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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

Civil Action No. 2023-CP-22-00210

Appellate Case No. 2023-001776

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 BRIEF OF RESPONDENT GEORGETOWN COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SOUTH CAROLINA

STATUTES

ORDINANCES

GEORGETOWN COUNTY

COURT RULES

STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court properly find that the Complaint failed to state facts sufficient to constitute a cause of action for declaratory judgment?

STATEMENT OF THE CASE

Appellants initiated this action against Respondents Georgetown County ("Respondent" or "Georgetown County") and Covington Homes, LLC ("Respondent Covington Homes" or "Covington Homes") on March 10, 2023. (R. p. 24; Compl. at 1). Appellants sought declaratory judgment on multiple alleged causes of action relating to Georgetown County Council's ("County Council") approval of a major subdivision application in Georgetown County, South Carolina.[1] (R. pp. 51–55; Compl. ¶¶ 119–32).

The Complaint purports to allege seven causes of action for declaratory judgment. (R. pp. 51–55; Compl. ¶¶ 119–32. Ultimately, Appellants were seeking declarations on three main issues that can be described as follows: (1) Appellants requested that the Court declare Georgetown County Zoning Ordinance Section 607 ("Ordinance 607") to be invalid because it conflicts with the Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code Ann. § 6-29-310 *et seq.* ("Planning Act"); (2) Appellants asked the Court to declare County Council's decision to approve the major subdivision application submitted by Respondent Covington Homes invalid because the decision relied on Ordinance 607 and conflicted with the Georgetown County Comprehensive Plan ("Comprehensive Plan"); and (3) Appellants asked the Court to declare that Respondent Georgetown County had a statutory mandate to amend Ordinance 607 to comply with the Comprehensive Plan. (R. pp. 51–55; Compl. ¶¶ 119–32).

[1] Appellants' Complaint also alleges a cause of action seeking to appeal Georgetown County Council's decision in the alternative. (R. p. 56; Compl. ¶¶ 133–34). The circuit court dismissed this alleged appeal in the alternative in its Order and Appellants have not appealed this decision. (R. p. 16; Order 14.

Respondent Georgetown County filed a motion to dismiss the Complaint on April 11, 2023 as well as a memorandum of law in support of its motion, which was filed on May 31, 2023. (R. pp. 110–11, 114–26). Respondent Covington Homes filed its motion to dismiss on April 13, 2023 as well as a memorandum of law in support of its motion, which was also filed on May 31, 2023. (R. pp. 112–13, 127–48). A hearing on both motions was held before the Honorable Kristi F. Curtis on July 13, 2023. Judge Curtis granted the motions to dismiss on August 15, 2023 (R. p. 239), later issuing a formal Order on September 19, 2023. (R. pp. 3–18). On September 29, 2023, Appellants filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. (R. pp. 166–79). Judge Curtis denied that motion on October 23, 2023. (R. p. 239). On November 14, 2023, Appellants served their notice of appeal on Respondents. (R. pp. 180–81).

FACTS

This case arises out of the approval of a major subdivision application in Georgetown County. The parcel of land in the proposed development is Tax Map No. 04-0204-025-03-00 and includes 2.01 acres of vacant land located at 319 Petigru Drive in Pawleys Island, South Carolina. (R. p. 28; Compl. ¶ 24). The land was purchased by Defendant Covington Homes, LLC ("Defendant Covington Homes") on April 7, 2022. (R. p. 28; Compl. ¶ 26). On December 20, 2022, Defendant Covington submitted a major subdivision application to the Georgetown County Planning Commission (the "Application"). (R. pp. 28–29; Compl. ¶¶ 27–28). The Application was considered by the Planning Commission at a public hearing held on January 19, 2023. (R. pp. 25, 38–39; Compl. ¶¶ 3, 66).

At the public hearing, the Planning Commission voted to recommend denial of the application before forwarding the application and its recommendation to the Georgetown County Council for review, as is required under Georgetown County Ordinances concerning more use-intensive developments like the one being proposed. (R. pp. 25, 39; Compl. ¶¶ 3, 5, 69). At a

council meeting held February 14, 2023, the County Council voted to approve the Application. (R. p. 25; Compl. ¶ 4).

STANDARD OF REVIEW

An appellate court conducts a *de novo* review of a grant of dismissal. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) ("In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court."). An appellate court may affirm a lower court's "ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

When deciding a motion to dismiss for failure to state a claim, the "Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003); *see also Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) ("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."). When deciding whether to grant a motion to dismiss, a court may consider exhibits attached to a pleading. *See* Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989) ("[B]y virtue of Rule 10(c), SCRCP the attachment became a part and parcel of the complaint."). Dismissal pursuant to Rule 12(b)(6), SCRCP, is appropriate when "the facts alleged in the complaint do not support relief under any theory of law." *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 170, 763 S.E.2d 426, 430 (2014) (quoting *Flateau*, at 202, 584 S.E.2d at 416).

Cases which present legal questions, and do not involve factual disputes, are well-suited for dispositive motions. *See Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493,

494 (2004) ("Where . . . the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss."); *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 434, 622 S.E.2d 564, 568 (Ct. App. 2005); *see also Palmer v. State*, 427 S.C. 36, 43, 829 S.E.2d 255, 259 (Ct. App. 2019) (finding that the circuit court did not err in dismissing the case pursuant to Rule 12(b)(6), SCRCP even the though the underlying issue was a novel one, because the underlying dispute was purely one of constitutional interpretation).

ARGUMENT

The circuit court correctly held that Appellant failed to state facts sufficient to constitute a cause of action for declaratory judgment. Therefore, the Court should affirm the decision of the circuit court in favor of Georgetown County as to all of Appellants' claims.

I. THE CIRCUIT COURT PROPERLY FOUND THAT THE COMPLAINT FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION FOR DECLARATORY JUDGMENT.

To establish a cause of action under the Uniform Declaratory Judgments Act, the pleadings must establish the existence of a justiciable controversy. *Power v. McNair*, 255 S.C. 150, 153, 177 S.E.2d 551, 553 (1970). For there to be a justiciable controversy, there must be a concrete issue, a definite assertion of legal rights, and a positive legal duty with respect to those rights which are being denied by the defendant. *Id.* at 153–54, 177 S.E.2d at 553. In other words, the dispute must be real and substantial, not contingent, hypothetical, or abstract. *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 588, 819 S.E.2d 142, 147 (Ct. App. 2018) (quoting *Power*, at 154, 177 S.E.2d at 553).

(A) The circuit court properly found that Ordinance 607 did not deprive Appellants of any constitutional rights and therefore the presumption of its validity cannot not be rebutted.

The Circuit Court recognized, correctly, that courts are limited in their authority to review and invalidate zoning decisions made by local governing bodies. (R. p. 6; Order 4). South Carolina

jurisprudence so restricts a court's authority to infringe upon a county's zoning decisions that a court may only invalidate an ordinance after finding that the ordinance has violated constitutional rights. *See Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991) ("Courts have no prerogative to pass upon the wisdom of the municipality's decision unless such decision is 'so unreasonable as to impair or destroy a citizen's constitutional rights.'" (quoting *Hampton v. Richland County*, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct. App. 1987))).

A zoning ordinance is a legislative act which must be presumed to be constitutional. *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992); *see also Knowles*, 305 S.C. at 224, 407 S.E.2d at 642 ("Zoning is a legislative act which will not be interfered with by the courts unless there is a clear violation of constitutional rights."); *see also Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals*, 440 S.C. 266, 278, 890 S.E.2d 748, 754 (2023) ("Courts must make every presumption in favor of the constitutionality of a legislative enactment."). A zoning ordinance violates constitutional rights when it deprives an individual of their property without due process of law. *McClanahan v. Richland County Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 243–44 (2002) (finding that county council's adoption of the county's comprehensive plan did not deprive Appellant of his property nor did the process by which it was adopted). While a court may invalidate an ordinance where it finds there has been a violation of constitutional rights, it may not substitute its judgment for that of the local zoning ordinance where no such violation is present. *Bear Enters. v. County of Greenville*, 319 S.C. 137, 141–42, 459 S.E.2d 883, 886 (Ct. App. 1995).

Zoning ordinances must be upheld so long as the propriety of the local governing body's decision is "fairly debatable." *Knowles*, 305 S.C. at 223, 407 S.E.2d at 642. A decision is fairly debatable when it is "not so unreasonable as to impair or destroy [a] citizen's constitutional rights." *Id.* at 224, 143 S.E.2d at 643 (internal quotations omitted). "The burden of proving the invalidity of

a zoning ordinance is on the party attacking it, and it is incumbent upon [the challenger] to show the arbitrary and capricious character of the ordinance through clear and convincing evidence." *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 298, 37 S.E.2d 601, 610 (2013) (quoting *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991)) (internal quotations omitted).

Appellants have not properly alleged that Ordinance 607 has deprived them of their constitutional rights. Neither the Complaint itself, nor any of Appellants' arguments presented to the circuit court include any claims that their constitutional rights have been violated. More specifically, they have not alleged that they have been deprived of their property without due process. Appellants now, for the first time, attempt to present an allegation that their due process rights have been violated by Ordinance 607. (Appellants' Br. 21). As an initial matter, because this argument was never presented to the circuit court, it cannot now not be considered by this Court.[2]

Furthermore, Appellants' reliance on *Schloss Poster Advertising Co. v. City of Rock Hill* fails to appreciate the holding in that case. 190 S.C. 92, 2 S.E.2d 392 (1939). The *Schloss Poster* court found that an ordinance which, on its face, restricts a property right without affording the owner due process, such that it permits the governing authority to arbitrarily restrict the enjoyment of individual's property without adequate procedural safeguards, is unconstitutional and void. *Id.* at 92, 2 S.E.2d at 394. This case does not involve any deprivation of property or enjoyment of property or anything of the kind. Appellants have not properly argued there has been any interference with their property rights. Additionally, the ordinance considered in *Scholls Poster* is

[2] Respondent intends to file a motion to strike any materials and references related to Appellants' due process claim and requests the Court ignore and/or strike the portions of Appellant's brief that reference it. *See* Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."); *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence.").

entirely distinguishable from Ordinance 607. In that case, the ordinance operated as a vehicle for the city to prohibit specific use of property without any specifications relating to procedures or review criteria. Ordinance 607 contains a multitude of procedural directions and requirements for site plans and development phases located within General Residential districts. Apart from the procedures that Appellants themselves are challenging, the Ordinance sets forth required documentation to be received, varying requirements and procedures for different use intensities and types of residential developments, design requirements such as setbacks and buffer areas, as well as express references for compliance with certain land use regulations. *See* Ordinance 607 (2011).

Because Appellants did not assert that their constitutional rights were violated by Ordinance 607, and the record contains no facts sufficient to establish they plead such a violation or any facts to sufficient to establish any violation at all of Appellants' constitutional rights, the circuit court properly found that the presumption of Ordinance 607's validity could not be overcome. The circuit court correctly found that Complaint failed to state facts sufficient to establish a justiciable controversy as to Ordinance 607's validity and as such, properly dismissed the Complaint.

(B) The circuit court properly found that Ordinance 607 did not conflict with the Planning Act.

Appellants argue that multiple provisions of Ordinance 607 are *ultra vires* because they purportedly conflict with the Planning Act and eliminate rights granted by the Planning Act. (Appellants' Br. 12). Taking the second argument first, the Planning Act does not grant rights relevant to Appellants' position in this case.[3] Additionally, this argument is not properly preserved

[3] In fact, the General Assembly took care to restrict any perceived granting of substantive rights, except in the narrowest of circumstances. *See* S.C. Code Ann. § 6-29-760(C) (making clear "this subsection does not create any new substantive right"); *see also* S.C. Code Ann. § 6-29-1550 (clarifying that vested rights described in the Planning Act are "not a personal right" but instead are attached to the property and, in practice, take shape as the right of a developer or property owner to develop their property as approved in a site specific development plan).

in the record considered by the circuit court. Appellants cite paragraphs 1, and 5 through 23 of their Complaint, yet a review of these sections cannot reasonably be read to assert any sort of substantive rights are granted by the Planning Act upon the Appellants. (Appellant's Br. 11). Nor does the Complaint or Appellants' brief indicate what these rights might be, what sections of the Planning Act they may be found in, or how they might have been violated by Ordinance 607 or County Council's decision to approve the Application. As such, this Court should not consider such arguments in this appeal as this argument was not presented to the circuit court for consideration and, as such, is not part of the record on appeal. *See* Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."); *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence.").

As for Appellants' argument that Ordinance 607 is *ultra vires* because its provisions purportedly conflict with the Planning Act, this argument was fully and properly addressed by the circuit court in its Order. Ordinance 607 does not conflict with the Planning Act, or by extension, the Comprehensive Plan. Ordinance 607 sets out the requirements for areas in Georgetown County that are zoned General Residential. Specifically, Appellants' disagreement lies focuses on two areas of that ordinance: (1) the site plan review provisions for certain two-home or multi-family residential developments, Georgetown County Zoning Ordinance § 607.207, 306 (R. p. 25; Compl. ¶ 5), and (2) the density provisions, Georgetown County Zoning Ordinance § 607.204, 207 (R. p. 27; Compl. ¶ 18).[4] Appellants have alleged that the site plan review provisions allowing for County

[4] The project at issue is considered a two-home family development under the Georgetown County Zoning Ordinance, and the main provisions relating to two-family developments are the ones under which County Council approved the Application. (R. p. 79–81; Compl. Ex. 11). Although certain provisions of Ordinance 607 relating to multi-family developments are also relevant and applicable and were considered by the circuit court in its ruling.

Council to review with final approval power certain, more intensive, developments are not permitted under the Planning Act. Ordinance § 607.207 provides that, "[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, [and] approved by County Council."[5] Georgetown County Zoning Ordinance § 607.207 (2011).

The creation and regulation of zoning districts is within the purview of the governing body of the county. S.C. Code § 6-29-720(A). Appellants have made reference to Section 6-29-1150 of the Planning Act, which is under the Planning Act's provisions relating to land development regulations, which are largely used to specify more distinct requirements of a development such as street or signage specifications. (R. p. 25; Compl. ¶ 6). It is argued by Appellants that this section of the Planning Act limits the final approval of all development plans to come from the Planning Commission or designated staff. (R. p. 25; Compl. ¶ 6). This interpretation is overly narrow and ignores both the legislative purposes of both Article Seven and Article Five of the Planning Act as well as the determinations of the County's governing body in enacting the procedures for approving development plans in a general residential district.

The intended function of Article Seven of the Planning Act, to provide counties with the ability to create regulations with broad authority in order to carry out the stated purposes, such as public health and safety, good order, and "progressive development of land." S.C. Code § 6-29-1120. The provisions of Article Five of the Planning Act state that zoning ordinances are to serve similar purposes in addition to and purposes which "further the public welfare in any other regard *specified by the governing body*." S.C. Code § 6-29-710 (emphasis added). These are purposes

[5] Certain ordinance provisions at issue in this appeal have recently been amended by Georgetown County. The version in place at the time of the approval of the Application is controlling and recent amendments are not part of the record on appeal.

directly within the purview and responsibility of the governing body of a county. The County Council ultimately determines the terms of the land use regulations and zoning ordinances to be used in Georgetown County to carry out the purposes enumerated in the Planning Act. *See* S.C. Code §§ 6-29-760, 1130. Although County Council may permit the Planning Commission to review and approve a development plan, it is also within the authority of the County Council to enact zoning ordinances which include procedural safeguards, such as additional approval for larger developments, in order to protect and promote the intended purposes of the Planning Act and good land use principles of the County. Ordinance 607 allows medium-to-high density residential uses, and it is apparent from the ordinance itself that the County intended to provide County Council with final approval authority over larger and/or more densely populated development proposals. This procedural process is not prevented by the terms of the Planning Act – rather, the opposite is true. Such a procedure is in keeping with good zoning practices to better ensure the purposes of the Planning Act are being promoted by allowing the County's governing body appropriate discretion in furthering the welfare of its citizens in their housing.

As for Appellants' argument that the allowance of high-density housing in a general residential district is void, such an assertion can find no support in the law. It is argued that Ordinance 607, which permits medium-to-high density housing in areas zoned general residential, is in conflict with the County's Comprehensive Plan and is therefore invalid. (R. pp. 27, 41, 44; Compl ¶¶ 18, 77, 86). First and foremost, it must be reiterated, a county's comprehensive plan is a law, and its terms are not required to be strictly adhered to. Appellants take issue with this characterization and claim that the circuit court's ruling would allow for counties to do as they wish without any restrictions or guideposts. (Appellants' Initial Br. 35–37). Such a conclusion not only misunderstands the circuit court's rulings but is not supported by any arguments made or sources cited in the record. It obfuscates the underlying principles of land use planning utilized by

Georgetown County as well as the extensive case law supporting a county's authority to utilize zoning schemes within certain legal parameters. The courts have made clear that a county may not infringe upon constitutional rights when effectuating a zoning decision, nor may it bypass procedural requirements. It seems that even Appellants would agree that the law requires procedures be in place to guide zoning decision. Respondent Georgetown County is not arguing anything to the contrary. Appellants merely disagree with what those procedures must look like. In effect, what Appellants are suggesting that every aspect of a county's zoning ordinance be in strict compliance with every word, illustration, chart, and data point in a comprehensive plan. This is neither practical nor in keeping with South Carolina jurisprudence.

Comprehensive plans cover a wide variety of elements such as housing, land use, economic development, natural resources, and cultural resources, to name some. Inevitably, the goals enumerated in one element may conflict with the intended goals of another. For instance, where a county may wish to provide more opportunity for economic development to better fund the county and provide a better job market for its citizens, such goals may directly come in conflict with preserving natural or cultural resources. Or where a county may wish to limit development to slow growth under its land use element, this goal may conflict with another goal in its housing element of fostering a market for and/or developing more affordable housing. Beyond the case law cited in both of Respondents' briefs in support of their motions to dismiss, such examples of the practical realities of a comprehensive plan show that what Appellants are asserting is not only unreasonable but is simply unachievable in practice.

The goals described in a county's comprehensive plan characterize a balancing of interests and priorities of that county. What the circuit court's Order correctly found in dismissing Appellants' Complaint, is that a county's comprehensive plan is important and works to guide the county in its adoption or zoning ordinances and other land use decisions. (R. pp. 11–14; Order 9–

12). A comprehensive plan though, is not an ordinance, it is not a law which must be strictly followed. As the circuit court aptly noted, where a planning commission is created by a county, it is charged with maintaining a planning process to be used "to *guide* the development and redevelopment" of a county. (R. p. 12; Order 10 (quoting S.C. Code Ann. § 6-29-510(A))). To that end, planning commissions are designated powers to exercise two main functions: to prepare comprehensive plans and amendments thereto and to recommend ordinances, policies, and procedures to the local governing body. S.C. Code Ann. § 6-29-340(B). Governing bodies may designate certain authorities to the planning commission or staff, but the delegation of powers is largely within the purview of the governing body. Nowhere in section 6-29-340 does the General Assembly dictate that planning commissions shall have exclusive power to conduct site plan reviews or make development decisions. S.C. Code Ann. § 6-29-340(B). Nor does the Planning Act expressly state that the comprehensive plan for a county is controlling.

The South Carolina Supreme Court has agreed that comprehensive plans act as a guide for the county in its land use and zoning decisions. *See McClanahan v. Richland County Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 243 (2002). Appellants' reliance on the application of *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010), is incorrect in this case and the Rhode Island standard used as a foundation for this reliance is not applicable. (Appellants' Br. 16–17 (citing *Hardy v. Zoning Board of Review of Town of Coventry*, 113 R.I. 375, 321 A.2d 298 (1974)). While the general principle that state law will act to supersede municipal laws where a conflict exists, South Carolina courts have taken great pains to effectuate the intent of the legislature that when it comes to zoning, the counties and municipalities of this State are to be given great deference. No conflict exists where a county has adopted and utilized a zoning scheme within its enumerated powers. Beyond this point, the Rhode Island law does not apply here as it has never been adopted as an appropriate standard by the courts in this State even though there has been ample

opportunity for them to do so. This standard is therefore neither controlling nor persuasive in this case.

As for the application of *Sinkler*, Appellants are mistaken in their assertion that the Order failed to appreciate the holding in that case and that is why this Court should overturn the circuit court's ruling. To the contrary, that case, along with the extensive history of case law in South Carolina on this topic, was available for the circuit court's consideration. However, because the holding in that case is not applicable to this case, the circuit court rightly did not delve into great detail as to that case's holding. The Complaint does not reference *Sinkler*, and nor does Appellants' memo in opposition. The evidence in the record never directed the court to that case as a principal basis for Appellants' claims.[6] Regardless, that case, along with Appellants' analysis in their brief, make it clear that the *Sinkler* court reviewed a starkly distinguishable scenario. That case involved the review of the Planning Act's provisions relating to planned development districts in light of an ordinance to rezone a property to a planned development district from an "AG-15" classification. *Sinkler*, 387 S.C. at 70, 690 S.E.2d at 778. After a review of the requirements for a planned development district, the court held in *Sinkler* that planned development districts required a form of mixed use and the ordinance under review did not fit within the parameters for a planned development district. *Id.* at 76–77, 690 S.E.2d at 781–82.

Importantly, although the *Sinkler* court reversed the ultimate decision of the Court of Appeals because of its finding regarding compliance with the use requirements for planned development districts, it found no error in the standard of review applied by the lower court. *Id.* at 78 n.3, 690 S.E.2d at 782 n.3. The standard of review applied by the Court of Appeals in its ruling on the case was that a court should practice judicial restraint in substituting its judgment for that of a local

[6] "Arguments made by counsel are not evidence." *See S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003).

governing authority's and that an "appellate court 'must leave [the disputed] decision undisturbed if the propriety of that decision is even 'fairly debatable.'" *Id.* at 73–74, 690 S.E.2d at 780 (describing the standard of review applied by the Court of Appeals). That same standard was applied in this case, and correctly so. However, this case does not involve a planned development district, and analysis of those statutory provisions are not relevant here. What is relevant is the circuit court's analysis of the legal standard and its application to the allegations contained in the Complaint. The facts of what occurred in this case are not disputed. The only dispute is a legal one, and in such an instance, the circuit court is permitted to dispose of a case on a motion to dismiss where the complaint does not contain any facts which would be sufficient to constitute the cause of action or show the plaintiff is entitled to the relief sought. *See Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004).

The adoption of Ordinance 607 and the amendments adopted in 2008 and 2011 were all adopted pursuant to the authority of County Council, as the governing body of Georgetown County. The provisions of Ordinance 607, as they were in effect at the time of the Application, do not conflict with the Planning Act and are therefore cannot be *ultra vires*. The circuit court was correct in its determination that because Ordinance 607 is presumed valid, and Appellants have not presented any facts sufficient to rebut that presumption, it must remain untouched by the court. As such, the circuit court's finding that a challenge to Ordinance 607 is now statutorily barred is likewise correct. Challenges to the "validity of a regulation or map, or amendment to it" must be brought within sixty days from the date of the decision of the governing body. S.C. Code Ann. § 6-29-760(D).

Appellants are not challenging the procedure used to adopt Ordinance 607 or its amendments made after the effective date of the Planning Act. They have not argued there was a defect in notice or properly indicated that County Council was without authority to adopt Ordinance 607 or the 2008, or 2011 amendments to it. They now try to argue that there is a conflict between the Ordinance and

the Planning Act as their grounds for alleging the Ordinance is *ultra vires*. However, as the circuit court correctly found and the record shows, there is no conflict between state law and Ordinance 607. A county must be free to enact zoning ordinances in the manner that it believes best achieves its goals and public interests. State law and decades of precedent make clear that courts are not in a position to second-guess the zoning decisions of a legislative body unless that decision can be shown to be so unreasonable as to infringe on constitutional rights. As it has been established, no such violation has occurred here, and Appellants have not argued that it has.

(C) The circuit court correctly found that the Complaint must fail as a matter of law dismissal pursuant to Rule 12(b)(6) was proper.

Appellants are ultimately seeking declaratory judgment in this case and the dismissal of those claims is the only issue being considered under this appeal. An action for declaratory judgment is defined by the nature of the underlying issue presented in the case. *Doe v. South Carolina Med. Malpractice Liability Joint Underwriting Association*, 347 S.C. 642, 645, 557 S.E.2d 670, 672 (2001). To make the determination as to whether such an action is legal or equitable, "an appellate court must look to the essential character of the cause of action." *Barnacle Broadcasting, Inc. v. Baker Broadcasting Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000). "The issue of statutory interpretation is a question of law for the court." *Sloan v. Greenville County*, 380 S.C. 528, 534, 670 S.E.2d 663,667 (Ct. App. 2009).

The heart of this case is centered upon statutory interpretation and the bounds of a county's authority to make zoning decisions. This is firmly within the purview of a legal issue to be decided by the court. For a complaint to survive a motion to dismiss under the Declaratory Judgments Act, there must be a justiciable controversy, a concrete issue, a definite assertion of legal rights, and a positive legal duty with respect to those rights which are being denied by the defendant. *Power v. McNair*, 255 S.C. 150, 153–54, 177 S.E.2d 551, 553 (1970). There can be no justiciable controversy

where a legislative body's zoning decision is at least fairly debatable. The decision in this case to approve the Application is fairly debatable in that it does not infringe on any of Appellants' constitutional rights – the Complaint does not even contain such allegations and is furthermore devoid of any definite assertion of legal rights. Ordinance 607 and its challenged provisions are protected under the same principle. The Complaint does not state any facts to sufficiently establish a claim that the Ordinance is arbitrary or capricious, or that it infringes upon any constitutional rights of the Appellants. Any challenges alleging Ordinance 607 is arbitrary and capricious would be barred either way. Appellants' attempt at trying to circumvent this statutory bar by claiming the Ordinance is in contradiction to the Planning Act is without merit and is unsupported by any legal basis. Therefore, the circuit court properly found that the Complaint failed to state facts sufficient to establish a cause of action for declaratory judgment.

CONCLUSION

Appellants have attempted to assert the circuit court went beyond its authority in granting Respondents' motions to dismiss. However, the motions were properly granted as the case solely involves a dispute as to the interpretation of the law and does not involve a dispute as to the underlying facts.

As the circuit court found and the record establishes, the Complaint does not state facts sufficient to constitute a cause of action for declaratory judgment, those claims were properly dismissed. It was correctly concluded by the circuit court that the presumption of Ordinance 607's validity cannot be rebutted based on the allegations in the Complaint and the decision to grant the Application pursuant to the valid provisions of Ordinance 607 should not be disturbed by the courts.

Therefore, for the reasons set forth herein, this Court should affirm the order of the circuit court granting Georgetown County's motion to dismiss.

(*Signature page follows*)

RESPECTFULLY SUBMITTED,

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ATTORNEYS FOR RESPONDENT GEORGETOWN COUNTY

July 30, 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

Civil Action No. 2023-CP-22-00210

Appellate Case No. 2023-001776

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

Pursuant to Rule 211(b), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

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July 30, 2024