THE STATE OF SOUTH CAROLINA IN
THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas Court

Hon. G.D. Morgan, Jr. Circuit
Court Judge

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SC Court of Appeals

Appellate Case No. 2026-000199

Dennis Floyd Bivens, Appellant

v.

York County by and through Joshua Edwards, York County Manager; Josh Reinhardt, York County Development Services Manager; and Jonathan Buono, York County Planning and Development Services Director, Respondents

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APPELLANT FINAL BRIEF

Appellant Dennis Floyd Bivens here files his Initial Brief and would show the Court of Appeals error of law and abuse of discretion by the trial court in seeking this court reverse the January 21, 2026, order of dismissal. Appellant respectfully shows the following in support.

Respectfully submitted,

HALFORD LAW FIRM, LLC
/s/. J. Cameron Halford,
Cameron Halford
Post Office Box 172
Barnwell, South Carolina 29812
803-524-8659 e-mail:
cam@halfordlaw.net
ATTORNEY FOR APPELLANT

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PROCEDURAL BACKGROUND

Dennis Bivens filed suit against York County October 3, 2025 alleging causes of action for (1) Declaratory Judgment; (2) Action for temporary and permanent injunctive relief; (3) Petition for Writ of Mandamus; and (4) Petition for Writ of Prohibition, filed in response to unlawful county permitting involving Silfab Solar Inc. ("Silfab") construction and operations that now constitute a change in use at the Silfab property neighboring Appellant's home and adjacent schools. The Silfab parcel is zoned Light Industrial by York County ordinance. Defendants timely filed a Rule 12 SCRCP in lieu of answer. Oral argument was heard November 17, 2025, before the Hon. G.D. Morgan, Jr. The court granted in part, and denied in part, dismissal. The court's order is dated January 21, 2026. From this order Bivens now appeals to the South Carolina Court of Appeals.

FACTUAL BACKGROUND

Bivens is a neighboring owner to the Silfab industrial site in Fort Mill at 7149 Logistics Lane. On December 21, 2022, a person named *Judy Quinby* sought zoning verification for "Proposed use: Manufacturing of photovoltaic cells & PV Module" at 7149 Logistics Lane, Fort Mill, SC 29715. [Exhibit-A]. (R.p.71) The parcel is zoned Light Industrial by York County zoning code. This has never changed. To be clear, at no time has there been a petition for variance or change of use brought before York County Council. Then there is a second letter. (R.p.71).

On December 27, 2022, the county's zoning office, a division of the county administrative government's planning and development services, issued a reply letter to Judy Quinby, "Ref: Zoning Verification for **7190000201**" "The use described in your request (manufacturing of photovoltaic cells and PV modules) is considered electrical equipment, applicant [appliances], and component manufacturing and is therefore *principally* permitted." (R.p.71) This is the purported

"Zoning Compliance Verification," argued in court where the circuit court errors at law, viewing the term improperly as de facto zoning approval.

In ruling Bivens had no standing, the court found at law and fact that no challenge or appeal of the December 27, 2022, Zoning Verification letter had been instituted by Bivens, and that Bivens had failed to exhaust administrative remedies prior to suit. This cannot legally be the case, and Bivens alleges reversible error for reasons cited below. The court viewed this incorrectly in favor of the movants and ignored that there is no appeal process related to a letter that would have been procedurally viable to Appellant. An abuse of discretion occurs here. South Carolina courts have explained that an abuse of discretion occurs when the trial court's decision is controlled by some error of law or is based on findings of fact that are without evidentiary support. Appellant respectfully avers no trial judge could have reached the same conclusion where no appeal method or procedure exists as to correspondences that do not constitute a final decision or did not constitute agency action, in fact. A mere advisory opinion is not agency action.

During the same general time period, Silfab and York County began negotiating a Fee In Lieu of Taxes (FILOT) described by defendants in argument and memorandums as "*incentive agreement*" or "*inducement ordinance*" that authorized legislative execution of the FILOT through the York County Council. The inducement ordinance authorized and directed county council representatives to execute the FILOT agreement and under the court's ruling at law purportedly was legislative action as to change of use at the Silfab site neighboring Bivens home. Critically, the ordinance provided that "[a]ll ordinances, resolutions, and parts thereof in conflict with the FILOT are, to the extent of such conflict, hereby *repealed.*" (R.p. 73); (R. p.75, Section 5).

The court relied upon respondent arguments related to the FILOT as a literal repeal of zoning ordinance, or de-facto zoning approval, where no due process or notice of zoning change as to the parcel's use was ever communicated to Bivens or the citizenry. Bivens, nor any other

citizen, received proper notice or opportunity to be heard specifically as to the zoning change of the property or a proposed change of use. This is evidenced by the letter by York County. (R. p. 71). The letter confirms it is not a permit.

The FILOT was executed by the county on September 18, 2023, (R.p.71-108) purportedly creating a binding agreement between the county and Silfab for the Canadian corporation to pursue development of the site for Silfab's project. Until this time, the property was a very large 790,000 distribution warehouse, *only*. Among other terms, the FILOT agreement specifically identified the parcel address for Silfab's development of its future chemical manufacturing plant. (R.p. 108). Appellant avers that this did not equate to proper notice and certainly did not comport with procedural or substantive due process to Appellant or the citizenry as to zoning.

An appeal of the April 27, 2022, zoning department interpretation was filed March 14, 2024 to the county Board of Zoning Appeals by Walter Buchanan and other citizens. ("BZA Appeal") (R. p.121-125). Concerned citizens sought interpretation because they were told by county officials that no specific zoning approval had occurred, in fact. On May 09, 2024, the county's BZA hearing reversed the zoning administrator's use interpretation and concluded that solar panel manufacturing is not allowed in a Light Industrial District, specifically the Silfab site in Fort Mill. (R.p.127-128). This decision was memorialized in writing May 30, 2024. Provided, however, in this case the court found at law: "*thus, the County, through formal legislative action of county council approved and specifically induced Silfab to locate in the County upon the Parcel.*" (R.p.236, ¶4 at 1-2). Appellant respectfully avers the court errors at law by finding a zoning change or change of use where no zoning approval under purported "zoning verification compliance," and the error constitutes reversible error if there was no zoning approval in fact, and particularly so if repeated permits issue after the BZA May 30, 2024 order reversing the zoning administrator and Silfab's interpretation, both rejected by the BZA. (R. p. 127-128).

STANDARD OF REVIEW

Dismissal of an action pursuant to Rule 12(b)(6) is appealable. *Williams v. Condon,* 347 S.C. 227, 234, 553 S.E.2d 496 (2001). An order granting a motion to dismiss under Rule 12(b) as to one of multiple claims is immediately appealable "because it affects a substantial right and strikes . . . a pleading." *Lebovitz v. Mudd*, 289 S.C. 476, 779-80, 347 S.E.2d 94 (1986). An order dismissing some, but not all, of the claims in a case, either by summary judgment or by dismissal pursuant to Rule 12(b)(6), SCRCP, "involves the merits" and is immediately appealable because it finally determines some substantial matter forming the whole or part of some cause of action or defense. *Link v. School Dist. of Pickens Cnty*, 302 S.C. 1, 7, 393 S.E.2d 176 (1990).

"In an action at law, on appeal of a case tried without a jury, the judge's findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 87, 221 S.E.2d 773 (1976). A case with legal and equitable issues presents a divided scope of review. *Perry v. Heirs at Law & Distributees of Gadsden*, 313 S.C. 296, 299 n.3, 437 S.E.2d 174 (1993). "When legal and equitable causes of action are maintained in one suit, each retains its own identity as legal or equitable." *Future Group, II v. Nationsbank*, 324 S.C. 89, 98 n.6, 478 S.E.2d 45 (1996). The determination of whether an action is in law or equity is accomplished by discerning the main purpose of the suit. *See Baughman v. AT&T*, 298 S.C. 127, 128, 378 S.E.2d 599 (1989). "The main purpose of the action should generally be ascertained from the body of the complaint." *Insurance Fin. Servs.*, Inc., 271 S.C. 289, 294, 247 S.E.2d 315 (1978). The nature of the issues raised by the pleadings or the pleadings and proof, and the character of relief sought, determines the character of the action as legal or equitable. *Bell v. Mackey*, 191 S.C. 105, 3 S.E.2d 816, 823 (1939). Actions for injunctive relief are equitable in nature. *Miller v. Borg-Warner Acceptance Corp.*, 279 S.C. 90,

302 S.E.2d 340, 342 (1983). "In an action in equity, tried by a judge alone," the appellate court "has jurisdiction to find facts in accordance with its views of the preponderance of the evidence." *Townes*, 266 S.C. 81, 221 S.E.2d 773, 776; *see Doe v. Clark*, 318 S.C. 274, 457 S.E. 336, 337 (1995) ("Because this proceeding was in equity, heard by the trial judge alone, this Court's scope of review extends to the finding of facts based on its own view of the preponderance of the evidence."). Id.

APPLICATION

The complaint alleged entitlement to injunctive relief and extraordinary writs in the form of Petition for Writ of Mandamus and Prohibition. The only action at law is the Declaratory Judgment action. Otherwise, the complaint body seeks equitable relief in the form plea for injunctive relief, and issuance of writs. As such, Appellant avers the Court of Appeals scope of review in this case can extend to findings of fact based on its own view of the preponderance of the evidence.

ARGUMENT

As a threshold matter regarding standing, two (2) circuit courts have now ruled on standing under S.C. Code Ann. § 6-29-950(A) arriving at different legal conclusions in the same general standing context under S.C. Code Ann. §6-29-950(A).[1]

I. DID THE CIRCUIT COURT ERROR AT LAW BY CONCLUDING BIVENS HAD FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, HAD NO STANDING, AND THERE WAS NO JUSTICIABILE CONTROVERSY?

[1] In case no. 2024-CP-46-*02641 Silfab Solar Inc. et al v York County Board of Zoning Appeals* another neighboring owner to the Silfab site, Walter Buchanan, sought and was granted the right to Intervene as neighboring owner with standing under the 10/22/2024 Order of Judge Marvin H. Dukes, III. This order has stood unchallenged, and specifically cites standing conferred under S.C. Code Ann 6-29-9

Yes. Respectfully the ruling misapprehends two (2) things. First, the December 2022 letter was not an appealable agency action; and (2) the FILOT zoning ordinance did not legislatively authorize in zoning change or change of land use. The December 27, 2022, verification letter is not an official agency decision from which an appeal can be undertaken. This is especially true if Bivens did not have notice, never received the letter in fact, or never have an opportunity to be heard as neighboring owner to the Silfab parcel. Appellant respectfully asserts abuse of discretion and reversible error of law as to Bivens having no standing. The error by the trial court is finding a zoning letter was a final agency action and decision from which a viable appeal could be undertaken.

Of more critical importance is the trial court error of law that there was zoning approval at law. Appellant contests the "*Zoning Compliance Verification*" letter of December 27, 2022, and asserts there was no zoning approval, making the circuit court ruling controlled by error of law, not supported by substantial record evidence, and abuse of discretion by the trial judge. The term of art argued in court "zoning compliance verification" does not constitute lawful zoning approval. The mere inserting of "compliance" as between "zoning" and "verification" does not equate to legislative action as to zoning or change of land use. The trial court rules with no supporting evidence that zoning approval existed in fact, and a "verification" letter was a judiciable controversy, where Bivens failed to appeal a letter. The court finds no judiciable controversy incorrectly viewing "zoning compliance verification" as government authorized zoning approval viewed most favorably to movants in error as legislative change of zoning or land use under a Rule 12 SCRCP review.

(a). DID THE CIRCUIT COURT ERR BY FINDING BIVENS HAD NO STATUTORY OR CONSTITUTIONAL STANDING?

Yes. The concept of justiciability encompasses the doctrines of ripeness, mootness, and standing. *Jackson v. State*, 331 S.C. 486, 490 fn.2, 489 S.E.2d 915, 917 n.2 (1997). The court views standing most favorably to the movant in error, where Bivens as neighboring owner would have both statutory standing, as well as constitutional standing. The issue is discussed in the Order at (R.p.238 at fn.5) at page 238 infra, and (R.p.240 at fn.6) both statutory and constitutional standing are discussed below. Here the circuit courts are ruling differently as to statutory standing in the quagmire of the Silfab cases now on record before all courts, which are cited by memorandums of the parties. While recognizing the complaint citing S.C. Code Ann. § 6-29-950(A) as an "avenue" for a neighboring property owner like Bivens to challenge a zoning action, the court under Rule 12(b)(6) views the statute and evidence and all inferences most favorably to the movants in error. Specifically, § 6-29-950(A) is cited by the court, where Biven's complaint pleaded both spot zoning and nuisance (R. p. 4 at ¶18). Both were alleged in the face complaint allegations. The relevant statutory text provides as follows:

> In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter...an adjacent or neighboring property owner who would be specially damaged by the violation may in addition to other remedies, institution 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.
>
> S.C. Ann. § 6-29-950(A).

Under the court's statutory standing analysis, this is precisely what Bivens did where it bears noting for the Court of Appeals that the "verification" letter of December 27, 2022, was not an agency decision. It would never meet citizens' consciousness as it was not delivered, did not convey notice pertinent to change of use or zoning, and did not offer Bivens (nor any other citizen)

a procedural method nor avenue of appeal. The trial court erred in concluding that the verification letter was an appealable decision and agency action because the record contains no substantial evidence that supports this finding. More critical is the trial court viewing the letter as supreme and paramount to the latter May 30, 2024, BZA reversal order, which was a unanimous five to zero decision. [R.p. 128-128] The court abused its discretion by weighing whether Mr. Bivens might conceivably not prevail under a Rule 12(b)(6) review. *Spence v. Spence*, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006) (R.p.240 Fn.8).

(b). DID THE CIRCUIT COURT ERROR BY CONCLUDING THERE WAS NO INJURY IN FACT, OR ACTUAL OR IMMINENT HARM WHERE A PROPOSED CHANGE OF USE FROM DISTRIBUTION TO CHEMICAL MANUFACTURING NEIGHBORS BIVENS HOME RESIDENCE?

Under a Rule 12(b)(6) review, "the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Id. "The decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. *Id.* The complaint alleged change of use, (Comp. at p.4, at 17) spot-zoning (Id. at 18), and nuisance. (Id. at 18). The trial court errors at law in misapprehending *special damages* cited by 6-29-950(A) and a substantial interest, erroneously as mandating *injury in fact* as to standing, (R.p. 241, ¶4 at 1-9) all viewed in the light most favorable to the movant under error of law and facts viewed inverted in favor of the movant. The statute does not cite "injury in fact" as requirement for standing. Conversely, the text of the statute states:

> 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. S.C. CodeAnn§6. 29.950(A).

Turning to constitutional standing, in applying the three prongs of standing, the court improperly weighed the evidence. First, the court found that Bivens suffered no injury in fact, despite the proposed use of the property by Silfab—without zoning approval—as a chemical manufacturing industrial facility involving toxic processes and hazardous chemicals use located adjacent to Biven's residence and schools. Second, the court failed to recognize that the alleged injuries are causally connected to Respondents' conduct, including the absence of zoning approval, the improper change in use, and the continued issuance of permits; despite the lawful zoning decision of the Board of Zoning Appeals' reversing the zoning administrator and Silfab on May 30, 2024. These actions directly facilitated Silfab's ongoing construction and operations pursuant to the county un-announced issue of a Certificate of Occupancy, February 13, 2026. Where, adjacent to Bivens' home and schools a change in land use now manifests itself prominently. Finally, the complaint adequately alleges that the injuries asserted—spot zoning and nuisance specifically—are likely to be redressed by a favorable judicial decision under injunctive relief sought by the complaint. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (describing the three-part standing test); *Sea Pines Ass'n for Protection of Wildlife v. South Carolina Dep't of Natural Res. & Cmty Services, Assoc. Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (explaining that to have standing one must have a personal stake in the litigation, which occurs when a private person "is in immediate danger of sustaining, prejudice from an executive or legislative action"). See, (R.p. 250 at fn.9) Appellant avers the Court of Appeals can take judicial notice of the two (2) same-week toxic chemical spills occurring at the Silfab site on March 3, 2026, and March 5, 2026, respectively. A week of hydrofluoric acid "drip" occurs at the plant without Silfab timely reporting it to county emergency response division, while children play at adjacent

school yard playgrounds and parents are unaware, until HAZMAT response teams show up, at Silfab where a second spill has occurred March 3, 2026.

Plaintiff respectfully avers that the court, by viewing the facts and inferences most favorably to the movant, improperly concluded that Plaintiff failed to allege facts demonstrating injury in fact, causation (actual or imminent), or redressability. Code §6-29-950 incorporates the language "*would be specially damaged*" not "*injury in fact*". The judge's order concluded incorrectly at fact and law that Bivins did not show evidence that he "had been injured." The error of law is the state statute does not require injury in fact but rather "would be *specially damaged*". Bivens alleges this is reversible error in the context of environmental changes and impact to health, safety, welfare and existing zoning which prohibits Silfab's land use now in active operations at the site. The two (2) chemical spill incidents that occurred at the Silfab Site directly relate to whether a neighboring owner like Bivens might be specially damaged.[2]

II. DID THE CIRCUIT JUDGE ERR IN CONSTRUING "ZONING COMPLIANCE VERIFICATION" AS LEGISLATIVE ZONING APPROVAL WHERE NO DUE PROCESS TO BIVENS OR THE AFFECTED PUBLIC AND APPELLANT RECEIVED NO NOTICE OR OPPORTUNITY TO BE HEARD PRIOR TO THE SEPTEMBER 18, 2023, FILOT PURPORTED CHANGES TO THE SILFAB PARCEL AS ZONING CHANGE OR CHANGE IN LAND USE.

Zoning Compliance Verification is the word salad cited in court, (R.p.179 at 13-17); (R.p. p. 26 para. A) first coined by defense counsel. Provided, however, it aptly describes a term of art which leads the trial court down the primrose path to error of law (R.p. 250 fn.9). Appellant avers the trial court errors at law in determining this term of art was viewed as de-facto zoning approval

[2] Appellant acknowledges SCACR 210 but respectfully avers the two (2) spills occurring after the trial court's order of January 21, 2026, cannot be viewed in a total vacuum; this court, like the trial court, should take note of the hazardous chemical spills in reference to the deed restrictions submitted into record after argument. The two spills at Silfab occur within 20 days of permanent Certificate of Occupancy ("CO") granted by county government 2/13/2026 and involved chemicals including Hydrofluoric Acid (HF) and Potassium Hydroxide (KOH).

by the zoning administrator under S.C Code Ann. § 6-29-950(A), where no such zoning approval existed. There is no link as to a zoning change and a tax incentive FILOT agreement. Both before and after oral argument, the County would seemingly disagree with defense counsel, and this court can take notice that the council and its former members state no zoning change was affected by the FILOT. (R.p.229-230).

Defendant clings to the lifeline of purported zoning *repeal* by way of the FILOT ordinance, (R. p. 73 at para.5) to frame the term of art "zoning *compliance* verification" leading the court to error as to purported legislative zoning or change of use which never occurred. The December 27, 2022, letter itself is titled Zoning *Verification*. (R.p.71). Inserting the word "Compliance" in between "zoning" and "verification" in arguments (R.p.26 at para. A) as to the letter does not convert its effect at law. York County has separate process for Zoning Compliance, which Silfab never completed, because S. C. Code Ann. ¶6-29-1145(A). The trial court dismissal is reversible error if respondent personnel failed to comply with 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 an applicant whether the tract or parcel of land is restricted by *any recorded covenant* that is contrary to, conflicts with, or prohibits the permitted activity".

This never occurred. Thus, there can be no "*confirmation*" occurring as between the "*zoning* compliance *verification*", and the ruling is error of law. Even the county's own zoning definitions submitted by the defense confirm this. (R.p. 71 at ¶6).

III. DID THE CIRCUIT COURT ERROR AT LAW BY FINDING A TAX INCENTIVE FILOT AGREEMENT WAS LEGISLATIVE AUTHORIZED CHANGE OF USE OR ZONING WHERE RESPONDENTS FAILED TO INQUIRE INTO DEED RESTRICTIONS BINDING THE PROPERTY?

Yes. The parcel is owned by Exeter 7149 Logistics. Silfab is but a tenant of the building at the Light Industrial site. Appellant respectfully avers error at law where the buried fine print within numerous pages of a FILOT ordinance purportedly implicating zoning or change of use and cannot

stand as a zoning change absent due process to Appellant, neighboring owners, or the public generally. The FILOT was but a *tax incentive*, not a zoning change. (See, R.p. 229-230). Even if the FILOT specifically mentions the physical address of the parcel, it nonetheless is not a zoning change approval nor legislative approval change of land use, nor is it a variance. Rather, Appellant alleges it is site specific spot-zoning prohibited by the deed restrictions, the BZA, the parcel's existing zoning classification. The deed restrictions the court failed to consider despite being urged to do so at argument. (R.p.219 at section 4). In viewing dismissal most favorably to the movant, the court erred at law and abused its discretion by viewing Zoning Compliance Verification erroneously as zoning approval. Critically, all letters defendants rely upon from zoning state, verification, "This letter does not constitute a permit". [R. p. 168 at 3-10]; see also (R.p. 71 at ¶5)] The trial court did graciously agree to permit plaintiff, after argument, to file of record in the case (1) Exeter deed restrictions impacting the Silfab parcel (R. p. 198-228) and (2) affidavit of a former county counsel member Allison Love saying the FILOT was at no time a zoning change. (R.p.2289-230). "Go ahead and submit them. If you would just e-file them and then I'll determine *whether I will consider them or not* but go ahead and file them." (R.p.181 at 14-17). Appellant avers it was abuse of discretion for the court not to consider the deed restrictions, which in absolute terms prohibit hazardous substances. (R.p. 204 at Section 23). If the court permitted the deed restrictions as exhibit, yet failed to consider it, the failure to exercise discretion by the trial judge is abuse of discretion. "An abuse of discretion occurs when the trial court's ruling is based on error of law, such as determining zoning compliance verification to be de-facto zoning approval as here, or, when based on 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; or when the ruling does not fall within the range of permissible decisions applicable to a particular case, such that it may be deemed arbitrary and capricious." *Fontaine v. Peitz*, 291 S.C. 536, 539, 354 S.E.2d

565,566 (1987); *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 n. 6 (2nd Cir. 2001) *State v. Allen*, 370 S.C. 88, 94 (S.C. 2006)

Appellant respectfully avers abuse of discretion by the circuit judge where the court failed to view import of the public recoded deed restrictions specifically, under abuse of discretion "go ahead and submit them"; "If you would just e-file them and then I'll determine whether I will consider them or not. But go ahead and file them." (Trans. P. 41 14-17) To be clear, Silfab is violating deed restrictions that its landlord Exeter deliberately left applicable to the Silfab parcel forbidding hazardous chemicals, noxious fumes, or use of corrosives that might impact neighboring owners. The purpose of the deed restrictions is clear and unambiguous - no hazardous chemicals permitted, period. This is why Appellant can demonstrate via complaint allegations he would specially be damaged and has standing. To be clear, Fort Mill residents were there first in this part of Fort Mill, not Silfab. Hundreds of residents have relied upon the existing zoning. Moreover, the county had constructive notice of the surroundings at the Site, all residential and/or planned schools. At minimum, deed restrictions gave the government agency personnel and Silfab personnel notice that deed restrictions entirely banned hazardous, toxic or corrosive chemicals use at site, and Biven's complaint therefore properly alleges he might be specially damaged by this type of change of use, if the government cannot stomach enforcing the laws or its own ordinances under its police power. The deed restrictions were imposed by JG Baxter, LLC – who sold to Exeter. Exeter then amended the deed restrictions but did not take out the prohibition against hazardous chemicals. (R.p. 204 at Section 23); (but *compare*, amendments R. P.186 ¶2).

A motion to dismiss under Rule 12(b)(6) should not be granted if the facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Overcash v. S.C. Elec.& Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Furthermore, the complaint should not be dismissed because the court doubts the plaintiff will prevail in the action. *Spence*,

368 S.C. at 116–17 (R.p.250 at Fn/9). Thus, the circuit court failed to view the evidence, facts and inferences most favorably to Plaintiff in ruling on the Rule 12 SCRCP motions where deed restrictions prohibited hazardous substances on the site neighboring Plaintiff's home, two schools, and scores of other residences. The affidavit of Allison Love (former county council member) confirms the FILOT was never a change to zoning. (P. 229-230).[3] This court can take judicial notice that York County, likewise, confirms the FILOT was not a zoning matter.

Provided, the court must have considered all documents incorporated by reference in the complaint and permitted in argument and not just those "to prevent plaintiffs from surviving a motion to dismiss intentionally omitting documents upon which their claims are based". (See, *Brazzell*, infra. And *Ballard*, infra at fn.1)(R.p.234 Fn.1); At oral argument, Respondent relied on eight (8) total Exhibits, A – H, to be construed under Rule 12. To be clear, Plaintiff counsel and Defense counsel stipulated that the court should limit its review under Rule 12(b)(6) and not convert to a Rule 56(c) review during argument January 21, 2026. However, Bivens was permitted only two (2) additional entries to be filed of record in support of Biven's rebuttal arguments that the court was presuming without substantial evidence, zoning approval by misapprehending legal effect of "*zoning compliance verification*". The trial judge abused discretion by failure to consider deed restrictions and covenants. The sandwich of words into term of art does not equate to legislative authorized zoning change or change in use. Bivens argued the deed restrictions – even

[3] By consent of plaintiff and defendant counsel, the court considered documents presented at oral argument not converting the motion to summary judgment. See, 1/26/2026 Order, fn.1 p. 1) (citing *Brazzel v Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) and *Ballard v. Admiral Ins. Co.*, 442 S.C. 22, 33, 897 S.E.2d 183, 188 (Ct.App. 2023).

as amended – contained the following in paragraph (23) applicable to Silfab and property owner Exeter, Silfab's landlord:

> **Section 23. "Hazardous Materials"** means any "hazardous material", "Hazardous substance", "Pollutant or Contaminant", "Petroleum" and "Natural Gas Liquids" as those terms are defined or bused in Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), hazardous waste, toxic substance, and any other substance regulated because of their effect or potential effect on public health and environment, including, without limitations, PCBs, lead paint, asbestos, urea formaldehyde, radioactive materials, pesticides, and infectious materials,. If a law or regulation defines any of the foregoing terms more broadly than another, the broader definition shall apply."
>
> Section 4. **Prohibited Uses**. No noxious or offensive activity will be carried on in any building on any Lot of Common Area, nor will anything be done therein which may be or may become an unreasonable annoyance or a nuisance to any property owner or may negatively affect the value or reputation of the project. In furtherance of, and not in limitation to the foregoing, the business conducted on each Lot and in any improvements thereon shall be conducted in such manner so as not to cause or product any of the following effects: Noise or sound which is objectionable due to volume, duration, frequency or shrillness; smoke; noxious or toxic or corrosive fumes, odors or gases; or dust or ash.

Appellant requests this court take judicial notice that this is precisely what occurs week of March 2 through March 6, 2026, at the site. The Canadian corporation is now operational and was engaged in this very activity, and the deed restrictions were never changed by Exeter 7149 Logistics as landowner. There is no record evidence the county considered them. Prohibited hazardous chemical use is now in operation adjacent to Appellant's home and schools and are precisely how Appellant can allege he might be specially damaged as to his home environmental and health safety. The trial judge erred in granting the dismissal. Bivens had standing under S.C. Code Ann. § 6-29-950(A). He likewise had constitutional standing, per S.C. Const. art. I section 3 (1971). Other courts sitting in similar statutory standing issues have ruled neighboring property owners have standing. (see, fn.1 p.infra). If one neighboring property owner has standing, all neighboring

property owners would have standing if they are neighboring owners with a substantial interest or can evidence, they may be specially damaged. The court of appeals should reverse.

IV. DID THE COURT ERROR IN CONSTRUING ZONING INTERPRETATION LETTERS ERRONEOUSLY AS AGENCY ACTION FAILING TO GIVE PRIORITY TO THE BZA REVERSAL DECISION OF MAY 30, 2024

On May 30, 2024, the Board of Zoning Appeals (BZA) reversed the zoning administrator and – notably- Silfab's interpretation of the ordinance under the "verification letters". The vote was unanimous 5-0. The BZA is the quasi-judicial body of the legislature, e.g., York County Council. At the relevant time it was engaged in a quasi-judicial or judicial action involving applying the statutes and ordinances and reversing the zoning administrator and Silfab. Silfab participated in these proceedings by letter, concurring with the erroneous interpretations of the zoning administrator. Both were reversed. The only written communication signed by the zoning administrator that the Canadian corporation has ever received is affirmative notice stating that its proposed land use is prohibited on the light industrial–zoned parcel.

Even assuming, *arguendo* that Defendants' arguments are legally correct as to legislative action purportedly enacting a surreptitious, if not clandestine, zoning change occurring behind the scenes the Appellant and citizens were hoodwinked. The Board of Zoning Appeals, however, affirmatively acted to reverse the county zoning administrator department and made clear that its decision applied to Silfab Solar, Inc. at 7149 Logistics Lane. [R.p.127-128]. From this determination both Silfab and county permitting government bodies nonetheless proceeded in haste toward full construction and permitting operation to commence involving a yet untested and first its kind chemical manufacturing site, despite the parcel not being zoned for this type of land use.

The Appellant asks the court to take judicial notice of public county information occurring after court arguments that Silfab has now sustained two (2) chemical incidents adjacent to homes and schools during the week of March 2, 2026.

The March 3 incident involved potassium hydroxide (KOH) spill. Two days letter March 5, 2026, there is an incident involving hydrofluoric acid (HF) leaks. Before this, the county quietly issues a permanent certificate of occupancy February 13, 2026, giving zero notice to the public. It took but a mere 18 to 20 days after CO for environmental spills to happen, preceded by county failure to even warn residents that full operations CO involving chemical uses had commenced by the Canadian corporation. The citizens are last to know. The specialized damages complained of in the complaint is not hypothetical or conjectural as characterized by the trial court. (R. p. 241 at ¶4). The danger is real, and the spills evidence concrete evidence as to how Bivens or others might be specially damaged. The specialized harm to neighboring properties is now reality, and it was predicted by paragraph (22) page (5) of Biven's complaint.

V. DID THE CIRCUIT JUDGE ERR BY DETERMINING AT LAW THAT A FILOT AND FILOT ORDINANCES ARE CONTROLLING AND PARAMOUNT TO THE EXISTING ZONING CODE IN YORK COUNTY AND THE BZA REVERSAL?

Yes. The FILOT ordinance does not comply with constitutional due process, guaranteed to all citizens under the S.C. Const. art. I, Section 3 (1971). Appellant was denied equal protection of the laws and ordinances by Respondent.

Section 3. Privileges and Immunities; due process; equal protection of laws.

The privileges and immunities of citizens of this state and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

Appellant respectfully avers the buried print in voluminous text of a FILOT ordinance (R.p. 79 at 79-108) or FILOT agreement (R.p.113) (or both taken together) cannot retroactively enact an implied lawful change of zoning for the parcel nor a change of land use where due process was

circumvented or entirely evaded. This would particularly be the case where no actual notice to the Appellant, public, and zero opportunity to be heard. Nothing about the FILOT agreement or ordinance would change constitutional due process.

Importantly, the courts' conclusion of law and fact that import of the FILOT agreement language "all prior actions taken with respect to the project" were *ratified* (*sic) as formal legislative action of the county is reversible error. The FILOT was but a tax incentive, nothing more. It was entirely disconnected and had no impact to zoning, express or implied. The court can take notice that even York County Council confirms this publicly. This is absolutely true if a change in use or zoning was never conveyed to the Appellant, or the affected public under the guise of FILOT tax incentive. The FILOT language cannot serve as *on-the-fly change* of land use by mere reference to address of the parcel, ignoring existing zoning code and state statutory law applicable to zoning approvals. If due process is circumvented and there is no notice, nor opportunity to be heard, there is but one party who stands at fault for not protecting its citizens, the county. Stated another way, negotiation of a FILOT agreement or a FILOT ordinance passed, gives zero notice to the Appellant or the affected citizenry that a heavy industrial chemical manufacturing facility that will use hazardous, toxic and corrosive chemicals now sits as changed use at Light Industrial zoned parcel adjacent to Biven's home, schools, and scores of residential homes - all of whom have relied on the existing zoning for decades. All existed in the community before there was ever Silfab.

The rogue Canadian corporation, with the collusion of Respondent County permitting officials, has persisted in breaking the law from the very start, from (a) violating deed restrictions the county seemingly cannot review; to (2) no legislative approved variance or change of use; to (3) no actual zoning *approval* by zoning administrator, and (4) continued feigned or substituted zoning approval by purported "zoning compliance verification"; and now (5) permitting a dangerous operation and nuisance atop stack after stack of unlawful permits, despite warnings (R.

p. 258). This all occurs after the BZA told the zoning administrator and Silfab "no" and reversed. (R.p. 127-128). The lower court's decision must be reversed where respondents have now permitted dangerous chemical operations evidencing change of use the site was never zoned for, and Respondents fear reprisals and retaliatory litigation by Silfab should Respondents exercise its police powers or enforce zoning. If Respondent cannot protect the citizens, the citizens are empowered to protect themselves especially as it pertains to environmental dangers impacting their environment. Under the constitution, all political power is derived from the people, only. S.C. Const. art. I Section 1 (1971). Generally speaking, South Carolina case law recognizes that the exercise of police power – to protect the health and safety of the citizenry – cannot be hampered a business' reliance upon and receipt of permits. Moreover, there is no pre-existing chemical manufacturing land use for chemical manufacturing at the time of adoption of the zoning ordinances. South Carolina courts have concluded that the police power is, however, usually paramount provided it has a reasonable basis. *Whitfield v. Seabrook*, 259 S.C. 66, 73, 190 S.E.2d 743, 746 (1972); see also *Daniels v. City of Goose Creek*, 314 S.C. 494, 497-98, 431 S.E.2d 256, 258 (Ct. App. 1993) (quoting *DeStafano v. City of Charleston*, 304 S.C. 250, 403 S.E.2d 648 (1991). At time of filing the notice of appeal, a letter from Plaintiff counsel to Defendant counsel filed of record as to permits alleged unlawful (R. p. 258). Silfab began operations in earnest February 13, 2026, under county-issued Certificate of Occupancy for operations, concealed from the public. As to the land use now in operation at the site, ([a] landowner acquires a vested right to continue a non-conforming use already in existence at the time his property is zoned in the absence of a showing that the use would constitute a detriment to the public health, safety, or welfare.") Id. Here Silfab is not the parcel owner, and the change of use it now engages in did not exist at the site before Silfab's operations began under 2/13/2026 Certificate of Occupancy for operations, where the Respondent County officials at no time notify the citizenry before HAZMAT emergency

response teams show up at chemical spills. It takes but a mere (18) to (20) days for the Canadian corporation to have not one, *but two*, chemicals spills near Bivens' home, adjacent schools, and hundreds of residential homes requiring temporary stop work orders, and investigation by EPA and South Carolina Department of Environmental Services (SCDES). As you read this memorandum, Silfab continues operation, even now. If the respondent is unwilling or cannot protect the citizens for fear of reprisals, then the citizens should have a right through the courts to step up and protect themselves where the county fails.

CONCLUSION

For the foregoing reasons, Appellant Dennis Floyd Bivens asserts abuse of discretion and error of law by the trial court and respectfully asks the Court of Appeals to Reverse and Remand. Appellant thanks this court for its review and consideration.

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