RECEIVED
Apr 04 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
Circuit Court Judge

Appellate Case No. 2024-000023
Circuit Court Case No. 2022-CP-22-00912

Michael T. Green and Carrie J. Green, Julian P. Rutledge and Melvin L. Rutledge; Carlethia B. Jenkins; Frances Jo Baker; Parkersville Planning & Development Alliance, Inc.; Keep It Green, Inc.; and Preserve Murrells Inlet, Inc.

Appellants,

v.

Georgetown County, Laine CRE, LLC; TriStar Land, LLC; and Samuel J. Nesbit on behalf of the heirs of Will Nesbit

Respondents.

INITIAL BRIEF OF APPELLANTS

/s/ F. Patrick Hubbard
F. Patrick Hubbard (SC Bar #12614)
1525 Senate Street
Room 312
Columbia, SC 29208
(803) 422-6762
phubbard@law.sc.edu
ATTORNEY FOR APPELLANTS

/s/ Cynthia Ranck Person
Cynthia Ranck Person (SC Bar #105126)
KEEP IT GREEN ADVOCACY, INC.
P.O. Box 1922
Pawleys Island, SC 29585
(843) 325-7795
kig.advocacy@gmail.com
ATTORNEY FOR APPELLANTS

April 4, 2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

STATUTES

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 ZONING ORDINANCE PROVISIONS REQUIRING COUNTY COUNCIL TO APPROVE SITE PLANS WERE *ULTRA VIRES* BECAUSE THEY CONFLICTED WITH THE ENABLING ACT AND DENIED RIGHTS GRANTED BY THE ENABLING ACT?

2. DID THE TRIAL COURT ERR IN FINDING THAT PLAINTIFFS' COMPLAINT FAILED TO STATE A CLAIM THAT GEORGETOWN COUNTY ZONING ORDINANCE PROVISIONS REQUIRING COUNTY COUNCIL TO APPROVE SITE PLANS WAS A DENIAL OF PLAINTIFFS' RIGHT TO DUE PROCESS?

3. DID THE TRIAL COURT ERR IN FINDING THAT PLAINTIFFS' COMPLAINT FAILED TO STATE A CAUSE OF ACTION FOR DECLARATORY JUDGMENT?

4. 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) MOTION TO DISMISS?

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

6. 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' 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."

Appellants assert that the trial court improperly dismissed Plaintiffs' Complaint on Rule 12(b)(6), SCRCP, Motions to Dismiss. This dismissal was improper because Plaintiffs' Amended Complaint: (1) properly states a cause of action under the Declaratory Judgments 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. Appellants rely on six arguments to support their position that the trial court improperly dismissed Plaintiffs' Complaint on a Rule 12(b)(6), SCRCP, Motion to Dismiss for failure to state a cause of action.

1. Summary of Complaint

This Complaint involves two land development subdivision applications proposing “high density” multi-family housing on two vacant parcels of heirs’ property land designated as “medium density” by the Georgetown County Comprehensive Land Use Plan and Maps. These parcels are located in the heart of a traditional African American community known as “Parkersville.”

Both subdivision applications were denied by Georgetown County Planning Commission after public hearing on August 18, 2022, on the basis that they conflicted with the Comprehensive Plan. No appeal was filed from the Planning Commission’s decisions to deny. After denial by Planning Commission, County Council improperly reversed the Planning Commission decisions and approved both subdivision applications without further input, review, consideration, or decision by Planning Commission.

Plaintiffs' Complaint is supported by 139 paragraphs of detailed factual averments incorporating fifteen exhibits. The Complaint requests declaratory relief as follows:

(a) Georgetown County Ordinance provisions requiring site plans to be approved by County Council were void on the basis of *ultra vires* because they (i) conflicted with explicit provisions of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code 1976, §§ 6-29-310, *et seq.*, (hereinafter "Enabling Act"); (ii) denied rights granted by the Enabling Act; and (iii) denied due process.

(b) County Council's approval of a site plan that had been denied by Planning Commission was invalid on the basis of *ultra vires* because of conflicts with the Enabling Act, denial of rights granted by the Enabling Act, and denial of due process.

(c) Planning Commission's decision to deny the site plan was not appealed in accordance with the Enabling Act and should serve as the final and binding decision.

(d) The procedure followed and the facts considered by County Council in making its decision to approve the site plan violated the Enabling Act, local ordinances, and due process.

(e) The approved high density subdivision itself violated the Enabling Act and local ordinances.

2. Procedural History

Plaintiffs are six individual adjoining landowners and three community organizations that represent landowners in the vicinity. (Complaint, pars. 11-30). Defendants are Georgetown

County, Laine CRE, LLC, TriStar Land, LLC, and Samuel J. Nesbit, on behalf of the heirs' of Will Nesbit. (Complaint, pars. 31-35).

Defendants filed Rule 12(b)(6), SCRCP, Motions to Dismiss on December 21, 2022, and March 27, 2023, and on June 22, 2023, Defendants Georgetown County, Laine, and TriStar filed memoranda in support of their motions. On June 22, 2023, Plaintiffs filed a Preliminary Memorandum of Law in Opposition to Defendants' Motions to Dismiss.

On June 23, 2023, a WebEx virtual hearing was held, and on July 18, 2023, an Order was entered granting Defendants' Motions to Dismiss. Plaintiffs filed a Rule 59(e), SCRCP, Motion to Alter or Amend Judgment on July 28, 2023. An in-person hearing was held on Plaintiffs' Rule 59(e) Motion on November 7, 2024, which was denied by Order dated December 11, 2023.

Plaintiffs filed a timely Notice of Appeal on January 5, 2024.

FACTS

This claim involves five subsections of Section 607 of the Zoning Ordinance of Georgetown County, South Carolina (hereinafter "Ordinance 607") that Plaintiffs contend were *ultra vires* because they conflicted with the Enabling Act and denied rights granted by the Enabling Act. (Complaint, pars. 4, 5, 7, 70-76, 92, 123-128). At issue is the approval of two high density multi-family subdivisions on two separate parcels of vacant land located in the heart of one of the oldest traditional African American communities in Pawleys Island, Georgetown County, South Carolina, commonly known as "Parkersville." The parcels were designated by the Georgetown County Comprehensive Plan and Maps ("Comprehensive Plan") as "Medium Density." (Complaint, par. 1).

The high density subdivision applications were denied by Georgetown County Planning Commission after public hearing on August 18, 2022, on the basis that they conflicted with the residential density requirements of the Comprehensive Plan. (Complaint, pars. 2, 65-69). Even though Section 6-29-1150(D) of the Enabling Act provides for judicial appeal from a Planning Commission decision, no appeal of this decision was filed by any of the Defendants. (Complaint, pars. 3, 69).

Instead, on September 27, 2022, Georgetown County Council, relying on the provisions of Ordinance 607 at issue, reversed the decision of the Planning Commission and approved the high density subdivision applications without further input, review, consideration, or discussion by the Planning Commission. (Complaint, pars. 4-6, 22, 70-93).

This decision by County Council was based on application of the following subsections of Ordinance 607 that address multi-family developments:

> § 607.207 A development of more than five (5) two-family buildings with a net density of five units per acre or greater *shall have a site plan*

reviewed *by the Planning Commission,* ***approved*** *by County Council* and comply with the following: ... (Amended Ord. 2011-41).

(emphasis added).

§ 607.306 A multi-family development of more than ten (10) dwelling units with a net density of five units per acre or greater *shall have a site plan* ***reviewed*** *by the Planning Commission,* ***approved*** *by County Council* and comply with the following: ... (Amended Ord. 2011-41).

(emphasis added).

§ 607.307 A development of ten (10) multi-family dwelling units or less *will be* ***reviewed*** *by Planning staff.* (Amended Ord. 2008-48).

(emphasis added).

§ 607.4025 A development of more than ten townhouses with a net density of five units per acre or greater *shall have a site plan* ***reviewed*** *by the Planning Commission,* ***approved*** *by County Council* and comply with the following: ... (Amended Ord. 2011-41).

(emphasis added).

§ 607.4026 A development of ten (10) townhouses or less *will be* ***reviewed*** *by Planning Staff.* (Amended Ord. 2008-48).

(emphasis added).

Plaintiffs contend that the above ordinance provisions were *ultra vires* because: (1) they conflict with Sections 6-29-1150 and 6-29-1155 of the Enabling Act which require ultimate approval or disapproval of site plans by Planning Commission and which grant rights to parties seeking approvals or denials; and (2) these ordinance provisions effectively eliminate rights granted by the Enabling Act. (Complaint, pars. 7, 60-64, 70-93, 123-128).

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 for which the standard of review is *de novo*. *South Carolina Public Interest Foundation v. Calhoun County Council*, 432 S.C. 492, 854 S.E.2d 836, 837 (2021), ("[T]he interpretation of a statute is a question of law for the Court to review *de novo*.")

ARGUMENTS

1. GEORGETOWN COUNTY ZONING ORDINANCE PROVISIONS REQUIRING COUNTY COUNCIL TO APPROVE SITE PLANS WERE *ULTRA VIRES* BECAUSE THEY CONFLICT WITH THE ENABLING ACT AND DENY RIGHTS GRANTED BY THE ENABLING ACT.

A. The Two Roles of the Planning Commission

Under the Enabling Act, the Planning Commission has two different roles. First, the Planning Commission is responsible for developing and recommending plans, policies, and regulations for adoption by the City or County Council.[1] Second, the Planning Commission and its staff are responsible for administering the regulatory schemes addressed in Article 7, Section 6-29-1110, *et seq.,* of the Enabling Act.

One central part of the Planning Commission's administrative role is the approval or disapproval of "site plans." The effect of the subsections of Ordinance 607 at issue was to substitute the County Council for the Planning Commission and its staff in the approval or disapproval of site plans.

B. Rights Granted by Section 6-29-1150 and 6-29-1155

Sections 6-29-1150 and 6-29-1155 of the Enabling Act provide a framework for site plan approvals and disapprovals by the Planning Commission and its staff and for the judicial appeals from the grant or denial of an application for site plan approval.

The subsection 6-29-1150(A) states: "The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff." (emphasis added). The use of "must" in this sentence is important. *See, e.g., South Carolina Police Officers Retirement Sys. v.*

[1] *See generally* Enabling Act, §§ 6-29-340, 6-29-510, 6-29-520.

City of Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990) (noting that "must' is considered mandatory under principles of statutory construction).

The remainder of section 6-29-1150(A) provides:

> Time limits, not to exceed sixty days, must be set forth for action on plans or plats, or both, submitted for approval or disapproval. Failure of the designated authority to act within sixty days of the receipt of development plans or subdivision plats *with all documentation required by the land development regulations* is considered to constitute approval, and the developer must be issued a letter of approval and authorization to proceed based on the plans or plats and supporting documentation presented. The sixty-day time limit may be extended by mutual agreement.

(emphasis added).

Subsection 6-29-1150(B) provides: "A record of all actions on all land development plans and subdivision plats with the grounds for approval or disapproval and any conditions attached to the action must be maintained as a public record. In addition, *the developer* must be notified in writing of the actions taken." (emphasis added).

Subsection 6-29-1150(C) addresses appeals from staff decisions as follows:

> Staff action, if authorized, to approve or disapprove a land development plan may be appealed to the planning commission by *any party in interest.*[2] The *planning commission must act on the appeal within sixty days and the action of the planning commission is final.*

(emphasis added).

Under general principles of exhaustion of administrative procedures, before filing an appeal in court,[3] an appeal from a staff decision *must* be addressed by an administrative appeal to

---

[2] For a discussion of "any party in interest," *see Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm'n*, 426 S.C. 97, 106–07, 825 S.E.2d 721, 726 (Ct. App. 2019).

[3] *See Stanton v. Town of Pawley's Island,* 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992); *Moore v. Sumter Cnty. Council,* 300 S.C. 270, 272, 387 S.E.2d 455, 457 (1990); *De Pass v. City of Spartanburg,* 234 S.C. 198, 202,

the Commission in order to preserve the right to appeal to Circuit Court.[4]

Subsection 6-29-1150(D) addresses appeals from the Planning Commission. Subsection 6-29-1150(D)(1) states: "An appeal from the decision of the planning commission must be taken to the circuit court within thirty days after actual notice of the decision."

In terms of record on appeals, the court in *Austin v. Board of Zoning Appeals,* 362 S.C.29, 34-35, 606 S.E.2d 209, 211-12 (Ct. App. 2004), held that the requirement of "final decisions and orders" could be satisfied by "written documents as well as records of proceedings."

Issues concerning docketing of the appeal and of jury versus nonjury treatment of the appeal are addressed in subsections 6-29-1150(D)(3) and 6-29-1150(D)(4). There is also a right of the property owner whose land is the subject of a Commission decision to seek pre-litigation mediation. The procedure for pre-litigation mediation is addressed in subsection 6-29-1150(D) and in section 6-29-1155.

C. 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

107 S.E.2d 350, 351 (1959). Exhaustion of remedies does not apply to a challenge to issues concerning the constitutionality of the statute establishing the agency. *Ward v. State,* 343 S.C. 14, 19-20, 538 S.E.2d 245, 248 (2000).

[4] *Austin v. Bd. of Zoning Appeals,* 362 S.C.29, 34-35, 606 S.E.2d 209, 211-12 (Ct. App. 2004); *see also Vulcan Materials Co. v. Greenville Cnty. Bd. of Zoning Appeals,* 342 S.C. 480, 495, 536 S.E.2d 892, 899 (Ct. App. 2000) (reaching a similar holding).

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).

D. <u>The Ordinance Provisions at Issue Are *Ultra Vires*</u>

The July 18, 2023, Order of Court relies on the principle that courts should be deferential to legislative decisions by local governments. (July 18, 2023, Order, pp. 4-8). However, this deference is not applicable herein because, as in *Sinkler v. County of Charleston,* the ordinance provisions at issue were *ultra vires.* The South Carolina Legislature adopted a scheme for addressing site plan approval in Sections 6-29-1150 and 6-29-1155 of the Enabling Act. Because the Ordinance provisions at issue eliminate rights and requirements provided by the Enabling Act, Georgetown County lacks the power to delete the provisions of this scheme.

The Order never addresses the conflict between the Ordinance 607 provisions at issue and provisions like Subsection 6-29-1250(A) of the Enabling Act which states: “The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the planning commission or designated staff.” (emphasis added). Though the Order quotes this language at page 6, the Order never addresses the role of the requirement or the importance of the use of the mandatory term "must."

The Order refers to subsections 607.4025 and 607.40254 of Ordinance 607, but never addresses the difference between "review" vis á vis the statutory language of “approval or disapproval” in subsection 6-29-1150(A). In effect, the lack of application of the test for conflict with state law indicates a somewhat *ipse dixit* approach to decision-making.

As indicated in Part C above, the ordinance provisions at issue eliminate substantial rights granted by Sections 6-29-1150 and 6-29-1155 of the Enabling Act. As with the language in subsection 6-29-1250(A), the Order adopts the same approach of failing to address the conflicts between the Ordinance 607 provisions at issue and the provisions of the Enabling Act. More specifically, the Order does not address the provisions of Ordinance 607 that conflict with the Enabling Act in the following ways:

(1) County Council was granted an unrestricted power to approve or deny certain site plans. (§ 607.207).

(2) The Planning Commission's role was reduced from having the power to approve or disapprove site plans to a role of merely reviewing site plans. (§§ 607.207, 607.306 (review by Planning Commission), 607.4026 (review by staff)).

(3) Rights granted to developers in Subsection 6-29-1150(B) of the Enabling Act were eliminated. (§§ 607.307, 607.4026).

(4) Rights of appeal to the Planning Commission granted to applicants and other parties in interest by subsection 6-29-1150(C) of the Enabling Act were eliminated. (§ 607.207).

(5) Rights of appeal to Circuit Court granted by subsection 6-29-1150(D) and by Section 6-29-1155 (property owner's right to prelitigation mediation) of the Enabling Act were eliminated. (§ 607.207).

In addition, the Order mistakenly states: "Plaintiffs ... fail to allege that any of those Ordinances work to deprive the Plaintiffs of their constitutional rights. Because these allegations are absent from the Complaint, it fails as a matter of law in its quest to invalidate the ordinances at issue." (July 18, 2023, Order, p. 6). This statement concerning the Complaint is not accurate.

Paragraphs 62-64, 68-69, and 71-76 list denials of constitutional and statutory rights, and Paragraphs 52-56, 86, 90, and 97 contain a listing of violations of Georgetown County Ordinances. The December 11, 2023, Order refers to a "lack of facts plead [sic], or arguments raised as to a denial of any constitutional right." (December 11, 2023, Order p. 5, fn. 1). However, the Order appears to overlook or ignore the numbered paragraphs in the Complaint that list constitutional, statutory, and ordinance-based rights.

2. GEORGETOWN COUNTY ORDINANCE PROVISIONS REQUIRING COUNTY COUNCIL TO APPROVE SITE PLANS DENIED PLAINTIFFS' DUE PROCESS.

The provisions of Ordinance 607 at issue deny Plaintiffs' right to due process because the provisions contain no controls or guides for the discretion granted to the Georgetown County Council. An example of this concern was addressed in *Restaurant Row Associates v. Horry County*, 335 S.C. 209, 516 S.E.2d 442, 445 (1999). The court noted, "When deciding whether to grant a variance, *a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary. Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Advertising Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939)." (emphasis added). Because the ordinance at issue in *Restaurant Row Associates* was sufficiently specific, the decision of the trial court was upheld.

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

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

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

The holding in *Schloss Poster Advertising Co.* is consistent with the general due process guarantee in Article 1, Section 3 of the South Carolina Constitution which provides:

> The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

The case is also consistent with Article 1, Section 8, which provides: "In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other."

The holding in *Schloss Poster Advertising Co.* is also bolstered by Article 1, Section 22, which provides:

> No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

Section 22 has been held to be "an additional guarantee of important due process rights." *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 511 S.E.2d 48, 54 (1998).

McIntyre v. Securities Commissioner of South Carolina, 425 S.C. 439, 451 823 S.E.2d 193 (S.C. App. 2018) applied Section 22 to a case involving an alleged violation of the Uniform Securities Act. Though the Legislature had required that rules be adopted by a "notice and comment" procedure, the Commissioner chose not to adopt any rules. The Commissioner's claim that any due process violation was harmless was rejected because a "harmless error" analysis "is

impossible and unnecessary to undertake where the structure of the proceeding under review was fundamentally unsound." *Id.* at 451, 199.

The scheme adopted in the ordinance provisions at issue is invalid. Like the ordinance in *Schloss Poster Advertising Co.*, the amended ordinance "commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them, the right and power to absolutely prohibit the use of property for the erection of bill boards." Consequently, the provisions requiring County Council approval result in a denial of due process to persons seeking or opposing an approval of a site plan.

3. PLAINTIFFS' COMPLAINT IS SUFFICIENT TO STATE A CAUSE OF ACTION FOR DECLARATORY JUDGMENT.

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. <u>July 18, 2023, Order of Dismissal</u>

The July 18, 2023, Court Order concludes that Plaintiffs' Complaint does not establish a justiciable controversy. However, in making this determination, the Order does not discuss or consider the specific allegations of Plaintiffs' Complaint. It also fails to address the underlying legal issues that form the basis of Plaintiffs' claims. As a result, the Order makes findings and draws conclusions based on characterizations of Plaintiffs' claims that fail to accurately reflect the allegations contained in the Complaint.

Plaintiffs' claims fall into two broad categories: (1) provisions of Georgetown County Ordinance 607 conflict with the Enabling Act and are *ultra vires* and a denial of due process; and (2) decisions by Georgetown County do not adequately address the Enabling Act requirement that zoning and land development regulations be in accordance with the Comprehensive Plan.

(1) *Ultra Vires* & Denial of Due Process Claims

The Order does not consider whether the Complaint states claims of *ultra vires* conduct and denial of due process of the Georgetown County ordinance provisions in question. Instead of addressing the proper inquiry in a Rule 12(b)(6), SCRCP, Motion to Dismiss, the July 18, 2023, Order improperly decides the merits of the ultimate issues of *ultra vires* and denial of due process as follows:

> *The ordinances requiring County Council to review site plan applications for more intensive proposed developments are permissible under the law.* The Plaintiffs' alleged cause of action regarding the authority of the County Council to review the applications is entirely contingent upon the opposite being true and there has been no definite assertion of legal rights. Thus, the facts alleged in the Complaint fail to establish a justiciable controversy and therefore fail to sufficiently constitute a cause of action.

(July 18, 2023, Order, pp. 11-12)(emphasis added).

Plaintiffs' *ultra vires* claim relies on the authority of *Sinkler v. County of Charleston, supra.* Although the July 18, 2023, Court Order cites *Sinkler,* it never addresses Plaintiffs' claim of denial of their statutory rights granted by the Enabling Act. The Order also fails to address the denial of due process resulting from the lack of standards for the approval of site plans by County Council under the Ordinance provisions at issue. (Complaint, pars. 62-64, 68-69, and 71-76).

Neither of the two Orders adequately addresses the application of the *Sinkler* decision to the facts at issue. The July 18, 2023, Order simply states at page 9: *"See Sinkler v. County of Charleston,* 389 S.C. 67, 690 S.E.2d 777 (2010); *see also* S.C. Code § 6-29-720(A)." There is no analysis or discussion of *Sinkler* or Section 6-29-720(A) of the Enabling Act.

Page 5 of the December 11, 2023, Order states:

> ... Plaintiffs' reliance on *Sinkler v. County Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010), is misplaced in this instance as the facts and relevant provisions of law are readily distinguishable. Plaintiffs argue that the holding in *Sinkler* essentially requires that a governing body is limited to a determination made by the county's planning commission because a governing body has no authority to venture beyond to contradict the provisions of the Planning Act. Pls.' Mot. Alter Am. J. 2–4. While the Court generally agrees that a county does not have free rein to contradict a statutory provision which is directly implicated by the county's actions, such a scenario is not at issue in this case. The holding in *Sinkler* is far more nuanced and narrower than Plaintiffs allege and the zoning ordinances at issue in this case are within the permissible authority of a county, as was thoroughly explained in the Order.

The Order does not analyze or distinguish *Sinkler* at all. Nor does it provide examples to show that *Sinkler* is "far more nuanced and narrower than Plaintiffs allege." Instead, both Orders simply rely on unsupported assertions that the County Council has an inherent legal power to delete provisions in the Enabling Act. (See July 18, 2023, Order, pp. 5-8; December 11, 2023, Order, p. 5).

(2) <u>Claims Under Enabling Act Section 6-29-720</u>

The July 18, 2023, Order summarizes the basis for its dismissal of the Complaint as follows: "In sum, because the Comprehensive Plan is not a legally binding standard, a perceived violation of its terms cannot substantiate a legal claim for relief. Accordingly, Plaintiffs' causes of action I through VI must be dismissed with prejudice as a matter of law." (July 18, 2023, Order, p. 10). The Order states further:

> [A] comprehensive plan does not require strict adherence to its terms and therefore creates no legal duty by which to abide. Because there is an absence of a positive legal duty in this case and no definite assertion of legal rights, there are no legal rights which could even conceivably be denied as the result of Defendants' conduct. Therefore, Plaintiffs' additional claims for declaratory judgment fail to establish a justiciable controversy and therefore the complaint fails to state facts sufficient to constitute a cause of action.

(July 18, 2023, Order, p.12). The Order misstates Plaintiffs' claims by failing to recognize that the claims arise from the "in accordance with" language in the Enabling Act, not the terms of the Georgetown County Comprehensive Plan. The Order also completely ignores the allegations of Plaintiffs' Complaint that list denials of constitutional and statutory rights and violations of Georgetown County Ordinances. (Complaint, pars. 52-56, 62-64, 68-69, 71-76, 86, 90, and 97.)

(3) <u>All Plaintiffs' Claims</u>

The Order recognizes that: "Ultimately, the land use decisions of a county are governed by the adopted zoning ordinances and land use regulations, *which are limited only by the terms of the Planning Act and other applicable state statutes."* (July 18, 2023, Order, p. 10)(emphasis added). The court clearly appreciates that state law imposes limitations on county land use decisions, zoning ordinances, and land use regulations. However, the Order does not recognize that this language precisely describes Plaintiffs' claims, *i.e.*, that the actions of Georgetown County in this case, including the ordinances and regulations in question, *exceed those very limitations imposed by state statute.*

These claims raise factual questions that can only be resolved after the record is developed and evidence has been presented. The 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. <u>Allegations Contained in Plaintiffs' Complaint</u>

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

1. Paragraph 1-7: Background and overview of the controversy including challenge to all Georgetown County ordinance provisions that require site plan decisions of the Planning Commission to be approved by County Council.

2. Paragraphs 8-10: Identification and description of the two land parcels at issue.

3. Paragraphs 11-36: Identification of the parties and their roles, including Affidavits signed by each Plaintiff describing themselves, their land, and their injury.

4. Paragraphs 37-42: Identification and description of the two major subdivision applications at issue.

5. Paragraphs 43- 47: Identification of the Comprehensive Plan Future Land Use Map designation of the two parcels in question and a description of neighboring parcel and community.

6. Paragraphs 48-54: Identification of inconsistent zoning and land development regulations and Comprehensive Plan provisions which constitute violations of the Enabling Act.

7. Paragraphs 55-56: Identification of applicable provisions of Comprehensive Land Use Plan.

8. Paragraphs 60-62: Identification of applicable South Carolina Enabling Act provisions.

9. Paragraph 63-64, 71-76, 92-93: Identification of the factual bases for the claim that Georgetown County Ordinance provisions and County Council decision were *ultra vires.*

10. Paragraphs 65-69: Facts regarding the Planning Commission public hearing and decision to deny the site plan.

11. Paragraphs 70, 77-89: Facts regarding the site plan approval by County Council, overruling the decision of Planning Commission to deny the site plan.

12. Paragraphs 90: Detailed description of the substantive areas of noncompliance of the proposed subdivisions with Georgetown County ordinances.

13. Paragraph 94-115: Detailed facts constituting Georgetown County's failure to comply with the Enabling Act.

14. Paragraphs 116–122: Bases for jurisdiction, venue, and standing.

15. Paragraphs 123–134: Six separate counts setting forth the issues and requesting relief under the Declaratory Judgments Act.

16. Paragraphs 135-136: Alternative appeal of the County Council decision pursuant to the Enabling Act.

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' 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 clearly satisfies pleading requirements.

4. THE TRIAL COURT ERRED BY CONSIDERING THE MERITS OF THE UNDERLYING CONTROVERSY AND APPLYING AN EVIDENTIARY PRESUMPTION IN THE CONTEXT OF A RULE 12(b)(6) MOTION TO DISMISS.

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).

A. Order Improperly Addresses Merits

Throughout the July 18, 2023, 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.

For example, pages 4–8 of the Order conclude that Plaintiffs have no claim because "the Court finds no conflict between the zoning ordinances complained of and the Planning Act." (July 18, 2023, Order p. 8). Pages 8–12 conclude that "Plaintiffs' causes of action I through VI must be dismissed with prejudice as a matter of law." (July 18, 2023, Order p. 8).

B. <u>Order Improperly Applies Evidentiary Presumption and Burdens of Proof</u>

In addition to considering and making decisions on the merits, the July 18, 2023, Order improperly imposes evidentiary presumptions without providing Plaintiffs with the opportunity to present evidence or arguments to rebut those presumptions.

The 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."*

(July 18, 2023, 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. Questions of Fact

The Court Order states that "[c]ases that present legal questions, and do not involve facts, are well suited for dispositive motions." (July 18, 2023, 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.

Interestingly, none of the cases cited by the Orders 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).

5. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFFS' COMPLAINT MUST BE DISMISSED AS A MATTER OF LAW ON THE BASIS OF FAILURE TO ALLEGE CONSTITUTIONAL DEPRIVATION.

The Court Order states, "Plaintiffs ... fail to allege that any of those ordinances work to deprive the Plaintiffs of their constitutional rights. Because these allegations are absent from the Complaint, it fails as a matter of law in its quest to invalidate the ordinances at issue." (July 18, 2023, Order, p. 6). This is an erroneous statement of the law. In addition, as indicated in Part D of Argument 1, Plaintiffs' Complaint contains a list of constitutional, statutory, and ordinance-based claims. (Complaint, pars. 52-56, 62-64, 68-69, 71-76, 86, 90 and 97).

A. Constitutional Deprivation is not a Requirement

It is well settled that, when the right to bring an action exists pursuant to a statute (such as the Declaratory Judgments Act), 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). On the contrary, 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., supra* at 113, 731; *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. Complaint Alleges Constitutional Deprivation

Notwithstanding that pleading constitutional deprivation is not required to state a cause of action for Declaratory Judgment, Plaintiffs' Complaint nevertheless alleges both traditional constitutional deprivation (Complaint, pars. 62-64, 68-69, and 71-76), and that Plaintiffs' rights have been "affected" in ways that amount to constitutional deprivation as follows:

(1) Negative impact on character, aesthetics and enjoyment of our land.
(2) Decrease in the value of our property.
(3) Increase in existing stormwater and flooding problems.
(4) Increase in traffic on secondary roads and highways that are not adequate to handle additional volumes of traffic.
(5) Increased burden on severely over-burdened infrastructure that is operating beyond capacity and is a serious safety hazard – streets and highways, insufficient numbers of fire, police, and emergency services personnel and equipment, flooding and stormwater, evacuation routes.
(6) Sets a precedent for other medium density land in immediate neighborhood to be approved for high density development.
(7) Sets a precedent for future land development that does not comply with the comprehensive plan.

(Complaint Pars. 11-30; Affidavits, Exhibits 1-7.)

Plaintiffs' Complaint properly pleads that Plaintiffs have been "affected" by the Ordinance provisions at issue. The nature and extent of their 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.

6. 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.

The Order of Dismissal interprets the requirement that zoning "regulations must be made in accordance with the comprehensive plan" as follows: "[B]ecause the Comprehensive Plan is not a legally binding standard, a perceived violation of its terms cannot substantiate a legal claim for relief." (Order, p. 10)

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.[5] The requirement was in the two predecessor acts in effect before the current Enabling Act was adopted.[6] A similar requirement is contained in the land development regulations.[7]

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,

[5] S.C. CODE § 1924 (33) 1066.

[6] *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

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

85, 254 S.E.2d 301, 304 (1979) ("Full effect must be given to each section of a statute, giving 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* concludes that the comprehensive plan is a guideline without providing a basis for this conclusion.

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 comprehensive 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 did in the movie. Because of its importance,

statutory interpretation requires more analysis than a humorous line from a pirate movie. Appellants submit that the clear and unambiguous statutory 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 4, 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 Complaint.

Respectfully submitted,

/s/ F. Patrick Hubbard
F. Patrick Hubbard, Esquire (SC Bar #12614)

1525 Senate Street
Room 312
Columbia, SC 29208
(803) 422-6762
phubbard@law.sc.edu

/s/ Cynthia Ranck Person
Cynthia Ranck Person, Esquire (SC Bar #105126)

KEEP IT GREEN ADVOCACY, INC.
P.O. Box 1922
Pawleys Island, SC 29585
(843) 325-7795, (570) 971-8636
kig.advocacy@gmail.com

April 4, 2024

ATTORNEYS FOR APPELLANTS