

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2022-CP-22-00032

Ernest F. Middleton, III, and Joyce J. Middleton, Michael J. Farrar and Diana Farrar, Robert H. Hunt and Jeane M. Sullivan, the Colony Homeowners Association, Inc., and Keep It Green, Inc., Respondents,

v.

Georgetown County and Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust dated June 18, 2004, Defendants,

Of whom Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust, dated June 18, 2004 is the Appellant and Georgetown County is a Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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JUN 29 2023  
SC Court of Appeals

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## SUMMARY OF ARGUMENTS

The Respondents, for the express purpose of injuring the Appellant and Appellant's property, organized and combined to interfere with the rezoning process and instituted a legal action after having failed to stop the approval and adoption of Ordinances 21-24 and 21-25. See *Respondents' Complaint pp. 1 – 33 and Exhibits 1 - 27*. In accordance with Rule 19(a)(2), SCRCF, the Appellant should have been named as an "Involuntary Plaintiff" or "Party-in-Interest", instead of a defendant, as required under to S.C. Code Ann. § 15-53-80. See *Rule 19(a)(2), SCRCF and S.C. Code Ann. § 15-53-80*.

The Respondents engaged in a civil conspiracy, conspiracy against rights and an ongoing effort to deprive the Appellant of rights under the color of law for the rezoning to medium density residential, 10,000 Square Feet Residential (R-10). The Respondents submitted a Petition containing more than one thousand (1,000) plus signatures of residents opposing Ordinances 21-24 and 21-25. See *Complaint p. 18 and Summons and Complaint; 1000 Plus Signature Petition; Keep It Green, Inc. correspondence to County Council and website postings*. The Respondents' lawyer and Respondents are or were members of Keep It Green, Inc. whose organizational mission is to contest the approval and adoption of rezoning to higher density on the Waccamaw Neck. See *Respondents' Complaint pp. 3 – 6 and Exhibit 10*.

There are no facts stated in the Respondents' Complaint that constitutes a fairly read cause of action against the Appellant, pursuant to Rule 12(b)(6), SCRCF. See *Complaint pp. 9 - 33*. Statements made by the Respondents' lawyer in an Email message, a Letter and Transcripts on Record summarily states that her clients have no specific claims against the Appellant. See *Email p. 1 (Feb 7, 2022); Letter p. 1 (Feb 15, 2022); Transcript, dated May 19, 2022, p. 12 and Transcript, dated March 23, 2023, p. 3*. The Respondents' Complaint is frivolous and does not

state any factual wrongdoing by the Appellant in the procedural approval and adoption of Ordinances 21-24 and 21-25.

The Respondents' Complaint did not allege any constitutional violations regarding the approval and adoption of Ordinances 21-24 and 21-25. See *Complaint pp. 9 - 33*. All allegations in the Respondents' Complaint are directed at the Georgetown County Council and elected Council members, specifically, for violations the South Carolina Comprehensive Planning Enabling Act and the Comprehensive Land Use Plan. See *Complaint pp. 9 - 33*.

Based on legislative immunity that prevents judicial intervention, a Stipulation of Dismissal between the Respondents' and Georgetown County lawyers dismissed any and all claims against the Georgetown County Council and elected members and there are no remaining claims. See *Stipulation of Dismissal, dated May 5, 2022, p. 1 - 2*.

The motion hearing occurred on March 23, 2023 and Form 4 of the Order, statement of judgment, was filed on March 24, 2023. On or about April 4, 2023, the Appellant received from Respondents' lawyer an unsigned and undated written document titled "Order Granting Plaintiffs' Motion to Dismiss Counterclaim and Motion to Strike Other Matters". The written Order, authored by the Respondents' lawyer, was not filed in the trial court.

## ARGUMENTS

### **I. REPLY TO THE ARGUMENT THAT THE COUNTERCLAIM COMPLAINT DID NOT STATE SUFFICIENT FACTS FOR A CAUSE OF ACTION TO ESTABLISH A CIVIL CONSPIRACY AS STATED IN THE WRITTEN ORDER, AND BASED ON THE ORDER DATED MARCH 24, 2023.**

#### **Standard of Review:**

A motion to dismiss a counterclaim must be based solely on the allegations set forth in the counterclaim. See Rule 12(b)(6), SCRCF; See *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "A Rule 12(b)(6) motion may not be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case." See *Stiles v. Onorato*, 318 S.C.

297, 300, 457 S.E.2d 601, 602-3 (1995). The question is whether in the light most favorable to the complainant, and with every doubt resolved on his behalf, the counterclaim states any valid claim for relief. See Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

“A plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff.” See Paradis v. Charleston County School District, 433 S.C. 562, 574, 861 S.E.2d 774 (SC Sup. Ct. 2021) and Charles II, 199 S.C. at 176, 18 S.E.2d at 727; Charles I, 192 S.C. at 101, 5 S.E.2d at 472; see also 16 Am. Jur. 2d Conspiracy § 53 (2020) (enumerating the prevailing elements of a claim for civil conspiracy recognized in most jurisdictions); 15A C.J.S. Conspiracy § 4 (2012) (same).

A plaintiff need not allege an unlawful act to state a cause of action; lawful acts may become actionable as a civil conspiracy if the objective is to ruin or damage the business of another. See LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988).

Therefore, the primary inquiry in civil conspiracy is whether the principal purpose of the combination is to injure the plaintiff. See Pye v. Estate of Fox, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. See McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006).

Proof showing concert of action in the commission of the unlawful acts, from which the natural or reasonable inferences arise that the acts were in furtherance of the common design of the alleged conspirators, is sufficient; at least to establish a prima facie case of conspiracy. See 15A C.J.S. Conspiracy Section 30 at 698-700 (1977).

Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. See Nottingham v. Wrigley, 221 Ga. 386, 144 S.E.2d 749 (1965). Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence; concert of action, amounting to a conspiracy, may be shown by circumstantial as well as direct evidence. Mixon v. Phoenix Landscaping Co., 136 Ga. App. 344, 221 S.E.2d 225 (1975); see also 15A C.J.S. Conspiracy Section 29 at 691 (1977).

**Discussion:** The Keep It Green (“KIG”) organization and members expressed purpose is to prevent increases in residential land use and population density on the Waccamaw Neck in Georgetown County. See *Complaint pp. 4 - 5*. A petition exceeding 1000 plus signatures was submitted by Keep It Green to the County Council opposing the rezoning of the Appellant’s

property. See *Complaint p. 18*. According to their affidavits, the adjacent Colony subdivision Respondents are all members of the KIG organization and all deny awareness that the ordinances had passed October 26, 2021. See *Complaint pp. 36 – 62; and Answer pp. 32 - 40*.

The Complaint contained several letters, as exhibits, addressed to the County Council ripe with unsupported statements, that demonstrate the extent of the organized and combined effort of the Respondents to cause proximal harm to the Appellant's property. See *Letter pp. 76 - 78* (Jul 14, 2021); *Letter pp. 89 – 90* (Aug 20, 2021); and *Letter pp. 94 – 100* (Oct 26, 2021).

The “essential consideration” in civil conspiracy “is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff.” See Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986). In order to establish conspiracy, a party must produce evidence “from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. See Island Car Wash, Inc. v. Norris, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987). The Complaint is relevant evidence and proof of an overt act to cause proximate financial damage through judicial intervention.

Proof of unlawful means or independently unlawful acts in order to establish a civil conspiracy is no longer required by South Carolina Courts. A cause of action may arise from an act two or more people committed even where no cause of action would arise if an individual committed the same act. Under South Carolina law, lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another. However, the party bringing the claim still must prove that even if the action itself was lawful, its purpose was to injure. See Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 10, 344 S.E.2d 379, 382 (Ct. App. 1986) (citations omitted). In order to establish a conspiracy, evidence, direct or circumstantial,

must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise. See *1000 plus Signature Petition and See Urgent Action Needed! and Goff Property Call to Action PDF, August 15, 2021; Help Save Our Community, October 13, 2021; and Last Chance to Stop Increased Density on the Neck, September 7, 2021*. Pursuant to Rule 402, SCRCF, the proffered documents are sufficient facts and admissible evidence for a cause of action and trial on the merits for civil conspiracy.

The field of admissibility of evidence is broadened in proof of conspiracy. See Hall v. Walters, 226 S.C. 430, 85 S.E.2d 729 (1955). In general, broad discretion and great latitude are permitted in the reception of evidence in conspiracy cases. “The law permits great latitude in the admission of circumstantial evidence tending to establish a conspiracy and to connect those advising, encouraging, aiding, abetting and ratifying the overt acts committed for the purpose of carrying into effect the objects of a conspiracy; the jury should have before them and are entitled to consider every fact which has a bearing on and a tendency to prove the ultimate fact in issue.” See 15A C.J.S. Conspiracy Section 29 at 690, 693-94 (1977); Coleman v. Stevens, 124 S.C. 8, 117 S.E. 305 (1923). See *Respondents’ Complaint, Exhibits and KIG Website Postings*.

South Carolina courts have broadened the field of admissible evidence to prove conspiracy. In, Island Car Wash, Inc. v. Norris, the court of appeals clearly summarized the approach to proof and allowed circumstantial evidence to provide the basis for the claim due to the “covert and clandestine” nature of a conspiracy. In order to establish conspiracy, a party must produce evidence “from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise.” See Island Car Wash, Inc. v. Norris 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987). The Respondents’ Complaint and exhibits

are prima facie evidence of a civil conspiracy against the Appellant and Appellant's property along with the requested and unanswered interrogatories and production of documents.

The exhibits which are printouts from the KIG website demonstrate the extent of the effort to facilitate the conspiracy to injure the property of the Appellant. Additionally, the Respondents' lawyer was the former president of the KIG organization and threatened a lawsuit if the County Council approved the Appellant's ordinances. The current market value of the Appellant's property has been compromised causing proximate damages.

The postings from KIG's website clearly establishes the existence of a civil conspiracy in combination or agreement of two or more persons; the collective action was to injure the Appellant by preventing the rezoning of the property; thereby, committing a lawful act for unlawful means through coordination; and together initiate the commission of an overt act in furtherance of the agreement to injure with resultant proximate damages to the Appellant. In *Charles v. Texas Co.* (Charles I), the Supreme Court held that even an act which is lawful can be a ground of liability if it is done in furtherance of a conspiracy to injure and damage the plaintiff, the allegation would be pertinent and relevant on that issue. See *Charles v. Texas Co.*, 192 S.C. 82, 101, 5 S.E.2d 464, 472 (1939) (Charles I); *Lee v. Chesterfield Gen. Hospital, Inc.* 289 S.C. 6 (S.C. Ct. App. 1986) 192 S.C. at 100, 5 S.E.2d.; and *Exhibits and KIG Website Postings*.

All organized, combined and coordinated actions by the Respondents and evidence before the trial court along with the Respondents' Complaint support the civil conspiracy claim and demands a trial on the merits. In contrast, the trial court has determined that there is fairly read cause of action in the Respondents' Complaint against the Appellant where none is stated and there are admissions of no claims; whereas, the trial court has determined that there is no cause of action in the Counterclaim Complaint where there is prima facie evidence of a civil

conspiracy, conspiracy against rights and an effort at the deprivation of rights under the color of law. The Appellant has provided the trial court with relevant and admissible evidence.

Respondents presented a nonsensical rebuttal argument that the Appellant's ordinances were approved ("got what he wanted"); therefore, he was not harmed or injured. Consequently, there is no civil conspiracy despite the furtherance of the overt act to render the ordinances null and void. With this and three other cases, KIG has served notice on landowners and potential developers that moderate to high density developments will be opposed by KIG and other local organizations. It is likely that the adjacent Colony residents will take political and/or legal action in the future to stop or inhibit development of the Appellant's property. A proximate injury has already resulted to the Appellant and property through the civil conspiracy and violations of constitutional rights. The clandestine nature of conspiracies requires discovery and a trial to prove a civil conspiracy. The Respondents have not rebutted with any evidence.

**II. REPLY TO ARGUMENT THAT THERE ARE NO FACTUAL EVIDENCE OF FEDERAL CONSTITUTIONAL VIOLATIONS OR CONSPIRACY AGAINST RIGHTS AND DEPRIVATION OF RIGHTS UNDER THE COLOR OF LAW IN THE COUNTERCLAIM COMPLAINT.**

**Standard of Review:**

Under Title 18, U.S.C., Section 241, it is unlawful for two or more persons to conspire to injure, oppress, threaten, or intimidate any person of any state, territory or district in the free exercise or enjoyment of any right or privilege secured to him/her by the Constitution or the laws of the United States.

Under Title 18, U.S.C., Section 242, it is a crime for any person acting under color of law, statute, ordinance, regulation, or custom to willfully deprive or cause to be deprived from any person those rights, privileges, or immunities secured or protected by the Constitution and laws of the United States.

Private persons, jointly engaged with state officials in the prohibited action, are acting under color of law for purposes of the statute. To act under color of law does not require that the accused be an officer of the State. It is enough that she/he is a willful participant in joint activity with the State or its agents. See United States v. Price, 383 U.S. 787, 794, n. 7, 86 S.Ct. 1152, 1157 n.7, 16 L.Ed.2d 267 (1966).

The U.S. Supreme Court has held that the private party's joint participation with a state official in a conspiracy to discriminate would constitute both state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights and action under color of law for purposes of the statute. See Adickes v. S. H. Kress & Co., 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970).

42 U.S. Code § 1983 – Civil Action for Deprivation of Rights – “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.”

State courts may now entertain Section 1983 actions if a plaintiff chooses a state court over the federal forum that is always available as a matter of right. See Martinez v. California, 444 U.S. 277, 283, and n. 7, 100 S.Ct. 553, 558, and n. 7, 62 L.Ed.2d 481 (1980). Section 1983 creates no substantive law. It merely provides one vehicle by which certain provisions of the Constitution and other federal laws may be judicially enforced. See Patsy v. Board of Regents of Florida, 457 U.S. 496, 503, 102 S.Ct. 2557, 2561, 73 L.Ed.2d 172 (1982) (quoting Mitchum v. Foster, 407 U.S. 225, 242, 92 S.Ct. 2151, 2162, 32 L.Ed.2d 705 (1972)) (emphasis added). State as well as federal courts have jurisdiction over suits brought pursuant to 42 U.S.C. § 1983, which creates a remedy for violations of federal rights committed by persons acting under color of state law.

Equal protection of the law means that equal protection and security shall be given to all under like circumstances in his life, his liberty, and his property, and in the pursuit of happiness, and in the exemption from any greater burdens and charges than are equally imposed upon all others under like circumstances. See Sovereign Camp, W. O. W., v. Casodos, D.C.N.M., 21 F.Supp. 989, 994.

**Discussion:** The Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. In addition to anticipated individual opposition, the Respondents and other members of the Keep It Green (“KIG”) organization combined and organize to oppose the rezoning because it would create undeserved profits for the Appellant. This profit motive reasoning was stated by a member of the Planning Commission and County Council as a reason for voting against approval of the ordinances. After an unsuccessful effort to prevent the

approval and adoption of the ordinances, the adjoining landowners who are members of KIG that opposed the rezoning, collectively filed a lawsuit against the County Council and the Appellant. See *Respondents' Complaint*.

The Appellant and Appellant's property was subjected to a civil conspiracy, conspiracy against rights and an ongoing effort for the deprivation of rights under the color of law for the rezoning private property. The Appellant, who should be an interested party under the S.C. Uniform Declaratory Judgment Act (UDJA), was arbitrarily and capriciously or with deliberate intent made a defendant under the UDJA in violation of the legislative intent of the law. See *Counterclaim Complaint pp. 16 – 40 and Respondents' Complaint*.

Concurrent with the public readings of the Appellant's Ordinances 21-24 and 21-25 to rezone its parcel to 10,000 Square Feet Residential (R-10), medium density, Ordinances 21-26 and 21-27 to rezone parcels to 10,000 Square Feet Residential (R-10), medium density was approved without any opposition from the Respondents or members of KIG. Additionally, those ordinances met no opposition from other individuals, groups and organizations, which confirms the disparate treatment detailed in the Complaint. See *First and Second Readings Agendas*.

The organization, KIG and its members and associated individuals and organizations, have engaged in a conspiracy of rights to reverse the rezoning under the color of law to purportedly deprive the Appellant of perceived underserved profits and/or prevent the development of the property to accommodate population growth.

A letter addressed to County Council members threatened legal action if the Appellant's ordinances were approved. Subsequently, the declaratory judgment lawsuit was filed to solicit judicial intervention. See *KIG Letter, dated October 26, 2021 and Website Posting filed in the Trial Court*. All of the evidence submitted with the pleadings are relevant, admissible and

unrebutted and establishes a cause of action for a conspiracy against rights with the intent of deprivation of rights under the color of law with the ongoing litigation.

The Court of Appeals should take judicial notice of the political and legal actions engaged in by the Respondent Keep It Green (“KIG”) and its members. In addition to this case, Case No. 2022CP-2200032, Keep It Green other (“KIG”) litigations include Case Nos. 2022-CP-22-00912, 2023-CP-22-00007, and 2023-CP-22-00210. The former executive director at KIG is the lawyer for all of the plaintiffs in the KIG litigations. In all of the litigations, the County and the landowners are named as defendants with allegations of non-conformance with the Comprehensive Plan and S.C. Comprehensive Planning Enabling Act.

The trial court judge denied the Appellant’s motion to dismiss him as a defendant, dated January 25, 2022 and implied a fairly read cause of action where there are no claims in the Respondents’ Complaint against the Appellant. In an Order, dated May 31, 2023, Case No. 2023-CP-22-0007, and an Order, dated June 23, 2023, Case No. 2022CP22-00912, the trial court granted the defendants’ motions to dismiss the Respondents Complaints in both cases because they did not state any claims upon which the Court could grant relief. In sum, each of the Respondents’ litigations, including the Appellant’s case, filed in the Circuit Court made the same or similar allegations and made the County and landowners defendants. The trial court granted the landowners’ joint motion to dismiss them as defendants.

In all four aforementioned active cases, the Respondents requested by declaratory judgment that the ordinances adopted by the County Council be rendered null and void because they conflicted with the Comprehensive Plan and violated the S.C. Comprehensive Planning Enabling Act. Specifically, these are the same issues raised in the declaratory judgment in the Appellant’s litigation by the Respondents against Ordinances 21-24 and 21-25.

Contrastingly, the trial court denied the motion to dismiss the Appellant as a defendant, denied the civil conspiracy and constitutional allegations, and dismissed the Appellant's motion for judgment on the pleadings despite admissions of no claims and the motion for summary judgment, where there are no material facts to be tried against the Appellant, who remains a defendant in the case. The Appellant's argument is justifiable and the decisions are indefensible.

**III. REPLY TO ARGUMENT THAT RESPONDENTS DID NOT JUSTIFY THE MOTION TO STRIKE OTHER MATTERS FROM THE APPELLANT'S ANSWER AND DEFENSES TO THE RESPONDENTS' COMPLAINT.**

**Standard of Review:**

S.C. Code Ann. § 14-3-330 (2) states impart that "The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: (2) An order affecting a substantial right made in an action when such (c) strikes out an answer or any part thereof or any pleading in any action.

Rule 12(f) Motion to Strike, states: Upon motion pointing out the defects complained of, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

**Discussion:** Pursuant to Rule 301, SCRPC, the Respondents did not offer any evidence to rebut or meet the presumption and the Appellant has met the burden of proof. The amendment to Rule 12(f) makes clear that a motion to strike must point out the defects complained of, and is consistent with the language of Rule 12(e). However, the Respondents wanted the trial court to simply strike the affirmatives defenses they arbitrarily and capriciously disagreed without pointing out defects, if any, or requesting a more definite statement. The affirmative defenses purported in the Motion to Strike are indefensible violations of the law by the Respondents.

The allegations the Respondents want to strike include the lack of facts to constitute a cause of action, lack of standing, lack of a justiciable controversy and the following affirmative defenses: 1) Forth Defense: Civil Conspiracy; 2) Fifth Defense: Conspiracy Against Rights; 3)

Sixth Defense: Deprivation of Rights Under Color of Law, Plaintiffs acting under color of law; 4) Seventh Defense: Misrepresentation; 5) Tenth Defense: Estoppel; and 6) Eleventh Defense: Unclean Hands, Plaintiffs.

In granting this motion to strike other matters, the trial court has allowed the Respondents to eviscerate the answers and defenses against Respondents' Complaint along with dismissing Counterclaim Complaint, the Motions for Judgment on the Pleadings and Summary Judgment. Essentially setting the stage for a lone trial against the Appellant, without genuine issues of material facts to be tried and admissions of no claims, for submitting a successful rezoning application. Notwithstanding that any and all claims against the County Council and its members have been dismissed, the Appellant will be tried for having submitted a rezoning application with all pertinent and valid defenses eviscerated by the trial court.

**IV. REPLY TO ARGUMENT THAT THE APPELLANT'S DESIGNATION AS A DEFENDANT IS NOT A JUSTICIABLE CONTROVERSY UNDER THE UNIFORM DECLARATORY JUDGMENT ACT.**

**Standard of Review:**

S.C. Code Ann. § 15-53-80 states in part that: "When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

S.C. Code Ann. § 15-53-20 states in part that: Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

"An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support." See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008).

**Discussion:** Whether the Appellant and/or Trust should be defendants with a fairly read cause of action is an issue for the court to determine in a declaratory judgment complaint. The intent of S.C. Code ann. § 15-53-80 is to inform and allow a potentially affected party to protect an interest and does not compel a party with an interest to be named as a defendant as opposed to a party-in-interest. In accordance with Fed.R.Civ.P. 17(a), the trustee, as the legal title holder of the trust's property, is generally the real party-in-interest. Under Federal Rule of Civil Procedure 17(b), the capacity of a trust to sue or be sued is determined by the laws of the state where the court is located. See Fed.R.Civ.P. 17(a) and (b).

The overwhelming weight of authority holds that a trust, under state law, does not have the capacity to sue or be sued in its own name. See Coverdell v. Mid-South Farm Equipment Ass'n, 335 F.2d 9, 12–13 (6<sup>th</sup> Cir.1964) and IV Scott, Trusts § 280 (1989). See *Court Docket*.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” See Charleston Cnty. Sch. Dist. V. State Budget & Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). “The determination of legislative intent is a matter of law.” See Media Gen. Commc’ns, Inc. v. S.C. Dep’t of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 529 (2010) (citation omitted). If a statute is ambiguous, the courts must construe its terms. See Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 750 S.E.2d 61 (2013). “A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers.” Id. At 128, 750 S.E.2d at 63 (citation omitted).

“Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” See Media Gen., 388 S.C. at 148, 694 S.E.2d at 530 (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “If a statute’s ‘terms are clear and

unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense.” Id. (citation omitted).

The Appellant, the sole trustee of the Appellant’s Trust, for all legal purposes is the owner of all assets held. Under Fed.R.Civ.P. 17(a), the trustee, as the legal title holder of the trust’s property, is generally the real party in interest with the power to prosecute or defend actions in the name of the trust. Accordingly, the Appellant’s Trust should not be designated as a Defendant. The Appellant’s Motion to Dismiss was predicated on being dismissed as a Defendant and designated as a party-in-interest in accordance with the Uniform Declaratory Judgment Act, Section 15-53-80 or Rule 19(a)(2), SCRPC which states that in a proper case the Appellant should be an involuntary plaintiff.

It is an abuse of discretion and a disregard of the plain language of the Uniform Declaratory Judgment Act for the Appellant to remain designated as a Defendant. Maintaining the Appellant as a Defendant, naming the Appellant’s Trust as a Defendant and creating a fairly read unstated cause of action against them is an abuse of discretion based upon errors of law and findings that are without factual evidentiary support. “In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.” See Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). A defendant is the party against whom relief or recovery can be obtained in an action or suit. The trial court has failed to correctly decide that the Appellant should not be a defendant with a fairly read cause of action in this lawsuit.

**V. RESPONDENTS DID NOT REBUT THE APPELLANT’S ARGUMENT THAT THE ORDER, DATED MARCH 24, 2023, DENYING THE MOTION FOR JUDGMENT ON THE PLEADINGS IS INCONSISTENT WITH RESPONDENTS’ COMPLAINT AND ADMISSIONS.**

**Standard of Review:**

“It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise.” See Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct.App. 1992). Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position. *Id.*; See Mellon Bank, N.A. v. Carroll, 314 S.C. 468, 445 S.E.2d 466 (Ct.App. 1994).

**Discussion:** Pursuant to Rule 301, SCRPC, the Respondents did not offer any evidence to rebut or meet the presumption and the Appellant has met the burden of proof. The Order, dated March 24, 2023 denying the motion for judgment on the pleadings conflicted with written and recorded transcript statements and admissions made by Respondents’ lawyer. The written trial court Order did not address the denial of the motion for judgment on pleadings. Also, the Order which was authored by the Respondent’s lawyer was not filed in the trial court. The March 24, 2023 Order denying the motion conflicts with the Respondents’ Complaint and admissions made in written statements and transcripts.

In an email message, dated February 7, 2022, subject, Middleton v. Georgetown County..., the Respondents’ lawyer stated:

“We received your Motion to Dismiss and wanted to let you know that we have a potential resolution of your motion if the county is willing to agree. My clients have no specific claims against you, and the only reason you are included as a party is that the Declaratory Judgment Act states that all "parties in interest" must be named. As owner of the land, the trust is arguably a party in interest. If the county is willing to stipulate that you are not a party in interest for purposes of the DJA, and that a decision on the issues would be binding on all parties without having you as a party, we would agree to your dismissal without prejudice.”

In a letter, dated February 15, 2022, subject, Middleton v. Georgetown County, 2022-CP-2200-032, the Respondents’ lawyer stated:

“My clients have no specific claims against you apart from the fact that the trust owns the real property. You are included as a party because the Declaratory Judgment Act provides that all “parties in interest” must be named. As owner of the land, the trust is a party in

interest. If the county is willing to stipulate that a decision on the issues would be binding on all parties without having you named as a party, and if the court agrees, we would be willing to dismiss you without prejudice.”

In the Transcript of Record on May 19, 2022, subject, Middleton v. Georgetown County, 2022-CP-2200-032, the Respondents’ lawyer stated:

“I certainly – I sympathize with Mr. Goff’s position in the sense that I know he feels he didn’t do anything wrong, and we don’t think that he did something wrong. But it is a declaratory judgment action, and he does own the property that is affected by these ordinances. And so under the Declaratory Judgment Act, he is a necessary party.” See *Transcript, May 19, 2022, Page 12, Lines 10-15.*

In the Transcript of Record on March 23, 2023, subject, Middleton v. Georgetown County, 2022-CP-2200-032, the Respondents’ lawyer stated: “The issues really involve Georgetown County”. See *Transcript, March 23, 2023, p. 3, Line 18.*

Respondents’ Complaint does not state any wrongdoing by the Appellant in the procedural approval and adoption of the ordinances. Even though, the Appellant’s Trust is not individually listed as a Defendant in the Respondents’ Complaint, it has been defined as a Defendant by the Court. The Appellant only submitted an application to rezone an unimproved parcel of land, Case Number REZ-21-28323, to the Georgetown County Planning Department, provided supporting memorandums of the need, and it resulted in the approval and adoption of the ordinances by the Georgetown County Council.

Neither the Order, dated June 3, 2022, nor the Order, dated March 24, 2023, as crafted by the Respondents’ lawyer and approved by the trial court, reflected the case facts and admissions made in the written statements to the Appellant and the transcripts in the trial court. See *Email p. 1 (Feb 7, 2022); and Letter p.1 (Feb 15, 2022) and transcripts.* The trial court should have granted the motion for judgment on the pleadings. In opposition, the Respondents filed a Rule 12(f) motion to strike which was denied, but trial judge denied the Appellant’s motion for

judgment on the pleadings which prolongs this case. The evidence of no claims against the Appellant in the Complaint and admissions are relevant, unrebutted and admissible.

**VI. RESPONDENTS DID NOT REBUT THE APPELLANT’S ARGUMENT THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACTS TO BE TRIED AND/OR A STATED FAIRLY READ CAUSE OF ACTION AGAINST THE APPELLANT AND THE MOTION SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THE ORDER, DATED MARCH 24, 2023.**

**Standard of Review:**

Rule 56, SCRCF provides that a party may move, with or without supporting affidavits, for summary judgment in his favor as to all or part of a claim. See Rule 56(a), SCRCF. The trial court must grant the motion “if the pleadings, answers to interrogatories, admissions and exhibits on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” See Id. Rule 56(c), SCRCF.

“Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact or any claims to be tried.” See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

Once the moving party carries its initial burden, the opposing party must come forward with admissible evidence that show there is a genuine issue of fact remaining for trial. See Baughman, 306 S.C. at 115, 410 S.E.2d at 545.

“Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). “Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ.” Rothrock v. Copeland, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991).

**Discussion:** Pursuant to Rule 301, SCRCF, the Respondents did not offer any comments or evidence to rebut or meet the presumption and the Appellant has met the burden of proof.

“With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by “showing”--that is, pointing out to the [trial] court--that there is an absence of evidence to support the nonmoving party’s case.’” See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). The moving party need not support its motion with affidavits or other similar materials negating the opponent’s claim.

See *Id.* (quoting Celotex, 477 U.S. at 323); and Richardson v. State-Record Co., 330 S.C. 562, 499 S.E.2d 822 (Ct. App. 1998). See *Respondents Complaint*.

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” See George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). In the grant of a summary judgment motion, the Court applies the standard under Summary judgment is proper when ‘there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.’” See Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 114-15 410 S.E.2d 537, 545 (1991).

In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. See *Id.* at 115, 410 S.E.2d at 545. However, the nonmoving party must demonstrate the likelihood that a trial will uncover additional relevant evidence.” See *Id.* at 112, 410 S.E.2d at 544. The undated Order and Respondents initial brief does not address the denial of the motion for summary judgment and/or any triable material issues of fact against the Appellant in the motion to dismiss, opposition memorandum or at the hearing. In sum, the Respondents’ lawyer stated her willingness to stipulate to dismissal of the Appellant. See *Transcript, May 23, 2023, pp. 4-5*.

In that the County Council members have been dismissed from the case, a review of the record before the Court compels a finding that summary judgment should be granted for Goff Trustee. See Humana Hosp.-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) (“Where a plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the lower court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law.”). The argument is un rebutted and indefensible.

In this instant complaint, the alleged facts by the Respondents are speculative conclusions and contrived evidentiary facts. The Respondents' Complaint does not state any facts that constitutes a cause of action against the Appellant as required by 12(b)(6), SCRCP.

**VII. RESPONDENTS DID NOT REBUT THE ORDER, DATED JUNE 3, 2022, DENYING THE MOTION TO DISMISS THE APPELLANT AS A DEFENDANT AND FINDING A FAIRLY READ CAUSE OF ACTION WAS AN ABUSE OF DISCRETION AND WAS NOT HEARD BY THE COURT OF APPEALS.**

**Standard of Review:**

The SC Supreme Court has held that an abuse of discretion arises in cases in which: (1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support. See Rochester v. Holiday Magic, Inc., 253 S.C. 147, 169 S.E. (2d) 387 (1969); See Brown v. Weathers, 251 S.C. 67, 160 S.E. (2d) 133 (1968); See Holliday v. Holliday, 235 S.C. 246, 111 S.E. (2d) 205 (1959); See Simon v. Flowers, 231 S.C. 545, 99 S.E. (2d) 391 (1957).

“In a case raising a novel issue of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.” See Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 466, 636 S.E.2d 598, 605 (2006). “The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and policies of this state and the Court's sense of law, justice, and right.” Id. at 467, 636 S.E.2d at 605-06.

In accordance with S.C. Code Ann. § 14-3-330 – (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from; (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

**Discussion:** Pursuant to Rule 301, SCRCP, the Respondents did not offer any evidence to rebut or meet the presumption and the Appellant has met the burden of proof. In the Order, dated June 3, 2022, the Appellant contends that the motion hearing judge abused his discretion in

deciding that he should remain a defendant with a “fairly read” cause of action in the Respondents’ Complaint. In accordance with Rule 19(a)(2), SCRPC, the Appellant should have been named as an “Involuntary Plaintiff” or “Party-in-Interest”, instead of a defendant, as required under to S.C. Code Ann. § 15-53-80. See *Rule 19(a)(2), SCRPC and S.C. Code Ann. § 15-53-80*. This Order, an abuse of discretion, was appealed and dismiss on motion as interlocutory. However, it involved the merits in the action an in effect has determined the outcome of the action. An interlocutory order is appealable under subsection (1) only if it involves the merits, that is, “finally determines some substantial matter forming the whole or a part of some cause of action or defense....” Subsection (2)(c) permits the direct appeal of orders which affect a substantial right by striking out an answer.

Under S.C. Code Ann. § 14-3-330(2), an order which affects a substantial right and in effect determines the action and prevents a judgment from which an appeal may be taken is immediately appealable. An interlocutory order is immediately appealable only if it involves the merits of the case or affects a substantial right. See Pendergrass v. Martin, 275 S.C. 413, 272 S.E. (2d) 172 (1980). Moreover, the order effectively discontinues the lawsuit against the County Council and elected members and substituted the Appellant, thus bringing the order under paragraph S.C. Code Ann. § 14-3-330(2)(a).

This Interlocutory Order denying the Appellant’s motion to dismiss him as a defendant and finding a fairly read unstated cause of action should be reviewed as an abuse of discretion. See Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). “An abuse of discretion occurs when the trial court's decision is based upon an error of law or upon factual findings that are without evidentiary support.” See Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 555, 658 S.E.2d 80, 85-86 (2008). “The determination of legislative intent is

a matter of law.” See Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 529 (2010) (citation omitted). The argument is un rebutted and indefensible.

**VIII. RESPONDENTS DID NOT REBUT THE APPELLANT’S ARGUMENT THAT LEGISLATIVE IMMUNITY AND THE STIPULATION OF DISMISSAL RENDERED THE RESPONDENTS’ COMPLAINT NULL AND VOID AND IT SHOULD BE DISMISSED IN ITS ENTIRETY.**

**Standard of Review:**

In a case decided by the S.C. Supreme Court, owners of property adjacent to rezoned land challenged the rezoning ordinance, arguing it conflicted with the local Zoning Land Development Regulations (ZLDR). See Mikell v. County of Charleston, 375 S.C. 552, 654 S.E.2d 92 (Ct. App. 2007), petition for cert. filed (S.C. January 24, 2008). The court specifically held that the zoning regulations and S.C. Code Ann. § 6-29-740 provide "County Council with final decision-making authority in rezoning actions. Id. at 560, 654 S.E.2d at 96-97. As noted in Mikell, "there is nothing to suggest that County Council cannot change an ordinance that it created." Id. at 561, 654 S.E.2d at 97.

With regards to legislative immunity, the Courts have opined in multiple cases: South Carolina recognizes the longstanding doctrine of legislative immunity for legislators carrying on their legislative duties. See Richardson v. McGill, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979) (holding a legislator was absolutely immune from liability for comments made during the performance of his legislative duties). Legislative immunity protects legislators from “deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good.” See Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The public good is undermined by any restriction placed on a legislator’s ability to exercise legislative discretion, including the fear of personal liability. See Bogan v. Scott-Harris, 523 U.S. 44, 48-49 (1998).

**Discussion:** Pursuant to Rule 301, SCRPC, the Respondents did not offer any evidence to rebut or meet the presumption and the Appellant has met the burden of proof. The trial court accepted a stipulation of dismissal that allowed the Georgetown County Council and elected members to be dismissed from the Respondents’ Complaint based on legislative immunity and lack of judicial power to render relief. This was an affirmation by the Respondents that the approved and adopted ordinances were valid and beyond judicial intervention. See S.C. Pub. Int. Found. v Courson, 420 S.C. 120, 125, 801 S.E.2d 185, 187 (Ct. App. 2017) and Williams v. Condon, 347 S.C. 227, 242-43, 553 S.E.2d 496, 505 (Ct. App. 2001).

With the dismissal of the County Council there are no claims against the County and the Appellant is the sole Defendant in this legal action in which he did nothing wrong. Absent the claims against the County Council, the Complaint is void. With the dismissal of the County Council and elected members, the Respondents should not be allowed to continue this litigation against the Appellant for exercising a constitutional right to petition for the rezoning of private property. See *Transcript, dated May 19, 2022, p. 12 and Transcript, dated March 23, 2023, p. 3.*

Courts lack the power to compel a legislative body to take legislative action with respect to a challenged ordinance. See Foster v. Taylor, 210 S.C. 324, 333, 42 S.E.2d. 531, 536 (1947) (“The court will, of course, not attempt to compel the legislature by mandamas to perform a legislative duty or function.”). Likewise, the power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.” See Bob Jones Univ., Inc. v. City of Greenville, 243 S.C. 351, 360, 133 S.E.2d 843, 847 (1963) (citation omitted).

“The County Council's decision was not arbitrary or capricious, as required by the applicable scope of review. See Bear Enters. v. County of Greenville, 319 S.C. 137, 141-42, 459 S.E.2d 883, 886 (Ct. App. 1995) (stating the reviewing court will focus on whether the municipal zoning authority's decision was arbitrary or capricious). With respect to judicial review of zoning ordinances, the S.C. Supreme Court has noted that there is a strong presumption in favor of validity of municipal zoning ordinances and validity of their application. See Bob Jones University, Inc. v. City of Greenville, 243 S.C. 351, *Supra*.

The burden of proving the invalidity of a zoning ordinance is on the party attacking it, and it is incumbent upon the party attacking it to show through clear and convincing evidence the

arbitrary and capricious nature of the ordinance. See Town of Scranton v. Willoughby, 306 S.C. 421, 412 S.E.2d 424 (1992). The Court has concluded that the action of a municipality regarding the rezoning of property will not be overturned by a court as long as the decision is “fairly debatable”. See Rushing v. City of Greenville, 265 S.C. 285, 217 S.E.2d 797 (1975).

A Land Use Plan prepared by the Planning Commission has no power to zone property. The plan does not establish the zoning for the property, nor does it mandate the County Council to abide by the plan. It merely provides a general direction for considering future rezoning, which is a legislative process. See Hampton v. Richland County, 292 S.C. 500, 357 S.E.2d 463 (Ct.App.1987) (an ordinance rezoning a particular piece of property, like an ordinance adopting a comprehensive zoning plan, is legislative, and as such, presumptively valid because it is not the court's prerogative to pass upon the wisdom of the municipality's decision).

The trial court granted the County lawyer motions to dismiss in Case Nos. 2023CP-22-00007 and 2022CP-22-00912 on the grounds that the “Respondents’ Complaint incorrectly and erroneously cites the laws of both the State of Carolina and Georgetown County as it relates to the underlying allegations of the Respondents’ Complaint such that any requested relief is impossible, impractical as a matter of law, an outside of the laws of the State of South Carolina such that dismissal with prejudice is the proper action by the Court.” Likewise, the Respondents’ Complaint against the County and Appellant cited similar allegations against the County about the rezoned Appellant ordinances applying incorrect and erroneous State and County laws.

**IX. RESPONDENTS DID NOT REBUT THE APPELLANT’S ARGUMENT THAT THERE ARE NO CONSTITUTIONAL ISSUES TO BE RESOLVED CONCERNING THE APPELLANT’S ORDINANCES.**

**Standard of Review:**

“[E]very presumption will be made in favor of the constitutionality of a legislative enactment; and a statute will be declared unconstitutional only when its invalidity appears

so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution.” See City of Rock Hill v. Harris, 391 S.C. 149, 152, 154, 705 S.E.2d 53, 54, 55 (2011). “[T]he power to declare an ordinance invalid because it is so unreasonable as to impair or destroy constitutional rights is one which will be exercised carefully and cautiously, as it is not the function of the Court to pass upon the wisdom or expediency of municipal ordinances or regulations.” See Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965).

“Appellant has not been deprived of due process of law because he was not deprived of his property due to the adoption of the Plan, nor due to the manner of the Plan's adoption. Appellant's claim in this regard is not justiciable because it is not ripe for review.” See Waters v. South Carolina Land Resources Conservation Comm'n, 321 S.C. 219, 467 S.E.2d 913 and McClanahan v. Richland County, 350 S.C. 433, 567 S.E.2d 240 (Ct. App. 2002).

**Discussion:** Pursuant to Rule 301, SCRPC, the Respondents did not offer any evidence to rebut or meet the presumption and the Appellant has met the burden of proof. There are no allegations or claims in the Respondents' Complaint or statements in the Affidavits or filed pleadings that the Respondents were deprived of property, due process of law or any constitutional rights of the United States and/or South Carolina. S.C. Code Ann. § 15-53-80 of the Uniform Declaratory Judgment Act requires service on the Attorney General if an ordinance alleged to be unconstitutional. No such service occurred because the allegations against the County Council involved only administrative violations of Comprehensive Plan and the S.C. Planning Enabling Act related to the passage of the ordinances. See *Complaint pp. 9 – 33*.

A municipal ordinance is a legislative enactment and is presumed to be constitutional. See Bibco Corp. v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998). The burden of proving the invalidity of a zoning ordinance is on the party attacking it and it is incumbent on the attacking party to show the arbitrary and capricious character of the ordinance through clear and convincing evidence. *Id.*; see also Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997) (a strong presumption exists in favor of the validity and application of zoning ordinances). "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." See Knowles v. City of Aiken, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991).

There were no alleged violations of the South Carolina Constitution, deprivation of property or due process of law, regarding the approval and adoption of the Ordinances 21-24 and 21-25. The Respondents' Complaint did not allege deprivation of property or due process law violations or any challenge to the constitutionality of the ordinances. See *Complaint pp. 26 – 33; and Transcript, May 19, 2022, pp. 1 - 17*. The argument is un rebutted and indefensible.

### CONCLUSIONS

The Appellant should not have been named as a Defendant as opposed to an Involuntary Plaintiff or Party-in-Interest. It is an abuse of discretion by the trial court and an error in interpreting the statues and laws for the Appellant to be a Defendant with a fairly read and unstated cause of action in this litigation. Despite the admissions of no claims against the Appellant and the absent of constitutional claims, the Respondents are continuing this civil litigation and making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts with the intention further harass and injure the Appellant. The Order, granting the motion to dismiss the Counterclaim Compliant and denying the Motions for Judgment on the Pleadings and Summary Judgment should be reversed by the Court of Appeals and the Respondents' Complaint dismissed in its entirety.

Respectfully Submitted,  
The Appellant

Date: June 27, 2023

  
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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

**RECEIVED**

APPEAL FROM GEORGETOWN COUNTY

JUN 29 2023

Court of Common Pleas

SC Court of Appeals

The Honorable William H. Seals, Jr.

Case No. 2022-CP-22-00032

Ernest F. Middleton, III, and Joyce J. Middleton, Michael J. Farrar and Diana Farrar, Robert H. Hunt and Jeane M. Sullivan, the Colony Homeowners Association, Inc., and Keep It Green, Inc., Respondents,

v.

Georgetown County and Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust dated June 18, 2004, Defendants,

Of whom Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust dated June 18, 2004 is the Appellant and Georgetown County is a Respondent.

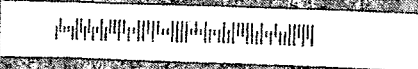
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case was served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on June 26, 2023 to the following:

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