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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 Kristi F. Curtis
Circuit Court Judge

Appellate Case No. 2023-001776
Circuit Court Case No. 2023-CP-22-00210

Kendrick A. Bryant and Keisha Bryant Sherman on behalf of the heirs of Ernest Bryant; Benjamin Dennison and Willie Dereef, Jr. on behalf of the heirs of Limerick Dennison; Lucille Grate; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlet, Inc.

Appellants,

v.

Georgetown County and Covington Homes, LLC

Respondents.

FINAL INITIAL BRIEF OF APPELLANTS

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   Suggested Answer: In the affirmative.

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' DUE PROCESS?

   Suggested Answer: In the affirmative.

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

   Suggested Answer: In the affirmative.

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?

   Suggested Answer: In the affirmative.

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

   Suggested Answer: In the affirmative.

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?

   Suggested Answer: In the affirmative.

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 rely on six grounds to contend 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. (Order; R. p. 3).

Plaintiffs' Complaint is supported by 137 paragraphs of detailed factual averments incorporating thirteen exhibits. (Complaint; R. 23-109). 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.

(Complaint; R. 23-109).

Plaintiffs are individual adjoining landowners and three community organizations that represent landowners in the vicinity. (Complaint, pars. 29-46; R. pp. 29-33). Defendants are Georgetown County and Covington Homes, LLC, the entity which owns the land parcel upon which County Council approved the high density subdivision. (Complaint, pars. 47-50; R. pp. 33-34).

Georgetown County and Covington Homes filed Rule 12(b)(6), SCRCP, Motions to Dismiss on April 11, 2023 (R. pp. 110-111) , and April 13, 2023, (R. pp. 112-113), respectively, and on May 31, 2023, filed memoranda in support of their motions, (R. pp. 114, 127). On June 1, 2023, Plaintiffs filed a Preliminary Memorandum of Law in Opposition to Defendants' Motions to Dismiss. (R. p. 149).

On July 13, 2023, a WebEx virtual hearing was held, (R. p. 185), and on September 19, 2023, an Order was entered granting Defendants' Motions to Dismiss. (R. p. 3). Plaintiffs filed a Rule 59(e), SCRCP, Motion to Alter or Amend Judgment on September 29, 2023, (R. p. 166), which was denied without hearing by Order dated October 23, 2023, (R. p. 19).

Plaintiffs filed a timely Notice of Appeal on November 14, 2023. (R. p. 180).

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. 1, 5-23; R. pp. 24-28). At issue is the approval of a high density multi-family subdivision on a parcel of vacant land in the heart of a traditional minority community in Pawleys Island, Georgetown County, South Carolina, zoned as General Residential ("GR") and designated by the Georgetown County Comprehensive Plan and Maps ("Comprehensive Plan") as "Medium Density." (Complaint, pars. 2, 26; R. pp. 24-25, 28).

The high density subdivision application was denied by Georgetown County Planning Commission after public hearing on January 19, 2023, on the basis that it conflicted with the residential density requirements of the Comprehensive Plan. (Complaint, pars. 3, 66; R. pp. 25, 38-39). 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 the County or Covington. (Complaint, pars. 3, 23, 67; R. pp. 25, 27-28, 39).

Instead, on February 14, 2023, 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 application without further input, review, consideration, or discussion by the Planning Commission. (Complaint, pars. 4, 5, 22, 69-89; R. pp. 25, 27, 39-45).

This decision by County Council was based on application of the following subsections of Ordinance 607, addressing 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. (Complaint, pars. 6-12, 22-23, 69-71, 82; R. pp. 25-28, 39-40, 43); and (2) they eliminate rights granted by the Enabling Act.

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 CONFLICTED WITH THE ENABLING ACT AND DENIED RIGHTS GRANTED TO PLAINTIFFS 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 plan approvals and disapprovals by the Planning Commission and its staff and for the judicial appeals from the grant or denial of an application.

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

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[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 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 subsections 6-29-1150(D) and 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 Order of Court, at pages 4-9 and 14, (R. pp. 6-11, 16), 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 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 dismissing the Complaint recognizes the proper approach to invalidating an ordinance as follows:

> Ultimately, the process for invalidating an ordinance functions as a two-step-process: *first*, a court must determine whether the county had the power to adopt the ordinance, and *second*, a court must determine *whether the ordinance is consistent with state law. McKeown v. Charleston County Board of Zoning Appeal*, 347 S.C. 203, 207, 553 S.E.2d 484, 486 (Ct. App. 2001) (citing *Bugsy's, Inc. v. City of Myrtle Beach,* 340 S.C. 87, 93, 530 S.E.2d 890, 893 (2000). *An ordinance is valid unless it conflicts with state law*, and for there to be a conflict, the ordinance and state law must contain express or implied conditions that are inconsistent and irreconcilable. *McKeown*, 347 S.C. at 207, 553 S.E.2d at 486 (citing *Wrenn Bail Bond Serv., Inc. v. City of Hanahan*, 335 S.C. 26, 29, 515 S.E.2d 521, 522 (1999)).

(Order, pp. 5-6; R. pp. 7-8) (emphasis added).

Despite recognition of the proper test, the Order never uses this two-part test to address 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). It is important to note that the Order quotes this language at page 6 (R. p. 8); however the Order never addresses the meaning or application of the quote.

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 portions of 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 the Ordinance works to deprive them of their constitutional rights. Because these allegations are absent from the Complaint, it fails as a matter of law in its quest to invalidate." (Order, p. 6; R. p. 8). This statement concerning the Complaint is not accurate. Paragraph 70 of the Complaint contains the following listing of the violations of statutory and constitutional rights:

> 70. Georgetown County ordinances requiring site plans to be approved by County Council are void and unenforceable for the following reasons:
>
> a. They are inconsistent with explicit provisions of state law as set forth hereinabove.
>
> b. They violate the doctrine of separation of powers.
>
> c. They reserve to County Council arbitrary power without the guidance of uniform rules and regulations.
>
> d. They do not articulate any standards by which the County Council should decide to approve or disapprove the decision by Planning Commission.
>
> e. They violate the South Carolina Planning Act and other law.

(R. p. 39).

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."

Schloss Poster Advertising Co. is further consistent with 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. Order of Dismissal

The Court Order granting dismissal of the Complaint relies on the conclusion that "the facts alleged in the Complaint fail to establish a justiciable controversy." However, the basis for this conclusion is not explained, the allegations in the Complaint are not discussed or considered, and the underlying legal authority is not addressed. (Order, pp. 13-14; R. pp. 15-16).

Plaintiffs rely on *Sinkler v. County of Charleston, supra*, as authority for their claim that the Ordinance 607 provisions at issue were *ultra vires.* The Court's Order cites *Sinkler,* but the Order never addresses the holding of *Sinkler* and never discusses or considers 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. This 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

These omissions may have been caused by failing to read the Complaint carefully. Plaintiffs' Complaint comprehensively enumerates the particulars of the "actual controversy" as required for a Declaratory Judgment Action as follows:

1. Paragraph 1-4: Background and overview of the controversy. (R. pp. 24-25).
2. Paragraph 5: Identification of Ordinance provisions at issue. (R. p. 25).
3. Paragraphs 6-12: Identification of specific conflicts between the Ordinance provisions and the South Carolina Enabling Act. (R. 25-26).
4. Paragraphs 13; 18-21: Identification of the specific conflicts between the applicable zoning regulations and the comprehensive plan which constitute violations of the Enabling Act. (R. pp. 26-27).
5. Paragraphs 14-15: Definitions under the Comprehensive Plan. (R. p. 26).
6. Paragraphs 16-17; 51-52; 90-94: Identification of applicable South Carolina Enabling Act provisions. (R. pp. 26-27, 34-35, 45-46).
7. Paragraph 22-23: Identification of the bases for the claim that Ordinance provisions and County Council decision were *ultra vires.* (R. pp. 27-28).
8. Paragraphs 24–38: Details about the land parcel in question and the Major Subdivision Application. (R. pp. 28-31).
9. Paragraphs 29-50: Identification of the parties. (R. pp. 29-34).
10. Paragraphs 53-65: Identification of applicable Comprehensive Plan and Georgetown County Ordinance provisions. (R. pp. 35-38).
11. Paragraphs 66-68: Facts regarding the Planning Commission public hearing and decision to deny the site plan. (R. pp. 38-39).
12. Paragraphs 69-89: Facts regarding the site plan approval by County Council. (R. pp. 39-45).

13. Paragraphs 95-111: Detailed facts constituting Georgetown County's failure to comply with the Enabling Act. (R. pp. 46-49).

14. Paragraphs 112–118: Bases for jurisdiction, venue, and standing. (R. pp. 49-51).

15. Paragraphs 119–132: Six separate counts requesting relief under the Declaratory Judgments Act. (R. pp. 51-55).

16. Paragraphs 133-134: Alternative appeal of the County Council decision. (R. p. 34).

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 far exceeds the minimum 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 Order, the trial court addresses the merits of the controversy by weighing evidence, finding facts, and considering matters that are beyond those raised in the four corners of the Complaint. The Order reads like a grant of summary judgment rather than a motion to dismiss.

For example, pages 4–9 of the Order conclude that Plaintiffs have no claim because "the Court finds no conflict between Ordinance 607 and the Planning Act and therefore finds it is

valid," (Court Order p. 8; R. p. 10). Pages 9–12 conclude that "all of Plaintiffs' claims must be dismissed with prejudice as a matter of law." (Court Order p. 12; R. p. 14). Page 14 concludes "there have been no facts plead which could substantiate any arbitrary or unreasonable grounds by which to vacate County Council's approval of the application." (R. p. 16). These conclusions were based on considering matters beyond those raised in the Complaint itself and by the weighing of evidence.

The Order further states: "any challenges to the validity of Ordinance 607 are now statutorily barred." (Court Order, p. 9; R. p. 11). In reaching this conclusion, the court relied 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.

(Order, p. 8; R. p. 10).

This reliance on Section 6-29-760(D) was addressed during the hearing held on July 13, 2023. (Hearing Transcript, p. 45; R. p. 229, lines 12 - 23). Plaintiffs argued that this subsection did not apply because the challenge was based on the theory that the ordinance provisions at issue were *ultra vires.* Thus, jurisdiction was 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).

B. Order Improperly Applies Evidentiary Presumption

The Order further improperly applies an evidentiary presumption and makes findings of fact in the context of a Rule 12(b)(6) motion wherein Plaintiffs have no opportunity to present evidence or arguments to rebut the presumption. The Court Order states that, "[a] municipal ordinance is a legislative enactment and is *presumed* to be constitutional . . . [z]oning ordinances must be upheld so long as the propriety of the local governing body's decision is 'fairly debatable.'" (Court Order, p. 5; R. p. 7) (emphasis added).

A claim cannot be properly dismissed for failure to overcome an evidentiary presumption *before* Plaintiffs have been given the opportunity to present evidence to rebut that presumption or meet the evidentiary standard. The questions of whether the ordinance is "constitutional," "fairly debatable," or "arbitrary and capricious" are issues of fact to be determined *after* evidence is presented and weighed *after* arguments have been offered and considered. These evidentiary conclusions are relevant to the *merits* of Plaintiffs' claims, not the *sufficiency* of the Complaint.

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 the Ordinance works to deprive them of their constitutional rights. Because these allegations are absent from the Complaint, it fails as a matter of law ...." (Order, p. 6; R. p. 8). This is an erroneous statement of the law. In addition, as indicated at page 20 of Argument 1, Paragraph 70 of Plaintiffs' Complaint, (R. p. 39), contains a list of constitutional and statutory claims.

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, par. 70, 115-118; R. pp. 39, 49-51), 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. 29-38; Affidavits, Exhibits 1-7; R. pp. 29-31, 58-74).

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. <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 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; R. p. 12)

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; R, p. 12). However, *McClanahan* never undertakes to address 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 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 *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,

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July 26, 2024

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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 Kristi F. Curtis
Circuit Court Judge

Appellate Case No. 2023-001776
Circuit Court Case No. 2023-CP-22-00210

Kendrick A. Bryant and Keisha Bryant Sherman on behalf of the heirs of Ernest Bryant; Benjamin Dennison and Willie Dereef, Jr. on behalf of the heirs of Limerick Dennison; Lucille Grate; Parkersville Planning & Development Alliance; Keep It Green; and Preserve Murrells Inlet, Inc.

Appellants,

v.

Georgetown County and Covington Homes, LLC

Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that the Final Brief of Appellants and Final Reply Brief of Appellants comply with SCACR 211(b) and are identical to the briefs previously served except for revised references to the Record on Appeal and pagination changed thereby.

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