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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

Appellate Case No. 2022-000389

University Hill Neighborhood Association..Respondent,

v.

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

FINAL BRIEF OF CITY OF COLUMBIA DESIGN/DEVELOPMENT REVIEW COMMISSION AND TRINITAS VENTURES LLC

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PROCEDURAL BACKGROUND

Trinitas Ventures LLC[1] ("Trinitas") intends to demolish existing, aging, commercial buildings in downtown Columbia, South Carolina and construct a new multi-family housing project (the "Proposed Construction"). The Proposed Construction, known as 1600-1620 Gervais Street, will be at the southeast corner of two busy commercial corridors, across Pickens Street from the new University of South Carolina School of Law and across Gervais Street from the recently renovated Hilton Garden Inn. Because the property is within the City Center Design/Development District ("City Center -DD"), 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 Commission ("DDRC").[2]

From January 2020 through July 2020, the DDRC held four public hearings and one public work session to consider Trinitas' applications. On March 20, 2020, the DDRC approved Trinitas' application for a Certificate of Site Plan Review. On July 9, 2020, the DDRC approved Trinitas' application for a Certificate of Design Approval. 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 DDRC to address concerns about the Proposed Construction and changed its plan and design multiple times to answer those concerns.

[1] Association named the wrong real party in interest. Trinitas Ventures LLC is not the appropriate defendant; instead, Trinitas Development LLC is, as set forth in Trinitas' Motion to Dismiss, which the circuit court denied, and as further articulated in this brief.

[2] Improperly named "City of Columbia Design and Development Review Committee" in Association's Complaint. 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.

A nearby neighborhood organization, University Hill Neighborhood Association ("Association"), has opposed the Proposed Construction throughout the process. Association has made it clear that its objection is not to site plan or design of the Proposed Construction, but, instead what Association's members perceive to be a "student housing" project. Association uncompromisingly complains about the *height* of the Proposed Construction to attempt to block what it believes to be an undesirable *use*, a consideration not in the purview of the DDRC.

The DDRC determined that the City Center –DD *Guidelines* ("*Guidelines*") allow the Proposed Construction. It will be situated on one of the City's busiest corridors, just blocks away from the tallest buildings in the City. The Proposed Construction's height is less than five feet taller than the adjacent University of South Carolina School of Law building, which is also within the City Center -DD. Moreover, the Proposed Construction is shorter than the Hilton Garden Inn which is across Gervais Street. Because the Proposed Construction met the *Guidelines'* requirement that new construction be considered by the DDRC within the context of its immediate surroundings, it was properly approved by the DDRC in accordance with City's *Guidelines* for the City Center –DD.

Unhappy with the DDRC's decision to approve the Proposed Construction, the Association filed a "Complaint"[3] in the circuit court. (*See* R. pp. 101-118.) On August 24 and 25, 2020, Appellants filed separate Motions to Dismiss. (*See* R. pp. 275-276; R. pp. 250-268; R. pp. 269-274.) Appellants raised issues regarding Association's standing and timeliness of the appeal, among other arguments. (*See id.*) The circuit court denied the motions by a thirty-two-page order filed on October 17, 2020. (*See* R. pp. 1-33.). The Order concluded that Association had associational standing, statutory standing, and, in the alternative, standing under the public importance exception. (*See id.* at

[3] It is undisputed Association appealed from two certificates issued by the DDRC to Trinitas. Association's pleading should have been captioned a "Notice of Appeal," rather than a "Complaint."

R. pp. 24-33.) The Order also seemingly determined the merits of Association's substantive challenges.[4]

Following the Order Denying Motions to Dismiss, the parties fully briefed all issues in this case. (R. pp. 277-329; R. pp. 330-394; R. pp. 395-418f.) A final merits hearing was held on October 14, 2021. (*See* R. pp. 570-615.) In a fifty-five-page order filed on December 7, 2021, the circuit court adopted Association's arguments and concluded:

> (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.

(*See* R. pp. 43-93 at p. 92.)

On December 17, 2021, Appellants filed a joint Motion to Reconsider the Final Merits Order. (*See* R. pp. 507-525.) The circuit court denied the Motion to Reconsider by order filed March 10, 2022. (*See* R. pp. 95-99.) Appellants timely filed a Notice of Appeal to the Court of Appeals on March 30, 2022. (*See* R. pp. 143-144.)

[4] Appellants filed an appeal of the Order Denying Motions to Dismiss on the basis that the Circuit Court's order substantively determined issues in the case. In response, Association filed a Motion to Dismiss, which was granted by the Court of Appeals. The case was remanded to the Circuit Court for further proceedings.

SUMMARY OF ARGUMENTS

The Final Merits Order adopted Association's arguments whole cloth, giving little to no consideration[5] to the arguments made by Appellants. (*See* R. pp. 43-93.) For the following reasons, the Final Merits Order should be reversed.

First, the circuit court's ruling is erroneous as a matter of law because it is undisputed Association failed to timely appeal the Site Plan Approval Decision as required by S.C. Code Ann. § 6-29-900(A). As a consequence, Trinitas has a vested right[6] in the DDRC's Site Plan Approval Decision, which could not be retroactively invalidated or set aside by the circuit court. The Court's ruling that Trinitas' Certificate of Site Plan review "is reversed," was procedurally and legally improper. Association's contention that its challenge to the Site Plan Approval Decision was filed within the general jurisdiction of the circuit court is procedurally without merit.

Second, the circuit court's ruling that City ordinance section 17-253[7] is an unlawful delegation of legislative power to the DDRC is in error because, irrespective of the intent of its drafters, the *Guidelines* form a part of City's ordinances. (R. pp. 616-696 at § 17-253.) 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. (R. pp. 697-807 at

---

[5] The Circuit Court refused to rule on Appellant's arguments concerning Association's claim that the *Guidelines* constitute an unlawful delegation of legislative authority by City Council. (*See* R. p. 507-525 at pp. 514-520.)

[6] R. pp. 616-696 at § 17-2 ("Establishment and conditions of a vested right").

[7] "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*].'" (*See* R. pp. 697-807 at p. 765, § 5.3.1.)

p. 765, § 5.3.1.[8]) Although the *Guidelines* state a general rule that new buildings in the City Center – DD 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.*[9]) 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 in the City Center -DD. The circuit court's Final Merits Order is erroneous on the basis that the *Guidelines* do not constitute an unlawful delegation of legislative power.

Third, the circuit court erroneously adopted the Association's position that the DDRC abused its discretion in approving the height of the Proposed Construction. (R. pp. 43-93 at p. 92.) The same reasons that cause Association's unlawful delegation argument with respect to the *Guidelines* to fail also undermine Association's argument as to the DDRC's alleged abuse of discretion.

While Section 5.3.1 of the *Guidelines* states a preference for new development within the City Center -DD to be within two to five floors, the *Guidelines* allow for "exceptions." (R. pp. 697-807 at p. 765, § 5.3.1.) 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." (*Id.*) The DDRC correctly decided that the Proposed Construction, which exceeds five stories but

[8] Section 5.3.1 of the *Guidelines* is the only section that Association claims is an unlawful delegation of legislative authority. (R. pp. 277-329 at pp. 301-304.) Nevertheless, Association sweepingly requested 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." (*Id.* at R. p. 327.) In other words, Association sought to set aside the entirety of the *Guidelines*, which have been part of City's urban planning and development strategy since 1998. The Circuit Court appears to have denied this request, although it is unclear in the Circuit Court's conclusions in the Final Merits Order. This Court should find that Association's request is overreaching, unsupported, and fails as a matter of law.

meets City's zoning ordinances as to height, was permissible. The fact that the Proposed Construction is comparably sized to immediately adjacent buildings, including the University of South Carolina School of Law and Hilton Garden Inn, further supports the DDRC's Design Approval Decision. The DDRC's conclusion was not an error of law or unsupported by facts.

DDRC and Trinitas believe this honorable Court should issue an opinion concluding:

(1) Association lacks standing to bring any of the challenges in its "Complaint";

(2) Association's appeal of the DDRC's Site Plan Approval Decision was not timely;

(3) the DDRC's Site Plan Approval Decision was not improper or without authority;

(4) the DDRC's Design Approval Decision was not improper.

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.[10] 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.[11] The Proposed Construction is subject to the scrutiny of the DDRC[12] only because of that voluntary zoning change.

[9] (*See also* R. pp. 616-696 at § 17-275 at note c ("Buildings between the height of 50 and 75 feet may be allowed[.]").)

[10] Association repeatedly, inaccurately, characterizes the Proposed Construction as "student housing." The Proposed Construction was approved by City as an apartment complex not limited to students. *See* R. pp. 616-696 at § 17-464 ("group housing development"). The Proposed Construction is not private dormitory housing. *Id.* at § 17-321 (defining "private dormitory").

[11] *See* R. pp. 616-696 at § 17-253 (-DD design/development area) and § 17-311 (supplementary district regulations for –DD design/development area).

[12] *See id.* at § 17-653 (establishing and authorizing the Design/Development Review Commission).

In compliance with applicable ordinances and *Guidelines* for the City Center -DD, Trinitas filed two applications to the DDRC: (1) for a Certificate of Site Plan Approval,[13] and (2) for a Certificate of Design Approval for New Construction, on December 3, 2019, under a Letter of Agency from Owner. The DDRC's consideration of such applications is governed by City ordinances, specifically, Sections 17-253, 17-653(b)(9), 17-674, 17-653(b)(9). (*See* R. pp. 616-696.)

A. January 9, 2020 Public Hearing

The DDRC first held a public hearing regarding the Proposed Construction on January 9, 2020.[14] (*See* R. pp. 1287-1315.) Trinitas presented evidence that the Proposed Construction met all requirements of the City Center -DD for site plan and design approval. (R. pp. 1287-1315 at 4:20-16:16, 28:23-30:11, 31:35-40:6.) Association presented testimony in opposition to the Proposed Construction. (*Id.* at 17:8-20:14, 28:11-15; *id.* at 26:7-27:1; *id.* at 25:4-26:5, 27:9-28:7, *id.* at 30:18-31:22, *id.* at 40:17-41:3, and *id.* at 41:14-43:4.) The majority of Association's representatives and/or members testified about their concern that the Proposed Construction 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 <u>use</u> of the building being incompatible with the adjacent University Hill and University . . . [and] adjacent historic districts" (*See* R. pp. 1287-1315 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,

[13] *See id* at § 17-655(b)(2) (issuance of certificate of design approval).

[14] *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").

asserting the DDRC's decisions were invalid, in part, because they were decided on inappropriate considerations of "use" of the Project. (*See* R. pp. 947-959 at February DDRC004-008.)

B. February 7, 2020 Public Hearing

At a hearing on February 7, 2020, the DDRC moved to revoke its prior denials of Trinitas' applications. (*See* R. p. 1316-1327.) The motion passed and the DDRC placed both applications for rehearing on March 12, 2020. (*Id.*) The day before the DDRC's hearing, Association and others, submitted letters in opposition to the Proposed Construction. (*See* R. pp. 960-1168 at March DDRC046-049.) Several members of the public also submitted letters in support of the Proposed Construction. (R. pp. 960-1168 at March DDRC0043, 0045.)

C. March 12, 2020 Public Hearing

1. Application for Certificate of Site Plan Approval

During its 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* R. pp. 960-1168 at 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* R. pp. 1328-1372 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* R. pp. 1328-1372 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* R. pp. 616-696 at § 17-674(c).) Trinitas explained how the Proposed Construction met all requirements.

Letters submitted by Association's members did not address any of the factors pertinent to DDRC's review. Instead, the concerns raised by the Association's members regarded *design* of the Proposed Construction, which was not an appropriate consideration by the DDRC for site plan approval. At least two of Association's members raised questions concerning the accuracy of certain data in a traffic study supporting Trinitas' application for a Certificate of Site Plan Approval. (R. pp. 1328-1372 at 16:5-18:12; *id.* at 20:15-21:6.) Neither of these individuals submitted any competing traffic analyses or reports. (*Id.*) In response to Association'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 Association'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 Association, objected to the DDRC's authority with respect to site plan review. (R. pp. 1328-1372 at 14:19-15:16; *see also* R. pp. 960-1168 at March DDRC050-62.) He asserted City's delegation of site plan review to the DDRC (instead of Planning Commission) violated the Enabling Act. (*See id.*) However, Mr. Hubbard 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" to the DDRC's determination of site planning. (*See* R. pp. 1328-1372 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 Association 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 (the "Site Plan Approval Decision"). (R. pp. 1328-1372 at 28:22-29:20.)

2. Application for Certificate of Design Approval

As to Trinitas' application for a Certificate of Design Approval,[15] 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." (R. pp. 1328-1372 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.)

Association's President, Thomas Gottshall, made arguments against the Proposed Construction's design. (*See* R. pp. 1328-1372 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[16].) Mr. Gottshall asserted the Proposed Construction was not "compatible" with neighboring buildings. (*Id.* at 44:23-46:8.) The DDRC asked Mr. Gottshall to explain "more about specific design elements of which [Association is] concerned with rather than just in general height and mass." (*Id.* at 49:8-12.) In response, Mr. Gottshall stated: "we're not thrilled, frankly, with the façade itself," including "a glass corner."[17] (*Id.* at 49:18-19.) He also expressed concern regarding the alleged lack of any setback.[18] (*Id.* at 50:6-7.)

Trinitas responded to Mr. Gottshall's objections by confirming that City ordinance Section 17-276 (C3 zoning, applicable for the Proposed Construction), allowed Trinitas to reduce setback to

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[15] (*See* R. pp. 96-1168 at March DDRC161-208.)

[16] A representative of Historic Columbia 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.

[17] Association is no longer challenging the façade or glass corner of the Proposed Construction.

[18] Association is no longer challenging the setback of the Proposed Construction.

zero on Gervais Street. (*Id.* at 52:14-53:3.) As Trinitas explained to the DDRC, the Proposed Construction includes an eight foot, four inch (8'4") setback, despite Mr. Gottshall'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. (R. pp. 1373-1415; *see also* R. pp. 1169-1195.) Several community members submitted letters in support of the Proposed Construction. (R. pp. 1159-1195 at June DDRC019-21.) Association submitted a letter in opposition, (*Id.* at June DDRC022-23), and Mr. Gottshall attended on Association's behalf and 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.[19] (R. pp. 1373-1415 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. (R. pp. 1373-1415 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

[19] Other than contesting the height of the Proposed Construction, Association is no longer challenging any of these other design elements in this case.

the back of the building (*id.* at 33:22-42:19). DDRC's Chairman stated: "I'm not suggesting changing the height of the building. I hope that's clear." (*Id.* at 31:24-25.)[20] 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 – I wasn't at the January hearing, but since I've started to see the design, so [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. (R. pp. 1416-1422; *see also* R. pp. 1196-1284.) 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." (R. pp. 1416-1422 at 3:2-4.) Further, Ms. Statler said:

> [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.

(R. pp. 1416-1422 at 3:7-11.)

Trinitas addressed specific concerns raised by Association and the DDRC in prior hearings. (*Id.* at 3:13-10:13; *see also* R. pp. 1196-1284 at July DDRC015-87.) Trinitas informed the DDRC that it had made numerous changes to the Proposed Construction. (R. pp. 1416-1422 at 3:13-10:13;

[20] *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.").

see also R. pp. 1196-1284 at July DDRC015-87.[21]) 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, so thank you for working with us on that." (R. pp. 1416-1422 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.").)

Association also attended the July 2020 hearing through its President, Mr. Gottshall, who opposed the application for a Certificate of Design Approval based on the number of floors and height of the building. (R. pp. 1416-1422 at 15:16-16:17.) Mr. Gottshall testified: "with regard 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

[21] 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 Association's representatives and recommended by the DDRC; (3) continued brick siding up to the top floor, as requested by Association'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 Association'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 Association's representatives and recommended by the DDRC.

windows. So, on that basis I recommend that we approve the certificate of design – grant the certificate of design approval.

(R. pp. 1416-1422 at 18:5-21.) The motion was approved by the DDRC (the "Design Approval Decision"). (*Id.*)

STANDARD OF REVIEW

A. Review standard of claim for unlawful delegation of authority.

Association contends that the appellate court's review of Association's 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 the Court should review *de novo*. (R. pp. 277-329 at p. 289.) Respondents agree.

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[22] 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

[22] "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).

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).

ARGUMENTS

I. ASSOCIATION LACKS STANDING.

Association 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 issue of 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). Association has failed to establish it has standing to bring its claims against the DDRC and Trinitas.

Association lacks standing under S.C. Code Ann. § 6-29-900(A) (requiring Association to prove that it is a "person" with "a substantial interest"). Association also fails to meet the public interest exception to the standing requirement. When the DDRC and Trinitas raised the issue of Association's standing to the circuit court in Motions to Dismiss, the circuit court found that Association had sufficiently pled allegations which, *if proven*, would provide it with standing to assert the claims in this appeal. (*See generally*, R. pp. 1-33.) However, at the final merits hearing stage, Association submitted no additional evidentiary support than it had at the motion to dismiss phase. Association has failed to meet its burden and the case should be dismissed for lack of standing. The circuit court's orders concluding otherwise should be reversed.

"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 Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001). As an unincorporated association, Association must show that "its members will suffer an individualized injury; a mere interest in a problem is not enough." *Id*. Association must prove 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 DDRC, and likely to be redressed by a favorable decision. *Id*.

Association made no attempt to claim that it, as an organization, has any concrete and particularized "substantial" interest to establish standing. Instead, Association attempted 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." (R. pp. 277-329 at p. 318.) The purported "negative impacts" described by Association are insufficient to establish standing under South Carolina law, in general. (R. pp. 277-329 at p. 319.) Association's members' alleged generalized concerns further specifically fail to articulate any concrete or particularized substantial interest or injury in the *design* or *site plan* of the Proposed Construction, which is the decision of the DDRC that Association appeals from.

The testimony relied upon by Association is simply its members' "concerns" that the Proposed Construction "is to be marketed to students," speculation that students would "mov[e] . . . through our neighborhood at night" causing damage, and conjecture regarding anticipated increases in traffic. (*Id.* (citations omitted).) Association's asserted injuries involving potential traffic impacts and nuisance activities are nothing more than vaguely described and "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).

Association's mere speculation of potential future injury, in general, is insufficient to establish standing. *See Town of Arcadia Lakes v. S.C. Dept. of Health and Envt'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 (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) ("testimony must be based on 'more than subjective belief or unsupported speculation.'").

In *Carnival Corp.*, the supreme court held that several neighborhood associations, like Association in this case, lacked standing to bring nuisance and zoning claims challenging Carnival's alleged unlawful use of a terminal by the its cruise ship, the *Fantasy*. In that case, the plaintiff-organizations sought injunctive relief based on ten claims—seven of which were based on purported violations of Charleston's city ordinances. 407 S.C. at 73, 753 S.E.2d at 849. The plaintiffs 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 cause traffic congestion in the area as well as the closure of public roads, (3) the *Fantasy* would 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 plaintiffs could not establish standing because they had failed 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 alleged by Association are speculative and conclusory "concerns" about potential traffic through the neighborhood,[23] hypothetical damage caused by students, and obstructed views.[24] (R. pp. 277-329 at pp. 319-320.) 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.

The recent appellate decision in *Charleston Dev't Co., LLC v. Alami*, 433 S.C. 533, 860 S.E.2d 687 (Ct. App. 2021), further supports dismissal of Association's challenges to the Proposed Construction based on lack of standing. 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. *Id.* at 538, 860 S.E.2d at 690. 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. *Id.* at 539, 860 S.E.2d at 690. On summary judgment, the trial court found plaintiffs lacked standing. Relying on *Carnival Corp.*, the appellate court affirmed.

The court affirmed the lower court's ruling that the plaintiffs were not "specially damaged . . .

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[23] (R. pp. 277-329 at p. 319; *id.* at notes 9, 10, 11, 12, 13, 14, 15; *id.* at R. p. 320 at note 16.)

[24] (*Id.* at R. p. 321 ("concern for the visual impact of a large, monolithic building looming over the area").)

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." *Id.* at 542, 860 S.E.2d at 692. Indeed, the court approved the lower court's finding that the plaintiffs had failed to establish that any of them were "neighboring properties." *Id.* at 543, 860 S.E.2d at 692-93. 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." *Id.* at 543, 860 S.E.2d at 692. The appellate court further affirmed the lower court's decision that the plaintiffs had not proven that the public importance exception to standing should apply. *Id.* at 544, 860 S.E.2d at 693. For the same reasons, the same grounds warrant dismissal of Association's claims in this case for lack of standing.

The circuit court relied 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) to find Association had standing. (R. pp. 43-93 at p. 70.) However, this decision and reliance is in error as the facts in *Preservation Society* are distinguishable. In *Preservation Society*, the plaintiff-associations were seeking a contested case hearing in the ALC to challenge 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). As one specific example, "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.* There is no such evidence or testimony in this case. None of Association's members' testimony before the DDRC arises to the level of specificity in *Preservation Soc'y of Charleston* as to their alleged individualized damage or injury. Association submitted no additional evidence in proceedings before the circuit court.

Significantly, the DDRC's decisions on appeal in this case relate to ***design*** of the Proposed Construction and its ***site plan***. Association has not produced any evidence showing a substantial interest in the design or the site plan of the Proposed Construction that would be different in character from those of any member of the public. Association's speculative allegations of "injury" all center on items such as traffic or noise. These concerns do not arise from the design or site plan of the Proposed Construction. Association is unable to show any personalized injury or substantial interest in the general design of the Proposed Construction or its site planning on the underlying parcel of property. Because Association has failed to establish this necessary showing, Association's entire case should be dismissed for lack of standing.

Moreover, Association also fails to prove that the "public importance" exception to standing should apply. The circuit court's orders concluded otherwise and, therefore, should be reversed. In order to have standing under the public importance exception, Association must prove 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 Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008).

Nowhere in Association's briefing to the circuit court did Association address the public interest exception with respect to its *appeal* of the DDRC's Design Approval Decision. (*See* R. pp. 277-329 at pp. 323-325 (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).) Even if Association had addressed this issue, there is no public interest in determining whether the DDRC's approval of the *design* of the Proposed Construction, particularly its height, was appropriate.

Association lacks standing to bring its challenges to the Proposed Construction. This case should have been dismissed by the circuit court pursuant to the clear authorities set forth in Appellants' briefing. By finding that Association had standing and that the public interest exception to standing applied, the circuit court committed reversible error.

To the extent Association's claims are not dismissed on this basis, the following additional legal reasons cause Association's challenges to fail as a matter of law.

II. ASSOCIATION NAMED THE WRONG TRINITAS ENTITY.

In its initial pleading, Association named Trinitas Ventures, LLC as the defendant in this case. However, the applicant for both the Certificate of Site Plan Approval and Certificate of Design Approval before the DDRC was not Trinitas Ventures, but rather Trinitas Development. Failure to name the proper development permittee to this case is fatal and mandates dismissal of action as a matter of law. Trinitas raised this issue in its Motion to Dismiss. (R. pp. 250-268.) The circuit court failed to address it in the Order Denying Motions to Dismiss (R. pp. 1-32) and, since that time, Association has taken no steps to amend the caption.

Development permittees are necessary parties to appeals of their respective permits. *See Spanish Wells Property Owners Ass'n v. Bd. of Adjustment of the Town of Hilton Head Island,* 295 S.C. 67, 69, 367 S.E.2d 160, 161 (1988) ("[W]e adopt the majority rule and hold that a development permittee is a necessary party to an appeal of its permit."). In *Spanish Wells*, the circuit court dismissed an appeal from a decision of the Hilton Head Island Planning Commission for failure to

name the development permittee (but allowed the appellant fifteen days leave to add the permittee as a party). *Id.* at 67, 367 S.E.2d at 161. Instead of amending, the plaintiff appealed the court's ruling that a development permittee is a necessary party. The appellate court, addressing only that issue, adopted the majority view that a development permittee is a necessary party to an appeal of its permit. *Id.* at 69, 367 S.E.2d at 161.

Here, there is no question Association named the wrong Trinitas entity. Association's appeal should be dismissed for failing to add Trinitas Development as the necessary party to this appeal.

III. ASSOCIATION'S CHALLENGE TO CITY'S SITE PLAN REVIEW PROCESS FAILS AS A MATTER OF LAW.

A. Association failed to timely appeal the DDRC's Site Plan Approval Decision.

There are *two* DDRC decisions at issue in this appeal: First, the DDRC's decision on March 12, 2020 to grant Trinitas' application for site plan approval (the "Site Plan Approval Decision"). Second, the DDRC's decision on July 9, 2020 to grant Trinitas' application for design approval (the "Design Approval Decision"). These are two separate, not combined, applications, and were decided by two different decisions by the DDRC after separate hearings on different dates. It is undisputed that Association failed to timely appeal the DDRC's March 12, 2020 Site Plan Approval Decision. This failure is fatal to half of Appellant's appeal pursuant to S.C. Code Ann. § 6-29-900(B) (2003). Therefore, this honorable Court should find that Association's challenge to the Site Plan Approval Decision is not appropriately before this Court and the circuit court's decision reversing the DDRC's Site Plan Approval Decision was erroneous.

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." In *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361 (Ct. App. 2005),

the appellate court 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.

Association was present through its representatives at the DDRC's March 12, 2020 and July 9, 2020 public hearings. Association, therefore, had actual knowledge of the DDRC's Site Plan Approval Decision on March 12, 2020, as well as its Design Approval Decision on July 9, 2020. Nevertheless, Association failed to timely appeal the March 12, 2020 Site Plan Approval Decision by filing within 30 days. Like *Blind Tiger*, this Court must strictly enforce the statutory deadline from which to appeal an administrative decision and hold that the Site Plan Approval Decision is not appropriately before the court. As a consequence, the circuit court's decision to reverse the Site Plan Approval Decision was erroneous.

B. Association failed to preserve the *ultra vires* issue for judicial review.

Association argued that City's delegation of site plan review to DDRC was *ultra vires.* However, Association 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. Association's argument was 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).

Only Mr. Hubbard raised the issue of *ultra vires* delegation when he appeared, in his individual capacity, before the DDRC. At that time, Mr. Hubbard was not representing Association, as he is now. (*See* R. pp. 960-1168 at March DDRC135-147.) Mr. Hubbard's arguments were not made by *Association* and therefore Association 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 Association 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-association. *Id.* at 543, 419 S.E. 2d at 776. On subsequent appeal, only the Association-neighborhood remained as a petitioner. At that time the neighborhood attempted to raise the legal issues 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 Association failed to raise the alleged issue of improper delegation of authority to review site plan applications, instead attempting to adopt Mr. Hubbard's opposition before the DDRC, Association failed to preserve this issue. Therefore, the circuit court erred by addressing this issue. The circuit court's Final Merits Order should be vacated as to any site plan issues.

C. 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 under the *Guidelines*. 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. (R. pp. 1328-1372 at 15:14-16; 15:17-19, 15:25-16:2.) Association concedes: "[t]he Chair of the DDRC ruled that the DDRC *could not and would not* address this issue." (R. pp. 101-118 at ¶ 35 (emphasis added).)

It was therefore improper for the circuit court, on appeal, to hear and determine issues that were outside the DDRC's jurisdiction under S.C. Code Ann. § 6-29-930(A) (stating the circuit court's role is to consider *only* whether the DDRC's decision was correct as a matter of law). The circuit 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). Instead of refusing to hear this argument asserted by Association, the circuit court considered the issue and ruled in Association's favor. (R. pp. 43-93 at pp. 45-56.) The orders on this issue should likewise be reversed.

D. The Final Merits Order applied the wrong remedy concerning Association's claim that the City's delegation of site plan review to the DDRC is ultra vires.

Finally, to the extent the circuit court invalidated and reversed the DDRC's Site Plan Approval Decision as the remedy for Association's challenge that the City's ordinance was an *ultra vires* delegation of authority, the court's orders are legally invalid and should be reversed. Association conceded and the circuit court accepted that the remedy for an *ultra vires* act is to void

the act involved. *Sinkler v. City of Charleston*, 387 S.C. 67, 78, 690 S.E.2d 777, 782 (2010) (in reviewing a challenge to a zoning ordinance, holding that the circuit court correctly ruled the ordinance invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act). (*See* R. pp. 43-93 at p. 55.)

The alleged *ultra vires* act involved here is the City's adoption of Section 3.5.4 within the *Guidelines* via City ordinance section 17-253. (R. pp. 616-696 at § 17-253.) Association purportedly brought its *ultra vires* challenge to City's delegation of site plan review in the general jurisdiction of the court, and not as an alleged appeal under S.C. Code Ann. § 6-29-900(A) because Association acknowledges that it failed to timely appeal the Site Plan Approval Decision. However, Association requested, and the circuit court ordered, both the ordinance invalid and reversed the Site Plan Approval Decision. By reaching beyond the City's alleged unlawful legislative act to reverse a quasi-adjudicative decision by the DDRC, the circuit court committed reversible error. The circuit court should not have remedied the alleged *ultra vires* issue by invalidating and reversing the DDRC's Site Plan Approval Decision as to the Trinitas' Proposed Construction.

IV. THE *GUIDELINES* DO NOT CONSTITUTE AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER FROM CITY TO THE DDRC.

Association asserted the *Guidelines* are an improper delegation of the City's legislative powers to the DDRC because the *Guidelines* were adopted "as an ordinance." (R. pp. 277-329 at p. 298.) Association argues 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.*) The Final Merits Order discussed Association's claim that the *Guidelines* that are so open-ended that they amount to an unlawful delegation of legislative authority; however, the circuit court declined to rule on it, citing to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) and *Heilker v. Zoning*

Board of Appeals, 346 S.C. 401, 552 S.E.2d 42 (2001). However, the circuit court concluded: it was "not necessary or useful" to rule on the issue. (R. pp. 43-93 at p. 70.) For the following reasons, Association's arguments lack merit and, to the extent the circuit court failed or refused to accept Appellants' arguments on this issue, should be reversed.

There is no legal or binding mandate as a result of the drafter's "recommendation" to the City and Association makes no attempt to argue otherwise. Indeed, Association's 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). Association's argument should also be deemed abandoned.

Further, even if Association'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.* (R. pp. 616-696 at § 17-253 ("Development within the –DD area must comply with design guidelines set forth in this Code and in the [*Guidelines*].").) Association fails to articulate why City's adoption of the *Guidelines* in this manner is unlawful or void.

Association also argues that the *Guidelines* provide nothing but "mere vague suggestions that provide no meaningful limit on the exercise of administrative discretion." (R. pp. 101-118 at ¶ 25(b); R. pp. 277-329 at pp. 299, 302.) However, in its earlier response to Motions to Dismiss, Association conceded that the *Guidelines* can be interpreted in a constitutional manner. (*See* R. p. 361 ("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.").) Association's earlier position

was directly contrary to the position it took in the final merits stage challenging the DDRC's Design Review Decision. Association should have been judicially estopped from reversing course. *See Cothran v. Brown*, 357 S.C. 210, 215, 592 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 Association's inconsistent positions is amplified by the fact that Association's position relies on an assumption that is unsupported by the record. Association assumes the DDRC adopted an interpretation of the *Guidelines* proposed in an electronic email from a City staff member to Association's President. (*See* R. pp. 1196-1284 at 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 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).

"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.*

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[.]" (R. pp. 616-696 at § 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). 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. (R. pp. 616-696 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. "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. (R. pp. 616-696 at § 17-653(c).) Such requirement provides 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.").

Association cherry picks terms like "illustrative," "should," and "non-binding," from the *Guidelines* for its basis for arguing that they are "literally non-binding" and conflict with the nondelegation-of-legislative power doctrine. (R. pp. 101-118 at ¶ 25(b); R. pp. 277-329 at p. 298.) Association 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. Association isolates words from the *Guidelines* and misuses them without context. "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 v. Columbia Bd. Of Zoning Appeals*, 395 S.C. 499, 505,

719 S.E.2d 660, 663 (2011) ("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*, supra. Chapter 5 addresses design considerations for construction of new buildings. (R. pp. 697-807 at p. 764.) As recognized in Section 5.1, "City Center is a complex area with a variety of development settings" and corresponding design styles." (*Id.*) 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." (R. pp. 697-807 at p. 764, § 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[.]

(R. pp. 697-807 at p. 765, § 5.3.1.)

Association 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). (R. pp. 277-329 at pp. 299-301.) 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." 190 S.C. 92, 2 S.E.2d at 394.

In contrast, Section 5.3.1 of the *Guidelines* specifically states that buildings are, "as a general rule," to be between two and five stories. (R. pp. 697-807 at p. 765, § 5.3.1.) 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 required 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, 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. (R. pp. 697-807 at p. 764, § 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. (R. pp. 616-696 at § 17-275 at note c ("Buildings between the height of 50 and 75 feet may be allowed[.]").) Further, the DDRC considered the "rhythm of the existing development pattern" and "context" of surrounding buildings. During the DDRC's March 12, 2020 meeting, City staff prepared and presented a "map to show the [Proposed Construction's] relationship to the City Center [-DD]." (R. pp. 1328-1372 at 30:3-17; *see* R. pp. 960-1168 at 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 Design District. "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." (R. pp. 1328-1372 at 31:21-23.) The Proposed Construction is 75 feet tall and within the rhythm and context of surrounding buildings.

Association's selective 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 Association asserts.[25]

V. ASSOCIATION'S CHALLENGES TO THE DDRC'S APPLICATION OF THE *GUIDELINES* AS TO BUILDING HEIGHT FAIL AS A MATTER OF LAW.

A. Association's complaints about the Design Approval Decision focus solely on *City's staff* interpretations of the *Guidelines*, not the *DDRC's* decision.

Association focused its challenge as to the DDRC's application of the *Guidelines* as to height not on the DDRC's Design Approval Decision itself, but, instead on statements made by an employee of the City of Columbia, Lucinda Statler. (R. pp. 101-118 at ¶¶ 3(a)(1), 21-22, 24, 26, 28, 31; R. P. 119-121; R. pp. 277-329 at pp. 301-302, 306-307, 310-311.) Association's reliance on Ms. Statler's statements was improper and should not have been considered or relied upon by the circuit court when issuing the Final Merits Order. The Order is reversible to the extent it relies on such evidence as the "DDRC's decision." (*See* R. pp. 43-93 at pp. 58, 64, 78, 87.)

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.) Association's case and the circuit court's Final Merits Order are fatally defective in that both improperly and exclusively focus on alleged legal errors contained in a City employee's email, *not* the "decision of the [DDRC]."

Association 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

[25] That Association seeks to have the court strike down the *entirety* of the *Guidelines* based on the singular argument that Section 5.3.1 is unconstitutionally vague is confusing. The *Guidelines* *protect* the City Center –DD (and Association's neighborhood) by requiring certain elements of design which otherwise would not exist if the *Guidelines*, as a whole, were struck down.

"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." (R. pp. 101-118 at ¶ 3(a)(1); *see also* R. pp. 277-329 at pp. 305-314.) Legal interpretations to which Association assigns mistake were not made *by the DDRC* in its Design Approval Decision, but instead, a City employee in an email to Association's President, Mr. Gottshall. (*See* R. pp. 277-329 at pp. 301-302, 306-307, 310-311.) Association claims the DDRC "based [its decision] on a legal misinterpretation by the staff of the DDRC." (*Id.* at pp. 287-306.) 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." (R. pp. 1416-1422 at 18:5-21.) This includes all evidence, testimony, and documentation, presented to the DDRC at three separate public hearings and one public work session. 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 DDRC's 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.*)

Association failed to suggest any error of law in the DDRC's Design Approval Decision made on July 9, 2020. Instead, Association took issue with opinions of a City employee. Association's appeal of the DDRC's Design Approval Decision should have failed because it did not

identify any part of the actual decision by the DDRC that contained an error of law. The Final Merits Order which concluded otherwise, and further relies on City's employee's email rather than the DDRC's Decision Approval Decision itself, constitutes reversible error.

B. The DDRC did not abuse its discretion in applying City's *Guidelines*.

Association asserted 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*. (R. pp. 101-118 at ¶¶ 21-31; R. pp. 277-329 at pp. 301-314.) "An abuse of discretion occurs when a . . . decision is controlled by an error of law or is without evidentiary support." *Mictronics, 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 have been upheld by the circuit court.

1. The DDRC's Design Approval Decision was not the result of an error of law.

Association 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. *Rockville Haven, LLC v. The Town of Rockville*, No. 09-CP-10-4417, 2010 WL 69975157. Association contends that "overlay district[s] like the –DD area [are] designed to impose design requirements in addition to the underlying zoning that already exists." (R. pp. 101-118 at ¶ 2; *see also id.* at ¶¶3(a)(1), 9, 22(1)); R. pp. 277-329 at pp. 287-288, 312-314.) However, Association'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 (2004). Section 17-653 of the City's ordinances empowers the DDRC to administer the *Guidelines*. (R. pp. 616-696 at §§ 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,* 312 S.C. 162, 439 S.E.2d 317. A court should refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision. *Talbot,* 222 S.C. 165, 72 S.E.2d 66.

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).

Association'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." (R. pp. 697-807 at p. 765, § 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.*) Association's argument makes the *Guidelines* more restrictive than applicable zoning ordinances and ignores the clearly-stated legislative intent which compels an opposite conclusion. Association'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.

Association's argument relies heavily on Section 6-29-960 of the Enabling Act and City's ordinance Section 17-181. (*See* R. pp. 277-329 at pp. 307-308.) 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." (R. pp. 616-696 at § 17-181.) Association's reliance on these authorities is misplaced. It is clear that both are intended to be a gap filler in statutory interpretation only when specific ordinances are in conflict and neither express which ordinance control.

In determining whether there is a conflict between ordinances or between a statute and an ordinance, the Court must determine whether "conditions, express or implied, are inconsistent or irreconcilable with the state law." *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) (general rule of statutory construction is that a specific statute prevails over a more general one).

Here, Association 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 Association also claims is so unclear and unspecific that it should be declared unconstitutionally vague. (R. pp. 277-329 at pp. 302-304.) 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." *National Western Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 175 F. Supp.2d 489 (S.D.N.Y. 2000). Here, Association's position is internally at odds. Section 5.3.1 of the *Guidelines* is somehow both "standardless" (R. pp. 277-329 at p. 304) and "more restrictive than the underlying zoning of 75 feet" (*id.* at R. p. 305). Association cannot have it both ways.

Even setting aside the obvious internal inconsistency with Association'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." (R. pp. 697-807 at p. 765, § 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 rules in Section 6-29-960 of the Enabling Act and City Ordinance Section 17-181 are inapplicable.

Association's argument also ignores the plain language of the *Guidelines* and City ordinances. 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." (R. pp. 697-807 at p. 765, § 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[.]" (R. pp. 697-807 at p. 765, § 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* R. pp. 1416-1422 at 18:5-21.) As such there was no error of law.

The DDRC's Design Approval Decision referenced *both* City's zoning ordinance and Section 5.3.1 of the *Guidelines*. (R. pp. 1415-1422 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. (R. pp. 616-696 at § 17-275 at note c ("Buildings between the height of 50 and 75 feet may be allowed[.]").) Since the height of the Proposed Construction is undisputedly within this limit, it is compliant with this ordinance and is compliant with the *Guidelines*.

As further evidence that the Proposed Construction complies with City's ordinances and *Guidelines*, City's express preference is for larger, denser, new construction, like the Proposed Construction, within the City Center -DD. (R. pp. 616-696 at § 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* R. pp. 697-807 at p. 765, § 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.").) 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 Association 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, Association failed to show legal error and cannot show prejudice. The DDRC's Design Approval Decision should have been upheld as not based on any abuse of discretion and lack of prejudice to Association. The Final Merits Order failed to apply the correct deferential standard to the DDRC's decisions and failed to properly apply City's ordinances and *Guidelines* to the circumstances presented in this case.

2. The DDRC's Design Approval Decision is supported by evidence.

Association contended there is insufficient evidence to support the DDRC's Design Approval Decision. (R. pp. 101-118 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.").) Association appears to have abandoned this argument which it did not include in its brief to circuit court. *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 issues and rulings not challenged in an initial brief are deemed abandoned). Nevertheless, based on a review of the extensive record supporting the DDRC's Design Approval Decision, Association's argument, even if preserved for review, should have been rejected. Instead, the circuit court ignored this issue and concluded that the DDRC's Design Approval Decision was incorrect as a matter of law.

"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[.]" (R. pp. 616-696 at § 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.* (R. pp. 1416-1422 at 18:5-21.)

Association believes that "[t]he comments in the staff report should contain reasons for" certain conclusions, but Association 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 Association contends the DDRC failed to justify certain conclusions, Association's protestation is unsupported and should be rejected.

First, Association contends the DDRC's Design Approval Decision lacks evidentiary support for "[n]ot following the five-story maximum rule." (R. pp. 101-118 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.

(R. pp. 1416-1422 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, Association 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." (R. pp. 101-118 at ¶ 29-30.) The *Guidelines* state that "height and scale of new buildings within City Center should complement existing structures." (R. pp. 697-807 at p. 765, § 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." (R. pp. 697-807 at p. 765, § 5.3.1.) City staff prepared and presented a "map to show the [Proposed Construction's] relationship to the City Center [-DD]." (R. pp. 1328-1372 at 30:3-17; *see also* R. pp. 960-1168 at March DDRC19.) The map shows that 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 adjacent to the Proposed Construction are 60-80 feet tall.[26]

Association 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 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.

[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." (R. pp. 1328-1372 at 31:21-23.)

The University of South Carolina School of Law and Hilton Garden Inn are. Further, Association's historic neighborhood begins more than a block away from the Proposed Construction and extends many city blocks away from the Proposed Construction.

Proposed neighboring buildings put forth by Association *were considered* by the DDRC as set out in the record on appeal. The DDRC simply chose to conclude that other, taller, buildings, were more relevant for consideration. 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[.]" (R. pp. 1328-1372 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. Association's assertion that no evidence supports the DDRC's decision is not supported by the record and should fail.

Third, Association 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." (R. pp. 101-118 at ¶ 29-30.) However, the DDRC *did* consider documents and testimony submitted by Association 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." (R. pp. 1416-1422 at 18:5-21 (citing *Guidelines* at Section 5.3).)

Finally, Association contends the DDRC erred by "[n]ot considering the impact of wall articulation and the pitched roof of the law school on its mass." (R. pp. 101-118 at ¶ 29-30.) However, the DDRC *did* consider Association'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 in its Design Approval Decision 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). (R. pp. 1416-1422 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.*)

Association's allegations that the DDRC's Design Approval Decision was not supported by evidence is simply not correct. Instead, Association's protestations are a mere complaint that the DDRC did not *agree* with Association's opposition to the Proposed Construction and, instead, exercised its discretion under the *Guidelines* to approve the Proposed Construction. The DDRC's Design Approval Decision was based on 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 Final Merits Order, which decided that the DDRC's Design Approval Decision was a mistake of law constitutes reversible error which should be corrected by this Court.

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 v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 915 (Ct. App. 1995) (quoting *Knowles v. City of Aiken*, [305 S.C. 219,] 407 S.E.2d 639 (1991) (other internal citations 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 DDRC's Design Approval Decision should be upheld by this Court.

CONCLUSION

DDRC and Trinitas respectfully request that this honorable Court issue an opinion holding:

(1) the circuit erred by finding Association had standing to bring any of the challenges at issue in this case;

(2) the circuit court erred by reversing the DDRC's Site Plan Decision because Association did not properly preserve any issues regarding the site plan for judicial review and the awarded legal relief was improper;

(3) the circuit court erred by finding the City's adoption of the *Guidelines* to be an unlawful delegation of legislative authority;

(4) the circuit court erred by reversing the DDRC's Design Approval Decision and finding the Design Approval Decision was supported by the evidence heard and received by the DDRC and it was based on an appropriate and reasonable application of the City Center –DD *Guidelines* and City ordinances.

Respectfully submitted:

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