THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2022-000276

C.A. No. 2017-CP-36-00385

Allen L. Murray, Christy Worthy Brown, Michael Adam Brown,..... Appellants,

v.

Newberry County, South Carolina,.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. In this non-jury action submitted by the parties' consent for judgment by the trial court, did the trial court correctly conclude that there is no material issue of fact related to the Appellants' claim that the zoning ordinance is unreasonable, arbitrary, capricious, or discriminatory, and that the defendant/respondent Newberry County is entitled to judgment thereon as a matter of law based on the undisputed facts?

2. In this non-jury action submitted by the parties' consent for judgment by the trial court, did the trial court correctly conclude that there is no material issue of fact related to the Appellants' claim that Newberry County made any statements that would estop it from enforcement of its zoning ordinance, and that the defendant/respondent Newberry County is entitled to judgment thereon as a matter of law based on the undisputed facts?

3. In this non-jury action submitted by the parties' consent for judgment by the trial court, did the trial court correctly conclude that there is no material issue of fact related to the Appellants' claim of an inverse condemnation, and that the defendant/respondent Newberry County is entitled to judgment thereon as a matter of law based on the undisputed facts?

4. In this non-jury action submitted by the parties' consent for judgment by the trial court, did the trial court correctly conclude that there is no material issue of fact related to the Appellants' claim of prior, lawful non-conforming uses of their properties, and that the defendant/respondent Newberry County is entitled to judgment thereon as a matter of law based on the undisputed facts?

Additional issue for resolution only if the foregoing questions are not answered to uphold the trial court:

5. Did the trial court, as an alternative to its conclusions stated above, correctly determine that the Appellants' second amended (final) complaint's pleading of facts and claims was fatally deficient as conclusory and lacking requisite specificity under Rule 12(e), SCRCivP, despite prior court orders and opportunities to correct those deficiencies and that it should therefore be dismissed pursuant to SCRCivP Rule 12(b)(6)?

STATEMENT OF THE CASE

The Appellants here challenge the validity and the implementation of the County's zoning ordinance (the "**Zoning Ordinance**"). [Rec. pp. 000205-310.]

This appeal is from an order of the Circuit Court (the Honorable Frank R. Addy, Jr.) entered on January 27, 2022 (the "**January 27 Order**"[1]) [Rec. pp. 000015-53], that granted the motions of the Respondent Newberry County (the "**County**") for summary judgment under Rule 56, SCRCivP, on the four issues raised by the plaintiffs (the "**Appellants**" in this appeal) in their final complaint (the "**Second Amended Complaint**," identified below). The grant of summary judgment on those four issues completely disposed of the case. In addition and alternatively, the January 27 Order dismissed the Second Amended Complaint under SCRCivP Rule 12(b)(6), for failure to allege facts rather than merely conclusions of law and for failure to comply with prior orders of the Circuit Court under Rule 12(e), SCRCivP, to make a more definite statement of facts and claims.

In January 2019, the parties had agreed and advised the Circuit Court that the issues presented by this case are non-jury issues that should be decided by the Circuit Court. After that, and prior to entering the January 27 Order, the Circuit Court held a hearing in this case on January 15, 2021. Transcript of January 15, 2021 Hearing (hereinafter, "**1-15-21 Tr.**") [Rec. pp. 000867-894.] At that hearing, counsel for the Appellants stated that the Appellants needed no further discovery and that the case was ready for trial. 1-15-21 Tr., p. 15, line 25 – p. 16, line 2. [Rec. pp. 000881-882.] Counsel for both parties agreed, and Judge Addy ordered, that the matter would be submitted and decided on written motions and memoranda for final disposition "as to all of

[1] Although Judge Addy electronically signed the Order on January 26, 2022, it was entered into the record by the Clerk on January 27, 2022, and has that date stamped on the margin.

Plaintiffs' causes of action." 1-15-21 Tr., p. 27, lines 17-24 [Rec. p. 000893]; and Form 4 Order entered by Judge Addy on January 15, 2021 [Rec. pp. 000010-11.]

On March 3, 2021, both parties submitted their filings (described in more detail below); neither party submitted any response to the filings of the other party; and, following review, Judge Addy issued the January 27 Order now under appeal.

The history of the case is as follows.

On July 28, 2017, the Appellants filed but never served their initial complaint. [Rec. pp. 000056-59.] On November 13, 2017, the Appellants filed, and shortly thereafter served, an amended complaint (the "**First Amended Complaint**") [Rec. pp. 000060-63], which was identical to the initial complaint except for the deletion of six plaintiffs and the addition of one plaintiff (Christy Brown).

The County answered on December 15, 2017. [Rec. pp. 000064-68.] In addition to other factual and legal defenses, the County answered that the First Amended Complaint was defectively vague and impossible to answer adequately because, among other deficiencies, it made no allegations identifying any affected property owned by an Appellant; specifying any desired use not permitted by the Zoning Ordinance; identifying the allegedly unreasonable and/or arbitrary aspects of the Zoning Ordinance; identifying any prior lawful use entitled to grandfathered status; stating how and against whom the Zoning Ordinance is discriminatory; identifying the makers, recipients, or content of alleged estopping representations by County officials; or identifying any required procedures allegedly violated by the adoption of the Zoning Ordinance. The County's answer included a prayer for relief that the Appellants make their First Amended Complaint more definite and certain.

On January 4, 2019, the County reiterated that request in a motion for, among other things, a more definite statement under SCRCivP Rule 12(e) of the facts and claims attempted to be asserted in the First Amended Complaint. [Rec. pp. 000069-477.] The County submitted a memorandum in support on January 10, 2019. [Rec. pp. 000478-493.]

On December 18, 2019, the Honorable Walton J. McLeod IV granted that motion and ordered Appellants to make their more definite statement by February 1, 2020. [Rec. pp. 000001-3.] The other aspects of the County's motion were continued until the completion of discovery, which was required to be done by May 1, 2020. *Id.* Despite obtaining that extension of time to pursue discovery, the Appellants did not do so. The only discovery conducted by the Appellants during the four-and-a-half year history of this case was submission of the standard Rule 33(b), SCRCivP, interrogatories on December 28, 2017, which the County answered on February 28, 2018.

On March 27, 2020, the County moved to dismiss the action, as the Appellants had not made the more definite statement required by Judge McLeod. [Rec. pp. 000494-499.] At a hearing on that motion on September 29, 2020, the Honorable R. Lawton McIntosh denied the County's motion to dismiss; granted the Appellants additional time until October 2, 2020, in which to make their more definite statement; and ordered the Appellants to pay the County's legal fees in connection with the motion to dismiss. That order is partially reflected in a Form 4 order entered October 5, 2020. The ordered payment of attorneys' fees has been made.

On September 30, 2020, the Appellants served their more definite statement (the "**Second Amended Complaint**") [Rec. pp. 000500-505], which seeks (*first cause of action*) to have the Zoning Ordinance declared unconstitutional on the basis that it is arbitrary, is unreasonable, is discriminatory, is overly broad, is not a legitimate use of the County's zoning power, is selectively

and discriminatorily enforced, was passed contrary to procedures, and deprives the Appellants of vested property rights in unspecified parcels of property that the Appellants claim to own; (*second cause of action*) to have the County estopped from enforcing the Zoning Ordinance against the Appellants on the basis of unspecified representations made by unspecified County officials; and (*third cause of action*) to have the Zoning Ordinance as it affects unspecified parcels of property that the Appellants claim to own declared an inverse condemnation that entitles them to actual damages and attorneys' fees.

On October 15, 2020, the County answered the Second Amended Complaint. [Rec. pp. 000506-517.] At the same time, the County also renewed its motion to dismiss [Rec. pp. 000518-529], based on the failure of the Second Amended Complaint to correct the defective vagueness. The differences between the First Amended Complaint and the Second Amended Complaint are highlighted in an exhibit to that motion. [Rec. pp. 000525-529.] The County supplemented that motion on December 21, 2020. [Rec. pp. 000530-535.]

The motion to dismiss came before Judge Addy on January 15, 2021. As described above, that hearing resulted in an agreement and order that the parties would submit written motions and memoranda for final disposition "as to all of Plaintiffs' causes of action" and that the case would be decided on that basis.

On March 3, 2021, the Appellants submitted "PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS." [Rec. pp. 000861-865.] The Appellants did not submit to the Circuit Court, either at that time or earlier in the case, any verification of their complaint(s), any affidavits, any admissions (they had requested none), any depositions (none had been taken), any documents provided by the County (they had requested none), or any interrogatory responses (the standard Rule 33(b), SCRCivP, interrogatories were the only ones that they had propounded).

On the same day, the County submitted its "FINAL DISPOSITIVE MOTIONS OF DEFENDANT NEWBERRY COUNTY, SOUTH CAROLINA" ("**County's Final Motions**") [Rec. pp. 000572-860] with five exhibits (each identified as "**CFM Ex. No. __**"), including three affidavits, and its "MEMORANDUM IN SUPPORT OF FINAL DISPOSITIVE MOTIONS OF DEFENDANT NEWBERRY COUNTY, SOUTH CAROLINA." [Rec. pp. 000536-571.][2] The County's Final Motions sought (1) summary judgment affirming the validity of the Zoning Ordinance; (2) summary judgment denying estoppel against enforcement of the Zoning Ordinance; (3) summary judgment denying inverse condemnation, damages, and attorneys' fees; (4) summary judgment denying any claim that an Appellant had established a lawful, non-conforming use prior to the effectiveness of the Zoning Ordinance with a concomitant right to continue that use post-effectiveness; and, in the alternative, (5) for dismissal under Rule 12(b)(6), for failure to allege facts rather than conclusions of law.

On December 10, 2021, Judge Addy entered a Form 4 order granting the County's motion for summary judgment [Rec. pp. 000012-14] and on January 27, 2022, entered the formal January 27 Order. In the January 27 Order, Judge Addy found no material issue of fact with respect to any of the four grounds for summary judgment set out in the County's Final Motions and granted summary judgment on each of those four grounds. He also and alternatively dismissed the Second Amended Complaint for failure to allege facts rather than merely conclusions of law.

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[2] In addition to the CFM Ex.'s, the County's Final Motions and supporting Memorandum identified various relevant public records of which the trial court and this Court may take public notice. *See* Rule 201, SCRE, reporter's comment. In addition, public records of governmental actions, the records of the courts, and materials at government websites are self-authenticating; and the trial court and this Court may take judicial notice of their contents. *See* Rules 201, 803(8), and 902(5), SCRE. *See also* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 551 (D. Md. 2007), and Paralyzed Veterans of America v. McPherson, 2008 U.S. Dist. LEXIS 69542, *21-23 (N.D.Cal., September 8, 2008) (government website documents are self-authenticating under Rule 902(5), FRE, which is identical to Rule 902(5), SCRE).

The Appellants filed a motion for reconsideration on February 4, 2022 [Rec. pp. 000866], which Judge Addy denied on February 8, 2022. [Rec. pp. 000054-55.]

STATEMENT OF FACTS

The pertinent facts relating to the provisions and the history of the Zoning Ordinance and its predecessor ordinance (the "**Prior Ordinance**," identified below) are matters of record, admitted, and/or not reasonably disputed.[3]

Appellants' Desired Use

The Appellants allege that they own certain unspecified parcels of real property in the County and that they desire to rent out multiple spaces on each of their properties to non-County residents who have employment in or near the County and who own recreational vehicles ("**RVs**"), in order to allow those non-residents to park their RVs and connect them to water, sewer, and electric services so that the RVs may serve as accommodations to the RV owners during their employment in or near the County. Of particular interest to them were the construction workers in neighboring Fairfield County at the now-terminated V.C. Summer Nuclear Power Plant expansion. That desire necessarily raises the question of whether, where, and under what conditions such use is allowed under the applicable zoning regulations.

The Appellants have never identified which parcels are involved, despite requests from the County and orders from the Circuit Court. *See* discussion in "STATEMENT OF THE CASE," above. The County has determined from tax records certain parcels that appear to be owned by the Appellants (the "**County-Identified Parcels**")[4], and has repeatedly through this case identified those parcels (which are also identified in the January 27 Order). The Appellants have not denied

[3] The facts with respect to County Council's adoption of the Prior Ordinance and the Zoning Ordinance, as well as the contents of those enactments, are legislative facts of which the trial court and this Court may take judicial notice. *See* fn. 2 above.

[4] CFM Ex. No. 5. [Rec. pp. 000850-860]

that these are, in fact, the parcels that are the subjects of the allegations in the Second Amended (and any prior) Complaint.

Each of the County-Identified Parcels is classified by the Zoning Ordinance and the Prior Ordinance as "R2."[5] The "R2" designation is described by the Zoning Ordinance as "primar[ily] rural." Zoning Ordinance § 153.068 (CFM Ex. No. 3 [Rec. pp. 000594]).

Effective Ordinances

On September 21, 2016, the County, through its duly-elected County Council, enacted the Zoning Ordinance to regulate land use in the unincorporated areas of the County. [Rec. pp. 000073-75.] The Zoning Ordinance replaced the County's prior zoning ordinance (the "**Prior Ordinance**"), that had been in effect since its adoption on December 5, 2001. CFM Ex. No. 2 (County Council action) [Rec. pp. 000073 and 000076-204]; CFM Ex. No. 4 (as codified) [Rec. pp. 000683-849].[6] The County's enactments of both the Zoning Ordinance and the Prior Ordinance were pursuant to the authorization granted to counties for zoning, and through the procedures prescribed, by S.C. Code of Laws § 4-9-30(9) and § 6-29-710 *et seq.* (the "**Zoning Act**"). Immediately upon first reading of the Zoning Ordinance on June 16, 2016, County Council unanimously approved a motion to invoke the "Pending Ordinance Doctrine" with respect to the Zoning Ordinance.[7]

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5 CFM Ex. No. 1. [Rec. pp. 000575].

6 Section references to the Prior Ordinance are to the as-codified version at CFM Ex. No. 4 [Rec. pp. 000683-849].

7 Pursuant to the Pending Ordinance Doctrine, once an ordinance that regulates land use is introduced and the Doctrine is invoked, any new use that is not permitted under the introduced ordinance and that is begun after that introduction and invocation, even if lawful under the existing ordinance, will nevertheless **not** be grandfathered in as a prior, lawful, non-conforming use if the ordinance is eventually adopted. See discussion in January 27 Order, pp. 11 and 35 [Rec. pp. 000025 and 000049].

Relevant Prior Ordinance Provisions

The Prior Ordinance did not allow the property use desired by the Appellants for properties zoned R2. The Prior Ordinance would have allowed a similar use only if the property owner requested and received from the County Board of Zoning Appeals (the "**BZA**") affirmative approval of a special exception under § 153.069 of the Prior Ordinance, related to commercial campgrounds, under narrow conditions specified in that provision. § 153.148(D) of the Prior Ordinance otherwise allowed RVs in R2 districts only for temporary recreational use – not, as the Appellants wish, for rental income on any kind of use or for use as long-term living quarters. § 153.191(C) of the Prior Ordinance specified additional factors that the BZA was to consider on an application for a special exception.

The Appellants have adduced no evidence, and have not even alleged, that any of them ever sought a special exception under the Prior Ordinance.

Adoption of the Current Zoning Ordinance

The County had begun the process of considering a revision and update of the Prior Ordinance prior to March 5, 2014.[8] Pursuant to the Zoning Act, the draft proposal to replace the Prior Ordinance, including changes relevant to the Appellants' desired use, was referred to and considered by the Newberry County Joint Planning Commission (the "**County Planning Commission**") between February 16 and April 25, 2016.[9] Appellant Michael Brown, who is the

[8] See County Council minutes of that date at https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-36.pdf.

[9] Affidavit of Bridgett Fain, Secretary of the County Planning Commission ("**Fain Aff.**"), appearing in the records of the Circuit Court in Case No. 2018-CP-36-00558 (the "**Brown Appeal**"). The Brown Appeal was the appeal by Christy Worthy Brown (an Appellant in this present case) of a denial of her applications to the BZA for relief from the provisions of the Zoning Ordinance challenged in this present case. Fain Aff. appears as Exhibit 3 to the BZA hearing of September 4, 2018 ("**BZA Brown Hearing**"), and was filed on December 11, 2018, with the Clerk

husband of Appellant Christy Brown and the manager of her property apparently involved in this present case,[10] was a member of that County Planning Commission.[11] He recommended several changes that would have allowed the more expansive use for rentals for non-resident worker RVs that Appellants want.[12] His recommended changes would have allowed space rentals for RVs to non-permanent resident workers on smaller lots (the proposal was a minimum of 10 acres; Mr. Brown recommended 1 acre); would have allowed greater density of such RV sitings (the proposal allowed one per acre with a maximum of five per parcel; Mr. Brown recommended siting three RVs per acre); and would have substantially reduced the proposal's required setbacks in order to allow such denser RV sitings. The County Planning Commission did not endorse Mr. Brooks's recommended changes to the pending proposal.[13]

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of Court by the BZA as part of its record ("**BZA Brown Record**"), as required by S.C. Code § 6-29-830. The Brown Appeal was denied and the judgment of the BZA (the "**BZA Brown Decision**" [Rec. pp. 0000895-907], also filed as part of the BZA Brown Record) was affirmed by order of Judge Walton J. McLeod IV, entered December 18, 2019 [Rec. pp. 000004-6]; and Mrs. Brown did not take any appeal therefrom. [The formatting of the BZA Brown Record is explained in a letter to the Circuit Court dated April 3, 2019, and filed with the on-line records of the Brown Appeal at https://publicindex.sccourts.org/Newberry/PublicIndex/PIImageDisplay.aspx?ctagency=36002&doctype=D&docid=1554385031755-198&HKey=574310171726882846976119113122110485449112118671094772511071114771102857110810655667083104507673541111.]

[10] BZA Brown Record, BZA Brown Hearing Tr. p. 50, lines 13-18; p. 52, lines 2-4 [testimony of Appellant Christy Brown].

[11] BZA Brown Record, BZA Brown Hearing Tr. p. 56, line 20 - p. 57, line 7 [testimony of Appellant Michael Brown].

[12] Fain Aff. and attachment thereto.

[13] BZA Brown Record, BZA Brown Hearing Tr. p. 76, line 8 - p. 81, line 23 [testimony of Appellant Michael Brown].

The County Council adopted the Zoning Ordinance, also without making the changes recommended by Mr. Brown.[14] Its first reading was on June 1, 2016.[15] At that time, County Council also, by separate and unanimous vote, invoked the Pending Ordinance Doctrine established by Sherman v. Reavis, 273 S.C. 542, 257 S.E.2d 735 (1979), and Stratos v. Town of Ravenel, 297 S.C. 309, 376 S.E.2d 783 (Ct. App. 1989).[16] That doctrine cuts off the ability of a property owner to begin a "prior, non-conforming use" that would be grandfathered under a new zoning ordinance, even before final adoption of the new ordinance. Second reading approval was on June 15, 2016.[17] County Council held a public hearing on July 6, 2016;[18] and final adoption was on September 21, 2016.[19] The resulting County Council action appears at CFM Ex. No. 2 [Rec. pp. 000073-75]; and the Zoning Ordinance as codified appears as CFM Ex. No. 3 [Rec. pp. 000205-310].

The purpose of the Zoning Ordinance, as stated in the preamble to the adopting Ordinance No. 06-11-16, is "promoting public health, safety, morals, convenience, order, appearance, prosperity, and general welfare; lessening congestion in the streets; securing safety from fire; providing adequate light, air, and open space; preventing the overcrowding of land; avoiding undue concentration of population; facilitating the creation of a convenient, attractive and harmonious County; protecting and preserving scenic, historic, and ecologically sensitive area; and regulating

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14 CFM Ex. No. 3. [Rec. pp. 000073-75, and 000205-310].

15 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-4574.pdf

16 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-4574.pdf at page 8

17 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-4690.pdf

18 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-4692.pdf

19 https://www.newberrycounty.net/sites/default/files/uploads/minutes/id-5916.pdf

development in harmony with the adopted Comprehensive Plan for Newberry County." CFM Ex. No. 2 [Rec. pp. 000073-75].

Relevant Current Zoning Ordinance Provisions

Under the current Zoning Ordinance, the use sought by Appellants is allowed within their R2 zoning classification only if the conditions set forth in one of two options provided by the Zoning Ordinance are met.

The first such option is as a "conditional use as temporary accommodations for workers." A conditional use is a use that is allowed in a zoning district if certain conditions are met. The Zoning Ordinance, at § 153.123(H), allows as a conditional use in R2 districts the renting of property for the siting of recreational vehicles used as temporary accommodations for persons working in or near Newberry County but who do not intend to relocate permanently to the County.[20] If the conditions are met, there is no need for approval by the BZA. This conditional-

[20] The conditions for this conditional use include:

- The parcel must be 10 contiguous acres or larger.
- One such temporary RV may be allowed per acre, however RV units may be clustered as long as they comply with all other requirements of this section and the setbacks required in the R2 zoning district. No more than 5 temporary RVs shall be allowed for this use on 1 parcel.
- No portion of any RV may be located closer than 20 feet to any portion of another RV or from a permanent residence if one is on the parcel.
- Application must be made by the property owner for each temporary RV requested to be located on the property. Application for more than 1 temporary RV may be submitted for a property at the same time.
- Such temporary RV shall be maintained in a manner which will facilitate and enable its removal by the expiration date of the permit.
- The placement of the temporary RV must meet SCDHEC requirements for water and wastewater connections and Newberry County requirements for temporary electrical

use provision is a new addition to the current Zoning Ordinance; there was no similar provision in the Prior Ordinance.

The second option is through a "special exception as commercial campground or RV park." The Zoning Ordinance, at § 153.053, will allow certain specified uses in specified zoning districts if certain general and certain specified requirements regarding the use and the property are met. The general conditions applicable to any specified use anywhere are set out in § 153.053.[21] Zoning

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service. Each proposed temporary RV dwelling shall have individual water, sewer and electrical service and connections and may not share such services with other temporary RV dwellings or permanent dwellings.

- A minimum setback of 100 feet is required between the perimeter of all RV sites and all property lines and the road right-of-way. A buffer of at least 50 feet in width is required along all side and rear property lines.

[21] The general requirements (§ 153.053(D)) for special exception use are:

(D) No special exception permit shall be approved by the Board of Zoning Appeals unless the following general findings of fact are made concerning the proposed special exception:

(1) The use will not materially endanger the public health or safety if located, designed, and proposed to be operated according to the information submitted.

(2) The use complies with all regulations and standards of this chapter.

(3) The use will not substantially injure the value of adjoining properties, or the use is a public necessity.

(4) The location and character of the use, if developed according to the information as submitted and approved, will be in harmony with the area in which it is to be located.

(5) The use will not create traffic impacts that will endanger public safety, or create or contribute to congestion.

(6) The use will not create noise, light, glare, odor, or obstruction of air flow on adjoining properties.

Ordinance § 153.141 permits special-exception use as a commercial campground and RV park, in R2 districts, and sets out the special requirements for that particular special-exception use.[22]

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(7) That the proposed use will not be in conflict with but will further the objectives of the Newberry County Comprehensive Plan for the area in which it is located.

[22] The special requirements (§ 153.041) for special exception as a commercial campground or RV park are:

> Commercial campgrounds and recreational vehicle (RV) parks may be permitted by special exception in the R2 zoning district provided the Board of Zoning Appeals finds that the following conditions are met.
>
> (A) Commercial Campground and RV Park facilities may include a residence for the owner/manager of the premises; utility hook-ups; accessory structures, playgrounds and open space areas, fenced yard areas for pets, and other similar amenities; and recreational vehicles (including travel trailers) in designated spaces.
>
> (B) All campground and RV park facilities, including structures, camping sites, RV camp/parking sites, and other facilities associated with the use shall be setback a minimum of 100 feet from all adjacent property lines, except where contiguous properties are zoned for commercial (LC or GC) and/or industrial (IND) uses.
>
> (C) All campground and RV park facilities, including structures, camping sites, RV camp/parking sites, man-made uses, and other facilities associated with the use shall be surrounded by a minimum 50 foot wide buffer, which meets the applicable requirements of § 153.182 - Buffers. Such facilities shall be surrounded by an opaque screen which meets the requirements of § 153.183 - Screening.
>
> (D) All applicable conditions required in § 153.089 - R2 Rural District Conditional Uses shall be met for this use.
>
> (E) Site design shall ensure safe, predictable vehicular access and movement onto and off of the site.
>
> (F) The use will not substantially injure the value of adjoining properties.
>
> (G) Additional conditions may be imposed to ensure that the use will not create a safety, health or traffic hazard.

A property owner must obtain approval from the BZA prior to any use as a special exception. In order to grant a special exception, the BZA must find that all of the general and special requirements are met (Zoning Ordinance §§ 153.053(D) and 153.141).

Failure to meet any condition in either option can be excused by the BZA as a "variance" under Zoning Ordinance § 153.052 and S.C. Code of Laws § 6-29-800(A)(2).[23]

> In order to grant a variance, the Board must make the factual determination that each of the four elements above [*see fn. 23 in text above*] favor granting the variance. *See* Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct.App.1992). Granting a variance is an exceptional power which should be sparingly exercised and can be validly used only where a situation falls fully within the specified conditions. Hodge v. Pollock, 223 S.C. 342, 75 S.E.2d 752 (1953).

Rest. Row Assocs. v. Horry Cty., 335 S.C. 209, 214, 516 S.E.2d 442, 445 (1999) [*emphasis added*].

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[23] The requirements for granting a variance under the Zoning Ordinance and the statute are substantially identical. Those requirements, as stated in the Zoning Ordinance, are:

> (C) A variance may be granted if the Board [*the BZA*] makes and explains in a written order all of the following findings and conclusions:
>
> (1) There are extraordinary and exceptional conditions pertaining to a particular piece of property;
>
> (2) These conditions do not generally apply to other property in the vicinity or in that district;
>
> (3) Because of these conditions, the application of the chapter to a particular piece of property would effectively prohibit or unreasonably restrict use of the property;
>
> (4) The authorization of the variance will not be a substantial detriment to adjacent property or to public good, and the character of the district will not be harmed by the granting of the variance; and
>
> (5) The effect of the variance would not allow the establishment of a use not otherwise permitted in the zoning district; would not extend physically a nonconforming use of the land; would not change the zoning district boundaries shown on the official zoning map.
>
> (D) The fact that property may be utilized more profitably, should a variance be granted, may not be considered grounds for a variance.

The primary aspects of the Zoning Ordinance that prevent the Appellants from qualifying for the newly-created conditional use and making their desired use of the County-Identified Parcels are the requirements that the parcel be at least 10 acres and have certain setbacks and that the density on a parcel not exceed a certain level. The fact that the Appellants' properties (that is, the County-Identified Parcels) do not meet those requirements can be seen from the property descriptions at CFM Ex. No. 5 [Rec. pp. 000850-860] and from Appellant Michael Brown's proposed amendments to the Zoning Ordinance, set out in the Fain Aff., each of which related to the parcel size and number of RVs allowed on a parcel.

The Appellants have adduced no evidence, and have not alleged, that any of them meets the conditions required for the newly-created conditional use. Appellants Murray and Michael Brown have likewise adduced no evidence, and have not alleged, that either of them ever sought a special exception for commercial-campground use or that either of them ever sought a variance under either option. Appellant Mrs. Brown did unsuccessfully seek variance and special exception relief under the current Zoning Ordinance; and that effort has resulted in a final and unappealed judgment against her, of which the Circuit Court took judicial notice. *See* discussion in fn. 9 above.

The Zoning Ordinance, by the addition of the new conditional use, did substantially enlarge the ability of qualifying R2 property owners to rent property to RV-owning non-County-resident workers. The Zoning Ordinance did not, however, enlarge that ability as much as the Appellants would like. Hence, this lawsuit.

STANDARD OF REVIEW

Judgment on Substantive Issues

As noted under "STATEMENT OF THE CASE" above, all parties agreed that the issues presented by this case are for determination by a court and not a jury. They further agreed, and the Circuit Court ordered, that all of the Appellants' causes of action would be determined on motions and memoranda. As also noted, the Appellants did not submit to the Circuit Court at any time any verification of their complaints, any affidavits, any admissions, any depositions, any documents provided by the County, or any interrogatory responses. The issues presented by the Appellants on this appeal are thus issues of law without controverted material facts.

Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. Bankers Trust of S.C. v. Benson, 267 S.C. 152, 226 S.E.2d 703, 704 (1976). On appeal from a grant of summary judgment, this Court's standard of review is the same as that of the trial court. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct.App.1999).

Summary judgment should be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCivP. Material facts are those identified by controlling substantive law as essential elements of claims and defenses. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ." Main v. Corley, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984).

The Court must view the facts and inferences in the light most favorable to the nonmoving party. *See* Thomas v. Waters, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct.App. 1994). When the

nonmoving party bears the burden of proof as to an issue, a party seeking summary judgment may meet this standard by pointing out to the trial court "that there is an absence of evidence to support the nonmoving party's case." Richardson v. State-Record Co., Inc., 330 S.C. 562, 566, 499 S.E.2d 822, 825 (Ct.App. 1998). A nonmoving party cannot evade summary judgment by creating and relying on "an inference that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). "[W]hen ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim…." Hansson v. Scalise Builders of S.C., 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). If a plaintiff cannot establish facts on each element of the cause of action asserted, summary judgment is mandated by Rule 56(c), SCRCivP. *Id.*

If a motion has been properly made and supported in accordance with Rule 56, the non-moving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRCivP; Belton v. Cincinnati Ins. Co., 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). This showing must be based on evidence that would be admissible at trial. Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct.App. 2002).

Dismissal for Failure to Allege Facts and Claims Sufficiently

On appeal, this Court applies the same standard of review as the Circuit Court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

A court may dismiss a claim if it fails to allege facts sufficient to constitute a cause of action. *See* Rules 12(b)(6) and 12(e), SCRCivP.

> "[*South Carolina*] 'retains the Code Pleading standard ... rather than the more lenient notice pleading standard found in the federal rules.'" Gaskins v. S. Farm Bureau Cas. Ins., 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (quoting Harry M. Lightsey, Jr. & James F. Flanagan, *South Carolina Civil Procedure* 93 (2nd ed. 1996)).

Paradis v. Charleston Cty. Sch. Dist., 424 S.C. 603, 613, 819 S.E.2d 147, 153 (Ct. App. 2018), rev'd on other grounds and remanded, 433 S.C. 562, 861 S.E.2d 774 (2021), and premise modified by Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 826 S.E.2d 585 (2019)). While recognizing that pleadings must be liberally construed, the Paradis Court reiterated that a plaintiff must "allege facts" [*emphasis added*], and that where "nothing more than legal conclusions" is pleaded, the complaint should be dismissed. *Id.*

ARGUMENT

The Circuit Court's January 27 Order fully and cogently sets out the factual background, the aspects of the Zoning Ordinance and of the Prior Ordinance, and the law compelling its decision to grant summary judgment to the County on each of the four substantive issues before it and alternatively to dismiss the case under SCRCivP Rule 12. The County in its Brief here will not restate that analysis in its entirety; rather, the County incorporates the Circuit Court's analysis (with which the County agrees in its entirety) and directs its discussion below to those aspects of the January 27 Order to which the Appellants, in their Initial Brief, ascribe error, re-presenting only those particular aspects of the January 27 Order that are required for context.

I. THE MISSING FACTS.

To a very large (and determinative) degree, this appeal is a contest of the "UNs" – the uncontroverted facts of the County and the unsupported allegations of the Appellants. As noted in "STANDARD OF REVIEW" above, the County may, in the current posture of the case, show that it is entitled to summary judgment by pointing out the absence of evidence to support the Appellants' case. The Appellants', in turn, may not rest on their pleadings but must come forward with specific facts, based on evidence that would be admissible at trial.

However, in each instance in Appellants' Initial Brief where they allege a fact to be relevant (for example, the nature of the affected locality, or the appropriate level of population density in an R2 setting, or the date when any Appellant began a non-conforming use or made an investment for such use), there is nothing – no verified complaint, no affidavit, no deposition, no admission, no produced document, no treatise, no matter for judicial notice – to support the allegation. A number, but not all, of those unsupported allegations are set out here as examples. (This list

includes allegations regarding only "factual" matters, and does attempt to include any mischaracterizations of the Zoning Ordinance.)

- "Appellants . . . are all landowners in Newberry County, South Carolina who own/owned land which they planned to use by having temporary workers and others pay to park/keep their campers and recreational vehicles on their property." Appellants' Initial Brief ("**App.Br.**"), p. 2. [*Citing only statements of counsel in argument before the Circuit Court*]

- "The workers would come to the facility and work for a period of time during plant shut downs. The workers, many of whom have families at their permanent residences, are in need of a place to park their RVs and campers during their temporary residence in Newberry County." [*Citing only statements of counsel in argument before the Circuit Court*] App.Br., p. 5.

- "Appellants all own land in Newberry County which they use and planned to use by having temporary workers and others pay to keep their camper or other recreational vehicle on their property." [*Citing only their Complaints in this case. The Appellants have still not identified any particular parcels for which they bring this action, and have not confirmed or denied that the County-Identified Parcels are those parcels.*] App.Br., p. 5.

- "Appellants procured the necessary permits to allow use of their property in this manner." [*Citing only statements of counsel in argument before the Circuit Court*] App.Br., p. 5.

- "Appellants invested substantial time and money and effort into making their property suitable for temporary trailers." [*Citing only statements of counsel in argument before the Circuit Court*] App.Br., p. 5.

- "In June of 2016 appellants began using their property to allow temporary workers to park their RVs and campers on their property." App.Br., p. 5.

- "[T]he requirement of . . . 10 acres . . . is grossly excessive for any consideration having to do with density of uses and avoiding crowdedness." App.Br., p. 10.

- "[T]o require that each recreational vehicle have its own separate services for water, sewer, and electricity" is "impractical, unnecessary, and unduly costly." App.Br., p. 10.

- "The recreational vehicle ordinance in this case is invalid when considered in light of the nature of the affected locality, including the client's property, and all of the surrounding circumstances." App.Br., p. 10. [*The relevant provisions of the Zoning Ordinance affect all R2 areas in the County, not just the locales surrounding "the client's [*Appellants'?*] property." There is no evidence regarding the nature or surrounding circumstances of the particular parcels allegedly owned by (but never identified by) the Appellants nor is there any evidence as to whether the parcels owned*

by any Appellant is in the same locality as a parcel owned by any another Appellant; so it is unclear what the "affected locality" refers to.]

- "[T]he recreational vehicles on the property of the Appellants and other similar properties are of good quality and are kept in good condition." App.Br., p. 10.

- "Appellants invested money in property they own for the purpose of placing recreational vehicles on their property." App.Br., p. 12, *see* also page 13

- "[T]he Appellants . . . received permits to have the recreational vehicles on their land." App.Br., p. 13.

- "The Appellants invested money on their property for the purpose of placing recreational vehicles on their land." App.Br., p. 13.

- "[T]he Appellants have historically used their property to allow temporary workers to rent their land to utilize recreational vehicles." App.Br., p. 14

- "Appellants have shown that a non-conforming use was lawfully established at the time the zoning ordinance was established." App.Br., p. 14

- "The Appellants . . . have owned the subject property and have used it continuously to rent spaces for recreational vehicles as temporary living accommodations since before the new ordinance went into effect." App.Br., p. 15

- "The Appellants also secured the necessary septic permits for having such vehicles on their property before the ordinance was enacted." App.Br., p. 15

- "Appellants have a history of renting out their land to temporary workers." App.Br., p. 18.

- "The temporary workers would use the land to park their recreational vehicles." App.Br., p. 18.

- "The Appellants rented their land before the zoning ordinance came into effect and did so legally." App.Br., p. 18.

- "[T]he County has selectively enforced this ordinance." App.Br., p. 19.

- [T]he County had made representations through its zoning of property that the Appellants relied upon." App.Br., p. 19.

None of the foregoing allegations cites to the record (other than, in the first five instances, citing only to the Complaints and arguments of counsel in the Circuit Court), for the simple reason that there is nothing in the record to support them.

The Appellants have failed to meet their burden to come forward with any evidence to support these allegations, which are integral and necessary parts of their arguments in Appellants' Initial Brief. Even if they had, for the reasons stated in the January 27 Order and in this Brief, such evidence of those allegations would not change the outcome of this case with regard to the validity of the Zoning Ordinance.[24]

Where the Appellants have presented no contrary evidence, they cannot at this stage rest solely on their pleadings. Rule 56(e), SCRCP; Belton v. Cincinnati Ins. Co., 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). The courts, both the trial and the reviewing appellate court under the "STANDARD OF REVIEW" described above, must rule based "on the record the parties have actually presented, not on one potentially possible." Spencer v. Miller, 259 S.C. 453, 456, 192 S.E.2d 863, 865 (1972).

[24] Conclusive evidence of a prior, lawful, non-conforming use by an Appellant begun before invocation of the Pending Ordinance Doctrine would not affect the validity of the Zoning Ordinance but might have allowed the particular Appellant making such showing to continue that use (except for Mrs. Brown, as to whom *res judicata* prevents her again raising a prior-non-conforming use contention). However, no conclusive evidence, in fact no evidence at all, was adduced by the Appellants when they had the opportunity in the Circuit Court proceedings.

II. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE ZONING ORDINANCE IS A VALID EXERCISE OF THE COUNTY'S AUTHORITY UNDER S.C. CODE OF LAWS § 4-9-30(9) AND § 6-29-710 *ET SEQ.*, AND THAT (A) IT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OR THE DUE PROCESS CLAUSE OF EITHER THE SOUTH CAROLINA CONSTITUTION OR THE FEDERAL CONSTITUTION; (B) ITS ENFORCEMENT BY THE COUNTY IS NOT ESTOPPED; (C) IT IS NOT AN INVERSE CONDEMNATION; AND (D) IT DOES NOT DENY A PRIOR, LAWFUL, NON-CONFORMING USE.

A. *The Appellants have not shown (and cannot show) the Zoning Ordinance to be unreasonable, arbitrary, capricious, or discriminatory.*

1. South Carolina courts accord a very strong presumption of validity to zoning ordinances.

The Appellants face a steeply uphill climb in challenging the validity of the Zoning Ordinance, as "[a] strong presumption exists in favor of the validity and application of zoning ordinances." Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230 at 235, 489 S.E.2d 630 at 632 (1997). Similarly, "there is a strong presumption in favor of the validity of municipal zoning ordinances, when within the municipal power as here." Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, and 173, 72 S.E.2d 66, 69–70 (1952).

> Judicial deference to legislative bodies on zoning matters is deeply entrenched.
>
> > One of the most firmly established principles in the field of constitutional law is that the wisdom of legislation is a matter exclusively for legislative determination. This principle has been applied to zoning laws, and courts have been declared to have nothing to do with the question of the wisdom, expediency, propriety, or good policy thereof. The courts may not interfere with the enactment or enforcement of zoning provisions for the sole reason that they may be considered unwise, as long as their requirements may not be classified as unreasonable, or as long as there is an apparent legal reason for the enacted requirements. The matter is largely within the discretion of the legislative authority, which is presumed to have investigated and found conditions such that the legislation which it enacted was appropriate, so that if the facts do not clearly show that the bounds of that discretion have been exceeded, the courts must hold that the action of the legislative body is valid. In this respect, it has been declared that the municipal governing bodies are better qualified because of their knowledge of the situation to act upon those matters than are the courts, which will not substitute their judgment for that of the legislative body.

Talbot, *supra*, 222 S.C. at 169-70, 72 S.E.2d at 68. Citing Talbot, *id.*, the South Carolina Supreme Court nearly forty years later, wrote:

> We have long recognized the principle that the power to zone is exclusively for the legislature and that zoning decisions will not be interfered with when made in the exercise of the governing body's police power to accomplish the desired end unless there is a plain violation of citizens' constitutional rights.

Beard v. S.C. Coastal Council, 304 S.C. 205, 208, 403 S.E.2d 620, 622 (1991). Again citing Talbot in that same year, the Supreme Court opined that "Courts cannot become city planners but can only correct injustices when they are clearly shown to result from the municipal action." (222 S.C. at 175, 72 S.E.2d at 70); and continued:

> While the landowner may not agree and may be able to convince this Court not to agree with the City's zoning choice, that is not the issue before us. We cannot insinuate our judgment into a review of the City's decision. Rather, we must leave the City's decision undisturbed if the propriety of that decision is even "fairly debatable." . . . Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of citizen's constitutional rights. In order to successfully assault a city's zoning decision, a citizen must establish that the decision was arbitrary and unreasonable. . . . Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is "so unreasonable as to impair or destroy citizen's constitutional rights."; and the decision should not be overturned by a court so long as the decision is "fairly debatable."

Knowles v. City of Aiken, 305 S.C. 219, 222–24, 407 S.E.2d 639, 642 (1991) [internal citations omitted].

Venerable federal precedent is in accord: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

But it is not only what must be shown that defeats the Appellants' claims here, but also the location of the burden of proof and the heightened standard:

> "The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent on respondent to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." Town of Scranton v.

> Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). "[I]n cases requiring a heightened burden of proof ... the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v. Mid–S. Mgmt. Co., Inc., 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009).

Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 298, 737 S.E.2d 601, 610 (2013) [*emphasis added*].

2. The Appellants' three arguments

Against that mountain of precedent, the Appellants throw three rocks.

(a) Appellants contend that the County had a wrongful purpose in adopting the Zoning Ordinance.

First, the Appellants repeatedly attribute a malign purpose to the adoption of the Zoning Ordinance.

> The ordinance was designed to restrict the ability to house temporary workers, which at the time would be working at the SCANA/SCE&G power plants. . . . Appellants took (and still take) the position that the County has passed an ordinance which discriminates against one class of people based solely on their occupation. Appellants took the position that the ordinance was passed solely to discriminate against a particular class of people, mainly temporary workers in Newberry County, South Carolina. . . . The ordinance was designed to restrict the ability to house temporary workers, who at the time would be working at the SCANA/SCE&G power plants (often referred to as the VC Summer Nuclear Plant). . . . The ordinance at issue was passed to prohibit this type of use. . . . The timing of the passage of this ordinance was not, as Appellants [*sic*] believe, a coincidence. . . . In essence the County has passed an ordinance which discriminates against one class of people based solely on their occupation. . . . This ordinance was passed solely to discriminate against a particular class of people, mainly temporary workers in Newberry County, South Carolina.

App.Br., pp. 2, 5 – 6 [*underscoring added*].

The public-record facts, however, dispel this fantasy. There was no need to adopt the Zoning Ordinance to prohibit such use. As described in "*Relevant Prior Ordinance Provisions*" under "STATEMENT OF FACTS" above, the Prior Ordinance already effectively prohibited such use, without a special exception. The Zoning Ordinance, in fact, far from restricting such use, opened up more possibilities for renting RV spaces to temporary, non-resident workers. It is true that, as

noted in "*Relevant Current Zoning Ordinance Provisions*" under "STATEMENT OF FACTS" above, the Zoning Ordinance did not enlarge that ability as much as the Appellants would like. But winning every landholder's approval is not required: "While the landowner may not agree and may be able to convince this Court not to agree with the City's zoning choice, that is not the issue before us." Knowles v. City of Aiken, 305 S.C. 219, 222, 407 S.E.2d 639, 642 (1991). With regard to the timing of the Ordinance, as noted in "*Adoption of the Current Zoning Ordinance*" under "STATEMENT OF FACTS" above, the process had begun two and a half years prior to adoption, following a statutorily-prescribed process that included review and input by the County Planning Commission, of which one Appellant was a member.

(b) Appellants contend that the Zoning Ordinance impermissibly discriminates against a protected category of transient persons

The second rock that the Appellants throw is the contention that the Zoning Ordinance, insofar as it affects their plans, discriminates against workers (which the Appellants are not) on projects in or near the County who need living quarters. *See, e.g.*, App.Br., pp.2, 5 – 6, 9. The Appellants make this assertion because – so they allege – everyone other than such workers can use RVs on parcels like those owned by the Appellants:

- " . . . The ordinance in question is arbitrary and unreasonable in that it allows others to use the property in the exact same way provided the property is not used by workers. Recreational use and hunting use can be made of the property by as many people as desire to use it as long as the people are not workers who are renting the property." [*Second Amended Complaint,* ¶ *6* [Rec. p. 000502].]

- "The ordinance does not apply to individuals who utilized a camper or recreational vehicle to stay on property when they were not temporary workers." [*App.Br., p. 2, repeated p. 5*]

- "If an individual wanted to use the property for recreational hunting, there is no limit on the amount of people who may stay on the property." [*App.Br., p. 6*]

- "The ordinance prohibits temporary workers, who are not from the county, from utilizing a parcel of land in a certain manner. On the other hand, a citizen of Newberry County is permitted to use the parcel of land in the same exact way." [*App.Br., p. 7*]

- "If a party, other than temporary workers, wanted to use the land for their recreational vehicles, they would be allowed to do so." [*App.Br., p. 12*]

- "Further, if recreational vehicles are being used by non-workers there is simply no restriction at all. In other words, if the travel trailers and RVs were being rented out to hunters, there could literally be hundreds of them on Appellants' property." [*App.Br., p. 13*]

Each of these assertions is incorrect as a matter of law. The source of the error is the Appellants' misunderstanding of the nature of the Zoning Ordinance. For none of these assertions do the Appellants cite any provision of the Zoning Ordinance that allows those uses. Their inability to do so is because there are no such provisions. And without specific authorizing provisions, the itemized uses are not permitted.

The Appellants' misunderstanding is a failure to note § 153.018 (first paragraph) and § 153.019(A) of the Zoning Ordinance [Rec. p. 000581] (substantially the same as § 153.040(C) of the Prior Ordinance [Rec. p. 000706]) which establish the dynamic of the County's zoning regime (similar to virtually all other zoning regimes in South Carolina): the Zoning Ordinance does not operate by restricting some uses and permitting all others; rather, the Zoning Ordinance operates by specifying the uses that are permitted (with or without conditions or prior approval requirements), with all other uses that are not specifically permitted being prohibited. Thus, while an R2 landowner may use his property by putting his own (single) RV on it for temporary non-residential uses and may allow someone else (not on a commercial lease basis) to put his RV on it for temporary non-residential uses,[25] the landowner may not allow use of an RV on his R2 property

[25] The Zoning Ordinance allows "parking or recreational use of recreational vehicles." Zoning Ordinance, § 153.123(B). It does not allow occupancy as a place of residence, nor does it allow renting space to a recreational vehicle for use as a place of residence. The allowed "parking or recreational use" is subject to the requirement "that no occupancy or use of such vehicle rise to the level of permanent occupancy or use, and that any use remains temporary in nature." Zoning Ordinance, § 153.123(C) [*emphasis added*]; see also Zoning Ordinance, § 153.123(G)(1), reiterating the "temporary" requirement. For those purposes, "temporary" requires, among other things, that there can be "no permanent connection to electric power for the RV" (which out-of-

for long-term living quarters, by himself or by anyone else; nor may he make commercial use of the property by renting space out to others for placing their RVs for residential or non-residential use.

The one specific allowance of commercially leasing land for siting RVs on R2 districts for living quarters that was added by the Zoning Ordinance (§ 153.123(H)), if anything, discriminates in favor or workers, as it is solely to allow "temporary accommodations for workers who will be working for a period of time in or near the County, but do not intend to permanently relocate to the area." *Id.* Residents and non-workers cannot make use of this new feature.

Because the Appellants have the burden to prove the invalidity of a zoning ordinance by clear and convincing evidence, their failure to substantiate their claim that other, non-workers can use the land in a way that workers cannot by specifying the permitting ordinance provisions is fatal to their claim. (That failure by the Appellants is also understandable, because there are no such provisions in the Zoning Ordinance.)

In addition to actually enlarging the options available to workers temporarily in the County's vicinity, the Zoning Ordinance, it is important to note, is not directed at the workers. Rather, it is directed at what use the landowner can make of the property. Simply because landowners with fewer than 10 acres cannot rent to them does not mean that the workers themselves are left without other options for accommodation in the County. The January 27 Order itemized a number of other possibilities in its footnote 26. [Rec. pp. 000036-37.]

County workers would have) and that "the RV may not be used as a fixed place of abode" (which the out-of-County workers would be doing). In other words, whether one is hunting, bird-watching, running a moonshine still, or enjoying a South Carolina version of Thoreau's life on Walden Pond, one cannot, in R2 areas, rent space for and/or live in an RV on more lenient terms than can these Appellants or any out-of-County workers. Simply put, there is no discrimination.

Finally with regard to the discrimination claim (and, again, incorporating by reference the full analysis of this issue in the January 27 Order), it is important to note that, in the case relied upon by the Appellants for the proposition that a zoning ordinance "aimed at transients" is impermissible (Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974), cited at App.Br., p. 9), the United States Supreme Court in fact upheld a zoning ordinance that disproportionately and adversely affected transient students.[26] And here, as noted above, transients are not discriminated against – they, in fact, can rent spaces for RVs where County residents cannot.

(c) Appellants contend that the alleged discrimination does not adequately serve a governmental purpose.

It is first important to note that, in order to survive due process and equal protection analysis, the Zoning Ordinance must, as the January 27 Order explains, show only a rational relationship to a proper governmental purpose. One of the valid purposes (and the only one that the Appellants attack) relates to density.

The Appellants argue:

- "[I]t is not apparent that the new ordinance serves any of the commonly accepted purposes for zoning ordinances. In particular, the requirement of having at least 10 acres, that is, 2 acres for each of the maximum of five vehicles allowed, is grossly excessive for any consideration having to do with density of uses and avoiding crowdedness." [*App.Br., p. 10*]

[26] Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974), upheld a zoning restriction on the number of unrelated (but not the number of related) persons who could occupy a housing unit. Rejecting numerous claims of protected status, including arguments like ones made by the Appellants here that the restriction infringed on the right to travel or to migrate freely, the United States Supreme Court noted that it was permissible for a local government, through a zoning law, to address the issues where "[m]ore people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds. A quiet space where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs." *Id.*, 416 U.S. at 9.

- "[T]he recreational vehicle ordinance in the instance [*sic*] case lacks any rational relationship, [*sic*; *to?*] promotion of health, safety, morals or general welfare of the community." [*App.Br., p. 12*]

- "The purposes of the zoning ordinance, as provided by the County are: lessening congestion in streets, fire safety, prevention of overcrowding, and avoiding undue concentration of population.[27] Appellants are zoned in a R2 classification, which is designated for 'low density residential uses.' While the stated purposes are perfect for a high density urban setting, Appellants live on a parcel of land with few neighbors. Adding recreational vehicles to their land, which Appellants invested money with the intent of doing so, will not overly congest the streets, will not heighten the risk of fire safety, will not overcrowd the area, and will not provide for an undue concentration of the population. [*App.Br., p. 12*]

The Zoning Act (in particular, S.C. Code of Laws §§ 6-29-710(A)(2) and (5), and -720(A)(3) specifically authorizes, indeed directs, local governments to consider density issues when adopting zoning ordinances. Contrary to the view stated in the third point quoted from the Appellants' Initial Brief above, density and related considerations are proper throughout a zoning ordinance and not just for those portions that relate to a "high density urban setting." A zoning ordinance is, after all, part of the land use plan process for local jurisdictions. S.C. Code of Laws § 6-29-720(A). It takes into account not merely the current status of property usage in the jurisdiction, but also the planned direction and geographic allocation of future property use development within it.

Still looking at the third point, it is again necessary to point out that there is no evidence for the assertions. The Appellants have adduced no evidence regarding the number or placement of neighbors in those areas surrounding their own (unidentified) parcels. (The January 27 Order, at its footnote 24 [Rec. p. 000031], does take judicial notice from records of another case in that Court that the neighboring landowners objected to Mrs. Brown's use of her property for transient

[27] This is the Appellants' paraphrase of the Zoning Ordinance's stated purpose. The actual statement is on pp. 11 and 12 above.

worker RVs.) The Appellants have adduced no evidence regarding street congestion either throughout all R2 zones in the County or even in those areas surrounding their own (unidentified) parcels. The Appellants have adduced no evidence regarding fire hazards or available fire protection or the cost of additional fire protection either throughout all R2 zones in the County or even in those areas surrounding their own (unidentified) parcels. The Appellants have adduced no evidence regarding population growth either throughout all R2 zones in the County or even in those areas surrounding their own (unidentified) parcels. In short, the completely unsupported assertions in the Appellants' Initial Brief on this point must, under the law regarding summary judgments, be disregarded. They do not even approach the scintilla of evidence standard, as they are no evidence at all.

In making their argument contesting whether density issues are a rationally-related valid government purpose, the Appellants overlook two basic principles. Both are obvious in the first sentence quoted: "[I]t is not apparent that the new ordinance serves any of the commonly accepted purposes for zoning ordinances."

First, even if that statement were correct, whether or not the purpose is apparent is irrelevant. The burden of proof – the very onerous burden of proof – is on the Appellants. They must come forward with clear and convincing evidence to show that the Zoning Ordinance is invalid. They may not simply sit back and offer an observation that its validity is not apparent, thus trying to shift the burden of proof to the County.

Second, second-guessing the duly-elected legislative Councilmembers of the County as to whether the distinctions that they drew in the Zoning Ordinance are in the best interest of the County that they represent is beyond a court's limited role:

> [T]he municipal governing bodies are better qualified because of their knowledge of the situation to act upon those matters than are the courts, which will not

substitute their judgment for that of the legislative body.

Talbot, *supra*, 222 S.C. at 170, 72 S.E.2d at 68.

In sum, the January 27 Order correctly upheld the validity of the Zoning Ordinance for the reasons stated therein and should be affirmed. The Appellants' Initial Brief offers no justification for doing otherwise.

B. *The Appellants have not shown (and cannot show) any statement made by the County that would estop the enforcement of the Zoning Ordinance.*

As the Appellants themselves note (App.Br., p. 13), in the rare instances in which estoppel might lie against a local government, one necessary element is "lack of knowledge and of the means of knowledge of the truth." [*Emphasis added.*] Both the Prior Ordinance and the Zoning Ordinance were matters of public record, publicly available. There was no "lack of means of knowledge" of the content of the Ordinances. See January 27 Order, p. 29 - 30 [Rec. pp. 000043-44], citing Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010). Moreover, that content and the meaning of it are matters of law, as to which there can be no estoppel. See January 27 Order, p. 29 [Rec. p. 000043], also citing Quail Hill.

And once again, the Appellants ignore their obligation in the face of a supported motion for summary judgment to come forward with evidence. As noted in the January 27 Order (footnote 29 thereof [Rec. pp. 000042-43), Appellants, in their Second Cause of Action, refer to the issuance by the County of unspecified permits and the allowance of recording of unspecified platting as being among the estopping representations. Second Amended Complaint, ¶ 15 [Rec. p. 0000503-504.] (Similarly, in their Initial Brief, the Appellants state that they "received permits to have the recreational vehicles on their land." App.Br., p. 13.) However, the Appellants do not identify any permits: by whom given, to whom given, allowing what action, when given, for how long effective, what property affected, under what restrictions. Platting relates to the recordation of parcel

boundaries and is not relevant to permitted land use. The Appellants also state in their Second Cause of Action that they "have relied upon the zoning maps and zoning ordinances as they existed when they began planning to use their property for the intended purpose." Second Amended Complaint, ¶ 17. There is, however, no right (and the Appellants have cited to none) to lock in a zoning regime simply by beginning to plan a particular activity; and the Prior Ordinance, in any event, disallowed their allegedly planned use.

In short, the Appellants have provided no evidence and only the most conclusory allegations that they received and justifiably relied upon any false representations from County officials of factual matters of which they could not have determined the truth, or indeed that they received and relied upon any representations from the County.[28]

In sum, the January 27 Order correctly determined that the County is not estopped from enforcing the Zoning Ordinance against the Appellants for the reasons stated therein and should be affirmed. The Appellants' Initial Brief offers no justification for doing otherwise.

C. *The Appellants have not shown (and cannot show) that the Zoning Ordinance effects any impermissible taking or inverse condemnation of their property.*

The Appellants assert: "Here, the Appellants have historically used their property to allow temporary workers to rent their land to utilize recreational vehicles." App.Br., p. 14. This assertion is, again, completely lacking any supporting evidence. The available evidence that is in the publicly available record of which the January 27 Order took judicial notice (Mrs. Brown's earlier case), demonstrates that at least with regard to the County-Identified Parcel that she owns, there was no such historic, prior, or lawful use of the kind that the Appellants desire. [Rec. pp. 000048-

[28] The blanket allegations of what "the Appellants received" and what "the Appellants relied upon," without differentiation from one Appellant to the other are particularly suspect in light of the complete lack of evidence that the Browns and Mr. Murray were in collaboration prior to the filing of this lawsuit.

51.] Indeed, there lawfully could not have been such use by any of the Appellants, as such use was prohibited by the Prior Ordinance.

As noted by the January 27 Order (pp. 32 – 33 [Rec. pp. 000046-47]), there are a large number of profitable uses that the Appellants can make of their property, thus defeating their claim of inverse condemnation.

Moreover, with regard to Appellants Messrs. Murray and Brown, their failure to exhaust administrative remedies by seeking a special exception and/or variance precludes them from making a Takings Claim, as explained by the January 27 Order, p. 37 at footnote 33 [Rec. p. 000051], citing Moore v. Sumter Cty. Council, 300 S.C. 270, 272–73, 387 S.E.2d 455, 457 (1990).

In sum, the January 27 Order correctly determined that the Zoning Ordinance did not effect an inverse condemnation of the Appellants' parcels (whatever those parcels may be) for the reasons stated therein and should be affirmed. The Appellants' Initial Brief offers no justification for doing otherwise.

D. *The Appellants have not shown (and cannot show) any non-conforming use that was lawfully established at the time the Zoning Ordinance was adopted that would allow continuation. Moreover, they are prevented from attempting to make any such showing by the doctrines of res judicata and failure to exhaust remedies.*

As the old song goes, "second verse, same as the first." The Appellants offer the same contentions of having engaged in their desired use prior to the adoption of the Zoning Ordinance that they made with respect to their inverse condemnation claim; and they offer the same evidence – which is none. To succeed on this claim, they would have to allege that they began such use lawfully prior to June 1, 2016, which was the date of the invocation of the Pending Ordinance Doctrine. (In fact, they allege that they began using their property to allow temporary workers to park their RVs "in June of 2016." App.Br., p. 5; *emphasis added*.) To make the allegation of lawful prior use, they would also have to allege that they had received a special exception from the BZA,

as that was the only way such use would have been lawful under the Prior Ordinance. They make no such allegation of application for or grant of a special exception.

In any event, with respect to Mrs. Brown, her claim in this regard is precluded by *res judicata*, as explained in the January 27 Order, pp. 35 – 36. [Rec. pp. 000049-50; *see also* Rec. pp. 000898-900 and 000004-6.] With respect to the other two Appellants, their claims are precluded by their failure to exhaust administrative remedies by making application under the Zoning Ordinance for recognition of a grandfathered use. January 27 Order, p. 36 [Rec. p. 000050], citing Moore v. Sumter Cty. Council, supra, 300 S.C. at 272–73, 387 S.E.2d at 457:

> [T]his Court has stated, "[t]he impact of [a] zoning ordinance upon [a given] property cannot be determined [when] the landowner has failed to pursue his administrative remedies by applying for a variance." *Dunbar v. City of Spartanburg*, 266 S.C. 113, 221 S.E.2d 848 (1976).

In sum, the January 27 Order correctly determined that the Appellants have not established (or even adduced any evidence of) a prior, lawful, non-conforming use, for the reasons stated therein and should be affirmed. The Appellants' Initial Brief offers no justification for doing otherwise.

III. *THE SECOND AMENDED COMPLAINT, LIKE ITS PREDECESSORS, IS INADEQUATE AS A MATTER OF LAW, AND SHOULD BE DISMISSED FOR FAILURE TO ALLEGE FACTS.*[29]

The Appellants argue that the Zoning Ordinance is invalid, or at least is invalid as to them, because of the effect that it has on their property. But they have never identified where that property is. Never. In any manner. Not tax map number. Not street address. Not latitude and longitude. Yet they claim that this property has been taken.

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[29] In this section of their brief, the Appellants refer twice (App.Br., p. 19, in (3) of the carryover paragraph) to Zoning Ordinance restrictions on the leasing of vehicles. The Zoning Ordinance does not address the leasing of vehicles. It deals only with land use.

The Appellants argue that, in using or planning to use their property, they relied on representations from County officials. But they have never stated the content of their representations. Or identified the officials who made them. Not by name. Not by title. Not by general appearance. Never.

The Appellants suggest in their Initial Brief (p. 19) that it is the duty of the County to ferret out such information, stating "Respondent would prefer to bypass discovery." But Respondent, the County, has limitations on how much discovery it may conduct (see SCRCivP, Rule 33(b)(9), limited number of interrogatories allowed); and there are costs incurred in the pursuit of discovery.

The Appellants have an obligation, and the County has the ability to enforce that obligation under SCRCivP Rules 12(b)(6) and 12(e), to provide a clear statement of its claim before the County has to begin using up its limited (and costly) discovery tools. Failure to meet that obligation, as the Appellants have repeatedly, obstinately, cavalierly done here despite orders from the Circuit Court including an order to pay attorneys' fees for having ignored an earlier Court order, justifies the remedy of dismissal. Paradis v. Charleston Cty. Sch. Dist., 424 S.C. 603, 613, 819 S.E.2d 147, 153 (Ct. App. 2018), rev'd on other grounds and remanded, 433 S.C. 562, 861 S.E.2d 774 (2021), and premise modified by Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 826 S.E.2d 585 (2019)).

In sum, the January 27 Order correctly determined that the Appellants' claims should be dismissed for the reasons stated therein and should, if the Court of Appeals reaches that issue, be affirmed. The Appellants' Initial Brief offers no justification for doing otherwise.

CONCLUSION AND PRAYER FOR RELIEF

The Appellants have presented only unsupported assertions and no evidence against the uncontroverted records from the County to justify overturning the decision of the Circuit Court in this matter. They cannot at this stage rest solely on their pleadings or other bare assertions of counsel. Rule 56(e), SCRCP; Belton v. Cincinnati Ins. Co., 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). This Court, like the Circuit Court, must rule based "on the record the parties have actually presented, not on one potentially possible." Spencer v. Miller, 259 S.C. 453, 456, 192 S.E.2d 863, 865 (1972).

For the reasons stated in the January 27 Order and the reasons stated herein, Newberry County respectfully requests that this Court affirm the Circuit Court's grants of summary judgment in its January 27 Order (or in the alternative, its dismissal in that Order), and thereby protect the legislatively-granted power of local government oversight of land use and development in South Carolina.

October 21, 2022

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Appellate Case No. 2022-000276

C.A. No. 2017-CP-36-00385

Allen L. Murray, Christy Worthy Brown, Michael Adam Brown,..... Appellants,

v.

Newberry County, South Carolina,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the final Brief of Respondent complies with Rule 211(b).

HAYNSWORTH SINKLER BOYD, P.A.

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