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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

Civil Action No. 2023-CP-22-00007

Appellate Case No. 2023-001306

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

v.

Georgetown County; and Alliance for Economic Development for Georgetown County,
…….Respondents.

FINAL BRIEF OF RESPONDENT GEORGETOWN COUNTY

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STATEMENT OF ISSUES ON APPEAL

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

STATEMENT OF THE CASE AND FACTS[1]

Appellants in this case include a collection of individuals whose properties are adjacent to the planned development at issue in this case, along with several activist organizations. Appellants filed an initial Complaint on January 6, 2023, without serving it upon any parties to the case and to which no responsive pleading was filed. (R. p. 147; Am. Compl. 1). Appellants then filed their Amended Complaint on February 6, 2023, seeking declaratory judgment against the applicant to amend the subject planned development, Respondent Alliance for Economic Development for Georgetown County (hereinafter the "Alliance"), as well as Respondent Georgetown County (hereinafter "Georgetown County").

This case arises out of the approval of an application to amend an existing planned development district ("PDD") in Georgetown County. (R. p. 147; Am. Compl. ¶ 1). This PDD was originally known as the "Pawleys Island Business Park" when it was first created in 2008. (R. pp. 156–57; Am. Compl. ¶ 40). At that time, the land was owned by a single entity, Waccamaw Land. Am. (R. pp. 156–57; Compl. ¶ 40). In 2013, the land was subdivided into three parcels, one of which was sold that same year to Mission Pawleys. (R. p. 157; Am. Compl. ¶ 40). In 2015, an application to amend the PDD on behalf of the landowners was submitted to allow for a technology park to be built and to change the name of the PDD to Mercom Technology Park ("Mercom PD"). (R. p. 158; Am. Compl. ¶ 40). This application was approved as Ordinance 2015-41 and soon after, Waccamaw Land sold Parcel 3 to the Alliance, and Mission Pawleys sold Parcel 2 to Mercado

[1] Georgetown County combines the statement of the case and the statement of facts to eliminate repetition due to considerable overlap between the procedural history and the facts pled in this case.

Holdings, LLC, which then transferred the property to Mercom, Inc. (R. pp. 158–59; Am. Compl. ¶ 40). Waccamaw Land retained ownership of Parcel 1. (R. p. 159; Am. Compl. ¶ 40). Under Ordinance 2015-41, the permitted uses within the PDD included use as general offices, warehouses, restaurants, and suite lodging. (R. p. 220; Pls.' Ex. 10, at 3). Mercom, Inc. later sold Parcel 2 to Barn on Petigru, LLC in July 2022. (R. p. 160; Am. Compl. ¶ 40).

The application to amend a planned development at issue in this case was submitted for consideration on August 16, 2022 (the "Application"). (R. pp. 148, 160; Am. Compl. ¶¶ 6, 40). The Planning Commission reviewed the Application and recommended denial of the request to the Georgetown County Council. (R. p. 149; Am. Compl. ¶ 11. County Council determined that the zoning amendment should be approved and accordingly voted to adopt Ordinances 22-36 and 22-37. (R. p. 149; Am. Compl. ¶ 12). Ordinance 22-36 formally amended the Georgetown County Comprehensive Plan ("Comprehensive Plan"), including the Future Land Use Map ("FLU Map"), while Ordinance 22-37 amended the Mercom PD to specifically allow for both commercial uses and ninety multifamily units on Parcel Three, conditioned upon twenty percent (20%) of the units being restricted for use as affordable housing for at least five years. (R. pp. 305–06; Alliance Mem. Support Mot. to Dismiss Ex. A, B). Appellants then brought suit seeking the following declaratory relief:

- Declaring that the classification of the Mercom PD as a planned development district was null and void from inception because it only contemplated a single use.
- Declaring that Georgetown County maintains a statutory mandate under Ordinance 1703 to initiate proceedings to revert all planned development districts upon which construction has not begun within two years of approval to its former zoning classification that conforms with the Comprehensive Plan.
- Declaring that the South Carolina Local Government Comprehensive Planning Enabling Act of 1994, S.C. Code § 6-29-310, *et seq.* requires zoning ordinances to be made in accordance with the Comprehensive Plan.

- Declaring that Georgetown County Council violated Ordinance 1701 by enacting Ordinances 22-36 and 22-37.

- Declaring that an application to amend a planned development district must be brought by all owners of the planned development.[2]

- Declaring that Ordinances 22-36 and 22-37 constitute unlawful spot zoning.[3]

(R. pp. 180–84; Am. Compl.). In response, Respondents Georgetown County and Alliance both moved to have this case dismissed on March 2, 2023 and March 3, 2023, respectively. (R. pp. 272, 285; Georgetown County's Mot. to Dismiss, Alliance Mot. to Dismiss).

A hearing on both motions was held before the Honorable William H. Seals, Jr. on April 6, 2023. (R. pp. 385–423). Judge Seals granted the motions to dismiss on May 1, 2023, later issuing a formal Order on May 31, 2023. (R. pp. 4–23). On June 12, 2023, Appellants filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP. (R. pp. 328–56). Respondents both filed memorandums in opposition to Appellants' motion on June 26, 2023. (R. pp. 357–78). Judge Seals denied Appellants' motion on July 18, 2023. (R. pp. 24–26). On August 16, 20234, Appellants served their notice of appeal on Respondents. (R. pp. 379–80).

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.

[2] Appellants have abandoned this requested declaration in their appeal as the only references to this alleged issue are simply a reiteration of the assertion that the Application allegedly violated 619.501. No direct issues are taken up in the appeal relating to the circuit court's findings on this matter and references to Ordinance 619.501 are not presented as a basis to overturn the circuit court's ruling.

[3] Appellants have abandoned this requested declaration as this allegation and the circuit court's ruling on it are not addressed in Appellants' appeal.

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.

I. THE CIRCUIT COURT PROPERLY FOUND THAT NONE OF THE ZONING ORDINANCES PERTAINING TO MERCOM PD DEPRIVED APPELLANTS OF THEIR CONSTITUTIONAL RIGHTS AND THEREFORE THE PRESUMPTION OF THEIR VALIDITY CANNOT BE REBUTTED BY APPELLANTS' CLAIMS 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).

The circuit court correctly recognized that courts are limited in their authority to review and invalidate zoning decisions made by local governing bodies. (R. p. 10; 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 any of the challenged ordinances have deprived them of their constitutional rights. Neither the Amended 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 argue that constitutional deprivation is not a requirement. (Apps.' Br. 36). Not only does this argument fail to appreciate the extensive and well-developed South Carolina jurisprudence on this subject, it also misunderstands the circuit court's ruling.

The circuit court did not find that in all actions for declaratory judgment there must be a constitutional deprivation. To the contrary, the circuit court's order made clear that this requirement is related to a cause of action which challenges a zoning ordinance. (R. pp. 10–12; Order 4–6). *Knowles v. City of Aiken* clearly states that "[z]oning is a legislative act which will not be interfered with by the courts unless there is a clear violation of constitutional rights." 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991). This principle has been reiterated time and time again by the courts. *See Sloan v. Greenville Cnty.*, 356 S.C. 531, 555, 590 S.E.2d 338, 351 (Ct. App. 2003) ("In reviewing the discretionary decision of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives."); *see also McClanahan v. Richland County Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 243-44 (2002); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 300, 37 S.E.2d 601, 611 (2013); *Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals*, 440 S.C. 266, 278, 890 S.E.2d 748, 754 (2023). The presumption of validity afforded by South Carolina courts to a local zoning ordinance has existed for well over fifty years, and the General Assembly has not taken issue with this principle. *See generally*, *Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531(1965) ("There is a strong presumption in favor of the validity of municipal zoning ordinances, and in favor of the validity of their application.").

The circuit court did not find that the adjoining landowners did not have a right to bring a suit challenging Ordinances 22-36 and 22-37 as Appellants seem to allege. (*See* Apps.' Br. 36).[4] The

[4] It was argued by Respondents that the non-profit Appellants and additional nonadjacent landowners they claim to represent do not have standing to bring this suit, however, the circuit did not reach that

circuit court found that Appellants had failed to plead necessary facts which could constitute the alleged causes of action for declaratory judgment in this case. Essentially, there has been no definitive assertion of legal rights. There is a strong presumption of validity for a local zoning ordinance and Appellants have not pled facts or made claims which could, under any theory of law, amount to a deprivation of constitutional rights. For these reasons, the decision of County Council must be considered fairly debatable. Being fairly debatable, the circuit court was correct in its determination that none of the challenged ordinances could be disturbed by the courts, and the Amended Complaint was properly dismissed.

II. THE CIRCUIT COURT CORRECTLY FOUND THAT THERE WAS NO ACTIONABLE CONFLICT BETWEEN THE ADOPTION OF ORDINANCES 22-36 AND 22-37 AND THE GEORGETOWN COUNTY COMPREHENSIVE PLAN BECAUSE ITS TERMS ARE NOT BINDING.

The majority of Appellants' claims rest on the assertion that a county's comprehensive plan acts as a binding standard that the county must follow when approving a land use decision, such as a zoning ordinance. Such an assertion is unsupported by South Carolina jurisprudence and cannot withstand practical application. A county's comprehensive plan acts as a guideline for numerous development considerations in a county. *McClanahan v. Richland County Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 243 (2002). *Sinkler v. Charleston County* supplies its own support of this principle. 387 S.C. 67, 75–76, 690 S.E.2d 777, 781 (2010). The record in that case demonstrates that

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argument in its Order as the case was properly disposed of in its entirety under a Rule 12(b)(6) dismissal. (R. pp. 274, 302–03; Georgetown County Mem. Supp. Mot. Dismiss 3, Alliance Mem. Supp. Mot. Dismiss 18–19). The circuit court did find that none of the Appellants in this case would have standing to bring claims on behalf of the landowners of the other parcels included in Mercom PD. (R. p. 20; Order 14). Additionally, any claims appearing to be made by Appellants in their appeal regarding a disparate impact on minorities is not properly included on appeal as these claims were not properly pled or considered as a cause of action by the circuit court, and, furthermore, Appellants would not have standing to bring such a cause of action. *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.").

neither the South Carolina Supreme Court, nor the trial court, reviewed the PDD in that case as having to meet any specific requirements set out in the Charleston County's Comprehensive Plan. Instead, the ordinance at issue in *Sinkler* was evaluated in relation to the requirements of the Planning Act and the provisions of the Charleston County's zoning and land development regulations adopted to implement "the goals, objectives and policies of the Comprehensive Plan." Charleston County, S.C., § 1.5 A, ZLDR; *see Sinkler v. County of Charleston*, No. 04-CP-10-1265, 2007 WL 1539285, at *4 (S.C. Com.Pl. Feb. 12, 2007); *see also Sinkler v. County of Charleston*, 387 S.C. at 75–76, 690 S.E.2d at 781.

Conformity with the Georgetown County's zoning ordinances and state law is what is required here. Abiding by every dictate of the Comprehensive Plan is not required. *See McClanahan* at 441, 567 S.E.2d at 243 (reiterating that "the Plan is only a guideline"). In fact, to require the County to treat every goal in the entirety of the Comprehensive Plan as a strict requirement would result in absurdity in practice, as the many goals and different elements of a comprehensive plan commonly conflict with each other in some form or fashion. Moreover, Appellants' position that slavish compliance with the Comprehensive Plan is required would ultimately remove the need for any zoning and land use regulations that are not in the Comprehensive Plan. While land use decisions and planning must seek guidance from the Comprehensive Plan, the governing body is not bound by every letter on the page. One cannot both limit all major development while at the same increase land use to account for current and future population growth, yet this is essentially what the Plaintiffs would have the County do. A reasonable mind can find, and the law of South Carolina provides, that such an interpretation is simply not feasible.

Appellants' insistence on excerpting preferential snippets of individual sections of the Planning Act fails to appreciate the entirety of the Act's intent and application. It is not uncommon that a sentence in one subpart of a statute is modified or restricted by the very next sentence. As with

any statutory interpretation, what is important is the intent of the legislature enacting the law, and the intent of the General Assembly in enacting the Planning Act very clearly indicates that broad authority and deference be given to a county and its legislative body in making land use decisions. While the Planning Act does provide guardrails, it makes clear that comprehensive plans act more as guideposts to allow a county to set out future plans based on data, economic goals, public policy, and long-term outlays. Appellants' reference to a satirical line from the Pirates of the Caribbean movie does not grasp the nuances of these principles and illustrates a misunderstanding of the circuit court's ruling as well as a disregard for South Carolina law regarding the purpose of comprehensive plans. A county's comprehensive plan certainly holds more water than a mythical pirate code, but it falls short of amounting to a set of rigid rules which must be strictly adhered to. The Comprehensive Plan is not a law and was never intended to function as such. Therefore, any alleged "violation" of the terms of the Comprehensive Plan cannot serve as a basis to invalidate Ordinances 22-36 and 22-37.

III. THE CIRCUIT COURT PROPERLY FOUND THAT MERCOM PD IS A VALID PLANNED DEVELOPMENT DISTRICT.

Appellants argue that Mercom PD was invalid from its inception and remains invalid after the 2022 amendment giving rise to this case. The issue as to whether the PD ever was and whether it still is a valid planned development district is one of statutory construction. It is "[t]he cardinal rule of statutory construction [] to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). But where a statute's meaning is "plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*

The Planning Act defines a planned development district as a development "comprised of housing of different types and densities *and* of compatible commercial uses, *or* shopping centers,

office parks, and mixed-use developments... [It] is characterized by a unified site design for a mixed use development." S.C. Code Ann. § 6-29-720(C)(4) (emphasis added). First, the comma preceding the "or" in the statute between two independent clauses invokes the plain meaning that the descriptive lists are two separate and apart descriptions which would both be acceptable makeups of a planned development district. This interpretation is evidenced by the Planning Act's express description of a planned development district as being "characterized by a unified site design for a mixed use development" as well as Georgetown County's Zoning Ordinances for Planned Development Districts, which set out minimum acreage requirements depending on the type of planned development is to be included in the site design. S.C. Code Ann. § 6-29-720(C)(4); *see* Georgetown County, S.C., Zoning Ordinance 619.1.

Additionally, what constitutes commercial use is not a prescriptive provision of the Planning Act. Local governments are generally free to create zoning districts with specific permitted and/or conditional uses, so long as they comply with the broad parameters of Section 6-29-720. At its core, a commercial use is any "use that is connected with or furthers an ongoing profit-making activity." *Commercial Use*, BLACK'S LAW DICTIONARY (11th ed. 2019). For its part, Georgetown County has multiple zoning districts which expressly permit different forms of commercial use, such as Office Commercial or Resort Commercial. *See* Georgetown County Zoning Ordinance 500 (2014).

Furthermore, even if there is some ambiguity as to the meaning of the statute, the legislature has expressed its intent for a planned development district to "allow flexibility in development that will result in improved design character, and quality of new mixed use developments." S.C. Code Ann. § 6-29-740 (1994). To effectuate this intent, the legislature conveyed broad authority to the local governing authorities in establishing these districts through variations of zoning ordinances and maps. *Id.* This intent is in accordance with the general principle that these types of decisions are to be afforded judicial deference. Georgetown County is in the best position to effectuate,

interpret, and apply its own zoning ordinances and legislative decisions involving such ordinances should be given every presumption of validity. *See Rush v. City of Greenville*, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965).

Appellants argue that Mercom PD is somehow analogous to the PDD at issue in *Sinkler v. County of County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010). (Apps.' Br. 20–21, 28–30). However, the facts at issue in *Sinkler* are readily distinguishable from those of this this case. First, the zoning ordinance taken up in *Sinkler* involved a proposed planned development which would merely reduce the required lot size from the current zoning of three acres to one acre. *Id.* at 72–73, 690 S.E.2d at 779. The area was previously zoned for agricultural use which was to be used to support the needs of the farming community, including residential development. *Id.* at 69–70, 690 S.E.2d at 778. There, the proposed development district would not add any additional uses and functioned simply as a vehicle to reduce the permitted lot size for residential homes. *Id.* at 71, 690 S.E.2d at 778–79. The trial court had ruled, and the Supreme Court agreed, that this type of ordinance did not meet the standards of a planned development as set out in the Planning Act. *Id.*[5]

The PDD in this case is of a different kind entirely. In 2008, the PDD included uses for non-residential resort services. (R. pp. 156–57; Am. Compl. ¶ 40). These types of uses are similar to those included within resort commercial districts, which also allows for mixed uses, including restaurant services, resort-oriented residential, and commercial use, although the 2008 plan did not

[5] 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. *Sinkler*, 387 S.C. 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 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). This same standard was applied by the circuit court in this case.

include all of these uses. *See* Georgetown County, SC, Zoning Ordinance 609. The 2008 PD also included warehousing, (R. p. 216; Am. Compl. Ex. 9, at 12), which would normally only be permitted in other districts such as industrial zones. *See* Georgetown County, SC, Zoning Ordinance 613, 614. The 2015 Amendment added more uses to include suite lodging, a restaurant, public green spaces and walking trail for pedestrians, clearly designated office spaces, and a large office/warehouse for use as a technology park rather than to serve as more flexible office spaces to carry out resort services. *Compare* (R. p. 216; Am. Compl. Ex. 9, at 12) *with* (R. p. 220; Am. Compl. Ex. 10, at 3). The 2022 amendment now permits high density housing units to exist within the Mercom PD, some of which are specifically set aside for affordable housing. The variety of uses in the Mercom PD includes typical uses normally existing within multiple types of typical zoning districts, but which would otherwise not be permitted to exist within any one defined category of zoning district. This is the exact purpose of a planned development district: to act as a flexible planning tool for Counties to implement new mixed-use developments. S.C. Code Ann. § 6-29-740. It is readily apparent that Mercom PD is not at all like the PDD examined in *Sinkler* and that court's ruling regarding the application of the law to that PDD is simply not comparable here.

Additionally, as the circuit court correctly found, challenges to the 2008 and 2015 ordinances relating to Mercom PD have long since been barred by the Planning Act's statute of limitations on such claims. Appellants' attempts to now claim those ordinances were *ultra vires* and, therefore, such limitations do not apply are misplaced in this case. This argument necessitates a conflict between the ordinances and the legislative authority provided to Georgetown County by the Planning Act. The circuit court correctly found that, as a matter of law, based in statutory interpretation, no such conflict existed. Because Appellants did not plead a procedural defect as to the 2008 or 2015 ordinances and they did not conflict with the Planning Act, they were presumed to be valid, and the statute of limitations therefore applies.

Furthermore, Appellants' arguments that there is some conflict between the adoption of Ordinances 22-36 and 22-37 and Section 6-29-760 of the Planning Act is also without proper foundation. (Apps.' Br. 19–20). First, the language regarding a change to the Planning Commission's recommendation is in reference to the terms of the ordinance reviewed by the Commission prior to sending it to County Council. To find otherwise would effectively cause a stalemate between the Planning Commission and County Council where an ordinance would pass from one body to another without ever being approved or denied. Such an interpretation would thus confer upon the Planning Commission more authority than is granted under the Planning Act. *See* Op. S.C. Att'y Gen., 2021 WL 1832308 (April 5, 2021) (indicating that the General Assembly intended a county's governing body to consider their local planning commission's recommendations but that they were not necessarily bound by that recommendation in its entirety). It would also require a complete disregard for the plain meaning of the term "recommendation" which describes a nonbinding referral or suggestion. The terms of the zoning ordinance provision applicable to the subject Application support this notion. Under Ordinance 619.2, plans are required to be "submitted to Staff of the Planning Commission and subsequently forwarded to County Council, with recommendations from the Planning Commission." Georgetown County, S.C., Zoning Ordinance 619.2.

Therefore, Appellants' theory of *ultra vires*, upon which they so heavily rely in their appeal, cannot be used to invalidate a lawful ordinance which was properly adopted under the legitimate legislative authority of a governing body.[6]

[6] Appellants appear to call into question the validity of the vote taken by Georgetown County Council to approve the Application by asserting Councilman Morant and Councilman Newton had a conflict of interest and should have recused themselves from the vote. While not expressly ruled upon by the circuit court, it is worth noting to this Court that the South Carolina State Ethics Commission investigated complaints about the vote and dismissed both complaints against Morant and Newton. *See* Order in Complaint C2022-162 and Order in Complaint C2022-163.

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT COUNTY COUNCIL DID NOT VIOLATE ORDINANCE 1701 BY ENACTING ORDINANCES 22-36 AND 22-37.

Ordinance 1701 is Georgetown County's Zoning Ordinance provision governing amendments to the Zoning Ordinance. Importantly, the challenged ordinances did not amend the Georgetown County Zoning Ordinance. Nor did it make a substantive change to the Official Zoning Map, as the subject property was already zoned as a PDD. Ordinance 1701 provides: "When the public necessity, convenience, general welfare or good zoning practice justifies such action and after the required review and report of the Planning Commission, the County Council may undertake the necessary steps to amend the Zoning Ordinance." A reasonable reading of this ordinance would indicate that any one or combination of multiple justifications listed could justify County Council's approval for amending a zoning ordinance.

The circuit court was correct in its reasoning that such as decision is "one which involves the exercise of the County's legislative powers." (R. p. 18; Order 12). As the record in this case extensively explains and establishes, courts are to afford great deference to such decisions. Appellants' disagreement with County Council's land use policies is apparent, but a disagreement on policy alone is not sufficient to constitute a cause of action from which the courts may provide relief.

V. THE CIRCUIT COURT CORRECTLY FOUND THAT THE AMENDED COMPLAINT MUST FAIL AS A MATTER OF LAW AND DISMISSAL WAS PROPER PURSUANT TO RULE 12(b)(6), SCRCP.

Appellants are ultimately seeking declaratory judgment in this case and the dismissal of those claims is the only issue being considered under this appeal. Appellants concede this point in their brief. Apps.' Initial Br. 9. 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 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 Amended Complaint does not even contain such allegations and is furthermore devoid of any definite assertion of legal rights. Appellants' attempts to now allege that the Planning Act endows them with some form of substantive rights which are being infringed on not only falls short of an alleged constitutional infringement, but Appellants are also incorrect in their assertions that the Planning Act grants substantive rights in this way. (Apps.' Br. 20, 37).

The Planning Act does contain a provision which grants certain parties the ability to file a suit contesting an ordinance or amendment, but this is a provision which grants statutory standing to these parties only. *See* § 6-29-760(C). Appellants fail to address this statutory provision in its entirety and, as a result, miss the clarifying language expressly included by the General Assembly: "An owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment; however, *this subsection does not create any new substantive right in any party*." This

language makes the General Assembly's intentions clear—that the Planning Act was drafted to allow for suits by only those who may be constitutionally deprived by potential violations thereof. It is reasonable to expect that an adjoining landowner could potentially be deprived of his property by a zoning ordinance changing the use of the next-door property. The case law is readily applicable to such scenarios. Through this practical application, it becomes even more clear that the General Assembly's drafting of the Planning Act sought to limit liability of local governments and the ability of courts to overturn municipal and county zoning decisions. By limiting statutory standing under the Planning Act to adjacent landowners, all other parties are specifically excluded. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (finding that canons of construction stand for the notion that "to express or include one thing implies the exclusion of another, or of the alternative") (internal quotations omitted). This limitation effectively limits those who may bring suit for alleged violations of the Planning Act to those who may be deprived of their property by such decisions.

Finally, the operative language of the rule is that one may not be "deprived…of property *without due process of law*." S.C. CONST. art. I, § 3 (emphasis added); *see also McClanahan v. Richland County Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 243–44. Appellants have not argued there have been any due process violations. The circuit court was therefore correct in its finding that Appellants' Amended Complaint did not plead facts which could sufficiently establish a claim that the Ordinances were arbitrary or capricious, or that the ordinances infringe upon any constitutional rights of the Appellants. Any challenges alleging Ordinances 22-36 and 22-37 are arbitrary and capricious would be barred either way. Appellants' attempt 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 Amended 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 Amended Complaint does not state facts sufficient to constitute a cause of action for declaratory judgment and those claims were properly dismissed. The circuit court correctly ruled that the Mercom PD was and is a valid PDD, that the terms of the Comprehensive Plan are not binding, that the presumption of Ordinance 22-36 and 22-37's validity cannot be rebutted based on the allegations in the Amended Complaint, thus the decision to grant the Application 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*]

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ATTORNEYS FOR RESPONDENT GEORGETOWN COUNTY

August 26, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

_____

Civil Action No. 2023-CP-22-00007

Appellate Case No. 2023-001306

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

v.

Georgetown County; and Alliance for Economic Development for Georgetown County,
……. Respondents.

_____

CERTIFICATE OF COMPLIANCE

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

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