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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

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

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

Elizabeth M. Powers and Edward A. Powers; Martha C. Green; Steven E. Basson; 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 ALLIANCE FOR ECONOMIC DEVELOPMENT FOR GEORGETOWN COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF THE ISSUES

I. **THE CIRCUIT COURT DID NOT ERR IN DISMISSING ALL OF APPELLANTS' SIX CLAIMS FOR DECLARATORY JUDGMENT DUE TO APPELLANTS' FAILURE TO ALLEGE A CONSTITUTIONAL DEPRIVATION.**

II. **APPELLANTS FAILED TO PROPERLY PRESERVE AND PRESENT FOR APPELLATE REVIEW COUNTS I, II, IV, V, AND VI OF THEIR COMPLAINT.**

III. **THE CIRCUIT COURT DID NOT ERR IN FINDING AS A MATTER OF LAW THAT THE MERCOM PLANNED DEVELOPMENT IS VALID UNDER THE SOUTH CAROLINA COMPREHENSIVE PLANNING AND ENABLING ACT AND THAT APPELLANTS' CLAIM IS STATUTORILY BARRED.**

IV. **THE CIRCUIT COURT DID NOT ERR IN FINDING AS A MATTER OF LAW THAT GEORGETOWN COUNTY ORDINANCE 1703 DOES NOT REQUIRE AUTOMATIC REVERSION OF UNDEVELOPED PLANNED DEVELOPMENT DISTRICTS IF CONSTRUCTION DOES NOT COMMENCE WITHIN TWO YEARS OF APPROVAL.**

V. **THE CIRCUIT COURT DID NOT ERR IN FINDING AS A MATTER OF LAW THAT GEORGETOWN COUNTY COUNCIL DID NOT VIOLATE THE SOUTH CAROLINA COMPREHENSIVE PLANNING AND ENABLING ACT BY ADOPTING ZONING ORDINANCES THAT DID NOT STRICTLY ADHERE TO THE GEORGETOWN COUNTY COMPREHENSIVE PLAN.**

VI. **THE CIRCUIT DID NOT ERR IN FINDING AS A MATTER OF LAW THAT GEORGETOWN COUNTY COUNCIL'S APPROVAL OF ORDINANCES 22-36 AND 22-37 DID NOT VIOLATE GEORGETOWN COUNTY ORDINANCE 1701.**

VII. **THE CIRCUIT COURT DID NOT ERR IN FINDING AS A MATTER OF LAW THAT GEORGETOWN COUNTY ORDINANCE 619.50 DID NOT REQUIRE THE OWNERS OF PARCELS 1 AND 2 IN THE MERCOM PLANNED DEVELOPMENT TO JOIN THE APPLICATION TO AMEND THE USE OF PARCEL 3.**

VIII. **THE CIRCUIT COURT DID NOT ERR IN FINDING AS A MATTER OF LAW THAT GEORGETOWN COUNTY COUNCIL'S APPROVAL OF ORDINANCES 22-36 AND 22-37 DID NOT AMOUNT TO UNLAWFUL SPOT ZONING.**

STATEMENT OF THE CASE

This case is about Appellants' political disagreement with a zoning decision by the Georgetown County Council ("County Council"). Specifically, Appellants disagree with County Council's decision to approve a mixed-use commercial and residential planned development in Pawleys Island, South Carolina. Rather than engaging in the political process with the local community to garner support for their position, Appellants seek a shortcut around the political process by asking the court system to substitute its judgment for that of County Council. Tellingly, Appellants are party to a number of similar lawsuits seeking to invalidate local zoning decisions, with each incorporating the same playbook to circumvent the legislative prerogative of local government.

The property at issue here is called the Mercom Planned Development ("Mercom PD"). The Mercom PD was originally approved in 2008 to permit various resort service uses among its three parcels ("2008 Ordinances"). In 2015, the Mercom PD was amended by Ordinance 2015-41 to permit a technology park, including general offices, warehouses, restaurants, and suite lodging ("2015 Ordinance"). In November 2022, County Council approved a second amendment to the Mercom PD via Ordinances 22-36 and 22-37 ("2022 Ordinances"). The 2022 Ordinances allow one of the three parcels ("Parcel Three") to develop ninety residential units, thirty percent of which will be designated for below market rate rents for a minimum of seven years. Georgetown County needs new and quality housing like this project, but Appellants are opposed to any development that increases residential density in this area of Pawleys Island (called the Waccamaw Neck).

To prevent development of the ninety residential units in the Mercom PD, Appellants seek to invalidate the 2022 Ordinances on six separate grounds. Appellants' legal arguments in support of their six requests for declaratory judgment are sparse, confusing, and ultimately meritless, which is why the circuit court dismissed all of them. Similarly, the "errors" Appellants assert in the

present appeal are difficult to follow. However, upon untangling the issues raised in Appellants' brief, Appellants have yet again come up short. First, there is no legal basis to declare the 2022 Ordinances invalid. Second, Appellants failed to preserve all six claims for appellate review. Third, Appellants do not identify any reversible errors in the circuit court's dismissal order ("Dismissal Order"). Accordingly, the Court of Appeals should affirm the Dismissal Order.

STATEMENT OF FACTS

I. Brief History of Mercom PD

The Mercom PD is a 28.4-acre tract of land located near the historical Parkersville neighborhood on Pawleys Island. (**R. 148 & R. 156**). Prior to the creation of the Mercom PD, the tract was zoned as Forest-Agriculture. (**R. 156**). However, in 2008, County Council approved the 2008 Ordinances that created the Mercom PD and allowed for development of various resort services. (**R. 15-57 & R. 247-61**). In 2013, the then-owner of the Mercom PD, Waccamaw Land, LLC ("Waccamaw Land"), divided the Mercom PD into three parcels. (**R. 157**). Presently, the three parcels are owned as follows:

> Parcel One ending in TMS 100; 6.373 acres owned by Waccamaw Land;
>
> Parcel Two ending in TMS 000; 7.388 acres owned by Barn on Petigru, LLC; and,
>
> Parcel Three ending in TMS 200; 14.449 acres owned by Respondent Alliance for Economic Development for Georgetown County ("Georgetown Alliance").

(**R. 157**).

In 2015, County Council approved the 2015 Ordinance that allowed for additional uses on the Mercom PD, including (but not limited to) research centers, restaurants, retail stores, day care centers, medical clinics, public, lodging, and conference centers. (**R. 158 & R. 247-61**). To date,

the Mercom PD has not been developed for resort services or the other allowed uses. (**R. 159**). Due to the Mercom PD remaining undeveloped, a developer contracted to purchase Parcel Three from Georgetown Alliance in 2020, with the plan to construct the multi-family housing project that Appellants oppose. (**R. 159**). The developer filed an application to amend the Mercom PD to allow high-density residential use on August 17, 2020 (subsequently withdrawn), and then again on August 22, 2022 ("Application"). (**R. 148 & R. 156**).

The Georgetown County Planning Commission ("Planning Commission") reviewed the Application and recommended denial to County Council on September 15, 2022, on the basis that the requested amendment to the Mercom PD did not conform to the Georgetown County Comprehensive Plan ("Comprehensive Plan"). (**R. 149, R. 171, & R. 247-61**). The Application next went to County Council for consideration. In order to effectuate the Application, County Council needed to adopt ordinances that would amend both the Mercom PD and the Comprehensive Plan to allow high-density residential development on Parcel 3 (*i.e.*, the 2022 Ordinances). County Council held three readings of the 2022 Ordinances, during which County Council considered the Planning Commission's recommendation and a host of other relevant information. (**R. 247-61**). On November 8, 2022, County Council voted to adopt the 2022 Ordinances (**R. 149**). Specifically, Ordinance 22-36 formally amended the Comprehensive Plan and Future Land Use ("FLU") Map to reclassify Parcel Three from commercial to high density residential. (**R. 149 & R. 247-61**). Ordinance 22-37 amended the Mercom PD to allow commercial use and ninety multi-family units on the property, conditioned upon thirty percent of the units having below market rate rent for seven years. (***Id.***)

II. The Dispute

Throughout the process, several local advocacy groups opposed the Application; namely, Appellants Keep It Green ("KIG"), Preserve Murrells Inlet, Inc. ("PSI"), and Parkersville Planning and Development Alliance ("PPDA"). KIG is a non-profit public interest law firm that opposes land use and zoning changes that increase residential density in the Waccamaw Neck of Georgetown County. (**R. 153-154**). KIG has opposed many residential projects in Georgetown County by asserting that they do not comply with the law. (**R. 148 & R. 199-201**). PSI is a non-profit organization that protects and preserves the Northern Waccamaw Neck from "inappropriate development." (**R. 154 & R. 202**). PPDA is yet another local non-profit opposed to residential development in Parkersville. (**R. 148 & R. 152-53**). The individual Appellants own property near the Mercom PD. (**R. 151-52**). They have each signed nearly identical affidavits attesting that they own property adjacent to the Mercom PD and that they are opposed to the development of the residential units in the Mercom PD. (**R. 186-95**). The affidavits of the individual Appellants that own property in the area claim that Appellants KIG and PPDA advocate on their behalf. (***Id.***)

Appellants oppose any development in the Mercom PD, arguing that it will negatively impact the character of the surrounding neighborhoods in Pawleys Island. *See*, *e.g.*, (**R. 148**). Appellants sought for years to have the Mercom PD invalidated and returned to its previous Forest-Agriculture designation, well before Georgetown Alliance submitted the Application to allow multi-family housing in Parcel Three. (**R. 162**). Continuing their long-running opposition to development in the Mercom PD, Appellants advocated vigorously against Georgetown Alliance's Application and the 2022 Ordinances, including a letter-writing campaign to County Council, a community petition, and testimony at two of the three readings of the 2022 Ordinances. (**R. 172**). Ultimately, however, Appellants were unable to persuade County Council to deny the Application, just as they were previously unable to persuade County Council to dissolve the Mercom PD.

III. Procedural History

Appellants initiated this lawsuit on January 6, 2023, and then amended the complaint on February 6, 2023. (**R. 28-145**); (**R. 146-266**).[1] In their lengthy Complaint, Appellants allege a number of legal deficiencies related to the 2022 Ordinances, culminating in six requests for declaratory judgment, summarized below:

> Count I: The Mercom PD was invalid from inception because it was only zoned for a single use in 2008 and therefore did not meet the statutory definition of a "planned development." (**R. 180**).
>
> Count II: Georgetown County has a statutory mandate under Georgetown County Ordinance 1703 to revert all planned development districts to their prior zoning designation if construction does not begin within two years of approval. Because construction did not commence on the Mercom PD within two years of the 2015 Ordinance, the property should have reverted to its prior zoning designation and the 2022 Amendments are therefore null and void. (**R. 180-81**).
>
> Count III: County Council's approval of the 2022 Ordinances violated the South Carolina Comprehensive Planning and Enabling Act ("Planning Act") because the 2022 Ordinances do not comply with the Comprehensive Plan. (**R. 181-82**).
>
> Count IV: County Council's approval of the 2022 Ordinances violated Georgetown County Ordinance 1701 because the zoning amendment to the Mercom PD was not justified by public necessity, convenience, general welfare or good zoning practice. (**R. 182-83**).
>
> Count V: Georgetown Alliance's Application was invalid under Georgetown County Ordinance 619.50 because it was not submitted jointly by all three parcel owners in the Mercom PD. (**R. 183**).
>
> Count VI: County Council's approval of the 2022 Ordinances amounted to unlawful spot zoning. (**R. 183-84**).

Appellants also requested attorneys' fees pursuant to S.C. Code § 15-77-300. (**R. 184**).

[1] Appellants amended their Complaint to correct the name of Georgetown Alliance. There are no substantive differences between the Complaint and the Amended Complaint, and all references herein to Appellants' Complaint are intended to refer to the Amended Complaint.

Respondent Georgetown County submitted a Motion to Dismiss the Complaint on March 2, 2023 and Respondent Georgetown Alliance submitted its Motion to Dismiss on March 3, 2023. (**R. 262-63**); (**R. 264-65**). Appellants and each Respondent submitted memoranda of law ahead of the hearing on the Motions to Dismiss. (**R. 267-71**); (**R. 272-84**); (**R. 285-304**). The circuit court held a virtual hearing on the Motions to Dismiss on April 6, 2023, after which Appellants submitted a supplemental memorandum in opposition. (**R. 308-27**).

On May 1, 2023, the circuit court issued a Form 4 Order granting both Motions to Dismiss on all counts, followed by the Dismissal Order on May 31, 2023. (**R. 4-6**); (**R. 7-23**). Appellants submitted a Motion to Alter or Amend on June 12, 2023, and Respondents submitted a memorandum in opposition to Appellants' Motion to Alter or Amend on June 26, 2023. (**R. 328-56**); (**R. 357-62**); (**R. 363-83**).

The circuit court denied Appellants' Motion to Alter or Amend by Form 4 Order on July 18, 2023. (**R. 24-26**). Appellants filed the instant appeal on August 16, 2023.

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." (*Id.)* Accordingly, courts "must accept as true" the allegations in a complaint. *Chestnut v. AVX Corp.*, 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015). Under this standard, the Court may sustain a dismissal 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*

v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003) (internal quotations omitted). Moreover, the Court "can affirm a lower court's order for any reason appearing in the record." *Chestnut*, 413 S.C. at 227, 776 S.E.2d at 84, *citing* Rule 220(c), SCACR.

In cases 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." *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001).

ARGUMENT

I. Threshold Problems with Appellants' Appeal

In the Dismissal Order, the circuit court set forth the primary basis for dismissing ***all*** of Appellants' claims seeking to invalidate the 2022 Ordinances, which is that zoning ordinances are entitled to judicial deference absent very specific circumstances that Appellants did not allege. (**R. 10-12**). The Dismissal Order also sets forth separate legal bases for dismissing each individual claim. (***Id.*** **at 6-16**). Rather than establishing how and why the circuit court's legal conclusions were erroneous, Appellants instead primarily focus on bizarre arguments about how the circuit erred in what it did ***not*** find and erred by performing ***any*** legal analysis at the motion to dismiss stage. For example, Appellants assert that the circuit erred by ***not*** finding that Appellants raised actual, justiciable controversies sufficient to support their claims under the Declaratory Judgment Act. (**App. Final Brief, pp. 22-26**). Moreover, Appellants argue that the circuit erred by ***not*** finding that they had standing to bring their claims under the Declaratory Judgments Act and the Planning Act. (***Id.*** **at 36-38**). These arguments ignore the basis of the circuit court's rulings. In the Dismissal Order, the circuit court ***assumes*** that Appellants raised an actual, justiciable controversy and had standing to do so, which is why those issues are not ruled upon. Instead, the Dismissal

Order finds that assuming Appellants had standing and raised justiciable controversies, the claims fail as a ***matter of law***.

Appellants describe several other alleged "errors" in their Statement of Issues, including that the circuit court erred by deciding questions of fact at the motion to dismiss stage, by issuing rulings "on the merits," and by applying evidentiary burdens to Appellants' allegations in the Complaint. (App. Final Brief, p. 8). Appellants appear to grossly misapprehend the difference between a question of fact and a question of law. Appellants also appear unaware that the circuit court is well-situated to address purely legal questions at the motion to dismiss stage, and that applying legal presumptions (*i.e.*, presuming an ordinance is constitutional) is not the same as applying evidentiary burdens of proof on Appellants' factual allegations.

The result of Appellants' confusion over these legal concepts and Appellants' presentation of the errors on appeal is that Appellants have failed to preserve most of their legal claims for appellate review. Because Appellants' brief is so protracted and confusing, it is difficult to parse through which of Appellants' claims are adequately preserved. Accordingly, Respondent Georgetown Alliance has organized this brief to first address the overarching reason the Court should affirm the Dismissal Order for all claims in the aggregate, then to address how Appellants failed to preserve and/or present most of their claims for appellate review, and then finally to address why the Court should affirm dismissal of each of Appellants' six requests for declaratory judgment as a matter of law.

II. Appellants Did Not Allege a Constitutional Deprivation and Therefore the Court Cannot Invalidate the 2022 Zoning Ordinances under South Carolina Law

In the Dismissal Order, the circuit court found that Appellants failed to allege a constitutional deprivation in their Complaint, and therefore Appellants' six requests for declaratory judgment to invalidate the 2022 Ordinances fail as a matter of law. (**R. 10-12**). On appeal,

Appellants argue that the circuit court was wrong to dismiss the case for lack of a constitutional deprivation for two reasons: (1) Appellants have statutory standing to bring a claim, making it unnecessary to also allege a constitutional deprivation, and (2) Appellants in fact did allege constitutional deprivations in the Complaint. Appellants are incorrect on both fronts.

a. Courts cannot invalidate a zoning ordinance absent a constitutional deprivation.

As discussed at length in the Dismissal Order, South Carolina courts have long recognized the requirement to exercise judicial restraint when reviewing the zoning decisions of a governing body, and "[c]ourts 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.'" *Knowles v. City of Aiken*, 305 S.C. 219, 224, 407 S.E.2d 639, 642 (1991), *quoting Hampton v. Richland Cnty.*, 292 S.C. 500, 503, 357 S.E.2d 463, 465 (Ct. App. 1987) ("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 Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 300, 37 S.E.2d 601, 611 (2013) ("It is not the function of the courts to pass upon the wisdom or folly of municipal ordinances or regulations."); *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."); *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. . . ."); *Bear Enters. v. Cnty. of Greenville*, 319 S.C. 137, 141-42, 459 S.E.2d 883, 886 (Ct. App. 1995) ("Of course, *if the court finds a violation of constitutional rights*, it may invalidate the ordinance. A court may not, however, substitute its judgment for that of the local zoning ordinance.") (emphasis added).

"A municipal ordinance is a legislative enactment and is presumed to be constitutional." *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1992). Zoning ordinances must be upheld so long as their prosperity is "fairly debatable." *Knowles*, 305 S.C. at 223, 407 S.E.2d at 642 (citations 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*, 401 S.C. at 298, 37 S.E.2d at 610, *quoting Willoughby*, 306 S.C. at 422, 412 S.E.2d at 425 (internal quotation marks omitted). Constitutional rights are violated when a zoning ordinance deprives property without due process of law. *McClanahan v. Richland Cnty. Council*, 350 S.C. 433, 441, 567 S.E.2d 240, 243-44 (2002).

As noted in the Dismissal Order, Appellants failed to allege a constitutional deprivation and therefore Appellants' Complaint "fails as a matter of law in its quest to invalidate the zoning ordinances. The Court cannot (and will not) substitute its judgment for that of the legislative body of Georgetown County." (**R. 12**). The circuit court correctly found that Appellants' political disagreement with County Council's decision is insufficient to overcome the significant body of South Carolina law that affords broad authority to local governing bodies and constrains the ability of courts to invalidate zoning ordinances absent a constitutional deprivation that is notably absent from the Complaint.

b. Standing to bring a case does not negate the need to state a claim upon which relief may be granted.

Appellants first argue that they have statutory standing to bring their claims under both the Planning Act and the Declaratory Judgments Act, and therefore the circuit court was wrong to dismiss their claims for failing to allege a constitutional deprivation. (**App. Final Brief, pp. 36-38**). Appellants confuse standing to bring a claim with bringing a claim that is cognizable under

the law. "In its most basic sense, standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, 430 S.C. 200, 209, 845 S.E.2d 481, 486 (2020). Having standing is necessary but not sufficient to survive a motion to dismiss. In addition to alleging standing to bring a claim, litigants must also state a claim that would entitle the litigants to relief under ***any theory*** to survive a motion to dismiss. *See Rydde v. Morris*, 381 S.C. at 646, 675 S.E.2d at 433 (when deciding a motion to dismiss, the court assesses whether a plaintiff is entitled to relief on any theory based on the facts alleged and the reasonable inferences therefrom). To bring a claim that would invalidate a zoning ordinance under any theory, South Carolina law is clear that a litigant must allege a constitutional deprivation. *McClanahan*, 350 S.C. at 441, 567 S.E.2d at 243-44; *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642.

Here, the circuit court found that Appellants did not allege a constitutional deprivation. (**R. 11**). So, even assuming Appellants had statutory ***standing*** to bring their claims, the circuit court ruled that all of Appellants' claims seeking to invalidate the 2022 Ordinances fail ***as a matter of law***. This ruling is based on binding South Carolina precedent, which Appellants' brief does not address (much less overcome).

c. Appellants did not allege a constitutional deprivation.

Appellants also claim that while it was not necessary to allege a constitutional deprivation (it clearly is), they in fact did allege constitutional deprivations in the Complaint. (**App. Final Brief, pp. 38-40**). Specifically, Appellants argue that statements included in the affidavits attached to the Complaint amount to allegations of constitutional deprivations. (***Id.*** **at 38-39**). In the affidavits, Appellants alleged the following potential injuries from the 2022 Ordinance: decreased property values, increased stormwater and flooding problems, negative impact on enjoyment of

land, increase to traffic, bad precedent of deviating from the Comprehensive Plan, increased burden on overly-burdened infrastructure, and gentrification.[2] (**R. 186-204**). Appellants also cite to several paragraphs in the Complaint alleging generalized harms from development in the Waccamaw Neck, using phrases like "permanent detrimental and discriminatory impact" and "far-reaching negative consequences" to describe the effect of the 2022 Ordinances. (**App. Final Brief, pp. 38-39**).

Even if these concerns were valid (which Georgetown Alliance does not concede), they do not amount to a deprivation of Appellants' property without due process of law. South Carolina case-law on claims alleging lack of substantive due process and takings make clear that a zoning decision which potentially impacts the value or use of an owner's property is not tantamount to a constitutional deprivation. *See e.g. Braden's Folly, LLC v. City of Folly Beach*, 439 S.C. 171, 886 S.E.2d 674 (2023) (noting that zoning laws which impact the value of private property will "pass constitutional muster" under a takings analysis so long as they are not the functional equivalent of appropriating private property or ousting an owner from his domain); *Harbit v. City of Charleston*, 382 S.C. 383, 394, 675 S.E.2d 776, 782 (2009) ("A legislative body does not deny due process simply because it does not permit a landowner to make the most beneficial use of its property"); *McClanahan*, 350 S.C. at 441, 567 S.E.2d at 243-44 ("Appellant has not been deprived of due process of law because he was not deprived of this property due to the adoption of the Plan, nor due to the manner of the Plan's adoption."). Absent allegations that Appellants were actually or effectively deprived of their property, Appellants have not alleged a constitutional deprivation and

[2] Interestingly, the individual Appellants cite projected property value ***decreases*** as a perceived harm from the 2022 Ordinances. (**R. 186-204)**. However, Exhibit 18 of the Amended Complaint notes that a number of individuals spoke against the Application at the Planning Commission's September 15, 2022 public meeting and complained of concerns that the Application would result in "***increased*** property values."

therefore the circuit court could not provide the relief Appellants seek. *Knowles*, 305 S.C. at 224, 407 S.E.2d at 642.

Because Appellants did not allege a constitutional deprivation, each of Appellants' six grounds to invalidate the 2022 Ordinances must fail under prevailing South Carolina law. Accordingly, the Court should affirm the circuit court's dismissal of all six of Appellants' requests for declaratory judgment to invalidate the 2022 Ordinances.

III. Appellants failed to preserve and/or present Counts I, II, IV, V, and VI for appellate review, and also presented new claims and theories for appellate review that were not raised to the circuit court.

Assuming the Court does not affirm the Dismissal Order based on Appellants' failure to allege a constitutional deprivation, this Court should affirm the Dismissal Order on procedural grounds. Specifically, in their zeal to make sweeping, disorganized arguments about why the circuit court erred in its approach to dismissing their Complaint, Appellants failed to preserve many of their legal claims for appellate review. Appellants also attempt to have the appellate court rule on a claim that is not in the pleadings, and raise a new theory that is not in the pleadings or any other documents presented to the circuit court. As explained further below, this Court should decline to consider unpreserved issues, issues that are not properly presented for appellate review, and issues that were not pled or presented to the circuit court.

a. Rules of issue preservation and requirements for appellate review.

"It is axiomatic that an issue cannot be raised for the first time on appeal." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Accordingly, appellate courts will not consider claims that are not presented in the pleadings. *McNeely v. S.C. Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 41, 190 S.E.2d 499 (1972). While it is not required that a party "use the exact name of a legal doctrine in order to preserve the issue," "the issue must be sufficiently clear

to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

With regard to the brief itself, "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. While appellate courts *may* consider an issue not specifically set out in the statement of issues *if* it is reasonably clear from the appellant's arguments, the Supreme Court instructs that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Herron*, 395 S.C. at 466; 719 S.E.2d at 642-43, *quoting Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010). Appellate courts will also deem an issue abandoned if it is only argued in short, conclusory manner without supporting authority. *State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001), *citing Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999).

Finally, with regard to claims that are dismissed on more than one ground, appellate courts will affirm dismissal "unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 284 (2012). This is referred to as the "two issue rule." (***Id.***)

b. Appellants raise a new claim/theory for the first time on appeal.

In Issue I of Appellants' Statement of Issues on Appeal, Appellants invoke Section 6-29-760(A) of the Planning Act as their basis for seeking a declaration that the 2022 Ordinances are invalid. (**App. Final Brief, p. 8**). Section 6-29-760(A) sets forth the procedure for enacting and amending zoning regulations, which requires first submitting any "change in or departure from the text or maps as recommended by the local planning commission" to the planning commission "for review and recommendation." Appellants ***never once*** raised a violation of Section 6-29-760(A) of

the Planning Act to the circuit court as the basis for declaring the 2022 Ordinances invalid. In fact, there is not one citation to or mention of Section 6-29-760(A) in the Complaint, Memorandum of Law in Opposition to Defendants' Motion to Dismiss, or Motion to Alter or Amend. Not one. Appellants now argue ***for the first time*** that County Council adopted the 2022 Ordinances without first allowing the Planning Commission to review and make a recommendation (which is factually inaccurate), rendering the 2022 Ordinances "*ultra vires* and, therefore, void." (**App. Final Brief, p. 19-20**). Because appellate courts will not consider issues not raised in the pleadings and will not allow litigants to raise issues for the first time on appeal, the Court cannot consider Appellants' new argument for why the 2022 Ordinances were *ultra vires*. *Herron,* 395 S.C. at 465, 719 S.E.2d at 642; *McNeely*, 259 S.C. at 41, 190 S.E.2d at 499.

c. Appellants did not preserve Count I for appellate review.

Count I of the Complaint requests a declaratory judgment that the Mercom PD is not a valid planned development district because County Council previously only approved it for a single-use. (**R. 160-61 & R. 180**). The circuit court found ***as a matter of law*** that the Mercom PD is a valid planned development district under the Planning Act and that Appellants' claim is barred under the applicable statute of limitations, dismissing this claim on both grounds. (**R. 15-17**). Appellants failed to properly preserve Count I for appellate review for at least two reasons.

First, Appellants do not include any reference to this issue in the Statement of Issues on Appeal. Despite the absence of this issue from the Statement of Issues on Appeal, Appellants include a short discussion in their brief regarding the case Appellants relied on at the circuit court to argue the Mercom PD was invalid from inception: *Sinkler v. Cty. of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010). (**App. Final Brief, pp. 20-21**). However, Appellants do not articulate how the finding in *Sinkler* supports or even relates to any issue on appeal, instead simply stating with

no analysis that the Court should not be deferential to County Council's legislative decision "because, as in *Sinkler v. County of Charleston*, the Georgetown County Council failed to follow the requirements of the [Planning] Act." (***Id.* at 21**). Because Appellants failed to address the circuit court's ruling on this issue in the Statement of Issues on Appeal ***and*** because Appellants' arguments in the brief are not reasonably clear, the Court should not consider any arguments related the circuit court's dismissal of Count I. Rule 208(b)(1)(B), SCACR; *Herron*, 395 S.C. at 466, 719 S.E.2d at 642-43.

Second, the circuit court also ruled in the Dismissal Order that Appellants are statutorily barred from bringing a claim to invalidate the Mercom PD. (**R. 16**). Appellants do not identify the circuit court's ruling on the statute of limitations in the Statement of Issues on Appeal. Nonetheless, Appellants discuss the statute of limitations in the Argument section of the brief. (**App. Final Brief, pp. 30-32**). However, Appellants' only "legal" argument about why the statute of limitations does not apply is a conclusory statement with no citation to authority that the statute of limitations does not apply because County Council acted *ultra vires*. (***Id.* at 31**). Because Appellants did not include the circuit court's ruling on the statute of limitations in the Statement of Issues on Appeal and because Appellants make only a short, conclusory argument with no citation to legal authority, this issue is not properly before the Court. Rule 208(b)(1)(B), SCACR; *State v. Jones*, 344 S.C. at 58-59, 543 S.E.2d at 546.

Appellants did not effectively appeal either of the circuit court's grounds for dismissing Count I. However, even if the Court found that Appellants effectively appealed ***one*** of the grounds for dismissal, under the two issue rule, the Court must affirm the circuit court's order if Appellants did not effectively appeal ***both*** grounds for dismissal. *Atlantic Coast Builders & Contractors*, 398 S.C. at 328, 730 S.E.2d at 284.

Appellants did not preserve Count I for appellate review and the Court should affirm the circuit court's order dismissing Count I.

d. Appellants did not preserve Count II for appellate review.

Count II of Appellants' Complaint requests a declaratory judgment that Georgetown County has a statutory mandate under Ordinance 1703 to revert all planned development districts to their prior zoning designation if construction has not begun within two years of approval. (**R. 180-81**). Because construction did not commence on the Mercom PD within two years of the 2015 Ordinance, Appellants request the circuit court to declare that the property reverted to its prior zoning designation in 2017 and that the 2022 Amendments are therefore null and void. (***Id.***) The circuit court ruled that ***as a matter of law*** that the plain language of Ordinance 1703 does not require automatic reversion of planned development districts if construction does not commence within two years. (**R. 17**).

Appellants do not appeal the circuit court's grounds for dismissing Count II in the Statement of Issues on Appeal. There is no mention of Ordinance 1703 or reversion. Appellants also do not dispute the circuit court's legal reasoning for dismissing Count II in the body of the brief. Instead, Appellants argue that the determination of what Ordinance 1703 requires is a ***question of fact*** that cannot be decided on a motion to dismiss. (**App. Final Brief, p. 32**). But Appellants are incorrect. What the plain language of Ordinance 1703 means is clearly a ***question of law***; there are no facts Appellants could present that would change what the plain language means. Circuit courts are well-situated to decide questions of law at the motion to dismiss stage, and doing so is not an error. *See Unisys Corp*., 346 S.C. at 165, 551 S.E.2d at 267 ("When 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.") (internal quotations omitted).

Because Appellants do not include dismissal of Count II in the Statement of Issues on Appeal and did not make any arguments about why the circuit court erred in its ruling on the ***legal question*** of what Ordinance 1703 requires, the Court should decline to review this issue and affirm the circuit court's dismissal of Count II in the Dismissal Order. Rule 208(b)(1)(B), SCACR; *Herron*, 395 S.C. at 466, 719 S.E.2d at 642-43.

e. Appellants did not preserve Count IV for appellate review.

Count IV of the Complaint requests a declaratory judgment that County Council's approval of the 2022 Ordinances violated Ordinance 1701 because the zoning amendment to the Mercom PD was not justified by public necessity, convenience, general welfare or good zoning practice. (**R. 182-83**). The circuit court ruled ***as a matter of law*** that Ordinance 1701 requires an exercise of County Council's legislative powers, which the circuit court cannot set aside absent a constitutional deprivation. (**R. 18-19**). Therefore, because Appellants did not allege a constitutional deprivation, the circuit court dismissed this request for Declaratory Judgment. (***Id.***)

Appellants do not appeal the circuit court's grounds for dismissing Count IV in the Statement of Issues on Appeal. Moreover, Appellants make no legal arguments related to Ordinance 1701 in their brief. Because Appellants do not appeal the circuit's ruling on Count IV in the Statement of Issues on Appeal and do not make any arguments about how the circuit court erred as a matter of law in dismissing Count IV, Appellants have abandoned Count IV, and this Court should affirm the circuit court's dismissal. Rule 208(b)(1)(B), SCACR; *Herron*, 395 S.C. at 466, 719 S.E.2d at 642-43.

f. Appellants did not preserve Count V for appellate review.

Count V of the Complaint requests a declaratory judgment that Georgetown Alliance's Application was invalid under Ordinance 619.50 because it was not submitted jointly by all three parcel owners in the Mercom PD, rendering the 2022 Ordinances invalid. (**R. 183**). The circuit court analyzed Ordinance 619.50, and found ***as a matter of law*** that the plain and unambiguous language did not require all three parcel owners to join the Application. (**R. 19-20**). The circuit court also found that County Council's construction of the Ordinance was entitled to deference, and that there was no potential violation of the other parcel owners' constitutional rights because they received notice of the Application and an opportunity to be heard. (***Id.***).

Appellants do not appeal the circuit court's grounds for dismissing Count V in the Statement of Issues on Appeal. Appellants also do not make any arguments about why the circuit court's determination of what Ordinance 610.50 requires as a matter of law was an error. Appellants' only passing references to Ordinance 619.50 are in the "Facts" section of the brief and in the section of the brief where Appellants summarize the allegations in the Complaint that Appellants argue set forth an "actual controversy." (**App. Final Brief, pp. 10, 17, & 24**). Because Appellants do not appeal the circuit's ruling on Count V in the Statement of Issues on Appeal and do not make any arguments about how the circuit court erred as a matter of law in dismissing Count V, Appellants have abandoned Count V, and this Court should affirm the circuit court's dismissal. Rule 208(b)(1)(B), SCACR; *Herron*, 395 S.C. at 466, 719 S.E.2d at 642-43.

g. Appellants did not preserve Count VI for appellate review.

Count VI of the Complaint requests a declaratory judgment that County Council's approval of the 2022 Ordinances amounted to unlawful spot zoning. (**R. 183-84**). The circuit court dismissed Count VI ***as a matter of law*** on several grounds, including that Appellants' allegations and legal theories could not overcome the "fairly debatable" standard applied to planned development

districts under prevailing South Carolina law. (**R. 21-22**). Appellants did not appeal the circuit court's ruling on Appellants' unlawful spot zoning claim in the Statement of Issues, nor did Appellants include any arguments related to spot zoning in the Argument section of their brief. Accordingly, Appellants plainly abandoned Count VI on appeal. Rule 208(b)(1)(B), SCACR; *see Herron*, 395 S.C. at 466, 719 S.E.2d at 642-43.

h. Appellants' conflict of interest claim is not preserved for appellate review.

In their brief, Appellants attempt to replace Count VI of the Complaint with an ***entirely different*** claim. In their Statement of the Case, Appellants state that they requested the circuit court to invalidate the 2022 Ordinances on six grounds, with the sixth ground being "[t]hree members of Georgetown County Council who voted on this issue should have recused themselves due to conflicts of interest." (**App. Final Brief, p. 11**). Of course, the sixth ground upon which Appellants actually requested declaratory judgment was that County Council engaged in unlawful spot zoning, not that County Council's zoning decision suffered from conflicts of interest. (**R. 183-84**). It is true that Appellants discussed alleged conflicts of interest in their pleading at various points, but Appellants ***never*** requested a declaratory judgment from the circuit court on the conflicts of interest issue. *See*, *e.g.*, (**R. 175**). Appellants also discussed the alleged conflicts of interest in their Motion to Alter or Amend, arguing that the circuit erred in not taking their allegation of a conflict of interest as true for purposes of ruling on Respondents' Motions to Dismiss. (**R. 344-445**). But again, whether there were conflicts of interest was not one of the claims the circuit court was asked to rule upon and therefore the issue was not discussed in the Dismissal Order.

Because Appellants did not request declaratory judgment on the conflicts of interest issue, and because Appellants did not include this issue in the Statement of Issues on appeal, the Court

should decline to consider this issue. *Herron,* 395 S.C. at 465, 719 S.E.2d at 642; *McNeely*, 259 S.C. at 41, 190 S.E.2d at 499.

IV. The Court Has An Independent Basis to Affirm the Dismissal Order as to Each Individual Claim for Declaratory Judgment that Appellants Attempted to Appeal

In addition to Appellants' claims failing as a matter of law in the aggregate and Appellants' rampant procedural errors, the Court also has an independent basis upon which to affirm dismissal of each of Appellants' six Counts.

a. Count I: The Mercom PD is a valid planned development district and Appellants' claim is statutorily barred.

Under the Planning Act, local governing bodies are empowered to create "planned development districts," defined as 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." S.C. Code § 6-29-720(C)(4). Appellants' first request for declaratory judgment is that the Mercom PD was originally zoned for only a single use in 2008, and therefore was an invalid planned development district from inception. (**R. 160-61 & R. 180**). Because the Mercom PD was invalid from inception, Appellants argue that the 2022 Ordinances amending the Mercom Development are null and void. ***Id***.

The circuit court found that the Mercom PD has always met the statutory requirements for a planned development district, and also found that Appellants' attempt to invalidate the Mercom PD is barred under the applicable statute of limitations in the Planning Act. (**R. 15-17**). Appellants contend that the circuit court erred on both findings (albeit with sparse legal support and no mention in the Statement of Issues). For the reasons set forth below, assuming the Court reaches

the merits of Appellants' arguments, the Court should affirm the circuit court's ruling on both substantive grounds (as well as on the ground that Appellants failed to adequately preserve Count I for the Court's review).

i. The Mercom PD is a valid planned development district.

The crux of Appellants' argument is that the Planning Act requires planned development districts to be zoned for a mix of residential and commercial uses, and therefore County Council acted *ultra vires* in approving the Mercom PD for a single use in 2008 and again in 2015. (**App. Final Brief, pp. 20-21, 28-30**). Appellants also argue that whether the Mercom PD was single use or mixed use is a question of fact that the circuit court should not have analyzed at the motion to dismiss stage. (***Id.* at 28-30**). Appellants are incorrect on both fronts.

The Planning Act defines a planned development district as "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." S.C. Code Ann. 6-29-720(C) (emphasis added). Thus, there are two ways that a planned development district may be established: (1) as a development with a mix of residential and commercial uses, or (2) as a development with shopping centers, office parks, and mixed use developments.

The Complaint alleges that County Council approved the Pawleys Island Business Park Development District for various resort service uses in the 2008 Ordinances. (**R. 156-57**). Appellants argue that a planned development district zoned for resort services is single use, not mixed use. (***Id.* at R. 160-61**). Similarly, Appellants argue that when County Council approved the 2015 Ordinance that renamed the Pawleys Island Business Park Development District to the Mercom PD and authorized its use as a technology park (along with lodging and restaurants), that was also approval for only a single use. (***Id.* at R. 156-57, R. 160-61, & R. 247-61**).

Appellants argue that "[i]n order for a PD to be valid under the terms of the [Planning] Act, as interpreted by *Sinkler*, it must provide 'mixed uses' that go beyond a single zoning district category." (**App. Final Brief, p. 30**). In other words, Appellants argue that a planned development district cannot be zoned for purely commercial or business uses; it must also have a residential component. Appellants contend that *Sinkler v. County of Charleston* supports their position, but it does not.

In *Sinkler*, the Supreme Court invalidated an ordinance creating a planned development, finding "[t]he ordinance did not provide for housing of different types and densities and compatible commercial use, ***and*** it did not create a new mixed use development as contemplated in the statutes of the [Planning] Act. The property continued to have ***only residential*** dwellings and the ordinance did not plan for future diversity of development." *Sinkler*, 387 S.C. at 76, 690 S.E.2d at 781 (emphasis added). The Supreme Court did not state that planned development districts must incorporate multiple zoning ***categories*** as Appellants argue. Rather, the Supreme Court simply found that the planned development district in *Sinkler* did not meet either of the two statutory options for establishing a planned development district under the Planning Act because it was ***purely*** residential.

In contrast to the purely residential planned development district at issue in *Sinkler*, the Mercom PD met the requirements of a planned development district under the Planning Act in 2008 and again in 2015 because the Mercom PD was zoned for various commercial and business uses. (**R. 247-61**). For example, under Georgetown Zoning Ordinance 612, permitted uses in a resort services district include resort-related services, business services, repair services, manufacturing of resort-related items, warehousing and storage facilities, wholesale business outlets, animal boarding services, and trade services complexes. This is clearly "mixed use" as

contemplated in the Planning Act. Thus, the circuit court was correct to find that, based on the allegations and evidence in the Complaint, the Mercom PD has always been valid under the Planning Act.

Appellants also contend that whether the Mercom PD was single use or mixed use is a question of fact and Appellants' allegation that it was single-use must be taken as true. Appellants are simply incorrect. The circuit court must accept a plaintiff's factual allegations as true for purposes of a motion to dismiss, but the circuit court is not bound to accept a plaintiff's incorrect interpretation of the law. *See Dreher v. Dreher*, 370 S.C. 75, 79, 634 S.E.2d 646, 648 (2006) ("The issue of interpretation of a statute is a question of law for the court."). Here, Appellants misunderstand the requirements of the Planning Act, and it was entirely proper for the circuit court to rule on this as a pure question of law.

ii. Count I is barred under the statute of limitations.

The Planning Act is clear that no challenge to the validity of a zoning regulation or amendment may be made sixty days after the decision by the governing body, so long as the governing body followed the appropriate notice and procedural requirements. S.C. Code § 6-29-760(D). Without citing to any law, Appellants argue that the statute of limitations does not apply here because County Council's adoption of the 2022 Ordinances was *ultra vires*. (**App. Final Brief, p. 31**). Appellants then bizarrely argue that, because the statute of limitations does not apply, the circuit court has jurisdiction to hear the claims under the South Carolina Constitution. Appellants are incorrect. (***Id.***)

As an initial matter, Appellants never argued to the circuit court that because the statute of limitations does not apply to *ultra vires* acts, the circuit court has jurisdiction to rule on the issue

under Article 5, Section 11 of the South Carolina Constitution. Accordingly, the Court should decline to consider this argument.

Substantively, Appellants cite to no authority for the proposition that the statute of limitations in the Planning Act does not apply to alleged *ultra vires* acts. ***None*** of the cases Appellants cite to in support of the circuit court's jurisdiction to hear *ultra vires* claims address whether an *ultra vires* act is exempt from the applicable statute of limitations. (**App. Final Brief, pp. 31-32**). The cases Appellants cite do not discuss statute of limitations at all. In contrast, the plain language of Section 6-29-760(D) states that challenges to the ***validity*** of zoning regulation or amendment are time-barred after sixty days. Alleging a zoning ordinance is *ultra vires* is clearly a challenge to the validity of the zoning regulation. Appellants could have challenged the 2008 and 2015 Ordinances creating and amending the Mercom PD within the statute of limitations period in each instance, but did not.

Based on the foregoing, the Court should affirm the circuit court's dismissal of Count I as a matter of law and because the claim is time-barred under the applicable statute of limitations.

b. Count II: County Council was not mandated under Ordinance 1703 to revert the Mercom PD to its prior zoning designation.

Appellants requested a declaration from the circuit court that Georgetown County Ordinance 1703 required County Council to initiate proceedings in 2017 to revert the Mercom PD to its prior zoning designation because construction did not commence within two years of approval of the 2015 Ordinance, rendering the latter 2022 Ordinances null and void. (**R. 180-81**). The circuit court found that Ordinance 1703 plainly does not require County Council to initiate proceedings to revert the zoning classification of a planned development district, and therefore dismissed Appellants' request for declaratory relief on this basis. (**R. 17**).

Appellants do not appeal the the circuit court's construction of Ordinance 1703. Instead, Appellants argue that because they ***alleged*** in the Complaint that County Council's failure to comply with Ordinance 1703 invalidates the Mercom PD, Appellants' pleadings are sufficient to withstand a motion to dismiss. (**App. Final Brief, p. 32**). This argument is nonsensical. In considering Respondents' Motions to Dismiss, the circuit court was required to take Appellant's allegation that County Council did not initiate revision of the Mercom PD to its previous zoning designation as true, which the circuit court did. But again, Appellants do not get to declare what the law means or requires; that is the provenance of the court. *See Dreher v. Dreher*, 370 S.C. at 79, 634 S.E.2d at 648 ("The issue of interpretation of a statute is a question of law for the court."). Here, the circuit court found ***as a matter of law*** that Ordinance 1703 does not require reversion. This Court should reject Appellants' argument that the proper construction of Ordinance 1703 is a question of fact and should affirm the circuit court's dismissal of Count II.

c. Count III: The Comprehensive Plan is not binding on County Council.

Appellants requested a declaration from the circuit court that County Council's approval of the 2022 Ordinances violated the Planning Act because the amendments in the 2022 Ordinances were not in accordance with the Comprehensive Plan. (**R. 181-82**). The circuit court found that comprehensive plans implemented pursuant to the Planning Act are not binding on local governments, and therefore County Council's failure to strictly adhere to the Comprehensive Plan could not provide grounds for invalidating the 2022 Ordinances. (**R. 12-15**). Appellants appealed this ruling on the following grounds: (1) the language of the Planning Act evidences the General Assembly's intent to make comprehensive plans binding on local governments; (2) the circuit court's ruling renders the "in accordance with the comprehensive plan" language surplusage; and (3) the circuit court's ruling that County Council complied with the Planning Act is a finding of

fact that is inappropriate at the motion to dismiss stage. (**App. Final Brief, pp. 41-43**). Appellants' arguments fail for a host of reasons.

i. The circuit court is not empowered to depart from precedent.

To begin, Appellants note that in the Dismissal Order, the circuit court relied on the following statement by the South Carolina Supreme Court in *McClanahan v. Richland County Council*: "[t]he Comprehensive Plan is a guideline, not binding law." (**App. Final Brief, p. 41-42**). Appellants argue that "*McClanahan* simply states this conclusion without addressing the issue of the role of the comprehensive plan," and go on to explain why the Comprehensive Plan should have the effect of binding law. (***Id.* at 42**). Appellants are effectively arguing that the circuit court and this Court should depart from the Supreme Court's precedent in *McClanahan*, which the circuit court and the Court of Appeals cannot do. *See State v. Phillips*, 416 S.C. 184, 785 S.E.2d 448 (2016) ("[I]t is incumbent upon the court of appeals to apply this Court's precedent."), *citing* S.C. Const. art. V, § 9.

ii. The General Assembly did not intend for comprehensive plans to be binding on local governments.

With regard to Appellants' proposition that the General Assembly intended comprehensive plans to be binding on local governments, Appellants home in on one phrase from the Planning Act: "[zoning] regulations must be made ***in accordance with*** the comprehensive plan." S.C. Code § 6-29-720(B) (emphasis added). Appellants simply ignore other language from the Planning Act that makes clear comprehensive plans are meant to guide zoning decisions, not constrain them. For example, the Planning Act directs that the purpose of local planning commissions is to "develop and maintain a planning process . . . to ***guide*** the development and redevelopment of its area of jurisdiction." S.C. Code § 6-29-510(A) (emphasis added). The Planning Act also directs that the planning elements in the comprehensive plans developed by local planning commissions

"must be an expression of the planning commission ***recommendations*** to the appropriate governing bodies . . . ." S.C. Code § 6-29-510(E) (emphasis added).

Ultimately, a comprehensive review of the Planning Act indicates that the General Assembly intended for local governing authorities to adopt zoning regulations that are generally in accord with the guidance contained in their comprehensive plans. Georgetown County's Comprehensive Plan by its own terms is designed to "***guide*** future development and redevelopment within the County," and to "***assist*** the County when determining the proper use of land." (**R. 227**) (emphasis added). But ensuring that local zoning decisions are generally in accord with the guidance and goals set forth in a locality's comprehensive plan is not tantamount to giving comprehensive plans the binding force and effect of law. Construing the Planning Act this way does not render the phrase "in accordance with" surplusage as Appellants suggest; rather, it harmonizes language throughout the Planning Act indicating that while the General Assembly views comprehensive plans as useful tools in guiding local zoning decisions, the General Assembly ultimately intends for local governing authorities to have flexibility to make zoning decisions in the best interest of their jurisdictions. Rendering comprehensive plans as rigid constraints on local governing authorities' ability to legislate would not be in accord with the General Assembly's expressed intent in the Planning Act.

iii. Even if comprehensive plans had binding effect under the Planning Act, it would only apply to zoning district regulations and not zoning ordinances.

In arguing that the 2022 Ordinances violate the Planning Act, Appellants repeatedly cite to the provision in Section 6-29-720 of the Planning Act that states "[t]he regulations must be made in accordance with the comprehensive plan for the jurisdiction . . . ." In doing so, Appellants conflate ***zoning ordinances*** and ***regulations***. But a close reading of Section 6-29-720 reveals that

zoning ordinances and regulations are separate and distinct. Thus, even if the language Appellants cite to gives binding effect to comprehensive plans (it does not), that binding effect only applies to zoning district regulations and not to zoning ordinances, such as the 2022 Ordinances at issue here.

Section 6-29-720(A) first states that once a governing body has adopted at least the land use element of a comprehensive plan proposed by a local planning commission, that governing body may then adopt a zoning ordinance to help implement the comprehensive plan. Section 6-29-720(A) and (B) go on to state

> (A) . . . The ***zoning ordinance shall create zoning districts*** of such number, shape, and size as the governing authority determines to be best suited to carry out the purpose of this chapter. ***Within each district the governing body may regulate*** [a list of land development and use items that may be regulated].
>
> (B) ***The regulations*** must be made in accordance with the comprehensive plan for the jurisdiction, and be made with a view to promoting purposes set forth throughout this chapter. Except as provided in this chapter, all of these ***regulations must be uniform*** for each class or kind of building, structure, or use ***throughout each district***, ***but the regulation in one district may differ from those in other districts***.

(emphasis added).

The General Assembly used these two different phrases ("zoning ordinance" and "regulations") within this same section of the Planning Act, indicating that these are two separate concepts. And, a logical reading of Section 6-29-720 bears this out. Zoning ordinances are used to create or amend specific zoning districts, whereas regulations within zoning districts are used to regulate land development and uses ***within*** a particular zoning district. The Planning Act makes clear that "[t]he ***regulations*** must be made in accordance with the comprehensive plan," which makes sense because once the governing authority has designated an area as a particular type of

zoning district, the use within that zoning district should reflect the comprehensive plan. But the Planning Act also empowers governing bodies to adopt zoning ordinances that create or amend specific zoning districts "as the governing authority determines to be best suited to carry out the purpose of this chapter." The General Assembly ***did not*** require that zoning ordinances be made in accordance with a jurisdiction's comprehensive plan, and instead deferred to the governing authority's judgment.

Appellants simply read the law incorrectly. The court must give effect to the different phrases the General Assembly used in Section 6-29-720. Considering the two phrases together indicates that regulations within zoning districts should be made in accordance with the comprehensive plan (to the extent it has binding effect) but that same constraint does not apply to zoning ordinances like the 2022 Ordinances at issue in this case.

iv. <u>County Council has the authority to amend the Comprehensive Plan, which it did via Ordinance 22-36.</u>

Although the circuit court ruled as a matter of law that strict compliance with the Comprehensive Plan is not required under the Planning Act and dismissed Count III on that basis, it should also be noted that Appellants are incorrect that the 2022 Ordinances are not "in accordance with" the Comprehensive Plan. The Planning Act empowers a local governing authority to implement the comprehensive plans proposed by the local planning commission, either in whole or in parts, so long as the governing authority holds a public hearing. S.C. Code § 6-29-530. The Planning Act envisions that a comprehensive plan will be amended from time to time, but not later than every ten years. S.C. Code § 6-29-510(E). Logically, if the governing authority is the entity responsible for adopting the comprehensive plan, it is also the entity responsible for adopting any amendments to the comprehensive plan so long as it follows the proper public hearing procedure.

Appellants ignore that County Council, as the governing authority, ***amended*** the Comprehensive Plan via Ordinance 22-36, after holding public hearings. Thus, the 2022 Ordinances are not in conflict with the Comprehensive Plan because they amended it. Under Appellants' theory, any amendments to the Comprehensive Plan would not be in accordance with the existing Comprehensive Plan and would therefore be *ultra vires*. This is an absurd result and cannot be true.

v. The circuit court dismissed this claim as a matter of law.

Finally, Appellants argue that the circuit court made an inappropriate "finding of fact" in the Dismissal Order by ruling that County Council did not violate the Planning Act. (**App. Final Brief, p. 43**). Appellants continue to misapprehend the standard on a motion to dismiss. When deciding motions to dismiss, circuit courts must take as true the ***factual allegations*** in the complaint. *Chestnut*, 413 S.C. at 227, 776 S.E.2d at 84. Here, the circuit court took as true Appellants' factual allegation that the 2022 Ordinances did not comply with the Comprehensive Plan. The circuit court simply disagreed with Appellants' ***legal argument*** that the Planning Act requires County Council's strict adherence to the Comprehensive Plan. (**R. 18**) ("The determination by County Council to adopt the amendments cannot now be overturned by this Court for failure to adhere to the Comprehensive Plan."). The circuit court's ruling addressed a question of law and did not constitute a finding of fact.

For all of the aforementioned reasons, the Court should affirm the circuit court's dismissal of Count III.

d. Count IV: County Council did not violate Ordinance 1701 by adopting the 2022 Ordinances.

Appellants requested a declaration from the circuit court that the 2022 Ordinances violated Georgetown County Ordinance 1701, which allows County Council to amend zoning ordinances

"[w]hen the public necessity, convenience, general welfare or good zoning practice justifies such action." (**R. 182-83**). The circuit court held that the decision of whether a particular zoning amendment satisfies any or all of the criteria in Ordinance 1701 is a decision "which involves the exercise of the County's legislative powers . . . which must be liberally construed." (**R. 18**). Because Appellants did not allege a deprivation of constitutional rights or procedural due process, the circuit court ruled that "County Council's decision to adopt [the 2022 Ordinances] must remain free from judicial interference." (***Id.* at 13**).

As previously discussed, Appellants do not make any arguments about whether or how the circuit court erred in dismissing County IV as a matter of law. The circuit court properly relied on South Carolina Supreme Court precedent in stating "[c]ourts cannot impress upon the wisdom or folly of a county's discretionary exercise of its legislative powers." (**R. 19**), *citing Dunes*, 401 S.C. at 300, 37 S.E.2d at 611. County Council's decision to adopt the 2022 Ordinances reflected County Council's determination that doing so was justified by public necessity, convenience, general welfare, or good zoning practices, and it is not for the courts to intervene in this exercise of legislative power absent an allegation of a constitutional deprivation or a violation of procedural due process. Accordingly, the Court should affirm the circuit court's dismissal of Count IV.

e. Count IV: Georgetown Alliance's Application was not invalid.

Appellants requested a declaration from the circuit court that Georgetown Alliance's Application for an amendment to the Mercom PD was invalid under Georgetown County Ordinance 619.50 because all three parcel owners did not join the Application. (**R. 183**). Ordinance 619.50 requires that the owner or owners of the "area proposed" for a zoning amendment must join the application. With regard to Georgetown Alliance's Application, the circuit court found that, based on Appellants' pleadings, only Parcel 3 of the Mercom PD was the "area proposed" for

amendment and therefore the owners of the other two parcels did not need to join the Application. (**R. 19-20**). Moreover, the circuit court found that County Council's construction of its own ordinance as not requiring the other parcel owners to join the Application is entitled to deference. (***Id.* at 14**).

Appellants make no arguments as to why the circuit court's ruling on what Ordinance 619.50 requires and its deference to County Council's construction of Ordinance 619.50 is an error. Instead, Appellants mistakenly assume that simply alleging what they believe Ordinance 619.50 requires is sufficient to survive a motion to dismiss. But of course that is wrong. The circuit court must take Appellants' factual allegations as true when evaluating a motion to dismiss, but it is the provenance of the court to decide what the plain language of an ordinance requires. *See Dreher v. Dreher*, 370 S.C. at 79, 634 S.E.2d at 648 ("The issue of interpretation of a statute is a question of law for the court."). For this reason, the Court should affirm the circuit court's dismissal of Count V.

f. Count VI: County Council did not engage in unlawful spot zoning.

Appellants requested a declaration from the circuit court that County Council's approval of the 2022 Ordinances to allow high-density residential in Parcel 3 of the Mercom PD amounted to unlawful spot zoning because the surrounding land is designated in the Comprehensive Plan as either commercial or medium-density residential. (**R. 183-84**). The circuit court dismissed this request for several reasons, including: (1) planned developments are designed under the Planning Act to deviate from permitted uses in the surrounding area and therefore that deviation cannot be a basis to invalidate the 2022 Ordinances; (2) even if a planned development does amount to spot zoning, courts will uphold zoning decisions that are even "fairly debatable;" and (3) "violating"

the Comprehensive Plan is not a basis to invalidate an ordinance because Comprehensive Plans do not have the force of law. (**R. 21-22**).

Appellants make no arguments as to why the circuit court's dismissal of Count VI is an error. Appellants do not mention or discuss spot zoning at all. The Dismissal Order includes the circuit court's reasoning for dismissal, which the circuit court decided as a matter of law in reliance on applicable South Carolina precedent. Accordingly, the Court should affirm the circuit court's dismissal of Count VI.

CONCLUSION

The circuit court properly dismissed all six of Appellants' requests for declaratory judgment to invalidate the 2022 Ordinances because Appellants' did not meet the threshold requirement of alleging a constitutional deprivation. The circuit court also offered additional sound legal reasons for dismissing Appellants' six claims. Not only did Appellants fail to articulate any legal errors on the part of the circuit court in dismissing Appellants' claims, Appellants also failed to preserve and present five of their six claims for appellate review. For all of these reasons, Respondent Georgetown Alliance respectfully requests that the Court affirm the circuit court's Dismissal Order. Georgetown Alliance also respectfully asserts that Appellants should not be allowed to circumvent the local political process by invoking reckless mischaracterizations of South Carolina law and alleging vague harms to local property owners that do not amount to violations of constitutionally protected rights. Appellants must develop a new playbook for achieving their political aims that does not rely on frivolous lawsuits that further overburden South Carolina's judicial system.

(Signature Page to Follow)

Respectfully submitted,

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Dated: August 29, 2024

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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

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

Elizabeth M. Powers and Edward A. Powers; Martha C. Green; Steven E. Basson; 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 COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent Alliance for Economic Development for Georgetown County complies with Rule 211(b), SCACR and is identical to the brief previously served except for revised references to the Record on Appeal and pagination changes.

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