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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable G. D. Morgan, Jr.
Circuit Court Judge

Appellate Case No. 2026-000199

Dennis Floyd Bivens, ... Appellant,

v.

York County and Joshua Edwards, York County Manager, Josh Reinhardt, York County Development Services Manager, and Jonathan Buono, York County Planning and Development Services Director, each in their official capacities, ... Respondents.

APPELLANT REPLY BRIEF

Dennis Floyd Bivens here files Appellant's Reply to the Initial Brief of Respondents and would respectfully show the following.

Respectfully submitted,

HALFORD LAW FIRM
J. Cameron Halford-Attorney at Law-LLC
/s/. J. Cameron Halford
S.C. Bar Id. 17184
Post Office Box 172
Barnwell, South Carolina 29812
803-524-8659
e-mail: cam@halfordlaw.net

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REPLY

In Reply, the core issue in this appeal is whether the circuit court erred in Rule 12(b) SCRCP review by dismissing Appellant Biven's complaint not global resolution of the merits. The complaint challenged county planning actions inherent to the land use at 7149 Logistics Lane by Silfab, not merely a zoning violation. Land use is directly implicated. The Bivens' home is next to the site. The siting and now-changed land use did not occur at the site *until after* the York County Board of Zoning Appeals (BZA) ruled unanimously that solar panel and solar cell manufacturing was not permitted at the Light Industrial parcel. Respondent's Initial Briefing, respectfully, marginalizes the circumventing of due process and overstates the legal effect of a December 27, 2022, administrative "verification" letter and related FILOT language ignoring the significance of the BZA ruling. The circuit court fails to view most favorably to Bivens all facts, evidence, and inferences under its Rule 12(b) SCRCP where there is no zoning approval, in fact. The trial court's two-page Form-4 order transforms to a (22) page final order, wherein Respondent's arguments effectively attempt adjudicating the entire case on the merits with sweeping proclamation that the county had materially complied with all aspects of zoning, adopted carte blanche by the trial court where no zoning approval based on a purported "zoning compliance verification". Appellant further respectfully asserts the court abused its discretion by failing to consider Exeter deed restrictions that expressly prohibited toxic and hazardous chemical use at the site.

The circumventing and evading of constitutional due process, state statutes, and local zoning code is inherently relevant to the improper siting of a heavy industrial chemical manufacturing site at a Light Industrial parcel next to Appellant's home and two (2) schools. It is not rhetoric or extraneous background noise. It is fact. It has happened. Now, fully manifested at the "site", is an unlawful change of land use prohibited by code and the BZA March 30, 2024, ruling. The construction occurs under the less than watchful eyes of the county administrative

Planning and Development division, in *defiance* of the BZA ruling. York County repeatedly issued authorization(s) for Silfab to move forward to full construction, *after* the May 30, 2024, BZA reversal. This is where the Silfab "inducement" arguments fail, respectfully. (Res.br. 4 at II). As for the county Respondents, the word "malfeasance" is an understatement. An economic development project, no matter how monetarily enticing, cannot ignore the requirement of zoning approval.

As stated by the South Carolina Supreme Court, "an ordinance rezoning a particular piece of property, like an ordinance adopting a comprehensive zoning plan, is legislation, pure and simple." *Hampton v. Richland County*, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1986). To be clear, it is not misapprehension, misstatement, rumor, false allegation, or harsh rhetoric where a unlawful change of land use now exists at the site that was never legislatively authorized; and certainly not by purported "verification" letter or "zoning compliance verification". Zoning code violations are patent. The site is zoned Light Industrial by code and is now occupied by the foreign corporation's Heavy Industrial processes which inherently involve the use of toxic and hazardous chemicals next to Appellant's home and two schools. The unauthorized change of land use now sits fully operational (and not "*under development*" Rep.br. at 4 fn.4)) at 7149 Logistics Lane in Fort Mill. Hence the exaggerated reach by Respondent's arguments that a FILOT agreement and FILOT ordinance language "repeals" the zoning, where there was zero notice or meaningful opportunity to be heard provided by the county to Appellant, or the general public. Appellant simply did what the county government should have done, permissible under S.C. Code Ann §6-29-950(A). In dismissing Biven's complaint, the trial court under Rule 12 SCRCP impermissibly draws conclusory legal conclusions and improperly applies "injury in fact" as the standard, where the statute cites "would be specially damaged", constituting reversible error.

There is a distinct difference between the county adopting of a FILOT tax incentive, and re-zoning legislation. "We recognize that the adoption of zoning ordinances is a legislative function

and that a wide discretion rests with the governing authority of the municipality in determining the wisdom or expediency of such legislation." *Conway v. City of Greenville,* 254 S.C. 96, 173 S.E.2d 548 (S.C. 1970). Provided, however, there is a limit noted by the Conway court: 'Whether a zoning ordinance deprives a citizen of constitutional rights is a judicial question" Id. at 648. This principal was reinforced in *Quail Hill, LLC v. County of Richland,* 387 S.C. 223, 692 S.E.2d 499 (S.C. 2010) where the Supreme Court stated that a zoning designation may be changed only through legislative action by ***county council*** (Id. at 223), not the administrative zoning department. The trial court failed to view the distinction most favorably to Bivens in dismissing the case under its Rule 12(b)(6) SCRCP review.

Appellant, like many others, has vigorously asserted that the land use does not belong next to homes and schools. The question is, how did the change of land use get this far this quickly after the BZA unanimously ruled that solar panel and solar cell manufacturing was not permitted at the site. (R. p. __ BZA Reversal Order 5/30/2024). The county government planning and development division, however, begins repeatedly issuing construction authorization(s) to Silfab for full construction, defying the BZA May 30, 2024, ruling. This is what results in justified community outage cited by Respondent. (Resp.br. at 4). The case is about much more than Silfab Solar, however. Respondent's arguments of "*inducement*" and millions invested at the site after the BZA ruling are firmly rebutted by South Carolina law as to reasonable relation to public health and safety, cited infra.

The county and Silfab had constructive knowledge of the nature and surroundings of the site, including deed restrictions and that the site was zoned Light Industrial. As stated by the Supreme Court in *Whitfield v. Seabrook,* 259 S.C. 66, 72, 73, 190 S.E.2d 743, 746 (1972) "any expenditures after the permit were issued were made with the knowledge of the impending zoning change and therefore could not create vested right". Silfab occupied a distribution warehouse before

the Exeter purchase, and the existing land use involved no hazardous or toxic chemicals, nor any exhaust stacks or industrial infrastructure. Like in *Whitfield,* our courts have stated "[T]he landowner had no vested right, which could not be taken away in the proper exercise of the protection of health and safety" and "any expenditures after the permit was issued were made with knowledge of the impending zoning change and therefore could not create a vested right." *Scott v. Carter*, 273 S.C. 509, 257 S.E.2d 719 (S.C. 1979) (citing *Whitfield v. Seabrook*, 259 S.C. 66, 190 S.E.2d 743 (1972). Appellant avers that the trial court erred under "zoning verification compliance" in weighing Silfab was "induced" or made substantial expenditures after the BZA reversal, and South Carolina law is clear. "[S]uch action by a property owner does not create vested rights superior to the interest of the public in the valid exercise of the police power." *Douglas v. City of Greenville,* 92 S.C. 374, 383, 75 S.E.2d 687 (1912); *Willis v. Woodruff,* et al, 200 S.C. 266, 20 S.E.2d 699 (1940). Amended deed restrictions applied to the parcel by Exeter's own amended deed restrictions after its purchase prohibiting toxic and hazardous chemicals. It was abuse of discretion for the court not to consider the deed restrictions permitted to be filed after oral argument, given no zoning approval existed. Despite respondent's attempt to try every facet of the case, this memorandum focuses strictly on trial court error at the dismissal under Rule 12 SCRCP. Underneath it all, however, the underlying case is about whether local governments can ignore binding zoning law with impunity endangering the environment, health, and safety of families, schools, and neighborhoods; leaving them, *one and all*, without meaningful protections of due process and law. The trial court effectively did so in dismissing Bivens case.

The law did not change by a "verification" letter, which contrary to Respondent assertions is *not* a red herring, rather is it where the trial court erred under incorrect legal conclusion drawn most favorably to respondent in error. (Resp. br. p. 4 at fn.4). Unlike trial court arguments, however, Respondents now seek to reverse and put as much distance as possible between "*zoning compliance*

verification" and "*verification*" as they can, because legally there exist no such things as zoning compliance verification. The inserting of "compliance" into the title of the "zoning verification" was a purposeful attempt by the respondent to elevate the approval authority of a mere letter. But, by doing so the respondent has unintentionally confirmed that zoning verification, *by itself*, is not any type of approval and, moreover, respondent has unintentionally admitted that zoning compliance approval does not exist here. It does not exist at all for that matter, for the foreign corporation. And it is here where the trial judge errors at law, raised property by face of Biven's Notice of Appeal.

The fallback position of Respondent, now, to strictly "*verification* "is no different where there is no zoning administrator approval. S.C. Code Ann. §6-29-950 requires zoning approval by the administrator approval, *and no other person.* Zoning technicians cannot substitute for the zoning administrator. (R. p. __ letter, 12/27/2022). Respondent arguments, in fact, concede that "verification" is a not legislative action. (Resp.Br at 4 fn.4) The statute is clear and not ambiguous. "It is unlawful to construct, *reconstruct,* alter, demolish, *change the use of* or occupy any land, building, or other structure without first obtaining the appropriate permit or permit approval…". SC Code Ann 6-29-950(A). Importantly, here, approval of the zoning administrator is mandatory. The statute is reproduced below:

SECTION 6-29-950. Enforcement of zoning ordinances; remedies for violations.

(A) The governing authorities of municipalities or counties may provide for the enforcement of any ordinance adopted pursuant to the provisions of this chapter by means of the withholding of building or zoning permits, or both, and the issuance of stop orders against any work undertaken by an entity not having a proper building or zoning permit, or both. It is unlawful to construct, reconstruct, alter, demolish, change the use of or occupy any land, building, or other structure without first obtaining the appropriate permit or permit approval. No permit may be issued or approved unless the requirements of this chapter or any ordinance adopted pursuant to it are complied with. It is unlawful for other officials to issue any permit for the use of any land, building, or structure, or the construction, conversion, demolition, enlargement, movement, or structural alteration of a building or structure without the approval of the zoning administrator. A violation of any ordinance adopted pursuant to the provisions of this chapter is a misdemeanor. In case a

building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county or an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land. Each day the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use continues is considered a separate offense.

(B) In case a building, structure, or land is or is proposed to be used in violation of an ordinance adopted pursuant to this chapter, the zoning administrator or other designated administrative officer may in addition to other remedies issue and serve upon a person pursuing the activity or activities a stop order requiring that entity stop all activities in violation of the zoning ordinance.

While the county administrative Planning and Zoning could, and did, issue a verification letter - this is not legislative action. Respondent arguments elevate the December 27, 2022, letter above and beyond the law of the zoning code and the BZA ruling, where no Supersedeas. Zoning is inherently a legislative function to be exercised by county counsel, not an administrative department of the county government. "An ordinance rezoning a particular piece of property …is legislation, pure and simple." *Hampton v. Richland Co.*, 292 S.C. 500, 357 S.E.2d 463 (Ct. App. 1986). As to zoning *verification* letters, the county confirms on public record to the Attorney General they are the type of letter routinely sought from the county as a preliminary indication as to the compatibility of a proposed use on a specific site. They are not binding decisions on the county and, therefore, are not appealable. This is especially the case where the letter confirms it is "not a permit". (R.p. __ 12/27/22 letter).

It matters not whether the "verification" existed before, during, or after the date of county adoption of the FILOT agreement and ordinance, if it was not a de-facto permit and there is no zoning approval. The trial court erred in viewing the factual inferences and legal conclusions most favorably to the movant, extending this to ruling on Biven's purported failure to exhaust administrative remedies and standing. One cannot exhaust administrative remedies or appeal

something that does not exist. Here zoning approval does not exist, and the trial court erred in viewing that it did exist under terms of art.

As noted correctly by respondent, important here is Judge Morgan's Order did not find legislative action. As cited by respondent the court's order did not rule that the Verification amounted to legislative action as to zoning, nor constitute a change in zoning, or approve a change in land use for Silfab or the specific parcel. If the fine print of the FILOT ordinance was to repeal the parcel's zoning, there was zero notice to the Appellant, nor the general public, and no meaningful opportunity to be heard. Not so much as a zoning sign is physically placed at the parcel as the land use is actively transforming under county authorizations for continued construction of a chemical plant where once stood a distribution warehouse.

Respondents seek to evade state statutory law and constitutional due process mandates where the trial court respectfully errors by viewing *Zoning Compliance Verification* most favorably to the movants, and not Bivens. By insertion of the word "*compliance*" between "*zoning*" and "*verification*", the phrase acknowledges there is no zoning approval. The litany of "background" noise is designed to distract from the fact that Silfab's development has now resulted in a site-specific and fully functional reckless chemical operation, resulting in community outrage that is justified. Silfab is acknowledged to be a non-party to this litigation,[1] but that does not resolve whether Bivens individually stated a claim against the *county* defendants or whether the circuit court correctly dismissed Biven's claims on standing, exhaustion, preservation, and on Rule 12(b)

[1] While the trial judge's order denied any ruling predicated on Rule 12(b)(7) and Rule 12(b)(8), the continued argument on the failure to name Silfab is easily disposed of by reference to the statutes 6-29-850(A) and (B), where Silfab sought mediation in its notice of appeal filed in case no. 2024-CP-46-02641 *Silfab Solar, Inc. and Exeter 7149 Logistics, LP v. York County Board of Zoning Appeals*. Only a party with substantial interest in the parcel aggrieved by a BZA board ruling may petition for appeal and mediation, which appellants effectively did pursuant to S.C. Code §6-29-820 and §6-29-825.

SCRCP grounds. The foreign corporation obviously could not issue authorizations to continue retrofit, reconstruction, or change of the distribution warehouse; nor change of land use at the site effectively transforming it to a prohibited use. '[T]he existence of a vested right to nonconforming use depends upon whether the use was in existence at the time the zoning ordinance was adopted. *Whitfield v. Seabrook*, 259 S.C. 66, 73, 190 S.E.2d 743, 746 (1972). Here, like *Whitfield,* the county knew upon issuing construction authorizations (after the BZA ruling) that the purported permits issued for a parcel that was Light Industrial, in fact. Only the Respondent's administrative zoning departments could have issued authorizations, and only through proper legislative action that must necessarily have occurred first; not by site-specific spot zoning via the planning and development division of county government. As Appellant's home is located next to the site, and Bivens would have standing. The well pleaded complaint allegations that should have been viewed as true, ignore vested right of Bivens to petition for extraordinary relief in the form of writs of mandamus or writs of prohibition or at minimum Declaratory Judgement relief. The twenty-two-page order, instead, serves the adjudicate at the 12(b)(6) phase, merits of the county's actions going well beyond a Rule 12(b)(6) review.

The only concise and non-argumentative statement that Respondents and Appellant can agree upon is that Silfab is a *non-party* to this appeal, making the debacle that much worse.[2] Each case cited by Respondent on brief page 1 fn. 2 has met with legal ruling where the case(s) acknowledge standing, except for this case involving Dennis Floyd Bivens that was dismissed in error. The other litigation cited by Respondent (Res. Br. 1 and fn#2) are worthy of mention, however. The purpose for zoning appeals is not just for developers to appeal a denial of their proposed plan or use. It is also for neighboring and affected property owners, like in this case, to

appeal a project and change of use constructed in their backyard. In reference to case no. 2024-CP-46-02641, *Silfab Solar, Inc., et al v. York County Board of Zoning Appeals*[2] Biven's brother-in-law, *Intervenor* Walter Buchanan was ignored and denied justice despite the BZA ruling. Bivens then filed this suit for injunctive relief, as was his right, predicated on BZA ruling of May 30, 2024, and S.C. Code Ann. 6-29-950(A). He did so to highlight the alarming and recurring recalcitrance by York County issuing repeated authorizations for Silfab's on-going construction haste to create a prohibited land use adjacent to his home. This underscores both the nature and basis of the trial court's errors, as no zoning approval was, in fact, obtained. Under these circumstances, Appellant Bivens possessed standing equivalent to that of his brother-in-law, Walter Buchanan, whose standing was previously recognized by Judge Marvin Dukes in case no. 2024-CP-46-02641 below. Bivens could similarly allege by his complaint that he would suffer special damages. Moreover, the statutory langue does not require Bivens to show *injury in fact*. It merely cites the language "would be specially damaged." S.C. Code Ann. § 6-29-950.

REPLY TO COUNTER STATEMENT OF CASE

The only concise and non-argumentized statement that Respondent cites is that the foreign corporation is not a party to this case. Each case cited by Respondent on fn.2, page 1 of Respondents' initial brief has met with a legal ruling that acknowledges standing, except for the trial court's ruling on Dennis Bivens in the case sub judice. Appellant acknowledges that the leasee, Silfab, is a *non-party* to the litigation by caption. (Resp. Br. at 3, line 5). This makes the county debacle that much worse in dismissing Bivens on Rule 12(b)(6) grounds. Even a corporation renter under lease acquires an interest in real property for the term of the lease, making this argument

[2] Case No. 2024-CP-46-02641 *Silfab Solar, Inc. et al v. York County Board of Zoning Appeals* was argued May 26, 2026 before the Hon. William McKinnon May 26, and is under advisement. In that case, Silfab and Exeter appealed requesting mediation under 6-29-820 and 6-29-825 as aggrieved parties, demonstrating the BZA ruling as to the parcel applies to both Appellants.

moot, in addition not the statues cited in footnote 2. The alleged and false narrative "goal" cited by Respondents' characterization of Biven's October 13, 2025, complaint is not truthful and not made crystal clear to this court. The "background noise' of justified community outrage is marginalized, where citizens have warned, pleaded, and literally begged the government and their courts, going to the extraordinary length of filing cases in the circuit court, the court of appeals, and the Supreme Court irrespective of the parties' relationship. They all live next door to Silfab.

Noteworthy, there is no "*continued development*" for a solar cell and solar panel manufacturing facility. Rather, there is a now a fully constructed chemical plant and change of land use never legislatively approved at 7149 Logistics Lane in Fort Mill. Public filings by the county in response to the offices of the South Carolina Attorney General confirm this, and that there have been two (2) incidents already. There is no zoning approval, despite the eloquent and talented use of terms of art like "*verification*" and "*zoning compliance verification*". The changed land use violates zoning code; the Silfab plant site now in operation sited adjacent to neighboring homes and two (2) schools. The only thing that is *not* light industrial in the entire district is the Silfab Solar facility. The citizens were there first. The schools were there first. The citizens had the right to rely upon existing zoning classifications, and neither a "verification" letter, FILOT agreement, or FILOT ordinance could effectively change zoning where no due process is followed by the county in the first place, and hence the contorted reach for "zoning verification compliance" which the trial court misapprehended in dismissing Biven's case.

In this case, the constant is the law. Respondents had no statutory authority to administratively change the law by ignoring due process before or after the BZA order. The BZA order prohibits panel and solar cell manufacturing by chemical means. The foreign corporation's proposed land use for chemical manufacturing (no longer a distribution warehouse) of solar panels and solar cells, which is conveniently evaded by respondents, but made clear by the county Respondent in public

record after the dismissal hearing of May 26. While respondent discloses in footnotes (5) at Page 6 prior shutdowns, it does not acknowledge the two (2) incidents that have now occurred. The reason is simple: the solar cells inherently involve chemical process etching by hazardous substances banned by Exeter's very own amended deed restrictions, which the court failed to consider in abuse of discretion. Exeter is the landowner and Silfab, as Leasee, would for term of its lease carry an interest in the land even if Silfab were not on title. The application inquiry, in fact, strictly addresses the address and tax map for the site irrespective of who is on title. (R.p. __ 12/27/22 letter and application). Moreover, Exter placed its own amended deed restrictions upon the land *after* it acquired the site by purchase from RG Baxter Lane, LLC which the court ignores in abuse of discretion, after allowing the deed restrictions to be filed of record.

The site was formerly a large distribution warehouse complex, not a chemical plant. Before Silfab, the site had no chemical manufacturing process; it had no exhaust towers nor water treatment infrastructure, nor tanks. Distribution warehouses do not require this type of infrastructure. While respondent eloquently postures its incorrect recitation of facts, it is patent in effort to conflate community outrage but evade truth that Respondents authorized Silfab Solar's deceptive *retrofit* a distribution warehouse, now transformed to a chemical manufacturing facility. The facility now operates with use of hazardous and toxic chemicals beside Appellant's home having already met with respondent's publicly disclosed comments which betray arguments by Respondents' counsel. [3]

This change of land use was never vested, nor *legislatively* authorized. The use was absolutely prohibited by zoning code and the BZA. In such a case, the landowner had no vested right, would

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[3] Public statements issued by the County to the South Carolina Attorney General related to the Silfab project are posted on the county's website at http://www.yorkcountygov.com/1131 information-on-silfab solar.

could not be taken away in the proper exercise of the protection of public health and safety. *Whitfield,* 259 S.C. at 72, 190 S.E.2d at 746. The May 30, 2024, ruling by the BZA was just that, a valid exercise of police power. Generally, speaking, South Carolina case law recognizes that the exercise of police power – to protect the health and safety of citizenry – cannot be hampered by a business' reliance upon and receipt of permits, whether lawful or invalid. "Our Court has concluded that the police power is, however, usually paramount, provided it has a sound and reasonable basis. *Whitfield,* 259 S.C. 66 (1972). The issue here is the county continued to issue authorizations in defiance of the BZA for a forthcoming but prohibitive land use, sited in Biven's back yard literally.

Silfab could not have continued to operations without county malfeasance, grotesque recklessness, or collusion of the administrative government's zoning and planning department who openly defied the county BZA unanimous ruling against the zoning administrator and Silfab Solar, Inc. Hence, the strained resort to "*verification*" letters and "*zoning verification compliance*" as purported legislative action of the county artfully seeking substitute for zoning approval, which is missing here and not within the record. Unless this court finds that letters and terms of art like "zoning compliance verification" have changed the constitution and the zoning code, the court of appeals should respectfully reverse the trial court.

STANDARD OF REVIEW

An appellate court conducts a *de novo* review of a grant of dismissal. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) ("In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court."). When deciding a motion to dismiss for failure to state a claim, the "Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Flateau v. Harrelson,* 355 S.C. 197, 202, 584, S.E.d 413, 415 (Ct. App. 2003); see also *Plyler v. Burns,* 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) ("The question is whether, in the light most

favorable to the plaintiff, and with ever doubt resolved in his behalf, the complaint states any valid claim for relief."). The court should not dismiss merely because it doubts the plaintiff will ultimately prevail. At this stage, the Court does not weigh evidence, resolve factual disputes, or decide whether the plaintiff will ultimately prevail. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010).

Ordinarily, in ruling on a motion to dismiss, the Court cannot consider materials outside the complaint. However, under appropriate circumstances, which are present here (by consent), the trial court may do so in its discretion, (R.p.), Order at 1, n.1). The Court can consider additional information referenced in the complaint without converting the motion into a motion for summary judgment. *Brazell v. Windsor,* 384 S.C. 512, 516, 682 S. E. 2d 824, 826, (2009) (holding that a Court may consider documents incorporated by reference in the complaint to prevent plaintiffs "from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based"); *Tellabs, Inc. V. Makor Issues & Rights, Ltd., 551* U.S. 308, 322 (2007) ("[S]ources courts ordinarily examine when ruling on Rule 12(b)(6) motions [include] documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *Shepard v. Tex. Dep't of Trans.,* 158 F.R.D. 592, 595-96 (E.D. Tex. 1994) ("[D]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to [plaintiff's] claim.").

Each of the documents attached to the parties' memorandums and post argument filings of record was either explicitly referred to and relied upon in the Complaint, referenced or relied upon by inference, or are public record filings which the circuit court could appropriately considered and which the court may take judicial notice under Rule12 SCRCP. *See* Rules 201, 803(8), SCRE.

REPLY ARGUMENT

Appellant asserts that the trial court committed legal error by misapplying the governing standard, treating a mere zoning verification as the functional equivalent of legislative zoning approval under purported "zoning verification compliance" viewed most favorably to the movant. Appellant avers that the trial court abused its discretion in weighing the evidence, where the only issue before the trial court is whether the complaint allegations, taken as true and liberally construed, stated any viable basis for relief; the court incorrectly viewed *all* facts and inferences not in Biven's favor. At the dismissal phase, the trial court engaged in weighing evidence and deciding whether the plaintiff would ultimately prevail in view of zoning verification and zoning compliance verification, where there was no zoning approval in fact. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010). "An abuse of discretion occurs when the trial court's ruling is based upon error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion but the ruling reveals no discretion was exercised;" *State v. Allen*, 370 S.C. 88, 94 (S.C. 2006). During oral argument, the trial court permitted filing of Exeter deed restrictions but failed to exercise discretion in reviewing them. Had it done so, the deed restrictions would have demonstrated the need to guard against just the type of conduct the Canadian corporation has not engaged in. "[F]ailing to exercise discretion is abuse of discretion." *Jordan v. The Hartford Financial Group, Inc.*, No. 2019-001190 (Ct. App. 2021) (quoting *State v. Smith*, 276 S.C. 494 (S.C. 1981) and *State v. Allen*, 370 S.C. 94 (2006). Respondent's characterization of Bivens' appeal as "fatal" is misguided because the trial court erroneously treated "verification" and "zoning verification compliance" as de facto zoning approval under Rule 12(b), SCRCP viewed in error most favorably to the movant.

I. RESPONDENT'S "FATAL APPEAL" ARGUMENT IS MISGUIDED WHERE APPELLANT PROPERLY APPEALED THE DISMISSAL ORDER AND PROPERLY CHALLENGED THE LEGAL PREMISE UNDER WHICH ALL CLAIMS WERE DISMISSED.

Biven's Notice of Appeal on its face challenged the court's misapprehension of zoning compliance verification. Bivens' complaint alleged continued construction authorizations by Respondent for Silfab retrofit and the evolving change of land use under county malfeasance. The complaint alleges unlawful *spot zoning* and *nuisance*. (Comp. ¶18 p 4). At time of the complaint, the changed land use is evolving, and not yet fully completed. Contrary to Respondent arguments, however, the Notice of Appeal cites error by the trial court viewing "*zoning compliance verification*" as lawful zoning change, impermissibly drawing legal conclusions and factual inferences most favorably to the movant under Rule 12 SCRCP. Bivens alleged no zoning administrator approval per S.C. Code Ann. § 6-29-950(A). If no Zoning Administrator approval exists of record, "verification" letters do not suffice as any form of appealable county action, discussed *infra*, and it was error to view failure to exhaust administrative remedies against Bivens. Applying the Rule 12 standard, it was error not to deny defendant's motion to dismiss where the complaint alleged facts involving Nuisance, Spot Zoning and lawful Zoning Administrator approval that – when accepted as true and viewed in Bivens' favor, supported relief under at least one viable theory. The trial court was improperly asked to draw inferences *against* Bivens, resolve factual issues prematurely, and weigh the ultimate merits of Biven's claims under erroneous legal conclusions as to "verifications" and "zoning compliance verifications". The final (22) page order adjudicated all facts and merits, not just those pertinent to dismissal, resulting in sweeping but incorrect proclamation that the county had materially complied with all zoning. Rule 12(b) SCRCP does not permit this approach under the standard of review.

Because Plaintiff's claims were sufficient to state claims for relief, particularly under S.C. Code Ann. § 6-29-950(A) and 950(B), dismissal by the trial court at the pleadings stage was unwarranted and is reversible error. Dismissal under Rule 12 SCRCP is a drastic remedy and improper where the complaint allegations, taken as true and liberally construed, state any viable basis for relief. The trial court did not confine its analysis strictly to the complaint and improperly weighed evidence and resolved factual disputes and the merits and should not have dismissed under doubt that the Plaintiff would ultimately succeed due to zoning compliance verification or verification letter. Rather, the court should have construed the pleadings liberally so that substantial justice be done between the parties. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010).

II. THE TRIAL COURT ERRED IN FINDING BIVENS AS NEIGHBORING LANDOWNER DID NOT HAVE STANDING.

Respondents factually twist Biven's "goal" as attempt to prevent Silfab from continued development of a solar panel manufacturing plant. (Resp. br. 3 at ¶1 at 5-6). Biven's complaint did seek relief as against the county pursuing declaratory judgment, temporary and permanent injunctive relief, and extraordinary writs of mandamus and prohibition. Provided, neither Respondents nor non-party Silfab are innocent victims here. There is no "continuing development" as public record evidence Silfab now sits fully operational next to Bivens home. Bivens had statutory standing, direct, personal, and adverse concerns that he would be specially damaged precisely because of what now manifests itself as a distinct change of use that was never legislatively authorized. The property is now used for a Heavy Industrial purpose, despite its prior use as a light industrial distribution warehouse and its continued zoning classification as Light Industrial. Despite counsel's capable arguments, Respondent publicly proclaims its council did not engage in a zoning decision.

III. THE TRIAL COURT ERRED AT LAW IN DETERMING BIVENS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES INVOLVING THE DECEMBER 27, 2022 "VERIFICATION" LETTER.

The trial court's ruling errors at law occurs where the trial judge improperly assumes pursuant to Respondent's arguments that the December 27, 2022"*verification*" letter was an appealable agency action. It was not. On December 27, 2022, the County's zoning office, a division of the County's Planning and Development Services Department, issued a letter (not addressed to Silfab or Exeter) verifying that proposed operations were *principally permitted* (*sic), but not necessarily compliant at the site without further requirements and efforts. Importantly, the same letter makes clear that is ***not a permit***. (R. p. ___ 12/27/22 zoning letter). The trial court erred in finding that Bivens failed to challenge or appeal the "Zoning Compliance Verification" and failed to exhaust administrative remedies. The problem becomes whether the zoning verification compliance letter provided Bivens, *or any citizen for that matter*, notice and meaningful opportunity to be heard pertaining to the forthcoming and clandestine change of use that was in progress under the radar. It is conceded that at no time did Silfab or Exeter petition for variance or change of use prior to this "verification" letter, and the administrative government for York County is not the legislative body. York County Council is, however. The council delegates to the BZA the role as quasi-judicial finders of fact. The BZA board found the proposed use prohibited and reversed the zoning administrator and Silfab's "determination" or "interpretation" on May 30, 2024. But the BZA is comprised of a citizen's review board, not lawyers or judges, hence the reach that the zoning department "verification" should take precedence over a quasi -judicial board's ruling.

Equally important to Biven's standing is the fact that Respondent, nor the corporations, timely sought the BZA reconsider its order, and it thus became law of the case. Respondent did not seek supersedeas, nor did the corporations Silfab or Exeter. Silfab and Exeter's appeal merely demanded pretrial mediation at the relevant time. It was not incumbent upon Bivens nor any citizens to petition

the BZA or circuit court for supersedeas, which would legally fall upon the shoulders of Respondent, or Silfab and Exeter. This was not done, making the BZA ruling law of the case. The corporations' notice of appeal merely sought mediation, which was conducted to impasse by Costa Pleiconsens on April 21, 2025. Only an aggrieved party with substantial interest in the parcel can appeal or ask for mediation, and the June 28, 2024, appeal by Silfab in case no. 2024-CP-46-02641 did precisely that.

As for the zoning division, an economic development project no matter how financially enticing, cannot ignore the need for *zoning approval.* (*emphasis). S.C. Code Ann. § 6-29-950(A) Zoning approval cannot be obtained by verification letter, rather permits can issue only by approval of the zoning administrator. Id. While a talented term of art, there exist no such thing as *Zoning Verification Compliance* as cited in Biven's Notice of Appeal to this court. Respondent's arguments resort to "verifications" and "zoning verification compliance" are not surprising, as the record is devoid of a zoning approval. It is also not about product types, generally. It is quintessentially about change of land use. The December 27, 2022, letter was not an appealable agency action, and by its own terms did not grant a permit. Yet, where no supersedeas authorizations continued by the county ad nauseum to the foreign corporation defying the May 30, 2024, BZA reversal. No matter how compelling the objective or how financially attractive, the court cannot ignore that no zoning approval exists. Pursuant to S.C. Code Ann. § 6-29-1145(A) "In an application for permit, the local planning agency must inquire in the application or by written instructions to the applicant whether the tract or parcel of land is restricted by any recorded covenant that is contrary, conflicts with, or prohibits the permitted activity". Importantly, this did not occur. The only zoning approval Respondents can cite is by *inference* (which should have been drawn most favorably to Bivens and not the movant) claiming that the FILOT agreement and FILOT ordinance were purported legislative act to change use or zoning, which is acknowledged to have never occurred by legislative

action by county council where there is likewise no zoning approval by the zoning administrator. The zoning administrator position has been vacant for months in York County.

IV. DUE PROCESS AND DEED RESTRICTIONS WERE PROPERLY RAISED AND IGNORED BY THE TRIAL COURT AND ARE PRESERVED FOR REVIEW BEFORE THIS COURT.

Respondent mischaracterizes the December 27, 2022, correspondence as binding law. It is not. The letter affirmatively states it is "not a permit". After this letter, the impending due process violations become patent and evolve at an alarming rate after the BZA reversal ruling. Before the BZA, the application (R. p. __"application") never identifies Silfab, nor Exeter by name. Nor did the letter or county application disclose amended deed restrictions, which were omitted and left blank. Correspondences and incomplete applications do not trump statutory requirements or constitutional due process mandates. Even the complacency of the Planning and Development department cannot omit something the statute requires as a "*must*". See S.C. Code Ann. § 6-29-1145. A local planning agency *must* ask a permit applicant whether the land is subject to any recorded restrictive covenant that conflicts with or prohibits the proposed permitted activity, here chemical processing upon a Light Industrial parcel.

If the agency has actual notice (Light Industrial zoning) of such a restrictive covenant it must not issue the permit unless the applicant confirms the covenant has been released by the proper authority, property holders, or court order. Id. The government agency is not required to search records for deed restrictions. Rather, the applicant is required by statute to disclose deed restrictions, which the record plainly shows did not occur here. If not, the process involving a non-binding zoning verification letter is garbage in, and thus garbage out. It is erroneous from the time of application by a *Judy Quinby*, and it matters not which corporation Judy Quinby was acting agent for when the precise address and tax map number was referenced by application. Both corporations

appealed as aggrieved parties with interest in the land in Silfab's appeal of the BZA in case no. 2024-CP-46-02641 referenced by Respondent's Initial Brief.

If there was a failure to consult deed restrictions, whether inadvertent or deliberate, the zoning administrator was operating in the blind and would be issuing a flawed determination based on a lack of material information pertinent to the site's zoning. Here, the record on appeal shows citation to the precise address and tax map number, evidencing that the BZA ruling applied to the site, Silfab, and co-appellant landowner Exeter 7149 Logistics. Exeter's amended deed restrictions prohibited toxic and hazardous chemical use at the site. The record is devoid of evidence showing any efforts to change the land use, including petition for change of use or variance. The trial court respectfully abuses its discretion by failure to exercise discretion after permitting Biven's counsel to file them within the case record after argument. The court is willfully turning a blind eye, no different than the administrative zoning division, under S.C. Code Ann§6-29-1145(A) where the trial court misapprehends zoning compliance verification. Because there exists no Supersedeas, the BZA ruling cannot be ignored. The court errors in dismissing Bivens' case, specifically under Rule 12(b)(6) under conflated arguments of zoning approval.

(V). THE CIRCUIT COURT ERRED IN RULING BIVEN'S COMPLAINT FAILED TO STATE FACTS SUFFICIENT TO SUSTAIN ANY CAUSE OF ACTION.

The motion and the court order were based on Rule 12(b) SCRCP grounds, despite reservation the ruling did not encompass Rule 12(b)(7) and Rule 12(b)(8) The trial court erred by construing "*zoning verification compliance*" or "verification" as de-facto zoning approval, where no zoning approval ever existed. The court, in adopting a (22) page order, inadvertently engaged in weighing the evidence and ruling on the merits as purported "ratification". While Respondent's counsel vaguely references "it" (Resp.br. 3 at ¶1, line 7-8), the "it" is a FILOT agreement specifically, and

the FILOT ordinance fine print. The FILOT agreement was a tax incentive agreement, nothing more. It was not a petition for change of use repealing, by implication, the parcel zoning. This is particularly the case where no due process was afforded prior to FILOT ordinance adoption carrying the fine print. The boilerplate language states "[a]ll ordinances, resolutions, a part thereof (sic) in conflict herewith are, to the extent of such conflict, hereby repealed" never provided due process, notice, or meaningful opportunity to be heard to the general public or Appellant. While the FILOT may or may not have created a valid contract with the county's government, it did not *repeal* the zoning code. It could not expand the statutory authority of the administrative department. Nor could it restrict the statutory authority of legislative body, or the BZA board quasi-judicial ruling. The board on May 30, 2024, reversed the zoning administrator (and Silfab's) interpretation, unanimously. To find otherwise renders established ordinances and statutory law moot by virtue of letters and contractual agreements, where the county council publicly acknowledges it did not render a zoning decision. While the FILOT agreement expressly identified the site/parcel tax map number and address, *the same is also true* of the citizens' appeal to the BZA via citizen Walter Buchanan. (Resp. br. p.1 fn.#2). The BZA found the proposed land use prohibited and the decision applied to Silfab. The only party who inexplicably can, nonetheless, issue repeated approvals for the foreign corporation's ongoing construction was the Respondent County. It was not necessary for Bivens to name Silfab Solar Inc. as a party. The administrative zoning department defied the BZA, and any authorizations issued after May 30, 2024, were an *ultra vires* act of the zoning departments, usurping the statutory authority of the county council and, notably, the BZA. This occurred where no supersedeas efforts by the county or the corporations.

CONCLUSION

Appellant is one of many neighboring homeowners now living in proximity to a transformed chemical manufacturing land use. For Appellant, this exists, literally, in his back yard. The land use has changed from distribution warehouse to chemical operations. The operations involve toxic and hazardous chemicals. This was prohibited by the BZA ruling. It is prohibited by Exeter deed restrictions of record. It is prohibited by zoning code. It is a repugnant back door effort to spot zone a legislatively unauthorized change of land use in violation of zoning where Respondents cannot show the county strictly observed statutory requirements, nor can they show approval by the Zoning Administrator specifically. Neither "verification" letters nor "Zoning Compliance Verification" can substitute for zoning approval.

Applying the standard of review here, the complaint alleged spot zoning and nuisance, facts that if are accepted as true and viewed in Biven's favor support relief under at least one viable, theory, if not several. The County's arguments improperly asked the trial court to draw inferences against the Plaintiff, resolve factual issues, or test the ultimate merits of claims under purported zoning compliance verification. It improperly sought a court order to proclaim that all county actions were materially correct in the twenty-two-page order. This appeal strictly involves dismissal review of Biven's claims set forth in the complaint. Rule 12(b)(6) SCRCP does not permit this approach. Appellant had standing pursuant to S.C. Code Ann. §6-29-950(A), and the South Carolina Constitution, Article I section 3 and section 22. Because Bivens allegations were sufficient to state a claim for relief, dismissal was improper. Appellant respectfully prays this court Reverse and Remand.

Respectfully submitted,

HALFORD LAW FIRM
J. Cameron Halford-Attorney at Law-LLC
/s/. J. Cameron Halford

S.C. Bar Id. 17184
95 Allen Street
Post Office Box 172
Barnwell, South Carolina 29812
(803) 524-8659
E-mail: cam@halfordlaw. net
ATTORNEY FOR APPELLANT
DENNIS FLOYD BIVENS