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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 David P. Caraker, Jr.
Circuit Court Judge

Circuit Court Case No. 2024 CP 2200577

Emanuel Stikas, Trustee of the Stikas Revocable Living Trust, dated February 1, 2023, d/b/a The Village Shops; Donald W. Reid and Katheryn W. Reid, husband and wife; Elizabeth Gattshall Hawkins Martin; Tall House Farm, L.P.,

Appellants,

v.

Georgetown County; David E. Tanner; RCB Land Holdings, LLC; Magic Oaks, LLC,

Respondents.

FINAL BRIEF OF APPELLANTS

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July 30, 2025

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A. Failing to consider and apply applicable law, striking properly pleaded and substantially relevant allegations from Plaintiffs' Complaint that were essential elements of Plaintiffs' cause of action, effectively dismissing that cause of action;		
B. Exceeding the proper scope of inquiry, considering contested factual matters beyond the face of the Complaint, and making findings of fact that serve as a final determination regarding Plaintiffs' cause of action; and		
C. Precluding Plaintiffs from litigating their claim that Georgetown County Council exceeded its power by adopting the changed ordinance text, plan, and map without complying with the statutory provision in Section 6-29-760(A) of the Enabling Act? -----		16
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STATEMENT OF ISSUES ON APPEAL

**DID THE TRIAL COURT ERR IN GRANTING DEFENDANTS' RULE 12(f),
SCRPC, MOTION TO STRIKE BY:**

- A. FAILING TO CONSIDER AND APPLY APPLICABLE LAW, STRIKING PROPERLY PLEADED AND SUBSTANTIALLY RELEVANT ALLEGATIONS FROM PLAINTIFFS' COMPLAINT THAT WERE ESSENTIAL ELEMENTS OF PLAINTIFFS' CAUSE OF ACTION, EFFECTIVELY DISMISSING THAT CAUSE OF ACTION;**

- B. EXCEEDING THE PROPER SCOPE OF INQUIRY, CONSIDERING CONTESTED FACTUAL MATTERS BEYOND THE FACE OF THE COMPLAINT, AND MAKING FINDINGS OF FACT THAT SERVE AS A FINAL DETERMINATION REGARDING PLAINTIFFS' CAUSE OF ACTION; AND**

- C. PRECLUDING PLAINTIFFS FROM LITIGATING THEIR CLAIM THAT GEORGETOWN COUNTY COUNCIL EXCEEDED ITS POWER BY ADOPTING THE CHANGED ORDINANCE TEXT, PLAN, AND MAP WITHOUT COMPLYING WITH THE STATUTORY PROVISION IN SECTION 6-29-760(A) OF THE ENABLING ACT?**

STATEMENT OF THE CASE

A. Introduction

Appellants contend that the Trial Court erred in granting Defendants' Rule 12(f), SCRPC, Motion to Strike by: (1) failing to apply applicable law and the proper standard of inquiry; (2) improperly striking well-pleaded, material, and substantially relevant allegations from Plaintiffs' Complaint that formed the basis of their cause of action; (3) improperly considering and making findings of fact based on extrinsic evidence of contested factual matters; (4) improperly ruling that allegations forming the basis for Plaintiffs' cause of action and the cause of action itself were "moot and immaterial," effectively dismissing that cause of action; and (5) failing to consider that although Defendants' motion was characterized as a Motion to Strike, it operated as a Motion to Dismiss and should have been treated as a Motion to Dismiss.

The Trial Court's decision to grant Defendants' Motion to Strike serves as a final determination of Plaintiffs' claim that Georgetown County Council's failure to follow Section 6-29-760(A) of the South Carolina Comprehensive Planning Enabling Act, (hereinafter "Enabling Act"), S.C. Code, Section 6-29-310, *et seq.*, was *ultra vires* as set forth hereinafter.

B. Summary of Plaintiffs' Claim

Appellants are Plaintiffs (adjoining landowners) in a Declaratory Judgment action filed on June 18, 2024, challenging the validity of two zoning ordinances approved by Georgetown County Council on April 23, 2024. (Complaint, pars. 1-2) (ROA, pp. 14-15). One of the causes of action raised in the Complaint claims that the approved zoning ordinances were void from their inception due to *ultra vires* acts of County Council in failing to follow a provision in Section 6-29-760(A) of the Enabling Act which states:

No change in or departure from the text or maps as recommended by the local planning commission may be made

pursuant to the hearing unless the change or departure be first submitted to the planning commission for review and recommendation.

(Complaint, pars. 2, 7(c), 52-55, 59, 75-76) (ROA, pp. 14-17, 28-30, 34).

The zoning ordinances pertain to a proposed housing development called "Magic Oaks," on land next to Pawleys Creek that was designated by the Georgetown County Comprehensive Land Use Plan as "Conservation Preservation." Plaintiffs' Complaint alleges that on February 15, 2024, Planning Commission held a public hearing at which it reviewed and recommended approval of the proposed ordinance text, plan, and map for Magic Oaks. Nearly two months later, on April 4 and 5, 2024, the Developer made changes to the text, plan, and map. These changes included the addition of a public kayak launch and items related to the public kayak launch. The changes were not part of the original plan, text, and map reviewed, considered, and recommended by Planning Commission on February 15, 2024. Without going back to the Planning Commission for review of the modifications, the "changed plan" was submitted to County Council for approval at Second Reading on April 9, 2024, and for final approval at Third Reading on April 23, 2024. (Complaint, pars. 2, 7(c), 52-55, 59) (ROA, pp. 14-17, 28-30).

According to Enabling Act, Section 6-29-760(A), the "changed plan" should have been submitted to the Planning Commission before being considered or approved by County Council. The changes were not submitted to the Planning Commission. Instead, County Council finally approved the changed ordinance text, plan, and map for Magic Oaks at its meeting on April 23, 2024. The Complaint alleges that this failure by County Council to follow Section 6-29-760(A) of the Enabling Act resulted in an *ultra vires* decision that rendered the zoning ordinances void from their inception as of April 23, 2024. (Plaintiffs' Complaint, pars. 2, 7(c), 52-55, 59, 75-76) (ROA, pp. 14-17, 28-30, 34).

A critical element of Plaintiffs' cause of action was the "change" to the plan that was improperly considered and approved by County Council without review or approval by Planning Commission as required by the Enabling Act. This "change" was the addition of a public kayak launch and items related to the public kayak launch. (Complaint, par. 7(c), 52) (ROA, pp. 14-17, 28).

C. Procedural History

1. Defendants' Motion to Strike

On August 23, 2024, Respondents RCB Land Holdings, LLC, and Magic Oaks, LLC, (Defendants in the lower court) filed a Motion to Strike all paragraphs of Plaintiffs' Complaint relating to the public kayak launch on the basis that the paragraphs were "moot and immaterial" because an alleged "contingency," (that is not a matter of record), supposedly did not occur, and, thus, the public kayak launch would not be constructed. (ROA, pp. 108-111). This alleged contingency did not appear anywhere of record and was raised for the first time in Defendants' Motion to Strike.

2. Plaintiffs' Memorandum in Opposition

On September 16, 2024, Plaintiffs filed a Memorandum in Opposition to Defendants' Motion to Strike, (ROA, pp. 116-121), raising the following arguments:

- a. Plaintiffs' Complaint alleges that the challenged zoning ordinances were rendered "void" by the *ultra vires* acts of County Council as of April 23, 2024. Whether or not the public kayak launch is or is not ultimately constructed does not change Plaintiffs' claim that County Council did not have the power or authority to approve the "changed plan" in the first place. Something that is "void" cannot be reversed by events that occur *after* the fact.

- b. The proper inquiry is whether the allegations have any "substantial relation" to the cause of action. *Lucas v. Garrett*, 208 S.C. 292, 295, 38 S.E.2d 18, 20 (1946).
- c. Allegations in Plaintiffs' Complaint that reference changes to the plan, which include the public kayak launch, not only have a substantial relation to Plaintiffs' cause of action, but are critical elements of that cause of action.
- d. A Motion to Strike is limited to "defects" in the pleading itself, *i.e.*, "redundant, immaterial, impertinent or scandalous matter" within the four corners of the Complaint. It is not proper to consider extrinsic "evidence" that are matters of contested fact.
- e. While Defendants' motion was characterized as a "Motion to Strike," the relief requested would have the effect of dismissing Plaintiffs' cause of action.
- f. Defendants' Motion to Strike referenced a "contingency" that was not part of Plaintiffs' Complaint or the record. The question whether a contingency exists or was met is an issue of fact that is not properly considered in a Rule 12(f) Motion to Strike.

3. Affidavit of Defendant

Within minutes after Plaintiffs filed their Memorandum of Opposition on September 16, 2024, Defendants filed the following extrinsic evidence in support of their Motion to Strike: Affidavit from Tripp Nealy (an owner of one of the Developer Defendants) dated September 16, 2024, (ROA, pp. 112-113), attaching an undated Letter from a neighboring landowner, (i3, LLC), (ROA, p. 111), and a site plan referred to as the "Development Plan." (ROA, p. 110). The content of this extrinsic evidence purported to establish that (a) approval of the public kayak

launch was subject to an alleged "contingency" that had not been fulfilled, and (b) the public kayak launch would not ultimately be constructed.

4. WebEx Virtual Hearing

On September 19, 2024, a WebEx virtual hearing was held on Defendants' Motion to Strike. In addition to the matters raised in Plaintiffs' Memorandum in Opposition, Plaintiffs' Counsel specifically argued that the alleged "facts" contained in the Affidavit and Letter were not proper matters of record to be considered by the Court in this context. (Hearing Transcript, p. 16, ln. 23 - p. 17, ln. 4) (ROA, pp. 240-241). Neither the Affidavit nor the Letter had been subject to cross examination or rebuttal, and they had never been admitted as legitimate evidence at any point in time. The Trial Court responded to this argument as follows: "... when Mr. Crowl says [the kayak launch is not happening] as an officer of the court, I believe him when he says so." (Hearing Transcript, p. 22, lns. 14-17) (ROA, p. 246).

5. Court Order

After hearing, the Trial Court granted the Motion to Strike and requested Counsel for Defendants to draft an Order. (ROA, p. 248). On October 15, 2024, the Trial Court signed and filed the Order drafted by Counsel for Defendants. (ROA, pp. 5-8). According to the Order, the Trial Court considered and made findings based on the Affidavit and Letter submitted in support of Defendants' Motion to Strike. (Order, p. 2, 3, fn. 1) (ROA, pp. 6-7). The Order concluded that:

[T]his Court finds that Plaintiffs' allegations regarding the public kayak launch *and* the alleged failure to resubmit the amended plan to Planning Commission are moot and immaterial.

(Order, Page 3) (emphasis added) (ROA, p. 7). The Order struck out all allegations in Plaintiffs' Complaint referencing the public kayak launch which was the change to the development plan, text, and map, which formed the basis for Plaintiffs' *ultra vires* cause of action.

The Order cited no case or rule of law and failed to address the proper scope of inquiry in a Rule 12(f), SCRCPP, Motion to Strike, *i.e.*, whether the allegations requested to be stricken have any "substantial relation" to Plaintiffs' cause of action. Instead, relying on the extrinsic evidence presented by Defendants, the Trial Court granted the Motion to Strike and signed the Order prepared by Defendants' Counsel.

6. Rule 59(e) Motion to Alter or Amend

On October 25, 2024, Appellants filed a Rule 59(e), SCRCPP, Motion to Alter or Amend Judgment raising all the issues previously raised in their Memorandum of Opposition and in this appeal. (ROA, pp. 122-126). Appellants specifically raised the improper consideration of and reliance on the Affidavit and Letter on the following bases: (a) It was not proper to consider disputed facts submitted by way of extrinsic evidence in the context of a Rule 12(f) Motion to Strike. (b) The Affidavit and Letter addressed matters that allegedly occurred *after* Plaintiffs' cause of action had arisen and were not relevant to the Rule 12(f) Motion to Strike that was before the court. (c) The contents of the Affidavit and Letter had not been subject to cross-examination or rebuttal, nor had either been properly admitted into the record as legitimate evidence.

Appellants' Rule 59(e) Motion to Alter or Amend was denied without hearing or further explanation by a Form 4 abbreviated Order dated December 27, 2024. (ROA, pp. 9-11). Accordingly, the Trial Court's decision serves as a final determination of Plaintiffs' claim that County Council's failure to follow Section 6-29-760(A) was *ultra vires*. Plaintiffs filed a timely Notice of Appeal on January 5, 2025. (ROA, pp. 219-223).

STANDARD OF REVIEW

A. Motion to Strike/Motion to Dismiss

In a Rule 12(f), SCRPC, Motion to Strike, the usual standard of review is addressed to the sound discretion of the circuit court and will not be disturbed in the absence of an abuse of discretion or error of law. *Skywaves Corporation v. Branch Banking and Trust Co.*, 423 S.C. 432, 814 S.E.2d 643, 656 (Ct. App. 2018); *Williams v. South Carolina Nat. Bank*, 284 S.C. 346, 326 S.E.2d 187 (Ct. App. 1985). According to the South Carolina Supreme Court:

The exercise of discretion ... begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances.

Morris v. BB & T Corporation, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023). "An abuse of discretion occurs when the trial court is controlled by an error of law or when the court's order is based on factual conclusions without evidentiary support." *Citizens for Quality Rural Living, Inc. v. Greenville Cnty. Plan. Comm'n*, 426 S.C. 97, 103, 825 S.E.2d 721, 724 (Ct. App. 2019). (citations omitted) (internal quotation marks omitted).

In the present case, although the motion at issue was characterized as a "Motion to Strike," the relief requested operated as a "Motion to Dismiss." In granting the Motion to Strike, the Trial Court Order effectively dismissed Plaintiffs' cause of action without regard to the proper inquiry in a Motion to Dismiss. Appellants submit that the standard of review in this circumstance is set forth in *Grazia v. South Carolina State Plastering, LLC*, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010) (citations omitted) (internal quotation marks omitted) as follows:

[A] motion to strike under Rule 12(f), SCRPC, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRPC. In reviewing a ruling on a motion to dismiss a claim, this Court must base its decision solely

on the allegations set forth on the face of the complaint. The motion cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.

In reviewing a decision on a Motion to Dismiss under Rule 12(b)(6), SCRCP, “the appellate court applies the same standard of review as the trial court.” *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 247 (2007). While the Motion to Strike in this case did not explicitly “challenge” the Plaintiffs’ theory of recovery, the relief requested implicitly challenged Plaintiffs’ theory of recovery by eliminating it.

B. Matters of Law and Statutory Interpretation

The standard of review for matters of law and statutory interpretation is *de novo*. *South Carolina Public Interest Foundation v. Calhoun County Council*, 432 S.C. 492, 854 S.E.2d 836, 837 (2021), (“[T]he interpretation of a statute is a question of law for the Court to review *de novo*.”) Accordingly, with regard to matters in this case involving applicable law and the interpretation of law, the appellate court’s review is *de novo*.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' RULE 12(f), SCRPC, MOTION TO STRIKE BY:

- A. **FAILING TO CONSIDER AND APPLY APPLICABLE LAW, STRIKING PROPERLY PLEADED AND SUBSTANTIALLY RELEVANT ALLEGATIONS FROM PLAINTIFFS' COMPLAINT THAT WERE ESSENTIAL ELEMENTS OF PLAINTIFFS' CAUSE OF ACTION, EFFECTIVELY DISMISSING THAT CAUSE OF ACTION;**

- B. **EXCEEDING THE PROPER SCOPE OF INQUIRY, CONSIDERING CONTESTED FACTUAL MATTERS BEYOND THE FACE OF THE COMPLAINT, AND MAKING FINDINGS OF FACT THAT SERVE AS A FINAL DETERMINATION REGARDING PLAINTIFFS' CAUSE OF ACTION; AND**

- C. **PRECLUDING PLAINTIFFS FROM LITIGATING THEIR CLAIM THAT GEORGETOWN COUNTY COUNCIL EXCEEDED ITS POWER BY ADOPTING THE CHANGED ORDINANCE TEXT, PLAN, AND MAP WITHOUT COMPLYING WITH THE STATUTORY PROVISION IN SECTION 6-29-760(A) OF THE ENABLING ACT.**

1. Proper Scope of Inquiry in a Motion to Strike

Rule 12(f), SCRPC, states: "Upon motion pointing out the defects complained of ... the court may order stricken from any pleading any insufficient defense or any *redundant, immaterial, impertinent or scandalous matter.*" (emphasis added). By its own terms, a Rule 12(f) Motion to Strike is limited to defects within the pleading itself, *i.e.*, "redundant, immaterial, impertinent or scandalous matter." In interpreting this Rule, South Carolina courts have long held that the proper inquiry in a Motion to Strike is "if the allegation has *any substantial relation* to the cause of action or defense alleged, it is relevant and should *not* be stricken." *Lucas v. Garrett*, 208 S.C. 292, 295, 38 S.E.2d 18, 20 (1946) (emphasis added); *See also, Poole v. Combined Utility System of City of Easley*, 269 S.C. 271, 274, 237 S.E.2d 82, 84 (1977).

The following cases illustrate that it is reversible error for the trial court to go beyond the limited inquiry permitted in a Rule 12(f) Motion to Strike and make a decision about disputed

facts that affects a claim or defense. In a situation squarely on point with the case at bar, the Court of Appeals in *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 390 S.E.2d 370 (Ct. App. 1990), reversed the trial court for striking matters that "effectively precluded [the Defendant] from presenting evidence proving the defense." *Id.* at 93, 372. The court observed that the trial court's decision to strike inappropriate matters

demonstrates a misconception of the nature of a motion to strike. Such a motion seeks to have stricken from a pleading 'any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.' S.C.R.C.P. Rule 12(f). In ruling on such a motion, a Court decides whether a party should be *allowed* to plead a defense or other matter, *not* whether there are facts supporting what has been pleaded.

Id. at 93, 372. (emphasis added).

Likewise, the court in *Williams v. South Carolina Nat. Bank, supra*, 348, 188, applying the same reasoning as *Alladin*, reversed the trial court's granting of a Motion to Strike on the basis that "the trial court abused its discretion in granting [a] motion to strike as it related to the contributory negligence defense." In other words, by granting the Motion to Strike, the trial court had effectively *precluded* Defendant from pursuing its defense. *See also Robinson v. Code*, 384 S.C. 582, 587, 682 S.E.2d 495, 497 (Ct. App. 2009) ("In ruling on such a motion, a Court decides whether a party should be *allowed* to plead a defense or other matter, *not* whether there are facts supporting what has been pleaded.") (emphasis added).

These cases address the precise situation in the present case. The Trial Court's granting of Defendants' Motion to Strike effectively precludes Plaintiffs from presenting evidence of the "changed plan" that is the basis of their *ultra vires* claim. South Carolina law is clear that a pretrial Rule 12(f) Motion to Strike is *not* a proper vehicle to evaluate the merits of claims

alleged in Plaintiffs' Complaint or to make factual determinations about whether a cause of action may or may not ultimately prevail, fail, or be rendered moot.

2. Stricken Allegations Were Substantially Relevant

Plaintiffs' Complaint claims that Council's approval of the challenged ordinances was *ultra vires* because Council improperly approved an amended text, plan and map. The modified text, plan and map had never been reviewed by Planning Commission as required by Section 6-29-760(A) of the Enabling Act which states:

No change in or departure from the text or maps as recommended by the local planning commission may be made pursuant to the hearing unless the change or departure be first submitted to the planning commission for review and recommendation.

The proper inquiry should have been: Does the matter requested to be stricken have "any substantial relation" to the cause of action alleged in Plaintiffs' Complaint? If so, "it is relevant and should not be stricken." *Lucas* at 295, 20. In this case, the answer is clearly "yes." The changes made to the plan, text, and map, which include the public kayak launch, are the very basis of Plaintiffs' *ultra vires* cause of action which makes them substantially related and relevant. This should have been the end of the inquiry and the Motion to Strike should have been denied on that basis.

3. Improper Consideration of Extrinsic Evidence

In granting Defendants' Motion to Strike, the Trial Court failed to address the proper scope of inquiry, *i.e.*, whether the allegations stricken have any "substantial relation" to Plaintiffs' cause of action. Instead, the Trial Court went far beyond the scope of a Rule 12(f) Motion to Strike and improperly considered extrinsic evidence of contested facts that were irrelevant and not properly matters of record. By doing this, the Trial Court made decisions that

relate to the *merits* of Plaintiffs' claims and the *merits* of defenses asserted by the Developer Defendants, not to the *relevance* of the allegations at issue or any defect or impropriety in the pleading.

a. Affidavit and Letter

The Court Order explicitly states that it considered an Affidavit from the Developer Defendant and a Letter from a neighboring landowner. (Order, p. 2, 3, fn. 1) (ROA, pp. 6-7). These items raise contested matters that allegedly occurred *after* the *ultra vires* actions giving rise to Plaintiffs' cause of action, *after* the zoning ordinances in question were allegedly rendered void by those *ultra vires* acts, and *after* the Complaint itself was filed. Neither the Affidavit nor the Letter had ever been subject to cross examination or rebuttal, and they were never admitted as legitimate evidence. This issue was raised by Plaintiffs' Counsel at the motion hearing (Hearing Transcript, p. 16, ln. 23 - p. 17, ln. 4) (ROA, pp. 240-241). The Trial Court responded:

... when Mr. Crowl says [the kayak launch is not happening] as an officer of the court, I believe him when he says so.

(Hearing Transcript, p. 22, lns. 14-17) (ROA, p. 246). The Court improperly accepted these disputed factual matters as true and then based its decision on them.

Plaintiffs' Complaint alleges that the challenged zoning ordinances were rendered "void" by the *ultra vires* acts of County Council as of April 23, 2024. By definition, something that is "void" has no legal effect from inception. "It is ineffectual so that nothing can cure it." (*Black's Law Dictionary, 4th Ed.; Westlaw Practical Law*). Something that is "void" cannot be reversed by events that occur *after* that which rendered it void. Subsequent evidence demonstrating that the improper changes to the text, ordinance, and development plan will not ultimately be constructed does not change Plaintiffs' claim that County Council did not have the power or authority to approve the revised ordinances.

Based on this improper consideration of matters outside the Complaint as well as the truth of these matters, the Court Order concluded:

[T]his Court finds that Plaintiffs' allegations regarding the public kayak launch *and* the alleged failure to resubmit the amended plan to Planning Commission are moot and immaterial.

(Order, p. 3) (ROA, p. 7) (emphasis added). The decision improperly struck allegations that were substantially relevant to Plaintiffs' cause of action and prevents Plaintiffs from presenting evidence that forms the basis for this cause of action.

b. Contingency

Relying on the Affidavit and Letter, the Trial Court also made another elaborate and curious finding about a "contingency" that does not appear anywhere as part of the record. There is no "contingency" mentioned in Plaintiffs' Complaint. There is no "contingency" that appears in the approved ordinances or plans. The notion of a "contingency" was raised for the first time by Respondents in their Motion to Strike, and is in the nature of a defense or legal argument. The question whether a contingency exists or was met, involves issues of contested fact that relate to the *merits* of Defendants' defense and goes far beyond that which may be properly considered in this pretrial Rule 12(f) Motion to Strike.

Based on nothing other than misplaced reliance on alleged "facts" contained in an Affidavit and Letter submitted by Defendants, the Trial Court improperly made the following findings:

The inclusion of the public kayak launch was contingent upon receiving approval from the adjoining Hammock Shops landowner for access to the south boundary of its property for parking and access to the kayak launch. It was clearly identified in the development plan that the public kayak launch was subject to this contingency.

On August 14, 2023, i3, LLC, on behalf of the Hammock Shops informed Defendants that the Hammock Shops landowner is 'unable to provide access to the South boundary of Hammock Shops Real Estate for the intended purpose of a public boardwalk and kayak launch.' Thus, the contingency upon which the public kayak launch was dependent will not occur.

(Order, p. 2) (ROA, p. 6) (footnotes omitted).

The Trial Court not only considered extrinsic evidence, but wholly relied on the disputed facts contained therein as a basis for making improper findings of fact in a Rule 12(f) Motion to Strike where factual findings have no place.

4. Order Effectively Dismisses Plaintiffs' Cause Of Action

Although the motion at issue was characterized as a "Motion to Strike," the relief requested had the effect of a final determination of Plaintiffs' claim regarding the *ultra vires* nature of County Council's approval of the "changed plan." The South Carolina Supreme Court in *Grazia, supra*, and the Court of Appeals in *Robinson, supra*, recognized that when a Motion to Strike has the effect of a Motion to Dismiss, it should be treated as a Rule 12(b)(6), SCRPC, Motion to Dismiss.

a. Proper Inquiry in Motion to Dismiss

In a Motion to Dismiss “[t]he question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states *any* valid claim for relief.” *Doe v. Marion*, 373 S.C. 390, 398, 645 S.E.2d 245, 247-48 (2007). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on *any* theory, then dismissal under Rule 12(b)(6) is improper.” *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019). (emphasis added).

b. Elements of a Declaratory Judgment Action

This is a Declaratory Judgment action. The South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann., Section 15-53-30, states:

Any person ... whose rights, status or other legal relations are affected by a statute, [or] municipal ordinance may have determined any question of construction or validity arising under the ... statute, [or] ordinance ... and obtain a declaration of rights, status or other legal relations thereunder.

“A cause of action under the Declaratory Judgments Act is established by showing the existence of a *justiciable controversy*, defined as a real and substantial controversy which is appropriate for judicial determination.” *Farmer v. CAGC Insurance Company*, 424 S.C. 579, 588, 819 S.E.2d 142, 147 (Ct. of App. 2018) (citations omitted) (emphasis added). *See also Guimarin & Doan v. Georgetown Textile & Mfg. Co.*, 249 S.C. 561, 566, 155 S.E.2d 618, 621 (1967), and *Jowers v. South Carolina Department of Health and Environmental Control*, 423 S.C. 343, 354 815 S.E.2d 446, 452 (2018).

A justiciable controversy is “an existing controversy or at least the ripening seeds of a controversy.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423-424, 593 S.E.2d 462, 467 (2004) (citations omitted). “The Act is to be *liberally construed* and administered to achieve its intended purpose to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595, 748 S.E.2d 781, 786 (2013) (citations omitted) (emphasis added).

Plaintiffs’ Complaint alleges that their rights and legal relations were affected by the *ultra vires* approval of the zoning ordinances, as detailed above, and asks the court to determine rights, status, validity and other legal relations with regard to these statutes, ordinances, and decisions. The allegations referencing the changes made to the development plan after it was

reviewed and approved by Planning Commission are an integral and relevant part of Plaintiffs' *ultra vires* claim. Accordingly, Plaintiffs' Complaint properly stated a cause of action under the Declaratory Judgments Act and should not have been dismissed.

5. Plaintiffs are Precluded from Litigating Claim

The Trial Court's Order effectively precludes Plaintiffs from litigating their *ultra vires* claim on the merits. The basic legal framework for planning and zoning is set forth in the Local Government Comprehensive Planning Enabling Act of 1994. The purpose of the Enabling Act is to enable or authorize local governments to engage in planning and in regulating the use and development of land. As noted in Section 6-29-330(A): "A municipality may exercise the power granted *under the provisions of this chapter* in the total area within its corporate limits." (emphasis added). The phrase "under the provisions of this chapter" indicates that the "powers granted" are both defined by and limited by the Enabling Act.

In *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2d 777 (2010), the South Carolina Supreme Court applied the general principle of applying an Enabling Act that was articulated by the Rhode Island Supreme Court in *Hardy v. Zoning Board of Review of the Town of Coventry*, 321 A.2d 289, 290–291 (R.I. 1974), as follows:

[Where a local government] purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is *ultra vires* of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void.

The *Sinkler* court made it abundantly clear that the failure of County Council to comply with the requirements of the Enabling Act was *ultra vires*:

[W]e hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD *as contemplated by the terms of the Enabling Act*.

Based on the foregoing, we ... hold the circuit court properly invalidated the ordinance rezoning the Walpoles' property from AG-15 to a PD district *because the requirements for a PD district under the Enabling Act were not met.*

Sinkler at 78, 782 (emphasis added). The holding specifically turned on the county's failure to comply with the Enabling Act. This is directly on point with Plaintiffs' claim in the present case.

Article V, Section 11 of the South Carolina Constitution provides: "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law." Because this grant of general jurisdiction supports the filing of this *ultra vires* action in Circuit Court, it has served as the basis of all the following South Carolina *ultra vires* cases except *O'Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008), which was filed in the original jurisdiction of the Supreme Court.

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. *See, e.g., South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *Sinkler v. County of Charleston, supra* (holding circuit court properly invalidated rezoning); *O'Brien v. South Carolina ORBIT*, 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city's decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of conveyance by Circuit Court); *City of North Charleston v. North Charleston District*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable); *Sloan v. School District of*

Greenville, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgment that certain contracts entered into by school district were *ultra vires* and, therefore, invalid).

By striking allegations of Plaintiffs' Complaint that provide evidence of the changes to the development plan that form the basis for the *ultra vires* acts of County Council, the Court has improperly precluded Plaintiffs from litigating a legitimate and well-founded claim on the merits.

6. Abuse of Discretion

Appellants contend that this matter should be reviewed according to the standard for a Motion to Dismiss as set forth in Paragraph 4(a), above. However, even if abuse of discretion is the proper standard, the Trial Court abused its discretion and committed reversible error by basing its decision to grant the Motion to Strike "on an error of law and on factual conclusions without evidentiary support." *Citizens for Quality Rural Living, Inc., supra*, at 103, 724.

According to the South Carolina Supreme Court, the exercise of discretion is a judgment "guided by sound legal principles." *Morris, supra* at 587, 397. The *Morris* court observed that proper "exercise [of] discretion will be apparent when the record indicates the court followed ... a thought process" that involves three distinct elements: (a) "the trial court's clear understanding of the applicable law;" (b) "sound analysis of the situation before it in light of the law;" and (c) a "ruling that follows the law and is supported by the facts and circumstances." *Id.* at 587, 397.

The Trial Court's Order in the present case does not demonstrate any of these three necessary elements. The Order does not cite a single case or statute or rule of law indicating that the Trial Court had a clear understanding of the applicable law. The Order does not even recite the verbiage in Rule 12(f), SCRCF, itself. There is no analysis of the situation in light of the law.

There is nothing in the Order to establish what, if any, legal standard the court understood or applied in making its decision. To the contrary, everything about the Order indicates that the proper legal standard was not applied. Instead, the decision appears to have been based on erroneous law and improper findings of fact as set forth in detail above.

CONCLUSION

For the foregoing reasons, Appellants respectfully request this court to reverse the Trial Court's decision granting Respondents' Motion to Strike and permit Appellants to litigate their cause of action on the merits.

Respectfully submitted,

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