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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT

The Honorable L. Casey Manning
Fifth Circuit Judge

Case No. 2022-00389

UNIVERSITY HILL NEIGHBORHOOD ASSOCIATION, ... RESPONDENT,

v.

CITY OF COLUMBIA, CITY OF COLUMBIA DESIGN AND DEVELOPMENT REVIEW COMMISSION, AND TRINITAS VENTURES, LLC .... APPELLANTS,

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BRIEF OF RESPONDENT
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STATEMENT OF ISSUES ON APPEAL

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B. DID THE TRIAL JUDGE ERR IN FINDING THAT THE ISSUE OF UNLAWFUL DELEGATION DID NOT NEED TO BE ADDRESSED?

IV. DID THE ASSOCIATION HAVE STANDING?

V. IS TRINITAS VENTURES THE PROPER DEFENDANT IN THIS LITIGATION?

STATEMENT OF THE CASE

I. PARTIES

This appeal involves two decisions by the City of Columbia Design and Development Review Commission (DDRC) that granted final approvals for the construction of "Trinitas," a proposed eight-story, 75 feet tall apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) DDRC, a "Board of Architectural Review" established pursuant to S.C. Code §§ 6-29-880 et seq. and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), the real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein.

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

II. PROCEDURAL HISTORY

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

January 2020 public hearing, both applications were denied. (R. pp. 987–90), filed as Supplemental Record on Appeal by DDRC, filed Apr. 20, 2021.

Subsequently, these denials were rescinded at a special called meeting on February 7. Prior to voting to rescind, the DDRC went into executive session to receive legal advice pursuant to Section 30-4-70 of the South Carolina Code. (R. pp. 1007–08).

At the regular March hearing, the DDRC granted site plan approval for the project. (R. pp 1087–88). Design approval was granted by the DDRC at the regular July public hearing. (R. pp. 1161–62). In addition to these four public hearings, the DDRC conducted a "work session" on the design approval on June 10, 2020 (*See* R. pp. 1089–1142).

On July 23, 2020, the Association filed a Complaint/Appeal in Circuit Court. The DDRC, Trinitas, and the City each filed an Answer and a Motion to Dismiss. The motions to dismiss were denied. (R. pp. 4–36 (Order filed Oct. 7, 2020)). The denial of these motions was appealed. The Court of Appeals dismissed the appeal on the ground that the order was not immediately appealable. (Appellate Case No. 2020-001586, Order filed Jan. 14, 2021).

Following the Order Denying Motions to Dismiss, the parties fully briefed all issues in this case. (Association's Brief, Respondents' Joint Brief, Association's Reply Brief.) A final merits hearing was held on October 14, 2021. (*See* R. p. 570–615.) In a fifty-five-page order filed on December 7, 2021, the Circuit Court adopted the 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 it discretion by making a mistake of aw in deciding that the height of the proposed building was determined by the underlying zoning rather than the -DD overlay zoning, 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.

(R. pp. 37–93.) On December 17, 2021, Appellants filed a joint Motion to Reconsider the Final Merits Order. (*See* R. pp. 507–25.) The Circuit Court denied the Motion to Reconsider by Order filed March 10, 2022. (R. pp. 94–99.) Appellants timely filed a Notice of Appeal to the Court of Appeals on March 30, 2022. (R. pp. 143.)

At the same time as the Notice of Appeal was filed, Appellants filed: (1) a Motion to Expedite Appeal with the Court of Appeals; and (2) a Motion to Certify the Appeal Pursuant to Rule 204(B) with the Supreme Court. The Motion for Expedited Appeal was denied on May 19, 2022. The Motion to certify was denied on June 28, 2022.

III. FACTS

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

The overlay district herein is termed the "City Center Design/Development District of Columbia, South Carolina" and is referred to as "-DD area" in Sections 17-253 and 17-655(b)(2) of the Columbia City Code.[1] As indicated in Argument I below, the -DD overlay district is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists.

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

This approach was chosen even though the *Guidelines*: (1) were prepared by planners to guide the legal task of drafting an ordinance, and (2) explicitly state that the *Guidelines* are "non-binding" and are not meant to serve as an ordinance. Instead, as noted in Section 3.5.2, "*It is through the Zoning Ordinance that the Design Development Guidelines will be implemented*. . . ." (emphasis added) As an example of this process, in discussing "Building Heights" at page 5-2, the *Guidelines* state: "This section provides *non-binding* general direction for development within City

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[1] The Parties have filed a "Joint Stipulation Regarding City of Columbia Ordinances." ["Joint Stipulation"] Exh. A of the Joint Stipulation contains selected portions of the City of Columbia Code of Ordinances, Chapter 17, Planning, Land Development and Zoning. (See Appendix for Contents of Record)

[2] *See* Exh. B to Joint Stipulation, *supra* note 1.

Center, with the recommendation that the *City's regulatory plans and codes be amended* to reflect the guidance included here." (emphasis added).

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

IV. STANDARD OF REVIEW

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

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

The site plan review claim and the unlawful delegation claim were combined with the appeal pursuant to Section 6-29-900(A) for three reasons. First, the facts concerning all three of the Association's claims are interconnected in the record concerning the appeal of the decisions

pursuant to Section 6-29-900(A). Second, combining these two claims enables Trinitas to assert its interests in these two claims. Third, the Association was motivated to assert the *ultra vires* claim and the unlawful delegation claim at this point in time, rather than earlier, because there was no harm to substantial interests of the Association and its members until the DDRC approved the site plan and the design for the Trinitas project.

A third challenge is an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. The Association argues that the DDRC abused its discretion in approving the height of the Trinitas apartment building because it made a mistake of law in deciding that the height of the proposed Trinitas project should be determined by the underlying zoning rather than the -DD overlay zoning.

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

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

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

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

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

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

(emphasis added) The Association argues that the DDRC abused its discretion by committing an error of law in its decision that the underlying zoning, rather than the overlay zoning set forth in the *Guidelines*, controlled the determination of the height of the building.

ARGUMENTS

I. THE DDRC MADE A MISTAKE OF LAW IN APPLYING THE UNDERLYING ZONING TO DECIDE THE HEIGHT ISSUE RATHER THAN THE OVERLAY ZONING PROVISIONS.

A. The DDRC interpretation of the height restrictions in the *Guidelines*

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

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

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

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

(emphasis added)

The DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, even though the "contextual approach" to evaluating the design of new projects is *"critical"* and *"fundamental"* to the implementation of the *Guidelines*, the decision was based on a legal misinterpretation that the overlay zoning contained in the *Guidelines* did not regulate the height of the building. The basis of this interpretation was addressed in an email from Lucinda Statler (the City's Principal Planner/Urban Design) to Thomas Gottshall, President of the University Hill Neighborhood Association. (*See* R. pp. 119–21.) Part of this email states:

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

(emphasis in original)

This interpretation was consistently adopted in the *Staff Comments* for the meetings addressing height as a part of design review.[3] The DDRC and Trinitas claim that the Association should address the DDRC's decision rather than the staff's interpretation. However, this argument ignores the explicit directions by the staff to the Commission members. For example, the *Staff Comments* for the July 2020 meeting states: "The building height and mass remain the same [as earlier versions of the proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance." (R. p. 1207.)

In addition, at the June 10, 2020, "work session," the Staff of the DDRC stated that it wanted to "*ensure that we all understand that the DDRC can't require a reduction in the allowable height or the allowable building envelope that's permitted by zoning.*" (emphasis added) The Chairman of the DDRC replied to this statement as follows: "*Right. And I appreciate that. Understand that.*" (R. pp. 1391–92(emphasis added)).

Finally, the motion to approve the design by the chair of the DDRC explicitly adopts the staff position on the role of the underlying zoning. The Chairman's remarks contain the following language as the reason for the decision on height: "*[The position of the opponents to the proposed*

[3] The comments by the staff of the DDRC consistently took the position that the underlying C-3 zoning determined the height. Record, Exh. 1, pp. 013–014; Exh. 3, p. 12; Exh. 5, p. 011.

height] seems to hinge on the notion that [the] DDRC has the ability to request the building be shorter than [underlying] zoning allows and our reading is that that's not the case, at least, mine is, and staff's reading is as well. . . . [W]e are limited in our purview." (R. p. 1421, ln. 12–24 (emphasis added).)

Based on this interpretation concerning the role of the underlying zoning in determining height, the motion by the Chairman contained the following language:

> [T]he applicant meets applicable design guidelines. Specifically, it meets the following sections of section 5.3, building mass and organization which are 5.3.1 building height, in which is stated, quote, *The city's comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.*

(R. p. 1422 (emphasis added).)

B. The DDRC interpretation was a mistake of law.

The DDRC interpretation was a mistake of law for four reasons. First, the DDRC interpretation conflicts with the Enabling Act and with the treatment of overlay districts by the courts. Second, it is contrary to provisions in the Enabling Act and the Columbia City Code concerning the approach to conflicts between requirements. Third, the DDRC analysis is contrary to the treatment of "vested rights" in the Columbia City Code. Fourth, the interpretation ignores the explicit intent in the *Guidelines* concerning the role of the *Guidelines*.

1. The DDRC interpretation conflicts with the Enabling Act and with doctrine concerning overlay districts.

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

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

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

The *Guidelines* provide two standards for determining the permissible height of a building. First, the *Guidelines* adopt "a general rule [that] . . . buildings within most of the City Center should be *no more than five stories*." *Guidelines* § 5.3.1 (emphasis added). Second, as indicated at Part A of this Argument, the *Guidelines* note that a "contextual approach is fundamental to the implementation of the Guidelines" and that it is "critical that in applying these Guidelines . . . the City be consistent in considering the height of proposed structures as they relate to the *adjacent* development context."[4] (emphasis added) The development adjacent to the proposed apartment

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[4] The *Guidelines* also state:

> [T] design of a building should be *compatible* with its function and *with its surroundings (context)*. New buildings should be compatible with the existing more traditional buildings. . . . These projects 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. . . .

Guidelines § 5.2 (emphasis added).

building is predominantly one-, two-, and three-story buildings.[5] Based on these two quantitative measures of adjacent development, the maximum height would either be three stories or five stories.

Appellants ignore all the "adjacent" context except for two buildings. These exceptions are: (1) The University of South Carolina Law School, which is set off by large open spaces; and (2) a hotel, situated across Gervais Street, which is a wide, very busy street[6] and outside the -DD district. Appellants also refer to taller buildings that are "blocks away." (Brief DDRC and Trinitas, p. 3)

As indicated above in the discussion of the Facts in Part III of this Brief, an overlay is described in Section 6-29-720(C)(5) of the Enabling Act as a district that "*imposes* a set of requirements *or relaxes* a set of requirements imposed by the underlying zoning district." (emphasis added) It is clear from the content of the *Guidelines* that the *Guidelines* are meant to impose requirements, not relax them.

The legal interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay like that involved herein and the underlying zoning backwards. Because the -DD design overlay involved herein was adopted to *increase* requirements by imposing *additional* requirements in order to address design concerns, the current overlay zoning controls where there is a conflict between the underlying zoning and the additional requirements of the overlay zoning. If this were not the case, there is no reason to bother with the time and expense of applying the increased requirements of the zoning overlay scheme.

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[5] *See* R. pp. 1010, 1095.

[6] Section 2.5.1 of the *Guidelines* notes at p. 2–7 that the Gervais Street "corridor accommodates over 40,000 vehicle-trips per day. . . ."

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

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

(emphasis added)

South Carolina follows this approach of "two sets of zoning requirements" in overlay cases. For example, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) involved an "Airport Overlay District" (AO) which, among other things, restricted certain uses and expansions within the AO District. The church claimed it was entitled to a building permit for a proposed expansion because: (1) an earlier permit included the expansion;[7] and (2) an incorrect approach had been used in determining whether the expansion would increase the "occupant load" of the church's property. "Occupant load" in the area within the AO District was important because of a concern for a high potential for accidents affecting the public areas near a military airport. The defendants rejected both of the church's claims.

The church appealed, and a master-in-equity ruled in favor of the church. The Court of Appeals reversed the decision of the master-in-equity. In terms of the "occupant load" concern of the AO District, the Court held "the evidence in the record clearly supports the Planning

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

Commission's finding that the [proposed] fellowship hall would increase the occupant load for the site." 828 S.E.2d at 241. In reaching this decision, the Court followed the general principle that, where an overlay imposes additional requirements, those additional requirements supplement or replace the underlying zoning.

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

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

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the height requirements in the *Guidelines*, which had become a part of "current zoning regulations" when they were adopted by reference by the Columbia City Council. As indicated above in Part B-1 of this Argument, the height requirements in the *Guidelines* require either a three-story or a five-story maximum height. As a result, the DDRC failed to follow the general rule of making the parcel within the overlay

district "simultaneously subject to two sets of zoning regulations." This error of law constitutes an abuse of discretion.

2. The DDRC interpretation of the *Guidelines* is contrary to provisions in the Enabling Act and in the Columbia Zoning Code concerning conflicts between requirements.

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

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

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

Section 17-181 of the Columbia City Code states:

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

(emphasis added)

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

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

The DDRC did not refer the height issue to the Zoning Board of Adjustment.

As indicated above at Part B-1 of this Argument, the two quantitative *Guideline* measures of height are "five stories" and "adjacent development context." These two *Guidelines* standards for determining height are more restrictive than the underlying zoning of 75 feet. Given the requirements in the Columbia City Code and the Enabling Act that the "more restrictive" standards shall govern, the more restrictive *Guideline* approach should have determined the height rather than the less restrictive underlying zoning.

3. The DDRC analysis of "vested rights" conflicts with the approach to vested rights in the Columbia Zoning Code.

The DDRC and Trinitas claim that Trinitas has a vested right to the site plan approval adopted at the March 2022 DDRC meeting. The problem with this claim is that it simply assumes that the grant of power to address site plan review is not ultra vires. Given the decision by the City to delete Section 3.5.4 from the *Guidelines*, it appears that the City agrees with the Association. In any event, until the ultra vires issue is addressed, it is not possible to consider the vested rights issue.

To the extent that the DDRC approach relies on the concept of "vested rights" to determine that the underlying zoning prevailed over the overlay zoning, the interpretation conflicts with the definition of vested rights in Columbia City Code, Section 17-2(a). This section states: "A vested

right is triggered only upon the approval or conditional approval of a site-specific development plan." Section 17-1(b) defines a "site specific development plan" as follows: "Site specific development plan means those documents that comprise a complete application for a zoning permit, certificate of zoning compliance, variance, special exception, planned unit development, sketch plat or plan, or other similar approval that authorizes the developer or landowner to proceed with investment in grading, installation of utilities, streets and other infrastructure, and to undertake other significant expenditures necessary to prepare for application for a building permit." An underlying zoning classification of C-3 zoning does not satisfy this definition of site-specific development plan.

4. The DDRC interpretation is inconsistent.

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

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

> Maintain the predominant difference between upper story openings and street level storefront openings (windows and doors). Usually, there is a much greater window area *(70 percent)* at the storefront level for pedestrians to have a better view of the merchandise displayed behind as opposed to upper stories which have smaller window openings *(40 percent)*.
> Whenever an infill building is proposed between two adjacent commercial structures, the characteristic rhythm, proportion and spacing of existing door and window openings should be maintained.

(emphasis added) Despite the quantitative nature of this guideline, the DDRC uses it rather than the underlying zoning to address the proportion of openings.

II. THE CITY'S GRANT OF POWER TO THE DDRC TO CONDUCT SITE PLAN REVIEW WAS ULTRA VIRES, THE TRIAL COURT DID NOT ERR IN REVERSING THE DDRC'S SITE PLAN APPROVAL, THE CHALLENGE TO THE DDRC'S SITE PLAN APPROVAL WAS TIMELY, THERE IS NO REQUIREMENT OF PERSERVATION OF ERROR AT A PUBLIC HEARING, THE DDRC LACKED THE POWER TO DECIDE THE ULTRA VIRES ISSUE, AND THE ULTRA VIRES ISSUE IS NOT MOOT.

A. Site Plan Review by DDRC is Ultra Vires because it Conflicts with the Enabling Act

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

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

Under the Columbia scheme of land of development regulation set forth in Article IV of Chapter 17 ("Planning, Development and Zoning") of the City Code, the Planning Commission is charged with implementing the land development regulations. As a part of this scheme, terms like "sketch plan," "site plan," and "preliminary plat" are used to identify specific types of plans. Columbia City Code § 17-464. For a category termed "Group Development,"[8] a system of plan review termed "site plan review" is established. (See Columbia City Code §§ 17-464, 17-581 through § 17-589).

Section 3.5.4 of the *Guidelines* for the -DD area shifts the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC.[9] This approach to site plan review is *ultra vires* because it conflicts with explicit language in Section 6-29-1150(A) of the Enabling Act, which addresses the submission of plans or plats to the planning commission. This subsection addresses "Submission of plan or plat to planning commission" and states: "The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the *planning commission or designated staff*." (emphasis added). The shifting of site plan review to

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[8] There are three categories of "group development" which are subject to site review by the Planning Commission within the definition of "subdivision, development type" in Columbia City Code § 17-464.

[9] Section 3.5.4 of the *Guidelines* states:

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

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

the DDRC pursuant to the *Guidelines* conflicts with this clear mandate of Section 6-29-1150(A) concerning the role of the planning commission.

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

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

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

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

as would be allowed under AG-15. However, the minimum lot size for the PD was reduced to one acre.

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

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

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

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

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

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

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

Sinkler, 690 S.E.2d at 781, 782.

In authorizing the DDRC to undertake site plan review, the City of Columbia, like Charleston County in *Sinkler*, failed "to meet the requirements" of the Enabling Act. Consequently, this grant of power to the DDRC was *ultra vires* and is, therefore, invalid.

B. Voiding the DDRC Site Plan Approval was the proper Remedy for Ultra Vires Act by the City

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. *See, e.g., South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *Sinkler v. Boyd, supra* (holding circuit court properly invalidated rezoning); *O'Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city's decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of conveyance by Circuit Court); *City of North Charleston v. North Charleston District*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgement that certain contracts entered into by school district were *ultra vires* and, therefore, invalid).

The Appellants' argument concerning remedy is puzzling. The deletion by the City of Section 3.5.4 of the *Guidelines* was, in effect, an admission that the ultra vires challenge by the Association was valid. Given this "admission," it is clear that the City improperly granted the DDRC the power to conduct site plan review. Nevertheless, even though the DDRC lacked the legal power to make the decision, Appellants claim that the Trial Court erred by invalidating the site plan decision in order to provide the Association with a remedy for the improper grant of power. If Appellants' position concerning this remedy is valid, the resulting lack of any remedy

for the Association would, in the words of Mr. Bumble in *Oliver Twist*, mean: "If the law supposes that, the law is a ass—a idiot."

C. The Challenge to the Site Plan Review was Timely

Article V, Section 11 of the South Carolina Constitution provides: "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law." Because this grant of general jurisdiction supports the filing of this ultra vires action in Circuit Court, it was the basis of all of the South Carolina ultra vires cases cited above in Part B of this Argument, except *O'Brien v. South Carolina ORBIT*, which was filed in the original jurisdiction of the Supreme Court. Given this jurisdictional basis, the requirements of Section 6-20-900(A) do not apply to the ultra vires claim.

D. There is No Requirement to Preserve an Issue at a Public Hearing

Appellants DDRC and Trinitas argue that the Association failed to preserve the ultra vires issue because no representative of the Association raised the issue: There is no such requirement in the context of a public hearing.

Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008) addressed the issue of the due process rights of a landowner's request to subdivide his property. The court stressed that adjudication is very different from decisions by discretionary zoning boards and commissions. *See* 656 S.E.2d at 350–351. It is generally accepted that "the purpose of holding a public hearing is for the government to obtain public testimony or comment on a particular

matter."[10] Given this goal, it is absurd to say that a person's testimony only counts if that person "preserves" the error and appeals.

E. The DDRC Lacked the Power to Decide the Ultra Vires Issue.

The DDRC and Trinitas argue that the DDRC never decided the ultra vires issue. It is not clear why this matters.

Nor is it clear that the DDRC was not correct when it refused to address the question. When the ultra vires issue was raised at the March 12, 2020, meeting, the Chair responded that the question is "out of our hands." (R. p. 1378.) Appellants agree with the Chair's position. In their brief filed on July 21, 2021, Appellants argue that 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." (Br. Appellants, p. 24 (filed July 21, 2021)).

F. The Ultra Vires Issue Is Not Moot

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

This ordinance amendment does ***not*** moot the ultra vires problem with site review. Eliminating the section granting the DDRC the responsibility for site plan review does not eliminate the ultra vires problem. In fact, it makes the situation worse because the process of site

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

plan review by the planning commission involves matters that are also authorized for review by the DDRC under other provisions of the *Guidelines*. These other provisions have not been deleted.

The Columbia City Code provisions concerning site review of "group developments"[11] by the City of Columbia Planning Commission involve a number of concerns, including the following:

(1) Procedures and requirements for specific plans and constructions drawings (§ 17-582);

(2) Off-street parking (§ 17-583);

(3) Water and Sewer Service (§ 17-584);

(4) Storm Drainage (§ 17-585);

(5) Parking areas, driveways, and internal streets (§ 17-586);

(6) Building setbacks (§ 17-587);

(7) Internal design and spacing (§ 17-588); and

(8) Screening (§ 17-589).

Even though Section 3.5.4 has been deleted from the *Guidelines*, there are other sections of the *Guidelines* which are designed to implement Section 3.5.4 by addressing the site plan review concerns. These sections require the DDRC to address items that would ordinarily be addressed by the Planning Commission pursuant to the Ordinance provisions listed in the preceding paragraph. The provisions that have not been deleted include the following:

(1) Subsection 5.4.1 of the *Guidelines* sets out a scheme to determine setbacks, which are also regulated by the planning commission.[12]

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[11] *See supra* note 8, Columbia Zoning Ordinance § 17-464 (establishing three types of "group development").

[12] Columbia City Code § 17-587.

(2) Subsection 5.4.2 addresses "building orientation," which is also involved in planning commission review.[13]

(3) Section 5.5 addresses "open spaces," which are also a matter for planning commission review.[14]

(4) Section 5.10 addresses parking and screening, which are also reviewed by the planning commission.[15]

The legal status of these provisions is not clear. The City argues that the site plan provisions in the *Guidelines* will be applied by the Planning Commission. However, the City has not identified any official action or decision that adopts or implements such an approach.

The City also argues that site plan review is a "ministerial function." (Initial Brief of City at p. 17) A ministerial act or duty is defined as "one which a person performs in obedience to a mandate of legal authority without regard to or the exercise of his own judgment upon the propriety of the act to be done." *Godwin v. Carrigan*, 87 S.E.2d 471, 473–74 (S.C. 1955) (quoting from *Sumter Cnty. v. Hurst*, 189 S.C. 316, 1 S.E.2d 242, 244 (1939)).

The City contradicts its assertion concerning the ministerial nature of the site plan review by arguing that addressing the issues involved in site plan review, whether done by the Planning commission or the DDRC, involves considerable discretion when dealing with concerns like parking, setbacks, internal design and spacing, and screening. (Initial Brief of City at p. 9) Given this discretion, site plan review is clearly not ministerial. The City's inconsistency on this point is a good reason to view the City's made-up "solution" as extremely questionable.

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[13] *See id.* § 17-582.

[14] *Id.* §§ 17-582, 17-588.

[15] *See id.* §§ 17-582, 17-583, 17-586, & 17-589.

Because of this overlap of review authority by both the Planning Commission and the DDRC, there is a substantial likelihood that an application receiving a decision by the Planning Commission on a particular concern will conflict with a decision by the DDRC on the same concern. Such a result is obviously undesirable.

This problem of overlap of review by both the DDRC and the Planning Commission was identified at page 18 of Plaintiff's Memorandum in Opposition to Motion to Dismiss. Thus, the City was aware that Section 3.5.4 was not the only section involving an ultra vires grant of power. The City could have explicitly addressed the problem of the overlap in site plan review concerns. However, it chose not to do so.

III. EVEN THOUGH THE ADOPTION OF THE *GUIDELINES* AS THE OVERLAY "ZONING" MAY BE AN UNLAWFUL DELEGATION OF LEGISLATIVE POWER, THE TRIAL JUDGE DID NOT ERR IN FINDING THAT THE ISSUE OF UNLAWFUL DELEGATION DID NOT NEED TO BE ADDRESSED.

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

However, despite this explicit language concerning the need for "regulatory plans and codes" in a "Zoning Ordinance," the City Council chose to bypass the necessary steps of drafting and adopting an ordinance. Instead, the Council simply adopted the non-binding *Guidelines* as the

ordinance by adopting the *Guidelines* by reference. *See* Columbia City Code §§ 17-253, 17-655(b)(1). As a result of this approach, the DDRC and its staff have been authorized to apply a scheme of "illustrative" "non-binding" guidelines. Such an open-ended authorization constitutes an improper delegation of the City's legislative power.

The adoption of the *Guidelines* by reference results in extraordinary vagueness and contradictions. For example, Section 5.3.1 states that "it is not the intent of these guidelines to establish new height standards for development in City Center." However, this section also states:

> As a *general rule*, and consistent with *current zoning provisions* [, including these *Guidelines*, which have been adopted by reference as the overlay zoning,] buildings within most of City Center should be no more than five stories. . . . 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[.]*

The result is a statutory version of an MC Escher drawing.[16]

A. The City's Adoption of the *Guidelines* as the overlay zoning Constitutes an Unlawful Delegation

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

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

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[16] For a discussion of MC Escher, see *The Impossible World of MC Escher*, GUARDIAN (June 20, 2015), https://www.theguardian.com/artanddesign/2015/jun/20/the-impossible-world-of-mc-escher.

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

Id. at 470 (authorities deleted).

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

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

Id. at 470–71 (emphasis added) (authorities deleted).

In the regulation of land use, the unlawful delegation concern can also be expressed in terms of due process. For example, *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 516 S.E.2d 442, 445 (1999), stated: "When deciding whether to grant a variance, a local board must be *guided by standards which are specific* in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Adv., Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939)." (emphasis added) Because the

ordinance at issue was sufficiently specific, the decision at issue in *Restaurant Row Associates* was upheld.

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

> The ordinance before us is in no sense a zoning ordinance as provided in Sections 7390-7398, Code 1932, nor does it prescribe rules or conditions for the issuance of permits for the erection of billboards to which all persons similarly situated may conform. *It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them*, the right and power to absolutely prohibit the use of property for the erection of billboards.
>
> The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes no uniform rule upon which the special permission is to be granted.

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

B. Application of the Precatory, Illustrative, Non-binding *Guidelines* by the DDRC

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

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

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

(R. pp. 119–21 (emphasis added),)

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

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

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

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

(R. p. 1341 (emphasis added).)

At this hearing, Ms. Bryant also noted: "The guidelines are illustrative rather than prescriptive, and do not set forth detailed or rigid standards." (R. p. 1339.) This assessment of the contradictory, standardless nature of the *Guidelines* by counsel for Trinitas is virtually the same as the claim of the Association that the City Council has delegated its legislative power to the DDRC.

Because "the opposite proposition also holds true," the nonbinding height guidelines in the *Guidelines* are not sufficiently "specific . . . to prevent the ordinance from being invalid and arbitrary." Because the *Guidelines* do not bind the DDRC in any meaningful way, the "overall determination"—"substantially meets" approach is virtually the same as the legislative authorization in *Harbin* to suspend or revoke a license "for any cause satisfactory to" the Highway Department. Because this approach "does not profess to prescribe regulations," it must rely on the standardless application of non-binding standards. Thus, it is effectively the same as the ordinance in *Schloss Poster Advertising Co.*, *supra*, granting the Rock Hill City Council the power to decide who could erect billboards without any standard to limit the exercise of the Council's discretion.

The City cites *Maher v. City of New Orleans*, 516 F.2d 1051 (5th Cir. 1975), as support for the position that "[s]pecifying qualifications for the DDRC membership curbs any possibility of

abuse of discretion." Br. City at p. 35. However, in *Maher* the court also determined that the ordinance at issue "provides adequate legislative direction to the Commission." 516 F.2d at 1051 (listing specifics in footnotes 58–64)

The proceedings in this matter illustrate the problems with relying on expertise where inadequate guidance has been provided by the City Council. The DDRC voted at the January 9, 2020, meeting to deny approval for design review and for site plan review. Subsequently, the DDRC voted to rescind the denials at the special meeting held on February 7, 2020. This total reversal in less than a month does not speak well for reliance on expertise by the Commission.

C. The Trial Judge Did Not Err in Exercising his Discretion to Find that the Unlawful Delegation Issue Did Not Need to Be Addressed.

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

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

86 S.E.2d at 470.

This challenge is particularly perplexing in the case at issue. On the one hand, there are "standards" and "policies." On the other hand, the *Guidelines* explicitly state that these standards and policies are "nonbinding." Moreover, a ruling in favor of the Association's claim could result in a situation where the City would have virtually no design controls for the entire downtown area of Columbia.

The Association is challenging two specific approvals: (1) site plan approval and (2) design approval. The Trial Judge determined that the Association has standing to challenge these

approvals and that both approvals are invalid. As a result, the Association has prevailed in terms of the two approvals of the Trinitas project.

The Supreme Court has noted that, where a court addressing an appeal has disposed of the issues involved, it "need not address remaining issues when disposition of prior issue is dispositive." *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); *accord, e.g.*, *Whiteside v. Cherokee County School District No. One*, 311 S.C. 335, 428 S.E.2d 886, 889 (1993). This principle has been applied in zoning cases. *E.g.*, *Heilker v. Zoning Board of Appeals*, 346 S.C. 401, 552 S.E.2d 42, 48 (2001). Because the issues of site plan approval and design approval have been resolved in the Association's favor, the best approach for the perplexing issue of nondelegation in this case is to adopt the approach of these cases and not address the delegation of legislative authority issue.

IV. THE ASSOCIATION HAS STANDING.

A. Associational Standing

1. Doctrine

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

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

Preservation Society of Charleston v. South Carolina Dep't of Health & Envtl. Control, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020). The associations in *Preservation Society* were:

> [seeking] a contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston. Petitioners maintain they have standing to

> see this hearing as "affected persons" under section 44-1-60 (G) of the South Carolina Code (2018). The ALC concluded Petitioners did not have standing and granted summary judgment to Respondents.

Id. at 483.

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

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

Id. at 488.

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

> While geographic proximity may not be a determinative factor in every case, it is highly relevant to our analysis in this case. Here members would suffer the environmental consequences Petitioners allege the project will create, such as breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution.

Id. at 489–90.

2. Testimony Concerning "Substantial Interest"

Section 6-29-900(A) of the Enabling Act addresses standing to appeal from a design decision by an architectural review board as follows: "A person who may have a *substantial*

interest in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court . . . .” (emphasis added)

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

University Hill Neighborhood Association is an unincorporated association. As indicated above in Part 3 of the Statement of Case, the boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic district—a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local “Architectural Conservation District.” Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This district is “identified as Architectural District No. 1” and is “bound by Laurens, Senate, Henderson, and Greene Streets. . . .” *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic

Districts. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed.

Numerous residents of the University Hill Neighborhood testified under oath at public hearings concerning the Trinitas project that: (1) they lived within the boundaries of the University Hill Neighborhood Association, and (2) they as individuals and the neighborhood area as a whole would experience substantial negative impacts from the proposed project.[17] These testifying

[17] The City claims that "the Association should have filed affidavits from its members" even though the members testified under oath at the hearings. Initial Brief of City at p. 13. The DDRC and Trinitas claim that "at the final merits hearing stage, Association submitted no additional evidentiary support [for the claim of standing] than it had at the motion to dismiss phase." (Br. DDRC and Trinitas at p. 16). This is a gross distortion of the record. At the hearing, the Association relied on its Brief, which had extensive discussions of the facts in the Record. (*See* Br. Appellant at pp. 33–38)

residents include the following: Tom Gottshall,[18] John McGill,[19] Beth Richardson,[20] Catherine Fenner,[21] April Lucas,[22] Douglas Carlisle,[23] John Stucker,[24] and Bobby Lyles.[25]

Among their concerns was an increase in vehicular and pedestrian traffic through the neighborhood. Because Trinitas is a "university centric developer,"[26] it is likely that students will reside in the proposed project. As a result, pedestrian traffic from students going to and from class

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[18] R. pp. 1292–93 (noting, inter alia, that the proposed project is "adjacent to our neighborhood" and that, as a result of students in the proposed projects, hundreds of students will be "moving . . . through our neighborhood at night."); R. pp. 1299–1300, 1341–42 (noting, inter alia, that the project did not meet *Guidelines* and that the project "is to be marketed to students"); R. pp. 1378,. Mr. Gottschall also submitted written materials to the DDRC. *See* R. pp. 812–13; R. p. 956; R. p. 1006; R. p. 1191; R. p. 1282.

[19] R. p. 1294 (noting investment in homes in neighborhood, size of proposed building, and negative impacts of auto, bike, and pedestrian traffic through the neighborhood).

[20] R. pp. 1294–95 (noting size of proposed building and reasons why residents of proposed project are likely to be mostly students, expressing concern for "overloading the neighborhood," and describing significant investments in homes in the neighborhood).

[21] R. p. 1295 (noting that "Trinitas does student housing," concern for negative impacts of students returning to campus area from Five Points late at night, and concern that project will "smother our historic neighborhood"); R. pp. 1344–45 (referring to "people staggering home" in early hours of the day).

[22] R. p. 1295 (noting problems resulting from students returning from Five Points and "banging on our doors at 2:30 in the morning").

[23] R. p. 1296 (giving reasons to believe students will reside in proposed project and describing specific problems from drunken students "who have trooped through the neighborhood").

[24] R. pp. 1298–99 (expressing concern for negative impact of auto and pedestrian traffic by students).

[25] R. p. 1388–89 (stating that he was a resident of the Heritage and president of the homeowners' association and expressing concern that the scale of the proposed project would "overload" the neighborhood).

[26] R. pp. 1295–96 & 1331–32.

would flow through the neighborhood. In addition, because of topography and a railroad track, the route for these students and other young adults living in the proposed project returning from the bars in Five Points to the proposed Trinitas project would be through the University Hill neighborhood.[27] These people "moving . . . through our neighborhood late at night"[28] would inevitably include some drunken and rowdy students who, like many young people before them, will engage in things like the following:

- conduct involving "damage and vandalism and just altogether bad behavior in the small hours of the morning,"[29]
- "people banging on our doors at 2:30 in the morning,"[30]
- "people staggering home at" 5:00 am,[31] and
- students who have appeared "to be dead," engaged in yelling and "waking me up" at 2:30 in the morning, and "urinating in my driveway."[32]

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[27] Testimony of John McGill, R. p. 1294.

[28] Testimony of Tom Gottschall, R. p. 1293.

[29] Testimony of John McGill, R. p. 1294.

[30] Testimony of April Lucas, R. p. 1295.

[31] Testimony of Catherine Fenner, Supplemental Record, Exh. 8, at pp. 59, *l.* 22–p. 61, *l.* 4

[32] Testimony of Douglas Carlisle, R. p. 1296.

The residents also expressed concern for the visual impact of such a large, monolithic building looming over the area[33] and for overloading the neighborhood with people and their pets.[34]

The University owns two properties adjacent to the proposed building. Representatives of the University of South Carolina also gave testimony concerning the negative impacts of the proposed Trinitas project on the historical and residential character of the University Hill Neighborhood and concerning the negative impact on joint plans between the University and the neighborhood.[35] Representatives of Historic Columbia gave testimony objecting to failure to follow the *Guidelines* and negative impact on historical character of the area.[36] The evidence also includes a detailed written review of the historic importance of the buildings and surrounding area in the vicinity of the Trinitas project.[37]

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[33] Testimony of D. Gruner, the University Architect for the University of South Carolina, at Supplemental Record, Exh. 8, at p. 22, *l.* 22–p. 23, *l.* 17; testimony of Tom Gottshall, R. p. 1292.

[34] Testimony of Bobby Lyles, Supplemental Record, Exh. 8, at p. 58, *l.* 19–p. 59, *l.* 8; testimony of Catherine Fenner, p. 58, *l.* 19–p. 59, *l.* 8.

[35] Derek Bruner, R. p. 1294 (indicating negative impact on University Hill neighborhood from "student presence adjacent to and throughout their neighborhood," stressing conflicts with University's master plan, and noting that "height and scale and the mass" do not balance with neighborhood); see Letter from Bruner to Lucinda Statler, Record, Mar. 4, 2020, Exh. 3, at p. 44; Dan D'Alberto, Supplemental Record, Exh. 8, at p. 56, *l.* 17–p. 57, *l.* 21 (noting the plans of the University and stressing that the University "is in lockstep with University Hill Neighborhood in that we agree with the letter they submitted.").

[36] Robin Waites, R. pp. 1293–94 (describing historical character of area and negative impact of scale of proposed building, and objecting to violation of *Guidelines*); John Sherer, Supplemental Record, Exh. 8, at p. 50, *l.* 25–p. 52, *l.* 12, and p. 53, *ll.* 6–12 (describing factual errors in the Trinitas presentation, stressing the negative impact of the "view shed" of the project, and noting that the church building south of the project is historic).

[37] Testimony and written analysis of Patrick Hubbard, Record, R. pp. 1342–43, 1378, 1387–88; *see* "Analysis of Application of Certificate of Design Approval for Trinitas," R. pp. 1010, 1095..

3. Conclusion

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

In addition, at the March 12, 2020, Hearing, Linda Irving, speaking as "Trinitas's representative,"[38] recognized the importance of considering the negative impacts on the neighborhood. Ms. Irving stated: "The site is not within the bounds of a historic district or within a residential neighborhood, though *their proximity must absolutely be factored heavily*."[39]

Given the sworn testimony of residents in the immediate vicinity of the project and of representatives of the University of South Carolina and Historic Columbia, combined with the admission by the Trinitas representative that the proximity of historic districts and residential

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[38] R. p. 1331.

[39] R. p. 1338 (emphasis added).

neighborhoods "must be absolutely factored heavily," the Association and its members have shown a substantial interest in the decisions of the DDRC concerning the Trinitas project.

B. Public Importance Standing

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

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

1. Issues Involved

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

(1) Whether important aspects of a development within the -DD area, like height, are determined by the underlying zoning or by the overlay *Guidelines*;

(2) Whether the grant by the City of the power of site plan review to the DDRC for development within the -DD area was *ultra vires*;

(3) Whether the "overall determination" approach to the application of the precatory, non-binding language of the *Guidelines* constitutes an improper delegation of the City's legislative power and a denial of due process; and

(4) What is the legal status of the portions of the *Guidelines* that address site plan review concerns?

2. Importance of Issues

The -DD area of Columbia regulated by the *Guidelines* "consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River." Columbia City Code, § 17-253.

Given the size of this area, issues concerning the validity, proper scope, and application of the *Guidelines* effectively determine important aspects of development in the downtown core of Columbia.

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

More broadly, overlay schemes are authorized by Section 6-29-720(C)(5) of the Enabling Act and are a generally recognized technique for land use regulation.[40] Issues concerning the relationship between overlay schemes and underlying zoning could arise throughout South Carolina.

3. Need for Future Guidance

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

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[40] *See, e.g.*, JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 93–94 (3d ed. 2013); JOHN R. NOLON, LAND USE IN A NUTSHELL 219–22 (2006); PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION 222–23 (3d ed. 2015).

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

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

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

V. TRINITAS DEVELOPMENT IS NOT THE PROPER DEFENDANT IN THIS LITIGATION.

The DDRC and Trinitas claim that Trinitas Development, not Trinitas Ventures, is the proper defendant in this litigation. The dispute over the approvals for the Trinitas projects has lasted over two and one-half years thus far. In that time, there has been only one mention of an entity called Trinitas Development. This mention is contained in Paragraph 6 of the Answer of Trinitas Ventures. Trinitas claims that the issue concerning proper party was raised in its Motion

to Dismiss. Initial Brief of DDRC and Trinitas Ventures LLC p. 22. However, the Motion to Dismiss does not mention this issue. In the various hearings and filings in this matter, there has been no attempt to provide any evidentiary support for the assertion concerning Trinitas Development.

This is not surprising because the record herein shows that this claim is false. First, throughout the hearings in the matter, Linda Irving consistently claimed to be the agent for Trinitas Ventures.[41] Her email address is lirving@trinitas.ventures (Record, Exh. 1, p. 011), and her role as agent is recognized in the case Evaluation Sheet for each meeting as: "Linda Irving (developer)." (R. p. 821; R. p. 971; R. p. 1206.)

Second, on September 13, 2021, Trinitas and the DDRC filed a Petition for Writ of Mandamus pursuant to Rule 245(B), SCACR, or, in the Alternative, Petition for Certification Pursuant to Rule 245(A), SCACR. An Affidavit of Damien VanMatre is attached as Exh. 5 to this Petition. In the affidavit, VanMatre states:

> 2. I am employed by *Trinitas Ventures LLC ("Trinitas")* as Vice President of Development Operations. I am authorized to make the following assertions on behalf of Trinitas.
>
> 3. Trinitas entered into a contract for the sale of certain real property located at 1600-1620 Gervais Street (the "Property") with Capital Investments, LLC ("Owner") on August 30, 2018.

Finally, on March 30, 2022, Appellants filed a Motion for Expedited Appellant Review and a Petition for Certification Pursuant to Rule 204(B) SCACR. Each of these motions included

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[41] Testimony of Linda Irving, R. p. 1289 ("I'm Linda Irving with Trinitas Ventures. I'm the development manager for the project. . . ."); R. p. 1331 ("[M]y name is Linda Irving. I'm the development manager for Trinitas Ventures for the proposed project. . . .").

a copy of a second affidavit by Damien VanMatre. This affidavit added a listing of the costs incurred by a more detailed discussion of the costs that Trinitas has incurred, including for example, "more than One Million Dollars . . . in development costs associated with the proposed construction." (Paragraph 8)

Given these facts, it is clear that Trinitas Development was not a necessary party to the appeal.

CONCLUSION

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

(1) hold that, because the DDRC abused its discretion by making a mistake of law in deciding that the height of the proposed building was determined by the underlying zoning rather than the -DD overlay, the design approval of the Trinitas proposal by the DDRC is invalid,

(2) hold that the decision by the City of Columbia to grant the authority to conduct site plan review to the DDRC was ultra vires and, therefore, any decision by the DDRC pursuant to that grant is void,

(3) hold that even though the adoption of the *Guidelines* as an ordinance may be an unlawful delegation of the legislative power of the City, the trial judge did not err in finding that the unlawful delegation issue need not be addressed,

(4) hold that the Association has standing, and

(5) hold that the Appellants' argument concerning the real party in interest lacks merit.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel that this Final Brief complies with Rule 211(b), SCACR.

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