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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

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Case No. 2024-000438

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Faye P. Croft, Personally and as Trustee of the James A. Croft Trust; James A. Croft Trust; William A. Harbeson; Heyward G. Hutson; James Stephen Greene, Jr., Brian Peacher; Robert Klinger; Mary Becker; Summerville Preservation Society; and Dorchester County Taxpayers Association, individually, and on behalf of all others similarly situated,

Appellants,

v.

Town of Summerville; Town of Summerville Redevelopment Corporation; Town of Summerville Planning Commission; and Town of Summerville Board of Architectural Review,

Respondents.

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# INITIAL REPLY BRIEF OF APPELLANTS

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September 20, 2024

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## INTRODUCTION

The failure and ultimate collapse of The Dorchester Project and the discontinuance of the developer's public-private partnership with the Town followed the filing of this extensive and detailed complaint.

What the Town wants to do, though, is to sweep under the rug its patent failure to abide by the laws of the state and its local ordinances both in conceiving this public-private partnership and in implementing it. This project would likely have proceeded on this illegal basis had the Plaintiffs not filed their complaint. The Town seeks to have its illegal acts forgotten and forgiven due to the failure of the public-private partnership and the termination of The Dorchester project.

The rule of law and good governance in this state demand otherwise. The DJA provides the tools for the courts to review these illegal actions and hold the City accountable. The mootness doctrine does not and should not cover illegal or improper local government activity when the local jurisdictions are "caught" and want to avoid accountability if the object of the actions is unsuccessful and does not materialize.

In this case, the circuit court erred in allowing the City to get off the hook. The project may be over, but the actions leading to it happened and can be repeated. The courts are the place where parties, not the least of which this state's local governments, are made to account for actions they have taken contrary to law and prevent them from repeating those illegal actions. Such an accounting is neither "contingent, hypothetical, or abstract." Rather, it supports the rule of law and provides future guidance for local governments and courts in analyzing the law and evaluating and preventing similar situations. This court should reverse the circuit court's grant of summary judgment and send the case back for a full trial.

## ARGUMENT

### I. THE APPELLANTS' ACTION DID NOT SEEK ONLY TO STOP THE DORCHESTER PUBLIC-PRIVATE PARTNERSHIP; IT ALSO SOUGHT AN ADJUDICATION OF THE CITY'S UNLAWFUL ACTIONS IN PARTNERSHIP WITH A PRIVATE DEVELOPER, WHICH HAS NOT YET BEEN TRIED.

#### a. While The Dorchester Project failed, the underlying legal issues regarding the city's processes and decision-making remain unresolved.

The Respondents rely heavily on the case of *Croft v. Town of Summerville*, 433 S.C. 473, 860 S.E.2d 352 (2021).

Croft was a consolidated appeal of two approvals by the Summerville Board of Architectural Review of building plans submitted by the developer. Croft, 860 S.E.2d at 354-355. Those appellants argued that the Summerville board erred in approving those plans for various reasons. When the appeal of those building plan approvals came before the Supreme Court, the developer had abandoned the project. When the court explored that fact at oral argument, counsel for both parties had to concede that the building plan approval appeal was likely moot. Croft, 860 S.E.2d at 356

The only relief sought by the appellants in that case was the invalidation of the building plan approvals granted by the board.

> "At its core, the [***8] fight in this case is over whether the Developer can build the Project as currently approved by the Board, or whether the Developer must return to the Board and obtain new approval before building the Project. This controversy ended when the Developer decided not to build the Project." Id.

If there was no building project, invalidating the approvals would fit the definition of mootness. "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an

existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." Id., citing Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).

This case could not be more different. The significant difference between those building approval appeals and this case is that this case is a declaratory judgment action challenging illegal actions by Summerville in entering into the public-private partnership with the developer. The complaint seeks review and adjudication by the court of numerous instances of violation of the law by the Town, in addition to a separate injunctive relief cause of action seeking to stop the Defendants from repeating their illegal actions. There is an actual controversy (unless the Town concedes it violated the law, which at, this writing, it has not) and much work for the court to do in reviewing these facts and the law, deciding whether the Town violated the law, and preventing the Town from doing so again. Those issues are far from moot, and the circuit court erred in prematurely calling an end to this case based on the Town's plea of mootness.

This is not a case like *Sloan*, where the government body not only belatedly complied with its legal obligations after filing the complaint (in *Sloan*, producing the documents, in this case, abandoning the illegal project) but also conceded it was wrong. *Sloan*, 630 S.E.2d at 477-478. In that case, the plaintiff sought a declaratory judgment that the Friends group was an alter ego for the Hunley Commission and a public body. After filing the complaint, the defendant Friends group not only produced the documents under FOIA but also conceded it was a public body. Id. Accordingly, there was no further relief the court could grant.

Likewise, in *Seabrook v. City of Folly Beach*, 337 S.C. 304, 523 S.E.2d 462 (1999), the plaintiffs brought an action against the city alleging that the city had no authority to impose conditions upon

the development of their land. *Seabrook*, 523 S.E.2d at 462. After the trial court found in favor of the plaintiffs, the city removed the conditions and approved the plat. *Id*. In that case, though, there was a trial, the city was adjudged to have acted wrongly, and the city corrected its error. Here, there has been no adjudication of the Town's wrongful conduct in this case, nor has the Town conceded its violation of the law.

Here, the Town has not conceded anything and has not been adjudged in the wrong, and the instances of wrongdoing outlined in the complaint remain unaddressed. In the interest of supporting the rule of law and holding local government accountable to abide by state enabling legislation and its local ordinances, this court should reverse the circuit court's decision and send this case back for a full trial.

Allowing a local government to abandon its wrongdoing once it is made public by initiating litigation through the doctrine of mootness is bad public policy. It could incentivize local governments to terminate controversial projects whenever they are legally challenged to avoid judicial scrutiny of their processes. Again, this is not consistent with the rule of law in this state and should not be supported by the courts of this state.

**b. A declaratory judgment could guide the legality of the city's actions and prevent similar issues in future projects.**

The SC Declaratory Judgment Act allows challenges to unlawful government conduct even in precisely these circumstances.

> Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

S.C. Code Ann. § 15-53-20.

"The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a [**889] violation of the rights or a disturbance of the relationships." Graham v. State Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing Williams Furniture Corp. v. Southern Coatings & Chemical Co., 216 S.C. 1, 56 S.E.2d 576 (1949)); S.C. Code Ann. § 15-53-130 (1977).

Dismissing the case as moot frustrates this purpose and is contrary to the intent and purpose of the Declaratory Judgment Act and the policy behind the law of mootness in this state. This case, as pled in the complaint, has not been decided by the failure of the Dorchester project, and this court should allow the case to proceed to a decision as envisioned by the clear language of the Declaratory Judgement Act, in the interest of justice and support of the rule of law in this state.

## II. THE CASE FITS CLEARLY WITHIN THE EXCEPTIONS TO THE MOOTNESS DOCTRINE, INCLUDING EVADING REVIEW, PUBLIC INTEREST, AND EFFECT ON FUTURE EVENTS.

As argued above, the declaratory judgment cause of action in the complaint is not moot. Even if the Dorchester Project failed, however, sound policy reasons remain embodied in the exceptions to mootness as developed in this state's jurisprudence, compelling this case to be tried on the merits.

The Curtis court identified three general areas of exception to the mootness doctrine in this state. *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001).

An appellate court could take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. *Curtis*, 549 S.E.2d at 596, citing *Byrd v. Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996); *Citizen Awareness Regarding Educ. v. Calhoun County Publ'g, Inc.*, 185 W. Va. 168, 406 S.E.2d 65 (W. Va. Ct. App. 1991) (holding an appellate court could consider

newspaper's appeal from the trial court's injunction compelling the newspaper to publish political action advertisements even though the case was moot because the issue was capable of repetition yet evaded review).

An appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of significant public interest. *Id*., citing *Berry v. Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (the court recognized that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest).

Finally, if a decision by the trial court may affect future events or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give adequate relief in the present case. Id., citing 5 AM. JUR. 2D Appellate Review § 649 (1995).

The "capable of repetition yet evading review" exception should apply where the City initiates and then abandons controversial projects before legal challenges can be fully litigated. This practice creates the situation this exception is meant to address by ending the period available for review by unilaterally ending its wrongful behavior once it is challenged in an action filed in court. This deprives citizens of the ability to obtain judicial review.

There is a strong public interest in clarifying the legal requirements for significant development projects and ensuring government transparency. Even if this specific project is over, a ruling could provide meaningful guidance for future projects. See *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001) (outlining the public interest exception); and *Sloan v. Department of Transportation,* 365 S.C. 299, 618 S.E.2d 876 (2005) (the court applied the public interest exception to address issues of public importance regarding state procurement procedure).

In this case, the "public interest" exception supports deciding this case given the allegations of FOIA, ethics, and public contracting violations by the City in the Second Amended Complaint.

The Supreme Court, almost 80 years ago, recognized the need to address matters of public importance in local governance even where the actions complained of in the pleadings might be considered moot:

> the case is not an ordinary one; it is not a private controversy between individuals, as such. On the contrary, it is defended by [***28] an intended governmental agency which the legislature undertook to create by their enactments; and raised on the record are [**97] earnestly argued public questions of importance. The last stated factor brings into play the principle, now generally established, that questions of public interest originally encompassed in an action should be decided for future guidance, however abstract or moot they may have become in the immediate contest.
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> *Ashmore v. Greater Greenville Sewer Dist*., 211 S.C. 77, 96, 44 S.E.2d 88, 96-97 (1947).

Allowing the Town to avoid review under the cloak of mootness could invite future misconduct by this or other municipalities and should not be allowed by this court.

## CONCLUSION

Dismissal of this case before trial frustrates government accountability and transparency regarding development projects, particularly those in which local government is a "partner." This case raises issues of substantial public importance regarding municipal governance, ethics, and compliance with state and local laws that warrant judicial resolution despite the Dorchester's termination. This declaratory judgment action is an opportunity for guidance. It must be allowed to proceed to trial in the interest of good local governance and the rule of law in this state. For these reasons, the Appellants respectfully request that this Court reverse the lower court and remand this case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of Initial Reply Brief of Appellants has been served upon opposing counsel by emailing a copy on September 20, 2024, to:

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