development, private development, and signs. (Amended R. pp. 738 – 796). In contrast, Chapters 1 through 3 of the Guidelines do not contain design guidelines, but rather, provide background, context, and procedure related to review of development projects under the Guidelines. (Amended R. pp. 703 – 737).

Chapter 3 of the Guidelines "outlines an institutional and procedural framework that will lead to successful implementation of the substantive guidelines." GUIDELINES, § 3.1, p. 3-1; (Amended R. p. 725). In describing the relationship of DDRC review to other permitting processes and regulations, Chapter 3 of the Guidelines addressed site plan review as follows:

> Site plan review in Columbia is handled by the City's Planning Department, which has the 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 Commission 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 the City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review.** This would streamline the overall development 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. GUIDELINES, § 3.5.4, p. 3-12; (Amended R. p. 736). (emphasis added).

In accordance with Section 3.5.4 of the Guidelines, since 1999, the City had delegated authority to review and approve site plans for development within the City Center to the DDRC instead of the Planning Commission. Therefore, at the time Trinitas proposed its Project to the City, it was required to obtain two types of approvals from the DDRC: 1) a certificate of design approval, and 2) a certificate of site plan approval.

A site plan is a technical construction drawing showing street and lot layout; water, sewer and drainage infrastructure; arrangement, shape and dimensions of existing and proposed buildings; the proposed use of buildings or land; the location and dimensions of off-street parking; the proposed location and type of material of walls, fences and screen plantings; proposed locations and service connectors of fire hydrants and trash collection points; and any other information deemed necessary due to the characteristics of the proposed use. COLUMBIA MUNICIPAL CODE, § 17-582(2) and (3) (Amended R. pp. 665 – 666); COLUMBIA MUNICIPAL CODE, § 17-492(3) – (5). Site plan approval is required for apartment complexes in order "to prevent creation of traffic hazards, ensure the provision of off-street parking and ensure the provision of necessary utilities ...." COLUMBIA MUNICIPAL CODE, § 17-581; (Amended R. p. 665). Generally, the Planning Commission is charged with review and approval of site plans. COLUMBIA MUNICIPAL CODE, § 17-582(1)(d); (Amended R. p. 665). Site plans are first reviewed by City staff for compliance with technical standards. *Id.* at 17-582(1)(b) and (c); (Amended R. p. 665); (Amended R. pp. 853 –

855). The DDRC, standing in for the Planning Commission for reviewing site plans within the City Center Overlay Zoning District, had little discretion to deviate from requirements within the City's zoning, building, utility, or land development ordinances. *See* COLUMBIA MUNICIPAL CODE, §§ 17-583 – 17-586; (Amended R. pp. 666 – 668). It did have discretion to require additional setbacks, spacing between structures, and screening beyond what is required in these ordinances. COLUMBIA MUNICIPAL CODE, §§ 17-587 – 17-589; (Amended R. p. 668).

On March 12, 2020, the DDRC approved Trinitas' site plan for the Project. (Amended R. pp. 1024 – 1027, p. 1336, p. 28, line 22 – p. 29, line 20). Under S.C. Code Ann. § 6-29-900, an appeal of a DDRC decision "must be filed within thirty days after the affected party receives actual notice of the decision of the board of architectural review." Members of the Association was present during the DDRC's hearing on March 12, 2020. *See* (Amended R. p. 1333). The Association did not file an appeal of the DDRC's site plan approval within thirty days of its actual notice of the decision on March 12, 2020. On July 9, 2020, the DDRC approved a certificate of design approval for Trinitas' Project. (Amended R. p. 1422).

In its circuit court brief, the Association asked the circuit 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." (Amended R. p. 327). It did not ask to reverse the DDRC's Site Plan Approval for Trinitas' Project, 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, and the Association failed to timely appeal the site plan approval. *See* S.C. Code Ann. § 6-29-900; *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."). Yet in its proposed order submitted to the circuit court, the Association sought for the first time to reverse the DDRC approval of the site plan. (Amended R. p. 474). The circuit court entered the Association's proposed order, thus reversing the DDRC's site plan approval. (Amended R. p. 92).

STANDARD OF REVIEW

As against the City, the issues raised and ruled upon involve questions of law. Questions of law are subject to *de novo* review, which this Court is "free to decide without any deference to the court below." *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 6, 809 S.E.2d 223, 226 (2018). "A strong presumption exists in favor of the validity and application of zoning ordinances." *Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 S.C. 230, 235, 489 S.E.2d 630, 632 (1997). A zoning ordinance is reviewed "to give it a practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers." *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 489, 536 S.E.2d 892, 897 (Ct. App. 2000).

ARGUMENTS

The City raises five arguments on appeal: 1) the Circuit Court erred in finding that the Association has standing, or meets the public importance exception, to bring its claims against the City of Columbia; 2) the Circuit Court erred in concluding that the Association's *Ultra Vires* Claim was not moot; 3) the Circuit Court erred in reversing the DDRC's site plan approval as the remedy for the Association's *Ultra Vires* Claim against the City of Columbia; 4) the Circuit Court erred in declining to decide the Association's Unlawful Delegation Claim against the City of Columbia; and 5) the City's adopted Guidelines do not constitute an unlawful delegation of legislative power from City Council to the DDRC.

1. **The Circuit Court erred in finding that the Association has standing, or meets the public importance exception, to bring its claims against the City of Columbia.**

"Standing may be acquired (1) by statute, (2) under the principle of 'constitutional standing,' or (3) via the 'public importance' exception to general standing requirements." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 209–10, 845 S.E.2d 481, 486 (2020). In the court below, the City argued that the Association lacked constitutional standing to bring its causes of action against the City. (Amended R. pp. 344 – 346). The Association, and in turn, the circuit court, analyzed the standing issue solely from the standpoint of statutory standing under S.C. Code Ann. § 6-29-900(A), which is applicable to the Association's appeal of the DDRC decision-making. (Amended R. pp. 74 – 80). Because the Association's causes of action against the City are not appeals of a decision by the DDRC, the circuit court erred in holding that the Association had standing to bring its claims against the City based on the Association's "substantial interest in any decision of the board of architectural review." S.C. Code Ann. § 6-29-900(A). This alone should warrant reversal.

Even applying the correct test for standing, the circuit court erred in concluding that the Association had standing as against the City. To establish constitutional standing, the Association must demonstrate that one or more of its members: 1) has suffered a concrete and particularized injury that is actual or imminent; 2) a causal connection between the injury and the conduct complained of that is "fairly traceable" to the challenged action; and 3) it must be likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). "[I]t 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.*

"Elements of standing are 'an indispensable part of the plaintiff's case' with each element supported by evidence in the same way as any other matter on which the plaintiff bears the burden of proof." *Town of Arcadia Lakes v. S.C. Dep't of Health & Env't Control*, 404 S.C. 515, 529, 745 S.E.2d 385, 392 (Ct. App. 2013). Because the Association's cause of actions against the City are separate and distinct from its appeal of the DDRC's approval of Trinitas' site plan and design, testimony found in the record on appeal of any member of the Association during a DDRC hearing is arguably irrelevant. Instead, to establish standing for its claims against the City, the Association should have filed with the circuit court affidavits from its members averring to facts sufficient to meet the three elements of standing as against the City of Columbia. Yet the Association did not file any such affidavits.

To the extent testimony by Association members during DDRC hearings concerning Trinitas' site plan or design approval is relevant or appropriate to support standing to bring its claims against the City, this testimony falls short. The circuit court relied on testimony from members of the Association complaining about students roaming their neighborhood (Amended R. pp. 1292 – 1295), potential increase in traffic (Amended R. pp. 1294 – 1295), and the prospect of tenants in the apartment building parking in their neighborhood (Amended R. p. 1333, p. 1344). "In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014). None of these concerns are particularized. Instead, the Association'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).

What is more, the Association makes no effort to demonstrate how these purported injuries are fairly traceable to City's alleged procedural error and unlawful delegation of legislative power. Indeed, it seems quite difficult for the Association 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). The Association has not shown any likelihood that the Planning Commission would approve a site plan for the Trinitas in a different, more favorable way than the DDRC-approved site plan, or that invalidating[1] the Guidelines as unlawful delegation of legislative power would yield a shorter building than what was approved as part of Trinitas' certificate of design approval. The circuit court erred in concluding that the Association had standing to challenge the City's delegation of authority to the DDRC to review site plans or challenge its Guidelines as unlawfully delegating legislative authority to the DDRC.

Additionally, the circuit court erred in its analysis concerning the "public importance" exception to standing. In order to have standing under the public importance exception, a party

[1] Without the Guidelines, the DDRC must approve new construction if a proposed building's height as allowed under the site's underlying zoning designation, which is exactly what the DDRC concluded in this case. It is undisputed that the Project is within the allowable height restrictions set forth by City's zoning ordinances. COLUMBIA MUNICIPAL CODE, § 17-275 at note c ("Buildings between the height of 50 and 75 feet may be allowed[.]"); (Amended R. pp. 632 – 633). The Project is 75 feet.

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 needed for future guidance." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008). Courts "must be cautious with this exception, lest it swallow the rule." *Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 366, 815 S.E.2d 446, 458 (2018). None of the Association's causes of action against the City are so important to the public that they demand an urgent adjudication for future guidance.

The circuit court identified the relevant issues of importance as "whether the grant by the City of the power of site plan review to the DDRC for development within the [City Center Overlay Zoning District] was *ultra vires*" and 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." (Amended R. p. 81). The circuit court's conclusions concerning the need for future guidance focused exclusively on "the large area covered by the [City Center Overlay Zoning District]," "other overlay schemes in Columbia," and "overlay schemes in South Carolina." (Amended R. p. 82). The prevalence or legal characteristics of overlay zoning districts bear no relation to the Association's *Ultra Vires* Claim or Unlawful Delegation Claim against the City of Columbia. The circuit court does not identify a reason why there is a need for future guidance concerning either cause of action against the City. *See* (Amended R. pp. 82 – 83).

Avoiding reasoned analysis, the circuit court order erroneously found that this case satisfies the "public importance" exception because of arguments that Trinitas and the DDRC

made in a Petition for Writ of Mandamus pursuant to 245(B), SCACR, or, in the alternative, Petition for Certification pursuant to Rule 245(A), SCACR. Although the City did not join in this Petition, the lower court pointed out that the City filed a letter with the Supreme Court stating that the "City of Columbia does not oppose the petition." (Amended R. p. 83 fn. 39). In the Order, the court states that:

> 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. At pages 10-17 of this filing, Trinitas and the DDRC argue: (1) that "[t]his case involves issues of significant public interest," and (2) that "this case has the potential to affect every board of architectural review established by governmental bodies throughout the state and all applicant who file applications to those boards." Given these statements, the parties are in agreement that this case satisfies the public important [sic] test for standing. (Amended R. p. 83).

The circuit court's conclusion is directly contrary to the South Carolina Supreme Court's ruling in *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 80, 753 S.E.2d 846, 853 (2014). In *Carnival Corp.*, the plaintiffs contended that the public importance exception to standing must apply if the Supreme Court granted defendant's petition for original jurisdiction. *Id.* "While the Court may exercise original jurisdiction under Rule 245, SCACR, '[i]f the public interest is involved,' the 'public interest' standard of Rule 245 is not synonymous with the public importance necessary for the public importance exception to standing to apply." *Id.* "Rule 245 is concerned with whether a case should be resolved by this Court in the first instance because of the public interest involved and the need for prompt resolution, whereas the public importance exception is concerned with whether a case is of such public importance that the requirement of standing should be waived. *Id.* "Thus, because the two rules aim to answer different questions—whether the public interest requires expeditious resolution of a case versus

whether the public interest requires resolution of a dispute for future guidance despite the lack of standing—the grant of the petition for original jurisdiction has no effect upon whether the public importance exception applies." *Id.* The circuit court's reliance on Trinitas' and DDRC's Petition for Writ of Mandamus to support its conclusion that the "public importance" exception applies to the Association's causes of action against the City is wrong, and should be reversed.

A grant of the public importance exception is not warranted here. As stated previously, City Council enacted an ordinance that eliminated its prior delegation of authority to the DDRC for approval of site plans within the City Center Overlay Zoning District. (App. to Amended R. p. 1439). The circuit court implicitly agreed that the Association's main *ultra vires* argument[2] based on Section 3.5.4 of the Guidelines was moot. (Amended R. pp. 50 - 51). A mooted argument has no urgent need for 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[.]"). Further, even if not mooted, the Association's narrow procedural issue - whether the City may lawfully delegate the ministerial function of site plan review from the Planning Commission to the DDRC for developments located within the purview of the DDRC - hardly rises to an important public issue warranting the time and attention of this Court. *See Jowers v. S.C. Dep't of Health & Envtl. Control*, 423 S.C. 343, 366, 815 S.E.2d 446, 458 (2018) (Courts "must be cautious with this exception, lest it swallow the rule.").

[2] The Association's main argument was that Section 3.5.4 of the Guidelines require site plan review within the City Center Overlay Zoning District area to be done by the DDRC rather than the Planning Commission, and this delegation of authority violated S.C. Code Ann. § 6-29-1150(A). (Amended R. pp. 293 – 294).

The Association's *ultra vires* argument concerning sections 5.4.1, 5.4.2, 5.5 and 5.10 of the Guidelines is also not worthy of invoking the public importance exception. This "overlapping authority" issue merely raises a highly speculative hypothetical that one day in the future, a proposed development to be located in the City Center may receive site plan approval by the Planning Commission which includes requirements that could possibly conflict with requirements approved by the DDRC as part of its certificate of design approval. A claim should be ripe before the public importance exception is even considered. *See Jowers v. S.C. Dep't of Health & Env't Control*, 423 S.C. 343, 367, 815 S.E.2d 446, 459 (2018) ("The public importance exception does not apply to a lack of ripeness.").

The Association's Unlawful Delegation claim similarly fails to meet the "public importance" exception to standing. It merely argued 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. As the Court in *ATC South, Inc. v. Charleston County* 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. 191, 199, 669 S.E.2d 337, 341 (2008). Simply 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 to standing. The Association, and in turn, the circuit court, failed to show how the Association's Unlawful Delegation Claim is of "imperative and manifest urgency" in need of future guidance.

2. **The Circuit Court erred in concluding that the Association's *Ultra Vires* Claim was not moot.**

Section 17-253 of the City's Zoning Ordinance requires that development within the City Center comply with the "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." COLUMBIA MUNICIPAL CODE, § 17-253 (Amended R. p. 632). Chapter 3 of the *Guidelines* "outlines an institutional and procedural framework that will lead to successful implementation of the substantive guidelines." GUIDELINES, 3.1, p. 3-1 (Amended R. p. 725). In describing the relationship of DDRC review to other permitting processes and regulations, Section 3.5.4 within Chapter 3 of the Guidelines stated that within the City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review. (Amended R. p. 736). In accordance with Section 3.5.4 of the Guidelines, since 1999, the City has delegated authority to review and approve site plans for development within the City Center to the DDRC instead of the Planning Commission. On March 12, 2020, the DDRC approved Trinitas' Site Plan. (Amended R. pp. 1024 – 1027; p. 1336, p. 28, line 22 – p. 29, line 20).

On July 24, 2020, the Association filed a Complaint described as an "appeal involving a decision by the City of Columbia Design and Development Review Commission granting final approval for construction of [the Project]." (Amended R. p. 101). The appeal was framed as two parts. The first part was an appeal pursuant to the appeal process set forth in S.C. Code Ann. § 6-29-900 concerning DDRC decisions. (Amended R. p. 102). In its second part, the Association brought a separate cause of action against the City of Columbia challenging the City's delegation of site plan approvals within the City Center Overlay Zoning District from the Planning

Commission to the DDRC as violating S.C. Code Ann. § 6-29-1150(A). (Amended R. p. 102, 104). This latter action against the City, not the DDRC, was based upon the Circuit Court's general jurisdiction granted under article V, section 11 of the South Carolina Constitution. Association (Amended R. p. 289). The Association argued that, in authorizing the DDRC to undertake site plan review, the City of Columbia failed to meet the requirements of S.C. Code Ann. § 6-29-1150(A) of the Enabling Act, thus making the City's grant of power to the DDRC an *ultra vires* act ("*Ultra Vires* Claim"). (Amended R. pp. 292 – 297). It asked the circuit court to "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." (Amended R. p. 327).

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 within the City Center Overlay Zoning District. (App. to Amended R. p. 1439). "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 County*, 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.* Because the City no longer delegates site plan review to the DDRC, Appellant's *Ultra Vires* Claim against the City is moot.

None of the recognized exceptions to mootness applies 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. *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26-27, 630 S.E.2d 474, 478 (2006). While it may be possible that the Association's *ultra vires* claim is capable of repetition,

the Association 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 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. *Friends of Hunley* at 26–27, 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). S.C. Code Ann. § 6-29-1150(A) simply requires that the City provide for a specific procedure for the submission and review of site plans by the Planning Commission. The City has always had this required procedure in place, with the City's prior delegation of site plan review to the DDRC for development within the City Center being an exception to its general rule that the Planning Commission review site plans. *See* COLUMBIA MUNICIPAL CODE, §§ 17-491 – 17-492; § 17-582(1) (Amended R. p. 665). The City eliminated its delegation of authority to the DDRC in December 2020. Given the narrow procedural issue raised by the Association and the City's repeal of its delegation of site plan review, there is no important public interest requiring any urgent need for future guidance. *See*

Croft as Tr. of James A. Croft Tr. v. Town of Summerville, 433 S.C. 473, 481, 860 S.E.2d 352, 357 (2021) (declining to invoke the public importance exception to mootness to decide whether Town violated public meeting requirements under FOIA and its ordinances requiring public comment); *Sloan v. Greenville County*, 361 S.C. 568, 571, 606 S.E.2d 464, 466 (2004) (rejecting the public importance exception to mootness because the county had revised its procurement process).

"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 the Association's *Ultra Vires* Claim would not affect future events relating to the parties, nor would there be any collateral consequences for the parties. Trinitas already has an approved site plan, which the Association failed to appeal in a timely manner. The 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). It cannot be applied retroactively to invalidate Trinitas' approved site plan. *See 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."). Trinitas has a vested right in its approved and unappealed site plan. COLUMBIA MUNICIPAL CODE, § 17-2(a) (Amended R. p. 619); S.C. Code Ann. § 6-29-1530. 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.").

Because the City's action mooted the Association's *Ultra Vires* Claim and no exception to mootness applies in this case, the circuit court should have dismissed the Association's *Ultra Vires* Claim. Instead, the circuit court ruled that the City's ordinance eliminating DDRC review of site plans for development within the City Center did not moot the Association's cause of action against the City "because eliminating the grant of the responsibility for site plan review to the DDRC does not eliminate the ultra vires problem." (Amended R. p. 51). The court explained that "[e]ven 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." (Amended R. p. 52). These sections were identified as sections 5.4.1, 5.4.2, 5.5 and 5.10[3] of the Guidelines. *Id.* In its Order denying the Respondents' motion to reconsider, the court elaborated, stating that "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." (Amended R. p. 95). The court concluded that "[t]his overlap of review authority by both the Planning Commission and the DDRC conflicts with the Enabling Act" and "that there is 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 ...." (Amended R. p. 53). The court then ruled that "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." (Amended R. p. 92).

---

[3] Although the Guideline's table of contents lists a Section 5.10 starting on page 5-21, there is not an actual Section 5.10; instead, in what appears to be a typographical error, on page 5-21, there is a Section 6.8 entitled "Parking Facility, Location, Landscaping, and Screening." GUIDELINES, p. iii and 5-21 (Amended R. pp. 700, 784).

Respectfully, the circuit court erred in ruling that the Association's *Ultra Vires* Claim was not mooted. To the extent that the court concluded that Sections 5.4.1, 5.4.2, 5.5 and 5.10 of the Guidelines confers authority upon the DDRC to review site plans, nothing in the Guidelines states that the DDRC applies Sections 5.4.1, 5.4.2, 5.5 and 5.10 of the Guidelines to any review of site plans. Nowhere in Sections 5.4.1, 5.4.2, 5.5 and 5.10 of the Guidelines are there any reference or command that the DDRC is the entity that applies these sections to a site plan review. Indeed, with City Council's deletion of Section 3.5.4 that delegated site plan review to the DDRC, the only approval authority of the DDRC remaining in the Guidelines is the review and approval of a certificate of design compliance. Guidelines, § 3.4.1, p. 3-8 (stating that the DDRC either denies or issues a certificate of design compliance) (Amended R. p. 732). The circuit court "cannot construe a statute without regard to its plain and ordinary meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." *City of Hardeeville v. Jasper County*, 340 S.C. 39, 44, 530 S.E.2d 374, 377 (2000). The circuit erred in reading into the Guidelines a requirement that the DDRC reviews site plans when City Council deleted the section that delegated authority for site plan review to the DDRC, leaving only the authority of the DDRC to review applications for certificates of design compliance. *See Adkins v. Comcar Indus., Inc.*, 316 S.C. 149, 151, 447 S.E.2d 228, 230 (Ct. App. 1994), *aff'd*, 323 S.C. 409, 475 S.E.2d 762 (1996) ("The court cannot read into a statute something that is not within the manifest intention of the legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute; to legislate and not to interpret.").

Moreover, the sections of the Guidelines that allegedly create an "overlap of site plan review concerns" does not hold up under a careful reading of the City's site plan ordinances.

Under § 17-581 of the City's site plan regulations, "plans for group developments such as ... apartment complexes, ... shall be submitted to the planning commission for review and approval." (emphasis added). (Amended R. p. 665). Under § 17-587, the Planning Commission must review setbacks in a site plan in accordance with the City's zoning ordinance (article III of Chapter 17). (Amended R. p. 668). Section 5.4.1 of the Guidelines (Amended R. p. 770) addresses setbacks and is incorporated by reference into the City's zoning ordinance. COLUMBIA MUNICIPAL CODE, § 17-253 (Amended R. p. 631). Therefore, upon City Council's elimination of its prior delegation of site plan review to the DDRC, it is the Planning Commission, not the DDRC, that applies Section 5.4.1 of the Guidelines as part of its site plan review for development within the City Center. Likewise, Section 5.4.2 of the Guidelines (Amended R. pp. 771 – 772) concerns the way buildings are oriented to the street, and is also incorporated by reference into the City's zoning ordinance. COLUMBIA MUNICIPAL CODE, § 17-253, (Amended R. p. 631). Under § 17-588 of the City's site plan regulations, the Planning Commission must review "internal design and spacing in a group development ... in accordance with the city zoning ordinance (article III of this chapter) ...." (Amended R. p. 668). Therefore, it is the Planning Commission, not the DDRC, that applies Section 5.4.2 of the Guidelines as part of its site plan review for development within the City Center. The same holds true for Section 5.5 of the Guidelines. (Amended R. p. 772). This Section addresses open, unbuilt public spaces along the setback line at the street, which falls under the Planning Commission's requirement, not the DDRC, that it consider the internal design and spacing within site plans in accordance with the City's zoning ordinance. COLUMBIA MUNICIPAL CODE, § 17-588 (Amended R. p. 668). The circuit court erred in concluding that the DDRC and Planning Commission had overlapping authority when the relevant ordinances clearly confer site

plan review, including site planning considerations found in Sections 5.4.1, 5.4.2 and 5.5 of the Guidelines, to the Planning Commission, not the DDRC. There is no overlapping authority.

The lower court also raised Section 5.10 of the Guidelines as another provision creating conflicting authority between the Planning Commission and the DDRC. The Guidelines list a Section 5.10 on page 5-21 in its table of contents; however, what is found on page 5-21 is Section 6.8 addressing certain design aspects of parking garages and surface lots. GUIDELINES, p. 5-21 – 5-25, (Amended R. pp. 784 – 788). Section 6.8 does not specify which entity applies these standards or for what particular purpose. Nonetheless, as explained above, with City Council's deletion of Section 3.5.4 that delegated site plan review to the DDRC, the only approval authority of the DDRC remaining in the Guidelines is the review and approval of a certificate of design compliance. GUIDELINES, § 3.4.1, p. 3-8 (stating that the DDRC either denies or issues a certificate of design compliance), (Amended R. p. 732). Therefore, the design standards for parking structures and surface lots are applied by the DDRC as part of its review of applications for certificates of design approval, not site plan approval.

At best, the argument of "overlapping authority," raised by the Association and approvingly ruled upon by the circuit court, raises a highly speculative hypothetical that one day in the future, a proposed development to be located in the City Center may receive site plan approval by the Planning Commission which includes requirements that could possibly conflict with requirements approved by the DDRC as part of its certificate of design approval. Without any supporting evidence, the circuit court found this scenario to create a substantial likelihood of conflicting authority between the Planning Commission in spite of the Guidelines' direction that, to the extent possible, the DDRC review process should be synchronized with other review

processes. GUIDELINES, p. 3-10 (Amended R. p. 734). The circuit court's empty conclusion should not stand because it is based upon conjecture, thus rendering the Association's effort to escape mootness as unripe for judicial review. *See Jowers v. S.C. Dep't of Health & Env't Control*, 423 S.C. 343, 353, 815 S.E.2d 446, 451 (2018) ("We have explained ripeness by defining what is not ripe, stating an issue that is contingent, hypothetical, or abstract is not ripe for judicial review."). Even if there is somehow a legitimate question of statutory interpretation, issues concerning proper interpretation of ordinances, in and of itself, do not rise to the level of an actual controversy. *Tourism Expenditure Rev. Comm. v. City of Myrtle Beach*, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013).

Moreover, that the Planning Commission may apply standards found under the City's site plan ordinances in its review of site plans, and the DDRC may apply different standards found in the Guidelines in its review of a certificate for design approval, does not violate S.C. Code Ann. § 6-29-1150(A). This Section of the Enabling Act states that "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." S.C. Code Ann. § 6-29-1150(A). S.C. Code Ann. § 6-29-1150(A) requires the City to enact a procedure for decision-making by the Planning Commission, which the City has done. COLUMBIA MUNICIPAL CODE, §§ 17-491 – 17-492; § 17-582 (Amended R. p. 665). Nothing in S.C. Code Ann. § 6-29-1150(A) confers upon the Planning Commission exclusive authority over parking considerations or any other substantive element of land development approvals.

The circuit court erred in rejecting the City's argument that the Association's *Ultra Vires* Claim was moot.

3. The Circuit Court erred in reversing the DDRC's site plan approval as the remedy for the Association's *Ultra Vires* Claim against the City of Columbia.

In addressing the Association's *Ultra Vires* Claim, the circuit court recognized that this claim is based upon this Court's general jurisdiction and not as an appeal under S.C. Code Ann. § 6-29-900(A). (Amended R. p. 42). Appellant failed to appeal the DDRC's approval of Trinitas' site plan; therefore, the circuit court had no jurisdiction to rule on this approved site plan. *See Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 185, 621 S.E.2d 361, 362 (Ct. App. 2005) (dismissing an appeal challenging the Board's authority to regulate alterations to interior windows as untimely). However, the circuit court concluded that the City's delegation of site plan review to the DDRC was *ultra vires* and reversed the DDRC's approval of Trinitas' site plan. (Amended R. p. 92). The circuit court's reversal of the DDRC's site plan approval was in error.

Appellant's *Ultra Vires* Claim was against the City of Columbia, not the DDRC. *See* (Amended R. p. 42) (explaining that Appellant's claim that the "shift by the City of site plan review to the DDRC was ultra vires). The Association argued that Section 3.5.4 of the Guidelines, adopted by City Council via Section 17-253, constitutes this unlawful delegation. (Amended R. p. 293). The Order identified this same act, concluding that "the City of Columbia ... failed to meet the requirements of the Enabling Act" and consequently, "this grant of power to the DDRC was ultra vires and is therefore, invalid ...." (Amended R. p. 46); *see also* (Amended R. p. 56) (stating that "[b]ecause the grant of power to the DDRC to address site plan review was ultra vires, that grant of power is invalid."). Appellant's remedy against the City of Columbia is to invalidate City Council's legislative act of delegating site plan review to the DDRC under Section 3.5.4 of the

City's Guidelines. *See Sinkler v. County of Charleston*, 387 S.C. 67, 78, 690 S.E.2d 777, 782 (2010) (invalidating ordinance that violated the Comprehensive Planning Enabling Act). This circuit court improperly reached beyond the City's legislative act to reverse a decision by the DDRC.

As the circuit court noted, the remedy for an *ultra vires* act is to void the act involved, citing several cases as an example. (Amended R. p. 55). The act involved here is the City Council's adoption of the challenged section of the Guidelines. Thus, the remedy for enacting any section of the Guidelines deemed to conflict with the Enabling Act is to void those same sections. *Sinkler v. Cty. of Charleston*, 387 S.C. 67, 78, 690 S.E.2d 777, 782 (2010). Yet the Order's relief is to reverse the DDRC's site plan approval, which is not the act involved. The only means by which the circuit court can reverse a decision by the DDRC is through the appeal procedure set forth in the Enabling Act, S.C. Code Ann. §§ 6-29-900, 920 and 930. Because the Association did not appeal the DDRC's approval of Trinitas' site plan, reversal of the DDRC's site plan approval is beyond the jurisdiction of this Court.

To hold otherwise would allow the Association to evade the exclusive appeal procedure under S.C. Code Ann. § 6-29-900. This the Association cannot do. *See e.g. Tourism Expenditure Rev. Comm. v. City of Myrtle Beach*, 403 S.C. 76, 82, 742 S.E.2d 371, 374 (2013) ("The Declaratory Judgments Act may not be invoked to avoid or circumvent the legislature's exclusive method for challenging A–Tax funds expenditures."); *Carr v. Guerard*, 365 S.C. 151, 154, 616 S.E.2d 429, 431 (2005) (rejecting attempt to bypass statute of limitations by restyling cause of action); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 416, 526 S.E.2d 716, 721 (2000) (rejecting referendum process to decide zoning issues as impermissibly circumventing procedures found in Comprehensive Planning Enabling Act of 1994).

4. The Circuit Court erred in declining to decide the Association's Unlawful Delegation Claim against the City of Columbia.

In its Trial Brief, the Association "asserted 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." (Amended R. p. 289). This claim was brought under the general jurisdiction of the Circuit Court against the City of Columbia, not the DDRC. *Id.* Its requested relief was for the circuit 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." (Amended R. p. 327). The adoption of the Guidelines was done by a legislative act of City Council; therefore, the remedy sought is to invalidate reference to the Guidelines within § 17-253 of the City's zoning ordinance.

The circuit court's Order deciding the merits of this case approvingly repeated the Association's arguments concerning its Unlawful Delegation Claim, but ultimately concluded that:

> 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. (Amended R. p. 91).

The circuit court erred in declining to decide the Unlawful Delegation Claim because its ruling on the Association's appeal of the DDRC's design approval is not dispositive of the Association's

Unlawful Delegation Claim against the City of Columbia. The court's reversal of the DDRC's approvals associated with Trinitas' Project does not touch or effect City Council's adoption of the Guidelines. Should this Court rule that the Association has standing, or meets the public importance exception to standing, the City respectfully asks that, in the interest of judicial economy, this Court decide the Association's Unlawful Delegation Claim. *See Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 582, 757 S.E.2d 399, 407 (2014) ("... for purposes of judicial economy we address the merits of the issue here ....").

5. The City's adopted Guidelines do not constitute an unlawful delegation of legislative power from City Council to the DDRC.

Municipalities are granted broad zoning and planning powers. *Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 S.C. 230, 234–35, 489 S.E.2d 630, 632 (1997). " ... [A] municipality may delegate the administration of its ordinances to a board provided the board's discretion is sufficiently limited by clear rules and standards. *Id.* Pursuant to S.C. Code Ann. § 6-29-870(A), the City is authorized to establish a board of architectural review to provide "for the preservation and protection of historic and architecturally valuable districts ... or ... for the unique, special, or desired character of a defined district, ... by means of restriction and conditions governing the right to erect, ... or alter the exterior appearance of all buildings or structures" within designated areas." Boards of architectural review, like the DDRC, apply standards that are contextual and flexible in nature. Courts have rejected claims that contextual definitions and standards within historic preservation or architectural design ordinances are indefinite or lack sufficient constraint upon decision-making. *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979); *Kalorama Heights Ltd. P'ship v. D.C. Dep't of Consumer & Regul. Affs.*, 655 A.2d 865, 873 (D.C.

1995); *Park Home v. City of Williamsport*, 545 Pa. 94, 102, 680 A.2d 835, 838–39 (1996); *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975); *Village of Hudson v. Albrecht, Inc.*, 9 Ohio St. 3d 69, 74, 458 N.E.2d 852, 857 (1984).

The Association argued that the GUIDELINES are an improper delegation of the City Council's legislative powers to the DDRC; therefore, the GUIDELINES must be voided. (Amended R. pp. 298 – 304, 327). At the outset, the Association takes issue with City Council's adoption of the Guidelines by reference and incorporated into Section 17-253 of the City's zoning ordinance, contrary to the recommendation of the consultants who drafted the Guidelines "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. *See e.g. F.B.R. Invs. v. County of Charleston*, 303 S.C. 524, 528, 402 S.E.2d 189, 191 (Ct. App. 1991) ("County Council was not bound to follow the recommendation of its planning boards and committees."). Irrespective of the drafters' recommendation that City enact a separate ordinance instead of adopting the Guidelines by reference, City Council's ordinances in fact require that the DDRC design approval decisions are made "under the terms of the design guidelines." COLUMBIA MUNICIPAL CODE, § 17-655(b)(1) (Amended R. p. 673). There is nothing inherently suspect or infirm about adopting the Guidelines by reference.

Under this State's non-delegation doctrine, the City Council is entitled to enact laws that authorize a board or commission to administer a regulatory scheme. *Terry v. Pratt*, 258 S.C. 177, 184–85, 187 S.E.2d 884, 887–88 (1972). "The degree of authority that may lawfully be delegated to an administrative agency must in large measure depend upon circumstances of the particular case at hand, including legislative policy as declared in the statute, objective to be accomplished

and nature of agency's field of operation." *Id.* "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." *S.C. State Highway Dept. v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955). Recognizing this need for flexibility, the City's ordinances need only "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). "Therefore, so long as a statute does not give an agency 'unbridled, uncontrolled or arbitrary power,' it is not a delegation of legislative power." *Hampton v. Haley*, 403 S.C. 395, 407–08, 743 S.E.2d 258, 264 (2013).

The City's urban design 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 MUNICIPAL CODE, § 17-651(1) (Amended R. p. 668); *see also* S.C. Code Ann. § 6-29-870 (giving architectural boards the power to restrict the alteration of the exterior appearance of structures). The purposes of 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. COLUMBIA MUNICIPAL CODE, § 17-651(5) (Amended R. p. 668). 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.").

A review of the applicable Guidelines demonstrates that they establish intelligible standards for carrying out the City's policies. 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." (Amended R. p. 764). 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. Facade proportion and rhythm of new construction should be consistent with surrounding facades. (Amended R. pp. 767 – 769). Roofing visible from the street should be sheathed with roofing material complimentary to the architectural style of the building and other surrounding buildings. (Amended R. p. 768 at § 5.3.6). Particular design elements are set forth concerning storefronts, exterior walls, upper facades, and buildings additions and renovations. (Amended R. pp. 770 – 780). Contextual standards such as these provide a sufficient limitation on DDRC discretion. *A-S-P Assocs. v. City of Raleigh*, 298 N.C. 207, 222, 258 S.E.2d 444, 454 (1979).

Concerning building height, Section 5.3.1 of the Guidelines specifically states that buildings are, "as a general rule," to be between two and five stories. (Amended R. p. 765). The Guidelines expressly contemplate that "exceptions" to the general rule as to height may be permitted by the DDRC. (Amended R. pp. 765 – 766). 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 required by Section 5.3.1 of the Guidelines to be "consistent with current zoning provisions." (Amended R. p. 766). "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, Association'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. (Amended R. p. 764 at § 5.1). The DDRC's discretion is sufficiently limited by clear rules and standards. *See Peterson Outdoor Advert. v. City of Myrtle Beach*, 327 S.C. 230, 234–35, 489 S.E.2d 630, 632 (1997) (stating that it is a "valid exercise of a municipality's police power to enact regulations that promote aesthetic considerations provided the regulation contains clear standards to limit the subjective exercise of discretion by the enforcing authorities.").

Further, the City requires that members of the DDRC must include an architect, a lawyer, an architectural historian, a city planner, and a real estate broker or developer. COLUMBIA MUNICIPAL CODE, § 17-653(c)(1) (Amended R. p. 670). Specifying relevant qualifications for the DDRC membership curbs any possibility of abuse of discretion. *Maher v. City of New Orleans*,

516 F.2d 1051, 1062 (5th Cir. 1975). And the City has provided a procedure for appeal of DDRC decisions as required under state law. COLUMBIA MUNICIPAL CODE, 17-655(f)(1) (Amended R. p. 675); (Amended R. p. 732 – 733); S.C. Code Ann. § 6-29-900. *See S.C. State Highway Dept. v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955) (identifying an appeal procedure as a means to curb agency power).

"To satisfy due process, guidelines to aid a commission charged with implementing a public zoning purpose need not be so rigidly drawn as to prejudge the outcome in each case, precluding reasonable administrative discretion." *Maher v. City of New Orleans*, 516 F.2d 1051, 1062 (5th Cir. 1975). The Guidelines, when considered as a whole with City's other ordinances, as this Court is required to do, provide sufficient standards to guide the DDRC and contain its discretion. The Guidelines are not invalid on the basis that they are an unlawful delegation of legislative power.

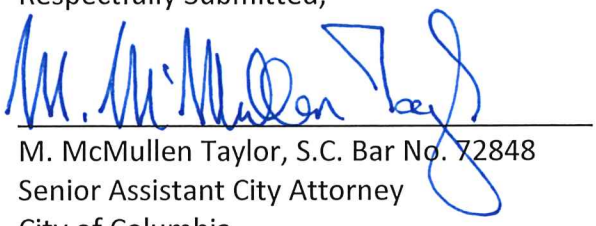
CONCLUSION

Appellant City of Columbia respectfully requests that this Court reverse the decision of the circuit court concerning the Association's causes of action against the City, and rule that:

1. The circuit court erred by finding the Association had standing, or met the public importance exception, to bring its claims against the City of Columbia;
2. The Association's *Ultra Vires* Claim is moot;
3. The circuit court erred in reversing the DDRC's site plan approval as the remedy for the Association's *Ultra Vires* Claim against the City of Columbia;
4. The circuit court erred in declining to decide the Association's Unlawful Delegation Claim; and

5. The City's Guidelines do not amount to an unlawful delegation of legislative power from City Council to the DDRC.

Respectfully Submitted,



M. McMullen Taylor, S.C. Bar No. 72848
Senior Assistant City Attorney
City of Columbia
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
(803) 737-4242
m.taylor@columbiasc.gov

October 14, 2022

Counsel for Appellant City of Columbia

RECEIVED
Oct 17 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT

The Honorable L. Casey Manning
Fifth Circuit Judge

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,

---

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Appellant City of Columbia in the above-referenced matter complies with Rule 211(b), SCACR.

M. McMullen Taylor, S.C. Bar No. 72848
Senior Assistant City Attorney
City of Columbia
Office of the City Attorney
Post Office Box 667
Columbia, South Carolina 29202
(803) 737-4242
m.taylor@columbiasc.gov

October 14, 2022

Counsel for Appellant City of Columbia