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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr.
Circuit Court Judge

Appellate Case No. 2023-001306
Circuit Court Case No. 2023-CP-22-00007

Elizabeth M. Powers and Edward A. Powers; Martha C. Green; Steven E. Basso; James R. Sherman; Alexander V. Picard and Jessica L. Picard; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlet, Inc.

Appellants,

v.

Georgetown County; and Alliance for Economic Development for Georgetown County

Respondents.

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February 26, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

STATUTES

Page

MUNICIPAL ORDINANCES

RULES

OTHER

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THAT PLAINTIFFS' COMPLAINT FAILED TO STATE A CLAIM THAT GEORGETOWN COUNTY APPROVAL OF THE AMENDMENT TO A PLANNED DEVELOPMENT WAS *ULTRA VIRES* BECAUSE THE APPROVAL CONFLICTED WITH SUBSECTION 6-29-760(A) OF THE ENABLING ACT?

2. DID THE TRIAL COURT ERR IN FINDING THAT PLAINTIFFS' COMPLAINT FAILED TO STATE A CAUSE OF ACTION UNDER THE DECLARATORY JUDGMENTS ACT?

3. DID THE TRIAL COURT ERR BY CONSIDERING THE MERITS OF THE UNDERLYING CONTROVERSY AND APPLYING AN EVIDENTIARY PRESUMPTION IN THE CONTEXT OF A RULE 12(b)(6), SCRCP, MOTION TO DISMISS?

4. DID THE TRIAL COURT ERR IN DISMISSING PLAINTIFFS' COMPLAINT AS A MATTER OF LAW ON THE BASIS OF FAILURE TO ALLEGE A CONSTITUTIONAL DEPRIVATION?

5. DID THE TRIAL COURT ERR IN ITS INTERPRETATION AND APPLICATION OF THE ENABLING ACT REQUIREMENT THAT ZONING "REGULATIONS MUST BE MADE IN ACCORDANCE WITH THE COMPREHENSIVE PLAN FOR THE JURISDICTION" AND IN FINDING THAT GEORGETOWN COUNTY MET THE STATUTORY REQUIREMENT IN THIS CASE?

STATEMENT OF THE CASE

The narrow issue before the court is whether Plaintiffs' Amended Complaint[1] (sometimes hereinafter "Complaint") sufficiently sets forth a cause of action under the broad provisions of the Uniform Declaratory Judgments Act, S.C. Code 1976, §§ 15-53-10, *et seq.,* (hereinafter "Declaratory Judgments Act"), and the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code 1976, §§ 6-29-310, *et seq.,* (hereinafter "Enabling Act").

Appellants assert that the trial court improperly dismissed Plaintiffs' Amended Complaint on Rule 12(b)(6), SCRCP, Motions to Dismiss, and that their Amended Complaint: (1) properly states a cause of action under the Declaratory Judgments Act and the Enabling Act; and (2) raises issues of material fact that cannot properly be resolved in a Rule 12(b)(6) Motion to Dismiss without development of the record.

1. Summary of Complaint

This case involves a zoning change application to amend the "Mercom Technology Park Planned Development," located in the heart of an historical African American neighborhood of Pawleys Island, Georgetown County, known as Parkersville. (Amended Complaint, pars. 1, 7, 8). The amendment requested to change the Mercom Technology Park Planned Development ("PD") zoning from an unconstructed non-residential technology park consisting of primarily vacant land, to a high density multi-family residential luxury housing development. (Amended Complaint, par. 6).

[1] Plaintiffs' Complaint was Amended to correct the name of one of the Defendants from "Alliance for the Economic Development for Georgetown County, Inc.," to "Alliance for Economic Development for Georgetown County." There were no substantive differences between the original Complaint and the Amended Complaint and there was no procedural activity prior to the Amended Complaint. In this brief, references to "Complaint" and "Amended Complaint" are used interchangeably to refer to Plaintiffs' Amended Complaint filed February 6, 2023.

The Complaint is supported by 150 paragraphs of detailed factual averments incorporating 18 exhibits, and requests the court to declare the zoning amendment invalid and void for the following reasons:

1. County Council's approval of the rezoning was *ultra vires* because Council did not comply with provisions of the Enabling Act regarding recommendation by Planning Commission. (Amended Complaint, pars. 15(c), 102-115).
2. The Mercom Technology Park was not a valid Planned Development capable of amendment because: (a) it was a single use PD and void from its inception *(ultra vires)* under the Enabling Act, *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010), and other law; and/or (b) it should have been reverted to its former zoning classification of Forest Agriculture (FA) pursuant to Georgetown County Zoning Ordinance §1703 (Amended Ord. 2005-37), which requires reversion of Planned Developments that have not been constructed within two years of approval. (Amended Complaint, pars. 15(a), 40-70).
3. The zoning change was not in accordance with the Comprehensive Plan as required by the Enabling Act. (Amended Complaint, pars. 15(d), 71-95).
4. The application to amend was defective because it was submitted by only one of the three Planned Development owners in violation of Georgetown County Ordinances and other law. (Amended Complaint, pars. 15(b), 65-70).
5. Georgetown County Council acted arbitrarily and capriciously, violated state law and local ordinances, ignored the clear and unambiguous terms of the Georgetown County Comprehensive Land Use Plan, and disregarded the Planning Commission's

unanimous vote to deny approval due to failure to conform to the Comprehensive Plan. (Amended Complaint, pars. 15, 71-115).

6. Three members of Georgetown County Council who voted on this issue should have recused themselves due to conflicts of interest. (Amended Complaint, pars. 15(h)-(i), 111-112).

2. Procedural History

Defendants are Georgetown County and Alliance for Economic Development for Georgetown County (hereinafter "Alliance"). (Amended Complaint, pars. 37-39). Plaintiffs are seven individual adjoining landowners and three local citizens groups that represent adjoining and neighboring landowners and residents of the local minority neighborhood. (Amended Complaint, pars. 16-35).

Georgetown County and Alliance filed Rule 12(b)(6), SCRCP, Motions to Dismiss on March 2, and March 3, 2023, respectively. On April 5, 2023, Plaintiffs filed a Memorandum in Opposition to Defendants' Motions to Dismiss. Defendants Georgetown County and Alliance filed memoranda in support of their Motions to Dismiss on April 5, 2023, and April 6, 2023.

On April 6, 2023, a WebEx virtual hearing was held on Defendants' motions. Following the hearing, Plaintiffs were given additional time to respond to issues raised by Defendants shortly before the hearing. On April 17, 2023, Plaintiffs filed a Supplemental Memorandum in Opposition to Defendants' Motions to Dismiss.

A final order was issued on May 31, 2023, granting Defendants’ Motions to Dismiss. Plaintiffs filed a Rule 59(e), SCRCP, Motion to Alter or Amend Judgment on June 12, 2023, which was denied without hearing by abbreviated Form 4 Order dated July 18, 2023.

Plaintiffs filed a timely Notice of Appeal on August 16, 2023.

FACTS

The Mercom Technology Park PD consists of three separate tracts of land. Each separate tract is owned by the following three distinct entities: (1) Alliance (the rezoning applicant) is the owner of Parcel #3 (14.45 acres); (2) Waccamaw Land, LLC, owns Parcel #1 (6.37 acres); and (3) The Barn on Petigru, LLC, formerly "Mercom," owns Parcel #2 (7.39 acres). (Amended Complaint, pars. 1, 2, 40). The application to amend the Planned Development was submitted by Alliance as the sole applicant. The Alliance did not act as agent for or on behalf of the other two Mercom PD owners. Neither of the other two owners joined in the application. (Amended Complaint, pars. 40(q), 40(v), 65).

1. Zoning & Comprehensive Plan Map History

The 28.4 acre tract was originally purchased by Waccamaw Land, LLC, in 2004, for use in its landscaping business. At that time the land was zoned Forest Agriculture (FA) and designated for no residential use. (Amended Complaint, pars. 1, 2, 40(a)). In 2008, architect Steve Goggans, (a member of Georgetown County Council at the time of the PD amendment application at issue), as agent for the landowner, applied for a zoning change from Forest Agriculture (FA) to a Planned Development (PD) called "Pawleys Island Business Commons" to construct a business park to be used for commercial resort services. The zoning change was approved by County Council in 2008, but construction of the Pawleys Island Business Commons was never started, and none of the approved "Planned Development" was built. (Amended Complaint, pars. 40(b)-(e)).

In 2013, Waccamaw Land subdivided the tract into three parcels. One parcel was retained by Waccamaw Land and the other two were ultimately acquired by the other two owners: Alliance and The Barn on Petigru. In 2015, a zoning change application was submitted by

owners of all three parcels to amend the Pawleys Island Business Commons Planned Development from resort services to a technology park, and to change the name to “Mercom Technology Park Planned Development." The requested zoning change was again based on plans designed and submitted by architect Steve Goggans. The zoning change was approved by Georgetown County Council on October 20, 2015, but construction of Mercom Technology Park never started. No written extensions were ever requested or granted by Georgetown County. (Amended Complaint, pars. 40(f)-(o)).

Both the 2008 and 2015 Planned Developments were "single use" Planned Developments with approved uses consistent with uses permitted within a single commercial zoning district. "Single use" Planned Developments were declared invalid by the South Carolina Supreme Court in *Sinkler, supra*, as discussed below in Argument 3. (Amended Complaint, pars. 40-43).

Neither the Pawleys Island Business Commons nor the Mercom Technology Park had ever been zoned for residential development, and the Comprehensive Plan Maps designated all three parcels as strictly commercial. In addition to the non-residential map designations, the text of the Georgetown County Comprehensive Land Use Plan specifically restricts increased or additional residential density in the geographic area where the Mercom PD was located. Residential density increases are allowed only in very limited and specific circumstances, none of which apply to this situation. (Amended Complaint, pars. 2-5, 83-90).

2. <u>Georgetown County Mandatory Reversion Ordinance</u>

Georgetown County Zoning Ordinance §1703, which has been in effect since 2005, requires that, when construction has not started on a PD within two years of approval, the PD will revert to the prior zoning classification. Georgetown County Planning Commission *shall*

initiate proceedings to revert the Planned Development to its original zoning classification or other classification consistent with the Comprehensive Plan. (Amended Complaint, par. 46).

Ordinance 1703 provides as follows:

> To prevent land speculation at the expense of the general public and to insure the timing of projects in accordance with stated development objectives, construction ***shall*** start on all properties rezoned Planned Development within two (2) years after rezoning.
>
> If construction is not begun within two (2) years after rezoning to a Planned Development, the Planning Commission ***shall*** review the zoning of said property, and, unless presented cogent reasons to allow additional time, ***shall initiate proceedings to return the zoning of the property to its original classification,*** or to such classification as the Planning Commission deems consistent with the Comprehensive Plan. If additional time is allowed, the Planning Commission ***shall*** review the zoning of the property at the expiration of such additional time if construction has still not begun.
>
> The Planning Staff ***shall*** periodically review the status of property which has been rezoned Planned Development, and bring to the attention of the Planning Commission any property which falls within the scope of this section.

(emphasis added.)

In this case, the original zoning classification was Forest Agriculture (FA). (Amended Complaint, par. 49). By the terms of its own ordinance, Georgetown County was ***required*** to initiate reversion proceedings to revert to FA in 2017, two years after approval of the Mercom Technology Park which remained wholly unconstructed. (Amended Complaint, pars. 46-47). Over the course of several years, neighboring landowners and members of the community repeatedly requested the county to initiate reversion proceedings in accordance with Ordinance 1703. More than 1,000 residents of Parkersville and the South Waccamaw Neck submitted a formal Petition to Georgetown County requesting reversion of the Mercom PD in accordance with local ordinances. The county disregarded these requests. (Amended Complaint, pars. 51-

53). As a result, the Mercom Technology Park remained improperly zoned as an invalid and unbuilt single use Planned Development District until the Alliance submitted an application for its amendment on August 16, 2022.

3. Planning Commission Public Hearing

At the public hearing on September 15, 2022, the Georgetown County Planning Commission unanimously voted to ***deny*** approval of the Alliance's zoning change request on the basis that it conflicted with the Comprehensive Plan and FLU Maps. (Amended Complaint, pars. 11, 102-104).

4. County Council Decision

Despite the Planning Commission's unanimous decision to deny the request for the Planned Development Amendment, County Council approved the rezoning in a 4-1 vote without complying with: (1) Subsection 6-29-760(A) of the Enabling Act, which requires that the change by the County Council be submitted to the Planning Commission for review and recommendation; (2) provisions of the Comprehensive Land Use Plan restricting residential density increases in the geographic area of the Mercom PD; (3) the Enabling Act requirement that zoning be in accordance with the Comprehensive Plan; (4) state law regarding the invalidity of single use Planned Developments; (5) the Georgetown County reversion ordinance and other procedures; and (6) without considering the signatures of more than 1,000 residents of Parkersville and the South Waccamaw Neck opposing the requested zoning change to high density residential on the basis that it would be a detriment to the community. (Amended Complaint, pars. 12, 113-115).

5. Conflicts of Interest of County Council Members

Two members of County Council who voted in favor of the zoning change were active members of the Board of Directors of Alliance, the entity requesting the zoning change. (Amended Complaint, par. 13, 111). A third member of Council who voted in favor of the zoning change was the architect who had been paid to prepare the plans upon which the Mercom Technology Park PD was approved in 2015 and served as the applicant's agent for the 2008 Planned Development amendment. (Amended Complaint, par. 14, 112). All three were requested by Plaintiffs and other citizens to recuse themselves from participating in or voting on this issue due to conflicts of interest or the appearance of impropriety. All three refused to recuse themselves and voted in favor of this zoning change. (Amended Complaint, pars. 111-112).

6. Other Relevant Considerations

The Mercom PD is located along a narrow back road in the heart of Parkersville which is one of the oldest and most historically significant neighborhoods in Pawleys Island. Parkersville represents one of the last vestiges of traditional African American life, history, and culture on the Waccamaw Neck. It encompasses a geographic area of about 2 square miles and is traditionally characterized by forest-agricultural land uses and low to medium density single family homes on narrow tree-lined roads, which are often unpaved, representative of the low country. Parkersville has been a longstanding target of detrimental county land use decisions that conflict with the Comprehensive Plan. As a result, the area suffers from commercial encroachment, predatory development of heirs' property, and gentrification. These impacts cause substantial displacement of residents of the minority community and threaten the survival of this important historical neighborhood. (Amended Complaint, pars. 7-9).

The amended Mercom PD is extraordinary in several respects. First, the amendment affects only a portion of the land involved even though Section 6-29-720(C)(4) of the Enabling Act requires a "unified site design." Second, it is a "zombie" PD because it is effectively "dead" under Ordinance 1703. Third, the other owners did not join in the request as required by Section 619.501 of the Georgetown County Zoning Ordinance. Fourth, the listing of nonresidential uses provides no certainty of whether any of these will be included. Finally, since the adoption of the original PD in 2008, several PD proposals have been approved; however, none of the proposals has been implemented.

STANDARD OF REVIEW

In reviewing a decision on a Motion to Dismiss under Rule 12(b)(6), SCRCP, "the appellate court applies the same standard of review as the trial court." *Doe v. Marion,* 373 S.C. 390, 397, 645 S.E.2d 245, 247 (2007). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling *solely on allegations set forth in the complaint …* " *Id.* 398, 247-48 (emphasis added). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on ***any*** theory, then dismissal under Rule 12(b)(6) is improper." *Id.* (emphasis added).

The case at bar also involves questions of law and statutory interpretation. The standard of review for these issues is *de novo*. *South Carolina Public Interest Foundation v. Calhoun County Council,* 432 S.C. 492, 854 S.E.2d 836, 837 (2021), ("[T]he interpretation of a statute is a question of law for the Court to review *de novo*.")

ARGUMENTS

1. THE APPROVAL OF THE REZONING OF PARCEL 3 OF THE MERCOM PD AS HIGH DENSITY RESIDENTIAL WAS *ULTRA VIRES* BECAUSE THE GEORGETOWN COUNTY COUNCIL DID NOT COMPLY WITH THE PROVISIONS OF SUBSECTION 6-29-760(A) OF THE ENABLING ACT.

Under the Enabling Act, the Planning Commission plays a major role in developing and recommending plans, policies, and regulations for adoption by the City or County Council.[2] The adoption or amendment of a zoning classification is addressed in Section 6-29-760. This section provides for a sharing of power between the County Council and the Planning Commission when enacting a zoning proposal.

A. Planning Commission Recommendation

Because of the importance of this sharing of power, Subsection 6-29-760(A) contains the following provision concerning the treatment of recommendations by the Planning Commission: *"No change in or departure from the text or maps as recommended by the local planning commission may be made pursuant to the [Council] hearing unless the change or departure be first submitted to the planning commission for review and recommendation."* (emphasis added).

A recent South Carolina Attorney General Opinion notes that "the zoning ordinance (S.C. Code §6-29-760(A)) is clear that Council cannot change a zoning recommendation of the Planning Commission without submission to the Commission . . . ." Op. S.C. Att'y Gen., 2021 WL 1832308. *See, e.g., Charleston County School District v. Harrell,* 393 S.C. 552, 713 S.E.2d 604, 609 (2011) ("Attorney General opinions, while persuasive, are not binding ... .").

The Georgetown County Council did not comply with this provision when it adopted the zoning change in November 2022. Instead, the Council simply adopted the Ordinance at issue

[2] *See, e.g.,* Enabling Act, §§ 6-29-340, 6-29-510, 6-29-520.

without seeking the required Planning Commission recommendation. As a result, the adoption of the ordinance was *ultra vires* and, therefore, void.

B. Role of the Enabling Act

The Rhode Island Supreme Court stated the general principle for applying an enabling act as follows: Where a local government "purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is *ultra vires* of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void." *Hardy v. Zoning Board of Review of the Town of Coventry*, 321 A.2d 289, 290–291 (R.I. 1974).

The South Carolina Supreme Court applied this principle in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010). At issue was the rezoning of a large parcel of land from the classification AG-15 (agricultural with minimum lot area of three acres) to PD ("Planned Development District"). This PD district would have 107 dwellings, which was the same number as would be allowed under AG-15; however, the minimum lot size for the PD was reduced to one acre.

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

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

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

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

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

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

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

690 S.E.2d at 781, 782 (emphasis added).

C. <u>The Rezoning Ordinance at Issue was *Ultra Vires*</u>

The Order of Court, at pages 4-9, relies on the principle that courts should be deferential to legislative decisions by local governments. However, this deference is not applicable herein because, as in *Sinkler v. County of Charleston*, the Georgetown County Council failed to follow the requirements of the Enabling Act. As a consequence, the approval of the ordinances was *ultra vires.*

2. PLAINTIFFS' COMPLAINT IS SUFFICIENT TO STATE A CAUSE OF ACTION UNDER THE DECLARATORY JUDGMENTS ACT.

A. Declaratory Judgments Act

The statutory framework for addressing a request for declaratory judgment is simple and straightforward. Section 15-53-20 of the Declaratory Judgments Act provides:

> *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.

(emphasis added).

Section 15-53-30 provides:

> Any person ... whose rights, status or other legal relations are affected by a *statute, municipal ordinance,* contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

(emphasis added).

Section 15-53-130 provides: "This chapter is declared to be remedial. Its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations. *It is to be liberally construed and administered."* (emphasis added).

B. Justiciable Controversy

The elements necessary to establish a Declaratory Judgment action are broad and uncomplicated. “A cause of action under the Declaratory Judgments Act is established by showing the existence of a *justiciable controversy,* defined as a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a

contingent, hypothetical or abstract character." *Farmer v. CAGC Insurance Company*, 424 S.C. 579, 588, 819 S.E.2d 142, 147 (Ct. of App. 2018) (citations omitted) (emphasis added). *See also Guimarin & Doan v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 566, 155 S.E.2d 618, 621 (1967), and *Jowers v. South Carolina Department of Health and Environmental Control,* 423 S.C. 343, 354 815 S.E.2d 446, 452 (2018). A justiciable controversy is "an existing controversy or at least the ripening seeds of a controversy." *Sunset Cay, LLC v. City of Folly Beach,* 357 S.C. 414, 423-424, 593 S.E.2d 462, 467 (2004) (citations omitted).

"The Act is to be *liberally construed* and administered to achieve its intended purpose to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." *Auto-Owners Ins. Co. v. Rhodes,* 405 S.C. 584, 595, 748 S.E.2d 781, 786 (2013) (citations omitted) (emphasis added).

C. Order of Dismissal Does Not Address Sufficiency of the Complaint

The Court Order dismisses Plaintiffs' Amended Complaint in its entirety without making a single reference to the elements of a Declaratory Judgment action or the requirements of a claim under the Enabling Act. The Order does not mention "justiciability" or "justiciable controversy" which is at the heart of a cause of action for declaratory judgment. There is no discussion or analysis of the allegations of the Complaint or whether they state a claim. The underlying legal authority raised by Plaintiffs is not addressed, and there is no finding that the Complaint fails to state a cause of action for Declaratory Judgment.

Instead, the Order essentially makes rulings on the merits of the case by improperly weighing evidence, finding facts, applying evidentiary presumptions, and considering matters well beyond the sufficiency of the Complaint, as more fully discussed in Argument 3 hereinafter. The trial court's failure to consider facts pleaded and legal authority raised is contrary to the

statutory mandate in Section 15-53-130 that the Declaratory Judgments Act "is to be liberally construed and administered."

D. Allegations Contained in Plaintiffs' Complaint

Plaintiffs' Amended Complaint comprehensively enumerates the particulars of the "actual controversy" and sets forth the following specific factual bases for this claim as follows:

1. Paragraphs 1-15: Identify the two ordinances in question, 22-36 and 22-37, and summarize the background and factual bases for Plaintiffs' claim that the ordinances are invalid.

2. Paragraphs 16–20: Identify the individual adjoining landowners and the land parcels they own, establishing that the parcels adjoin the Alliance land in question. Exhibits 1-5 are Affidavits signed by each individual Plaintiff, verifying the facts and detailing the injury caused by approval of the ordinances.

3. Paragraphs 21-35: Identify the associational Plaintiffs and the details of their representation of Plaintiffs and other adjoining landowners.

4. Paragraphs 36–39: Identify Defendants.

5. Paragraphs 40-64: Detail the title, land use, and zoning history of the Alliance parcel and the application for zoning change, and set forth facts and law that establish the basis for Plaintiffs' claim that the ordinances are not valid.

6. Paragraphs 65-70: Set forth the factual basis for Plaintiffs' claim that the zoning change application was defective.

7. Paragraphs 71-78, 102-105: Cite applicable provisions of the Enabling Act.

8. Paragraphs 79-95: Set forth applicable provisions of the Georgetown County Comprehensive Plan with which the ordinances at issue did not comply as required by the Enabling Act.

9. Paragraphs 96-101: Cite provisions of Georgetown County ordinances with which approval of the zoning ordinances at issue did not comply.

10. Paragraphs 102-104: Set forth provisions of the Enabling Act that pertain to amending Planned Development Districts with which Georgetown County did not comply.

11. Paragraphs 105-115: Set forth the facts pertaining to the County Council process and decision that form the basis for Plaintiffs' claim that approval of the two zoning ordinances in question was improper, arbitrary and capricious.

12. Paragraphs 116-122: Detail the bases for jurisdiction, venue and standing.

13. Paragraphs 123-147: Set forth separate counts requesting the court to declare the ordinances null, void and of no force or effect for reasons set forth in the Amended Complaint.

E. Pleading Requirements

"The purpose of pleadings is to place the adversary on notice as to what the issues are." *Langston v. Niles*, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975). "The principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." *S.C. National Bank v. Joyner*, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (S.C. Ct. App. 1986). "Pleadings are to be liberally construed . . . ." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 574–75, 743 S.E.2d 778, 785 (2013).

F. Standard for Rule 12(b)(6) Motion to Dismiss

In the context of a Rule 12(b)(6), SCRCP, Motion to Dismiss, "[t]he question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states *any* valid claim for relief." *Doe v. Marion*, *supra*, 398, 247–48 (emphasis added) (citations omitted). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on *any* theory, then dismissal under Rule 12(b)(6) is *improper*." *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019). (emphasis added).

A liberal review of Plaintiffs' Amended Complaint reveals that the detailed allegations and reasonable inferences viewed in the light most favorable to Plaintiffs clearly set forth an "actual controversy" that "affects" Plaintiffs. As a result, the Complaint sufficiently states a claim under the Declaratory Judgments Act that far exceeds the minimum pleading requirements.

3. THE TRIAL COURT ERRED BY CONSIDERING AND MAKING DECISIONS ON THE MERITS OF THE UNDERLYING CONTROVERSY, WEIGHING EVIDENCE, MAKING FACTUAL FINDINGS, AND APPLYING EVIDENTIARY PRESUMPTIONS IN THE CONTEXT OF A RULE 12(b)(6), SCRCP, MOTION TO DISMISS.

A. Order Improperly Addresses Merits

The purpose of a Motion to Dismiss under Rule 12(b)(6), SCRCP, is for "the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim." *Skydive Myrtle Beach, Inc., supra.* at 180, 587 (2019). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court *must* base its ruling *solely on allegations set forth in the complaint* . . ." *Id.* at 587 (emphasis added).

Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) summarized the proper approach for ruling on a Rule 12(b)(6) motion as follows:

> In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.

(citations omitted).

Throughout the Court Order, the trial court addresses the merits of the controversy by weighing evidence, finding facts, considering matters beyond those raised in the four corners of the Complaint, and making decisions on the ultimate issues. The Order reads like a decision following an evidentiary hearing or the grant of summary judgment rather than the grant of a Rule 12(b)(6), SCRCP, Motion to Dismiss.

1. Arbitrary and Capricious / Fairly Debatable

The Amended Complaint challenges the validity of the two zoning ordinances in question. Throughout the Order, the trial court recognizes that the validity of the ordinances depends on whether or not County Council's decision was "arbitrary and capricious," or "fairly debatable." (Order, pp. 5, 9, 15). These are questions of fact. After setting forth the standard, the Court improperly takes the next step and makes the following factual determinations: "[T]he Court finds that Ordinances 22-36 and 22-37 satisfy the 'fairly debatable' standard and cannot be invalidated by this Court." (Order, p. 16). This finding is a matter to be determined by the fact-finder *after* evidence is presented and weighed and *after* arguments have been offered and considered, not by the court in the context of a 12(b)(6), SCRCP, Motion to Dismiss.

2. Validity of Planned Development

The Amended Complaint alleges that the Mercom Planned Development was not capable of being amended because it was a "single use" and not a valid "mixed use" Planned Development as required by the Enabling Act, Section 6-29-720(C)(4), and interpreted by the South Carolina Supreme Court in *Sinkler*. Plaintiffs' Complaint clearly alleges that the Mercom PD was a single use PD and cites supporting facts. (Amended Complaint, pars. 15, 40, 41-45). The facts as pleaded must be accepted as true for purposes of a Rule 12(b)(6), SCRCP, Motion to Dismiss.

Notwithstanding the allegations of the Complaint, the Court Order improperly makes factual determinations that are contrary to those contained in the Complaint. The Court assumed the role of fact-finder by weighing evidence, determining fact questions, and making decisions on the merits as follows:

a. "Plaintiffs challenge the 2008 Ordinance creating the Mercom PD and assert that the Mercom PD was null and void from inception because the Mercom PD contemplated only a single use. *The Court disagrees*." (Order, p. 9)(emphasis added).

b. "*Plaintiffs' characterization* of the Mercom PD as a single use planned development district *is inaccurate*." (Order, p. 9)(emphasis added).

c. "*[C]ontrary to Plaintiffs' assertions* ... the PD has always contemplated a number of various uses." (Order, p. 10)(emphasis added).

d. "Mercom PD is a *valid* planned development district." (Order, p. 9)(emphasis added).

e. "[T]he Mercom PD *functions* exactly as the General Assembly envisioned, and there is nothing illegal, unconstitutional, or invalid to declare regarding the Mercom PD." (Order, p. 10)(emphasis added).

f. "[T]he Court finds that Mercom PD is a *valid* planned development district." (Order, p. 11)(emphasis added).

g. "This Court *finds the prescribed process* for amendment to a planned development district *was followed* by Georgetown County." (Order, p. 12)(emphasis added).

h. "[J]udicial review may only ask whether there has been, or imminently will be, a deprivation of constitutional rights or whether procedural due process has been violated. *This Court finds neither of those scenarios are present here."* (Order, p. 13)(emphasis added).

It is not the role of the court to agree or disagree regarding the facts presented in the Complaint. The narrow question is whether or not the facts *as pleaded* state a claim under the Declaratory Judgments Act.

In its discussion of Plaintiffs' claims regarding the invalidity of the Mercom Technology Park as a Planned Development, the Court Order also misinterprets and misapplies the concept of "single use" vs. "mixed use" as set forth in the *Sinkler* case and as alleged in Plaintiffs'

Amended Complaint. (Order, pp. 9-10). The term "single use" in the context of the *Sinkler* holding, does not refer to a Planned Development that has literally one solitary use as the court order suggests, but rather refers to a Planned Development in which all of the approved uses fall within one single zoning category. In order for a Planned Development to be valid under the terms of the Enabling Act, as interpreted by *Sinkler*, it must provide for "mixed uses" that go beyond a single zoning district category. "[A] PD is a zoning method that is used to create a planned mix of residential and commercial uses for the benefit of the community, as opposed to having only a single-use district." *Sinkler* at 76 (citations omitted).

In holding that "the ordinance is invalid because it did not properly establish a [mixed use] PD as contemplated by the terms of the Enabling Act," the South Carolina Supreme Court noted that "County Council clearly chose to employ the PD process ... and, once having invoked that technique, it could not arbitrarily fail to meet the requirements for a PD." *Sinkler* at 78. Plaintiffs' Amended Complaint in this case pleads the same factual scenario as *Sinkler,* and it was error for the Court Order to disregard the allegations of the Complaint and the legal authority cited therein and make its own factual determinations and decisions on the merits.

3. <u>Statute of Limitations</u>

The Court Order further improperly finds that Plaintiffs' claim regarding the validity of the Planned Development is barred by the statute of limitations in the Enabling Act. The Order states: "Plaintiffs' arguments that the Mercom PD was null and void from inception is statutorily barred at this juncture." (Order, p. 10). The part of the Court Order addressing the statute of limitations relies on Subsection 6-29-760(D) of the Enabling Act, which provides:

> No challenge to the adequacy of notice or challenge to the validity of a regulation or map, or amendment to it, whether enacted before or after the effective date of this section, may be made sixty days after the decision of the governing body if there has been substantial

> compliance with the notice requirements of this section or with established procedures of the governing authority or the planning commission.

The Order concludes that "given that Plaintiffs are challenging zoning regulations from 2008 and 2015, and the established procedures for approving the regulations were followed, the time for Plaintiffs to challenge such actions has long passed." (Order, p. 10).

The Court's reliance on Section 6-29-760(D) is misplaced. This provision does not apply to the issue of the validity of the Planned Development approval because the challenge is based on the theory that the ordinance creating the Planned Development was *ultra vires*, rendering the ordinance void from its inception. Thus, jurisdiction is based on Article 5, Section 11 of the South Carolina Constitution which provides: "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law."

This grant of general jurisdiction supports the filing of this *ultra vires* action in Circuit Court, and it has served as the basis of the following South Carolina *ultra vires* cases: *South Carolina Public Interest Foundation v. South Carolina Department of Transportation,* 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *Sinkler v. County of Charleston, supra* (holding circuit court properly invalidated rezoning); *O'Brien v. South Carolina ORBIT,* 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city's decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission,* 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming

voiding of conveyance by Circuit Court); *City of North Charleston v. North Charleston District,* 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable); *Sloan v. School District of Greenville,* 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgment that certain contracts entered into by school district were *ultra vires* and, therefore, invalid). A similar approach applies where the governmental action is unconstitutional. *See, e.g., Schloss Poster Adv. Co. v. City of Rock Hill,* 190 S.C. 92, 2 S.E.2d 392 (1939).

4. Reversion Ordinance Provision

Plaintiffs' Amended Complaint further claims that the Mercom Technology Park PD was not a valid Planned Development capable of being amended because Georgetown County failed to comply with the provisions of Georgetown County Reversion Ordinance §1703 as detailed in Paragraphs 46-64 of the Complaint. Thus, the actions of Georgetown County in regard to this claim are issues of fact. Without any reference to the allegations of the Amended Complaint relative to the actions of Georgetown County, the Court Order improperly concluded that "[t]he Court cannot give Plaintiffs the declaratory relief they seek because there is no support for it under a plain reading of Ordinance 1703." (Order, p. 11). This "finding" is improper because the issue before the court is limited to the sufficiency of the complaint, not the merits of the Plaintiffs' claims.

B. Order Improperly Applies Evidentiary Presumption and Burdens of Proof

In addition to considering and making decisions on the merits, the Court Order improperly imposes evidentiary presumptions without providing Plaintiffs with the opportunity to present evidence or arguments to rebut those presumptions.

The Court Order states:

1. "There is a strong *presumption* in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application ..."

2. “A municipal ordinance is a legislative enactment and is *presumed* to be constitutional ..."

3. "Zoning ordinances must be upheld so long as the propriety of the local governing body’s decision is *'fairly debatable.'"*

4. The *burden of proving* the invalidity of a zoning ordinance is on the party attacking it ..."

5. "[I]t is incumbent upon [the challenger] to *show the arbitrary and capricious character* of the ordinance through *clear and convincing evidence."*

(Order, p.5)(emphasis added).

These presumptions, standards of proof, burdens of proof, and burdens of production are *evidentiary principles* applicable to issues of fact only *after* Plaintiffs have had the opportunity to present evidence. At the stage of a Rule 12(b)(6), SCRCP, Motion to Dismiss, review is limited to the Complaint itself and all allegations of the Complaint must be presumed as true. Logic dictates that a claim cannot be properly dismissed for failure to overcome an evidentiary presumption that Plaintiffs have not been given an opportunity to rebut. The only presumption that should be applied in the context of a Motion to Dismiss is the presumption that all facts alleged in the Amended Complaint are true. The issue at this juncture is the *sufficiency* of the Complaint, not the weight of the evidence.

C. <u>Questions of Fact</u>

The Court Order states that "[c]ases that present legal questions, and do not involve facts, are well suited for dispositive motions." (Order, p. 4). While this may be true as far as it goes, the

relevance of this statement in the context of this case is curious inasmuch as this case involves many issues of fact that cannot be resolved without developing the record.

Some examples of the factual issues presented here are as follows: (1) whether the actions of Georgetown County Council in enacting the ordinances in question were arbitrary and capricious or fairly debatable; (2) whether the actions of Georgetown County followed proper procedure at all points in the zoning amendment process from application through approval of the rezoning; (3) whether the Mercom PD was an invalid single use Planned Development; (4) whether the actions of Georgetown County relative to reversion of the Mercom Planned Development violated the Reversion Ordinance; (5) whether the actions of Council were *ultra vires* with respect to the enactment of the ordinances at issue as well as the approval of the Planned Developments in 2008 and 2015*;* (6) whether the zoning ordinances in question were "in accordance with" the comprehensive plan; (7) whether the actions of Council members who voted on this issue while actively serving on the Board of Alliance were improper; (8) whether and to what extent the County's actions caused injury to Plaintiffs and/or deprived them of due process.

Interestingly, none of the cases cited by the Order dismissing Plaintiffs' Amended Complaint involved a Rule 12(b)(6), SCRCP, Motion to Dismiss. Instead, every one of the decisions cited was a case in which evidence had been presented, a record developed, and a factual determination made on the *merits*. See *Knowles v. City of Aiken,* 305 S.C. 219, 407 S.E.2d 639 (1991); *Dunes West Golf Club, LLC v. Town of Mount Pleasant,* 401 S.C. 280, 737 S.E.2d 601 (2013); *Sloan v. Greenville County,* 356 S.C. 531, 590 S.E.2d 338 (2003); *Rush v. City of Greenville,* 246 S.C. 268, 143 S.E.2d 527 (1965); *Bear Enterprises v. County of*

Greenville, 319 S.C. 137, 459 S.E.2d 883 (1995); *Town of Scranton v. Willoughby*, 306 S.C. 421, 412 S.E.2d 424 (1991); *McClanahan v. Richland County Council*, 350 S.C. 433, 567 S.E.2d 240 (2002).

4. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS' AMENDED COMPLAINT MUST BE DISMISSED AS A MATTER OF LAW ON THE BASIS OF FAILURE TO ALLEGE CONSTITUTIONAL DEPRIVATION AND FURTHER ERRED IN FINDING THAT THE ZONING ORDINANCES IN QUESTION DO NOT DEPRIVE PLAINTIFFS OF ANY CONSTITUTIONAL RIGHT.

Item I of the Court Order, under the heading "Analysis," states: "The zoning ordinances pertaining to the Mercom PD do not deprive Plaintiffs of any constitutional right, and the ordinances therefore cannot be invalidated." In its discussion of this item on Pages 4-6 of the Order, the Court makes the following findings:

> 1. The Amended Complaint does not allege that the zoning ordinances deprive the Plaintiffs of their constitutional rights." (Order, p. 4).
>
> 2. In the Amended Complaint, Plaintiffs fail to allege that any zoning decision as it pertains to Mercom PD deprives Plaintiffs of their constitutional rights. Because these allegations are absent from the Amended Complaint, the Amended Complaint fails as a matter of law ... ." (Order, p. 6).

This is both an erroneous statement of the law and an inaccurate characterization regarding the contents of Plaintiffs' Amended Complaint.

A. Constitutional Deprivation is not a Requirement

It is well settled that when the right to bring an action exists pursuant to a statute, it is not necessary to demonstrate traditional notions of constitutional deprivation as an additional requirement. *Preservation Society of Charleston v. South Carolina Department of Health and Environmental Control*, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2020); *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012). In the present case, Plaintiffs' Amended Complaint is based on the right to bring suit pursuant to *two* different statutes, *i.e.*, the Enabling Act *and* the Declaratory Judgments Act. Thus, if the right to bring an action is established under *either* of these two statutes, constitutional deprivation is not an additional requirement.

1. Enabling Act

Section 6-29-760(C) of the Enabling Act states that, in the context of a zoning ordinance or amendment, *"[a]n owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment."* (emphasis added). Thus, the right to bring an action hinges on (1) contesting a zoning ordinance or amendment, and (2) being an "owner of adjoining land" or the "representative" of an owner of adjoining land. There is no additional requirement of constitutional deprivation in order to bring an action under the Enabling Act.

The Court Order disregards the following allegations of the Amended Complaint that clearly establish Plaintiffs' right to bring an action under the Enabling Act.

a. The seven (7) individual Plaintiffs are *owners of land that directly adjoins* the Mercom PD/Alliance parcel. (Amended Complaint, pars. 16-20, Exhibits 1-5).

b. The associational Plaintiffs specifically *represent* the interests of the named individual Plaintiffs as well as all adjoining landowners, even those not specifically named in the Amended Complaint. (Amended Complaint, pars. 21-35, 119, 122, Exhibits 1-8).

c. Plaintiffs' Amended Complaint contests the validity of zoning ordinances 22-36 and 22-37 on behalf of all Plaintiffs on a variety of bases. (Amended Complaint, pars. 1-15).

2. Declaratory Judgments Act

As set forth in Argument 2, above, the Declaratory Judgments Act extends to *any* person whose rights are *"affected."* Courts have consistently interpreted the word *"affected"* very liberally to include residents in the vicinity of a land use issue who are impacted by traffic, enjoyment, recreational uses, and aesthetics, as well as organizations whose members are

affected in these ways. *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm'n*, 426 S.C. 97, 113, 825 S.E.2d 721, 731 (Ct. App. 2019); *Preservation Society of Charleston, supra*; and *Friends of the Earth, Inc. v. Laidlaw Environmental Services Inc.*, 528 U.S. 167, 170, 120 S.Ct. 693, 697, 145 L.Ed.2d 610 (2000).

B. <u>Complaint Alleges Constitutional Deprivation</u>

Notwithstanding that demonstrating constitutional deprivation is not required under either the Enabling Act or the Declaratory Judgments Act, Plaintiffs' Amended Complaint nevertheless alleges constitutional deprivation. The South Carolina Supreme Court in *Preservation Society of Charleston, supra* at 210, 486 (citations omitted), quoting the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), stated that the elements of constitutional standing are (1) an "injury in fact," *i.e.*, an invasion of a legally protected interest that is concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) that the injury may be redressed by a favorable decision.

Plaintiffs' Amended Complaint alleges that Plaintiffs have been "affected" by approval of Ordinances 22-36 and 22-37, in ways that amount to constitutional deprivation as follows:

1. Each of the seven individual Plaintiffs submitted Affidavits stating that they "own and reside on land that *directly adjoins* the Mercom Technology Park PD, Alliance parcel," and that "[t]he County's decision to approve the zoning change has caused and will cause us injury as follows:

    a. decrease in property values;
    b. increase in stormwater and flooding problems;
    c. negative impact on character, aesthetics and enjoyment of land;
    d. increase in traffic on secondary roads and highways that are not adequate to handle additional volumes of traffic;

e. precedent for future land development in the immediate neighborhood that does not comply with state law or the Comprehensive Plan;
f. increased burden on severely over-burdened infrastructure that is operating beyond capacity creating a serious safety hazard – streets and highways, fire, police, and emergency services personnel and equipment, evacuation routes;
g. detrimental and discriminatory impact on the Parkersville minority community resulting in further gentrification, displacement and destruction of this important historical African American neighborhood."

(Amended Complaint, pars. 16-35, Exhibits 1-8).

2. Paragraph 120 of the Amended Complaint states:

> Plaintiffs have constitutional standing to challenge these ordinances pursuant to Article III of the United States Constitution inasmuch as (a) *they have suffered an injury* by virtue of this zoning change to allow a residential use and increase in residential density on property that directly adjoins land owned by them and that did not previously allow any residential use or density; (b) *the injury was caused by the improper approval of the ordinances*; and (c) *the injury is redressable* by a favorable decision of this court declaring that these ordinances are improper, null and void and requiring Georgetown County to perform its required duties.

(emphasis added).

3. Paragraph 15(g) of the Amended Complaint alleges:

> This zoning change had and has a detrimental and discriminatory impact on the Parkersville minority community resulting in further gentrification, displacement and destruction of this important historical African American neighborhood.

4. Paragraph 24 of the Amended Complaint alleges:

> [T]he Parkersville minority community ... has been substantially and negatively impacted by county land use decisions and zoning ordinances that conflict with the comprehensive plan ... . This pattern of decision-making has had permanent detrimental and discriminatory impact on this traditional historical minority neighborhood.

5. Paragraph 25 of the Amended Complaint alleges:

> The ... high density multi-family residential zoning change at issue in this case ... threatens to continue a pattern of permanent and detrimental impact to this historical minority community.

6. Paragraph 95 of the Amended Complaint alleges:

> The cumulative incremental impact of density increases in the South Waccamaw Neck has had, would have, and is having devastating and far-reaching negative consequences to all citizens, and a disparate discriminatory impact on the minority community of Parkersville.

Plaintiffs' Complaint properly pleads a right to bring this action under both the Enabling Act and the Declaratory Judgments Act. Although it is not necessary to plead constitutional deprivation, Plaintiffs' Amended Complaint nevertheless does so. The nature and extent of Plaintiffs' injuries is a question of fact to be determined by the fact-finder *after* evidence has been presented, not at the stage of a Rule 12(b)(6), SCRCP, Motion to Dismiss.

5. <u>THE TRIAL COURT ERRED IN ITS INTERPRETATION AND APPLICATION OF THE ENABLING ACT REQUIREMENT THAT ZONING "REGULATIONS MUST BE MADE IN ACCORDANCE WITH THE COMPREHENSIVE PLAN FOR THE JURISDICTION" AND IN FINDING THAT GEORGETOWN COUNTY MET THAT STATUTORY REQUIREMENT IN THIS CASE</u>.

The Order of the Court relied on *McClanahan v. Richland County Council*, 350 S.C. 433, 567 S.E.2d 240 (2002) to hold that the Comprehensive Plan is only "a guideline" and "is not binding law."

The concern for requiring that zoning "regulations be made in accordance with a comprehensive plan" has been in the South Carolina Enabling Act since the original Act was adopted in 1926.[3] The requirement was in the two predecessor acts in effect before the current Enabling Act was adopted.[4] A similar requirement is contained in the land development regulations.[5]

For nearly a century, the requirement of "in accordance with a comprehensive plan" has been a basic part of the South Carolina approach to planning and zoning. Despite the long-standing nature of the requirement, the Order of Dismissal treats the requirement as mere surplusage rather than a "legally binding standard" to be interpreted and applied. This approach conflicts with the requirement that "full effect must be given to each section of a statute and words should not be added or taken away." *South Carolina National Bank v. Cook*, 291 S.C. 530, 532, 354 S.E.2d 562, 563 (1987); *Hartford Accident & Indemnity, Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979) ("Full effect must be given to each section of a statute, giving

[3] S.C. CODE § 1924 (33) 1066.

[4] *See Johnston v. City of Myrtle Beach,* 283 S.C. 288, 292, 321 S.E.2d 627, 629 (Ct. App. 1984) (discussing the two statutes).

[5] Section 6-29-1120(5) (Land development regulations should be "in harmony with the comprehensive plan . . . .")

words their plain meaning, and, in the absence of ambiguity, words must not be added or taken away.")

The Order cites *McClanahan v. Richland County Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 243 (2002) as support for the following interpretation: "The Comprehensive Plan is a guideline, not binding law." (Order, p. 10). However, *McClanahan* simply states this conclusion without addressing the issue of the role of the comprehensive plan.

McClanahan actually supports the Plaintiffs' position. The case states: "All rules of statutory construction are subservient to the one that *legislative intent must prevail* if it can be reasonably discovered in the language used, and that *language must be construed in light of the intended purpose of the statute*." 350 S.E.2d at 242. (emphasis added). One basic purpose of the Enabling Act is to guide regulation by planning. The purpose of the "in accordance with" language is to align zoning regulations with the adoption of plans.

The Order states that "a county's comprehensive plan exists to guide the land use decisions of a county." However, because of the refusal to view the "in accordance with" language as legally binding guidance in any way, a county can simply ignore the guidance in the comprehensive plan. This result is contrary to *"the intended purpose of the statute."*

In effect, the Order parallels the approach of the pirate Barbossa in the movie *Pirates of the Caribbean: The Curse of the Black Pearl* (2003). When challenged about the pirate code, Barbossa refers to the pirate code as "more what you'd call 'guidelines' than actual rules." The statutory phrase at issue has been a part of the zoning scheme in South Carolina since 1926. Requiring zoning regulations to be "in accordance with the comprehensive plan" should not be simply brushed aside in the same way that Barbossa evaded being bound in the movie. Because of its importance, statutory interpretation requires more analysis than a humorous line from a

pirate movie. The clear and unambiguous language means exactly what it plainly says, *i.e.*, that zoning "regulations must be made in accordance with the comprehensive plan."

In addition to the erroneous interpretation of this provision of the Enabling Act, the trial court's finding that Georgetown County complied with the Enabling Act requirements is a finding of fact that is improper at the stage of a Rule 12(b)(6) Motion to Dismiss as more fully set forth in Argument 3, above.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this court to reverse the trial court's decision and permit Appellants to proceed with their day in court on all counts and all paragraphs of their Amended Complaint.

Respectfully submitted,

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