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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE RICHLAND COUNTY CIRCUIT COURT
L. CASEY MANNING, Richland County Circuit Court Judge

Appellate Case No. 2017-000617
Case No. 2016-CP-40-00946

South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated........................ Appellants,

v.

The City of Columbia, Richland County, and Fairfield County................ Respondents.

BRIEF OF RESPONDENTS RICHLAND COUNTY AND FAIRFIELD COUNTY

Ray N. Stevens (SC Bar No. 5342)
Ray E. Jones (SC Bar No. 11322)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: 803.255.8000
Facsimile: 803.255.8017
raystevens@parkerpoe.com
rayjones@parkerpoe.com

Counsel for Respondents
Richland County and Fairfield County

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STATEMENT OF ISSUES ON APPEAL

I. BECAUSE APPELLANTS' STATEMENT OF ISSUES ON APPEAL FAILS TO SET FORTH A CHALLENGE TO THE LOWER COURT'S APPROVAL OF SPECIAL SOURCE REVENUE CREDITS, HAVE APPELLANTS FAILED TO PRESERVE FOR APPEAL THE QUESTION OF WHETHER PRIVATE DORMITORIES FOR STUDENTS ARE ENTITLED TO SPECIAL SOURCE REVENUE CREDITS?

II. BECAUSE THE LOWER COURT'S DECISION IS BASED ON MORE THAN ONE GROUND AND ALL GROUNDS HAVE NOT BEEN APPEALED, HAVE APPELLANTS FAILED TO PRESERVE FOR APPELLATE REVIEW THE QUESTION OF WHETHER PRIVATE DORMITORIES FOR STUDENTS MAY BE PLACED IN A PARK?

III. DO INCLUDING PROPERTY USED AS PRIVATE DORMITORIES FOR STUDENTS IN A MULTICOUNTY BUSINESS AND INDUSTRIAL PARK AND GRANTING SPECIAL SOURCE REVENUE CREDITS TO SUCH PROPERTY VIOLATE THE SOUTH CAROLINA CONSTITUTION OR STATUTORY LAW?

IV. DO THE APPELLANTS POSSESS STANDING?

STATEMENT OF THE CASE

In February 2016, Appellants filed a Complaint in the Richland County circuit court seeking a declaratory judgment against Richland County and the City of Columbia. Appellants subsequently filed an Amended Complaint which, among other changes, added Fairfield County as a party-defendant. Richland County, Fairfield County, and the City of Columbia responded timely.

To prepare for litigation, the parties identified the relevant undisputed facts, recorded their agreement to those facts in a Joint Stipulation of Facts, and filed the Stipulation with the circuit court August 31, 2016. Having established a lack of disputed facts, all parties filed cross-motions for Summary Judgment by September 20, 2016.

The circuit court, however, seeking to resolve the matter, directed the parties to pursue Mediation. Mediation occurred before former Court of Appeals Judge, William L.

Howard. The parties conferred in Mediation but on December 5, 2016, concluded they could not reach a resolution. Thus, Mediation was unsuccessful.

Lacking a Mediation resolution and having pending cross-motions for Summary Judgment, the circuit court heard the Summary Judgment motions on January 17, 2017. On February 15, 2017, the court granted Summary Judgment to Richland County, Fairfield County, and the City of Columbia. On February 17, 2017, the circuit court gave notice of Judgment to all parties by first class mail.

No party requested a rehearing or filed a motion under Rule 59(e), SCRCP. Rather, on March 8, 2017, Appellants filed with this Court an appeal of the circuit court's order.

STATEMENT OF FACTS

In 2003, Richland County and Fairfield County entered a Master Agreement which consolidated their multi-county parks into the 1-77 Corridor Regional Industrial Park ("Park"). Since 2003, Richland County and Fairfield County have added additional properties to the Park.

Richland County and Fairfield County made four additions to the Park, relevant to this case, during 2014 and 2015. These four properties added, with the consent of the City of Columbia, are used or to be used as Private Dormitories for Students. The additions are Park I (237 units, 640 bedrooms), Park II (227 units, 684 bedrooms), University Residences (247 units, 726 bedrooms), and Project Peak (218 units, 660 bedrooms).

Richland County authorized a Special Source Revenue Credit – of up to 50% for each of the four properties. The Special Source Revenue Credit, if applicable, reduces the fee-in-lieu-of-tax payments owed by each Private Dormitory and is applied under the

terms of the agreements between Richland County and each developer of the Private Dormitories.

Each of the four properties, once placed in service, will engage in the continuous activity of letting beds to students through the entering of a lease or other contractual arrangement. The lease or contractual arrangement is between the student and either the developer or the property manager of the Private Dormitories for Students. The lease provides a room in the facility and provides services.

The Private Dormitories' services in operating and leasing off-campus accommodations to college students include providing security, property management, and planned recreational activities. Based on these characteristics, the Richland County Assessor treats the Private Dormitories as business and commercial property taxed at a 6% assessment ratio. The City of Columbia also classifies the Private Dormitories as commercial property for water and sewer, property taxes, and zoning.

STANDARD OF APPELLATE REVIEW

The lower court decided this action on cross-motions for Summary Judgment. (R. pp. 2–3). The standard on appeal for a summary judgment review is the standard of Rule 56(c), SCRCP, the same standard applied by the trial court. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) ("When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c).)" That standard is whether i) the pleadings, depositions, affidavits, and discovery on file show no genuine issue of material fact ii) such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRCP.

SCOPE OF LOWER COURT DECISION

In deciding the Summary Judgment motions, the scope of the lower court's order finds no factual issues exist and the Counties and City prevail as a matter of law.

1. THE LOWER COURT FOUND NO MATERIAL FACTS IN DISPUTE

The lower court examined and then relied upon the parties' Joint Stipulation (R. pp. 3–5) and unopposed affidavits (R. pp. 5–6). From these, the order holds "[h]ere, no material facts are disputed."). (R. p. 3).

2. THE LOWER COURT ADDRESSED TWO QUESTIONS AS A MATTER OF LAW

The order below addresses and answers a "Placement Question" and a "Credit Question." The Placement Questions asks: What authority allows or prohibits the Counties and City "to place Private Dormitories in a Park[?]" (R. p. 6). The Credit Question asks: What authority allows or prohibits the Counties and City "to provide special source revenue credits for such property[?]" (R. p. 6).

Scope of Holdings on First Question of Placement in the Park

On the Placement Question, the lower court provides four independent holdings concluding "Private Dormitories may be placed within an industrial or business park." (R. p. 7).

First, the lower court holds "a Park may comprise many activities—some akin to industrial activities and some akin to business activities . . . [but] both are permissible activities [and h]ere the Court finds the Private Dormitories are within the Park's requirement of 'business.' ") (R. p. 7).

Second, in answer to Appellants' argument asserting residential property cannot be included in a Park, the lower court holds "Student Housing Apartments are not 'residential' in a property tax sense." (R. p. 11). Further, the lower court underscores its conclusion by holding "the Private Dormitories are not residential but are commercial and properly placed within a Park." (R. p. 7).

Third, in answering Appellants' assertion of a residential use being prohibited, the Court ruled "the Student Housing Apartments are well within the meaning of the authorized 'industrial or business' properties, **regardless of whether the property has a residential feature**." (Emphasis added.) (R. p. 12). That holding is emphasized by the lower court concluding "to the extent the Private Dormitories have any element of residential character, the Court finds any such element of residential character does not defeat the properties as being commercial properties properly placed in a Park." (R. p. 13).

The fourth independent finding that Private Dormitories are properly included in the Park are the holdings disagreeing with Appellants' assertion "the definitions of Chapter 29 of Title 4 apply to Chapter 1 of Title 4." (R. p. 13). The lower court finds the definitions of Chapter 29, Title 4 do not apply to Chapter 1, Title 4 and as a result "the Plaintiffs' assertion does not prohibit placing the Private Dormitories within the Park." (R. p. 13).

Scope of Holdings on Second Question of Special Source Revenue Credits

The lower court concludes as a matter of law the "special source revenue credits are proper." (R. p. 9). Just as in the Placement Question, the lower court relies on more than one independent holding in answering the Credit Question.

First, the lower court finds Special Source Revenue Credits are proper for the Private Dormitories because the two requirements of S.C. Code Ann. §4-1-175 are satisfied. Under the Ordinances stipulated to by the parties i) "the revenue source (against which the credit under review is applied) is the Private Dormitories fee-in-lieu-of-tax payment" (R. p. 9) and ii) "the Ordinances stipulated to by the parties show authorization for the credit for the Private Dormitories to be utilized to pay for improved or unimproved real estate and personal property used in the operation of the Private Dormitories" (R. p. 10).

Second, the lower court finds Special Source Revenue Credits are proper for the Private Dormitories through holdings which refute Plaintiffs' assertion that "the definitions of Chapter 29 of Title 4 apply to Chapter 1 of Title 4." (R. p. 13). The lower court finds "four reasons, . . . the Plaintiffs' assertion does not prohibit . . . providing special source revenue credits."

One, the definitions of Chapter 29, Title 4 do not apply to Chapter 1, Title 4 because the definitions only apply "[w]henever used in [Chapter 29]." Two, the definitions of Chapter 29 cannot apply to Chapter 1 because the "words 'Project' and 'Industry' do not exist in Chapter 1." (R. p. 14.). Three, not applying the definitions of Chapter 29 to Chapter 1 "follows existing practices of economic developers seeking to incentivize South Carolina economic development in a Park." And, four, even if the definitions of Chapter 29 could be imposed on Chapter 1, "the Private Dormitories here satisfy the definitions of Chapter 29 of Projects within an Industry within the meaning of S.C. Code Ann. § 4-29-10(3) and (6)." (R. p. 15)

ARGUMENT

I. BECAUSE APPELLANTS' STATEMENT OF ISSUES ON APPEAL FAILS TO SET FORTH A CHALLENGE TO THE LOWER COURT'S APPROVAL OF SPECIAL SOURCE REVENUE CREDITS, APPELLANTS FAIL TO PRESERVE FOR APPEAL THE QUESTION OF WHETHER PRIVATE DORMITORIES FOR STUDENTS ARE ENTITLED TO SPECIAL SOURCE REVENUE CREDITS

As discussed above in the "SCOPE OF LOWER COURT DECISION," the lower court rules on two questions. Appellants appeal only one.

The lower court order first rules "Private Dormitories may be placed within an industrial or business park." (R. p. 7). Second, the order rules "special source revenue credits are proper." (R. p. 9).

Appellants' Statement of Issues on Appeal asks this Court to review the question of what authority allows or prohibits the Counties and City to place Private Dormitories for Students in a business or industrial park. (See Appellant's Initial Brief, p. 1 asking "[d]oes including residential student housing projects in an industrial park violate South Carolina Constitution Article VIII, section 13 and the enabling statutes?"). The Statement of Issues on Appeal requests no review of the lower court's ruling that Special Source Revenue Credits are proper.

An appellate court reviews questions asked, not questions unasked. *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014) ("Appellants have the responsibility to identify errors on appeal, not the court; appellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal); *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011) ("Appellants argue the

master erred in awarding damages to Allen; however, this issue was not included in Appellant's sole statement of the issue on appeal. Therefore, we need not address this argument on the merits.")

Accordingly, no issue of Special Source Revenue Credits is preserved for appellate review and no Credit Question is before the Court. *Burris v. Propst Lumber & Logging, Inc.*, 396 S.C. 85, 94, 719 S.E.2d 695, 700 (Ct. App. 2011) ("this specific issue is not preserved for appellate review because [Appellant] did not specifically raise this point in its Statement of Issues on Appeal [and t]herefore, the court need not consider it.")

II. BECAUSE THE LOWER COURT'S DECISION IS BASED ON MORE THAN ONE GROUND AND ALL GROUNDS HAVE NOT BEEN APPEALED, APPELLANTS FAIL TO PRESERVE FOR APPELLATE REVIEW THE QUESTION OF WHETHER PRIVATE DORMITORIES FOR STUDENTS MAY BE PLACED IN A PARK

For the Placement Question, the only position appealed in the Appellants' Statement of Issues on Appeal is whether "including residential student housing projects in an industrial park violates South Carolina Constitution Article VIII, section 13 and the enabling statutes." (Appellants' Initial Brief, Statement of Issues). Thus, Appellants' challenge is: Private Dormitories for Students are not properly located in the Park if the properties are residential. Given that challenge, the "two-issue" rule prevents Appellants from obtaining appellate review of the Placement Question.

"Under the two-issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). In the same vein an "unchallenged ruling, right or wrong, is

the law of the case and requires affirmance.") *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct.App.1998).

Here, Appellants' appeal only the issue of whether residential property may be in the Park. The lower court finds, based on the case presented to it, residential use makes no difference to the issue of whether Private Dormitories for Students can be placed in a Park. Rather, the lower court holds regardless of residential use, the four properties are permitted.

> [T]he Student Housing Apartments are well within the meaning of the authorized "industrial or business" properties, ***regardless of whether the property has a residential feature***. Nothing in the plain language of the statute or constitution denies the ability to place property in the Park merely because a residential feature exists within a commercial property. Here, the properties are undeniably commercial properties and properly included in the Park. (Emphasis added).

R. p. 12.

That holding, standing on its own, allows the Private Dormitories—whether residential or not—to be placed in a Park. Accordingly, that unappealed holding constitutes the "law of the case" under the two-issue rule and prevents the Placement Question from receiving appellate review.

III. INCLUDING PROPERTY USED AS PRIVATE DORMITORIES FOR STUDENTS IN A MULTICOUNTY BUSINESS AND INDUSTRIAL PARK AND GRANTING SPECIAL SOURCE REVENUE CREDITS TO SUCH PROPERTY DO NOT VIOLATE THE SOUTH CAROLINA CONSTITUTION OR STATUTORY LAW

While the Appellants' Statement of Issues on Appeal requests no review of the Credit Question causing Appellants to fail to preserve the issue for review, if the Court were to review the question, none of the assertions by Appellants remove the authority of the Counties to grant Special Source Revenue Credits to Private Dormitories for Students. Similarly, while the "two-issue" rule prevents Appellants from obtaining

review of the Placement Question, if the Court were to review the question, no violation of S.C. Constitution, Art. VIII, Section 13 or statutes occurs by including Private Dormitories for Students in the Park. Respondents' views on the Credit Question and the Placement Question are addressed below.

A. Appellants Raise Two Primary Positions Seeking to Deny Placement of and Special Source Revenue Credits to Private Dormitories for Students in a Park

Appellants' overarching arguments present two fundamental positions. First, Appellants argue Chapter 29, Title 4 applies to and controls Chapter 1, Title 4. Second, Appellants argue the statutory language on the Credit Question and the Placement Question requires reviewing the intent of the General Assembly. That review, according to Appellants, shows no intention to include residential use property in a Park nor to grant Special Source Revenue Credits to such property. Appellants are incorrect—Chapter 1, Title 4 is not controlled by Chapter 29, Title 4 and the General Assembly expressed no intention to exclude Private Dormitories for Students from a Park nor deny Special Source Revenue Credits to such property.

1. Chapter 29, Title 4 Does Not Control Chapter 1, Title 4

a. No Statute Imposes the Definitions of Chapter 29, Title 4 to Chapter 1, Title 4

Appellants argue the definition provisions of Chapter 29, Title 4 control Chapter 1, Title 4. In particular, Appellants assert the definitions of "project" and "industry" found in § 4-29-10 must be used for properties placed in a Park created by § 4-1-170. No basis exists for such a position.

First, when the General Assembly imposes a definition (such as is the case for "Project" and "Industry") the definition applies only to the statutes using the defined

terms. *See e.g., Branch v. City of Myrtle Beach*, 340 S.C. 405, 413, 532 S.E.2d 289, 293 (2000) (where the Court addressed whether public employees are covered under right-to-work laws by stating "when the legislature desired to cover public employment it includes a definition doing so."). Here, the words "project" and "industry" are not used in Chapter 1—those terms are only found in Chapter 29. Hence, no basis exists for applying definitions from Chapter 29 to Chapter 1 when the defined terms supposedly controlling Chapter 1 do not exist in Chapter 1.

Second, if the General Assembly desired to impose the definitions of "Project" and "Industry" on multicounty business and industrial parks in Chapter 1, the legislature would have "included[d] a definition doing so" within Chapter 1 *Id.* Instead, the General Assembly used explicit wording limiting the definitions of Chapter 29 to terms as "used in this chapter [Chapter 29]." S.C. Code Ann. §4-29-10. Hence, the terms "Project" and "Industry" (as defined in Chapter 29) are not applicable to Chapter 1.

Third, the General Assembly has explicitly stated the limitations in Chapter 29 shall limit no other powers held by county governments:

> Neither this chapter nor anything herein contained shall be construed as a restriction or limitation upon any powers which a county or incorporated municipality might otherwise have under any laws of this State.
>
> S.C. Code §4-29-150.

Section 4-29-150 is the express statement of intent from the General Assembly that "chapter [29] shall [not] be construed as a restriction or limitation upon any powers which a county . . . might otherwise have." Obviously, Richland and Fairfield "otherwise have" the power to create a Park under §4-1-170 and to grant credits under §4-1-175. Therefore, under §4-29-150, Chapter 29 cannot be construed to limit or restrict those powers.

b. The Rule of Construction of *Pari Materia* Does Not Impose the Definitions of Chapter 29, Title 4 to Chapter 1, Title 4

Given the total absence of the terms "project" and "industry" in Chapter 1, the Appellants seek to bridge the divide between Title 4's Chapter 29 and Chapter 1 by telling this Court "[i]f two chapters relate to the same subject matter and to each other, they must be construed together." (Appellants' Initial Brief, p. 17). The rule Appellants urge upon this Court is a rule of construction known as *pari materia*—the view that "statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 598, 757 S.E.2d 408, 416 (2014). Before such a rule is relevant, Appellants must demonstrate Chapter 1 and Chapter 29 deal with the same subject matter. Appellants make no such showing because the two chapters deal with different subject matter. Chapter 1 covers a host of areas wholly unrelated to Chapter 29.

For example, beyond creating an industrial and business park (§4-1-170) and providing a credit against revenues received under Section 13 of Article VIII of the SC Constitution (§4-1-175), Chapter 1 includes statutes identifying counties as divisions of the state (§ 4-1-10), procedures for relocating a courthouse (§ 4-1-20 and 4-1-30), authority to change the name of townships (§ 4-1-40), authority of the chairperson of a county board to administer oaths (4-1-50), how to count populations added to cities by annexation (§ 4-1-60), rules for investing in sinking funds of defense securities (§ 4-1-70), furnishing office space and furniture to county officers and courts (§ 4-1-80 and 4-1-90), fees to be paid by a county and the method of paying court fees (§ 4-1-130 and 4-1-140), and many others.

On the other hand, the activity covered by Chapter 29 is that of enticing an "industry to construct and thereafter operate, maintain and improve a project" and then "to issue revenue bonds for the purpose of defraying the cost of acquiring . . . any project, and to secure the payment of such bonds." S.C. Code §4-29-20. In short, the broad breadth of Chapter 1 so far exceeds the specificity of Chapter 29 that the two chapters cannot be held to "deal with the same subject matter." Hence, no basis exists for applying the rule of construction of statutes being in *pari materia*.

Further, the rule of *pari materia* can apply only if an ambiguity needs resolving—it cannot apply where the meaning of the statute is clear and unambiguous. *Rabon v. S.C. State Highway Dep't*, 258 S.C. 154, 157, 187 S.E.2d 652, 654 (1972) ("rule may be applied where there is an ambiguity to be resolved and not where, as in this case, the meaning of the statute is clear and unambiguous."). Here, Appellants seek to enforce the definitions of §4-29-10 on properties in a Park when the meaning of §4-29-10 plainly and unambiguously limit those definitions to Chapter 29.

Under §4-29-10, the definitions of Chapter 29 are limited to "[w]henever used in this chapter [29]." Thus, the General Assembly by plain language states the definitions of Chapter 29 do not apply to other chapters of Title 4. Had the General Assembly meant the definitions of Chapter 29 to apply to any other Chapter in Title 4, the General Assembly would have so stated. *Horry Cty. Sch. Dist. v. Horry Cty.*, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) ("if [the] legislature had intended [a] certain result in [a] statute[,] it would have said so."). Thus, the *pari materia* rule of construction does not apply and the definitions of Chapter 29 do not apply to Chapter 1.

c. Even if Chapter 29, Title 4 Could Apply to Chapter 1, Title 4, the Private Dormitories for Students Meet the Definitions of "Project" and "Industry"

Appellants assert the Private Dormitories for Students fail to meet the definition of "project" in S.C. Code Ann. § 4-29-10(3) (Appellants' Initial Brief, p. 5 - 8) and fail to meet the definition of "industry" in S.C. Code Ann. § 4-29-10(5). (Appellants' Initial Brief, p. 9). While Private Dormitories for Students need not meet the definitions of Chapter 29, Title 4, those definitions are satisfied.

i. Private Dormitories for Students Are Within the Definition of "Project" in S.C. Code Ann. § 4-29-10(3)

"Project" at S.C. Code Ann. §4-29-10(3)(d) is defined as "any land and any buildings and other improvements on the land . . . considered necessary, suitable, or useful by . . . any enterprise engaged in commercial business **including, but not limited to** wholesale, retail, or other mercantile establishments." (Emphasis added). The words "but not limited to" are words of expansion. See *Whaley v. Dorchester Cty. Zoning Bd. of Appeals,* 337 S.C. 568, 579, 524 S.E.2d 404, 410 (1999) (where the words "but not limited to" signal an expansion of the "non-exclusive definition."); *Doe v. S. Carolina Dep't of Soc. Servs.*, 407 S.C. 623, 640, 757 S.E.2d 712, 721 (2014) (dissent by Justice Kittredge stating "the legislature defined the term [vulnerable adult] broadly, as evidenced by the 'including, but not limited to,' language."); *State v. Jones*, 416 S.C. 283, 297, 786 S.E.2d 132, 139 (2016) ("By using the language 'but not limited to, . . . we find the Legislature intended the protection of [stand-your-ground legislation] . . . to apply to incidents . . . without a geographical restriction.").

Here, given the "not limited to" language of S.C. Code Ann. § 4-29-10(3), the definition of "Project" is satisfied if the property under review is "engaged in commercial business." That condition is satisfied by the Private Dormitories for Students.

The parties agree "[a]ll of the projects engage in the continuous activity of letting beds to students through the entering of a lease or other contractual arrangements between the student and the developer or other property manager." (R. p. 356, paragraph 13.) That act of renting real property to students is a rental business dealing in commercial properties. (*See* R. p. 405, paragraph 8 (discussing classification of Private Dormitories as commercial properties); *see* North American Industrial Classification System ("NAICS") Code Sections 531110 & 721310, R. pp. 407–410.) Accordingly, renting commercial property (the activity in which the owners of the Private Dormitories for Students engage) is a commercial business. *See City of Beaufort v. Holcombe*, 369 S.C. 643, 650, 632 S.E.2d 894, 898 (Ct. App. 2006) ("A property owner renting commercial property to third parties is in the business of renting commercial property."). Therefore, the owners of the Private Dormitories for Students rent real property to students as dormitory space. That activity is the conducting of a commercial business satisfying the definition of "Project" in S.C. Code Ann. §4-29-10(3)(d).

ii. Private Dormitories for Students Are Within the Definition of "Industry" in S.C. Code Ann. § 4-29-10(6)

The rental activity discussed above for the term "Project" also meets the definition of "Industry" in S.C. Code Ann. §4-29-10(6). That statute defines "Industry" as "any person, firm or corporation engaged in any one or more of the enterprises identified in item (3) of this section or any person, firm or corporation providing facilities constituting a project to be used by any one or more of the enterprises identified in item

(3) of this section." As the above discussion of "Project" explains, the owners of the Private Dormitories for Students are "engaged" in the enterprises identified in item (3) since the owners rent real property to students as dormitory space and that activity is the conducting of a commercial business within S.C. Code Ann. § 4-29-10(3)(d). Therefore, the requirements of "Industry" are satisfied.

2. The Intent of the General Assembly Does Not Establish a Prohibition on Including Private Dormitories for Students in a Park nor Denying Special Source Revenue Credits to Such Property.

Appellants raise several arguments attempting to identify what intent the General Assembly had when enacting S.C. Code Ann. § 4-1-170 and § 4-1-175. The Appellants argue residential property must not be allowed in a Park because residential projects fail to bring the economic benefits of "industrial projects" (Appellants' Initial Brief, p. 10 – 11), residential properties fail to fulfill the purposes and policies supporting industrial development projects (Appellants' Initial Brief, p. 13 – 15), the SC Attorney General has opined on residential properties in a Park. (Appellants' Initial Brief, p. 12), and the Special Source Revenue Credits are not issued within the intent of S.C. Code Ann. § 4-1-175. (Appellants' Initial Brief, p. 15). None of these positions prevent placing Private Dormitories for Students in a Park nor granting Special Source Revenue Credits to such properties.

a. Whether to Exclude Residential Property from a Park Is Not Relevant to Placing Private Dormitories for Students in a Park

Appellants argue the intent of the General Assembly is to exclude property having "residential" features from the Park. From that premise, Appellants' Initial Brief repeatedly identifies the Private Dormitories for Students as "residential student housing." See e.g. Appellants' Initial Brief, in which the Statement of Issues calls the dormitories "residential student housing." Appellants are incorrect—the dormitories are not residential.

Article X, Section 1 of the S.C. Constitution, for property tax purposes, classifies real property as manufacturing, transportation, legal residences, agricultural, and "all other real property." The affidavit of the Assessor for Richland County discusses the classification of the Private Dormitories for Students as "other real property" and not as a "legal residence." Such a position by the Assessor is correct since the relationship of the occupants of the Private Dormitories for Students is stipulated to by all parties as "[a]ll of the projects engage in the continuous activity of letting beds to students through the entering of a lease or other contractual arrangements between the student and the developer or other property manager." (R. p. 356, paragraph 13). A property being used for rental purposes is classified as "other real property," the same classification used for traditional apartment complexes and other commercial properties. (*See* R. pp. 404–406). Thus, rather than "residential," the classification for the Private Dormitories for Students is commercial. Accordingly, as commercial properties, the properties are permitted in the Park and permitted to receive Special Source Revenue Credits.

b. Properties Placed in a Park and Used as Private Dormitories for Students, Produce Economic Benefits and Fulfill the Purposes and Policies of Economic Development But Achieve Those Objectives Without a Requirement to Produce a Specific Number of Jobs or a Specific Dollar Investment

Appellants argue "the tax benefits granted to industrial development projects benefit the surrounding communities by generating jobs and investments in the community [but i]n this case, the residential student housing projects do not bring such benefits." (Appellants' Initial Brief p. 10). Appellants' argument does not prohibit placing Private Dormitories for Students in a Park nor does it deny the use of Special Source Revenue Credits to such properties.

First, no requirement of S.C. Code Ann. § 4-1-170 imposes a duty to produce a specific number of jobs or to induce a specific investment amount in the community. Rather, what is required is "[b]y written agreement, counties may develop jointly an industrial or business park." S.C. Code §4-1-170(A). Hence, the counties have broad discretion in deciding what activities are most conducive to economic development for its citizens.

Appellants cite to and rely on *Quirk v. Campbell*, 302 S.C. 148, 394 S.E.2d 320 (1990) to argue investments in a Park must seek to attract "large capital-intensive businesses." Appellants' Initial Brief, p. 11. The Appellants are incorrect.

At best, *Quirk* supports an argument the incentive offered under Chapter 29, Title 4 seeks to attract investments with certain economic development characteristics (e.g., large number of jobs, specific type of facility, etc.). However, Chapter 29, Title 4 is not the incentive extended to the Private Dormitories for Students under S.C. Code Ann. §§ 4-1-170 or 4-1-175.

Further, *Quirk* does not support Appellants' argument that only projects of a certain size and type should benefit from economic development incentives. Instead, credits under § 4-1-175 have no requirements as to size of the investment or to the characteristics of the investment. Not imposing such limitations provides flexibility and innovation suitable to the characteristics of each investment under review.

The more appropriate tool for analysis of what investments to incentivize is the application of the broader "public purpose" jurisprudence of our courts. The South Carolina Supreme Court has well established that a public purpose has for its objectives the "promotion of the public health, morals, general welfare, security, prosperity, and contentment" of the residents within the political subdivision. *Nichols v. South Carolina Research Authority*, 290 S.C. 415, 425, 351 S.E.2d 155, 160 (1986). Public purpose is specific to geographic location and a particular population. *Id.* The Court has further found that a public purpose can be served even if a private party may benefit from the action. *Id.* at 426, 161. Many kinds of projects, such as hotels, stadiums, office buildings, and low-income housing, which have benefited from "public assistance" (through money, donation of land, issuance of bonds, etc.) have been held to pass constitutional muster because the investment served a public purpose. *Id.* at 427, 162.

The Special Source Revenue Credit granted to the Private Dormitories for Students satisfies the constitutional duty of serving a public purpose. The Private Dormitories for Students provide an increase to the revenue available to Counties by encouraging privately owned investment in facilities which would otherwise be provided by a tax-exempt entity (e.g. student dormitories provided by the University of South Carolina, a tax-exempt entity of the State.) Additionally, the Private Dormitories for

Students provide secondary benefits such as attracting residents to the business district of the City of Columbia and encouraging additional commercial establishments within the City to serve a growing presence of students in the area.

When analyzed within the public purpose framework established by our courts and not under the narrow, inapplicable analysis of the industrial development projects of Chapter 29, Title 4, the Private Dormitories for Students are proper investments to incentivize under a Park via S.C. Code Ann. §§4-1-170 and 4-1-175.

c. The SC Attorney General Has Not Opined that Private Dormitories for Students Are Prohibited in a Park

Appellants assert the South Carolina Attorney General on March 1, 2010 opined "the plain meaning of the Constitution and statutes governing industrial parks preclude[] the inclusion of residential projects in the industrial park." Appellants' Initial Brief, p. 12. From that statement, Appellants urge this Court to conclude Private Dormitories for Students are prohibited in a Park. For three reasons, the opinion is no support for concluding Private Dormitories for Students are denied placement in a Park.

First, it is axiomatic this Court is not bound by any decision of the Attorney General. *Eargle v. Horry Cty.*, 344 S.C. 449, 455, 545 S.E.2d 276, 280 (2001) ("this Court is not bound by opinions of the Attorney General."). Thus, the Court will reach a conclusion it determines is appropriate under the law notwithstanding an opinion of the Attorney General.

Second, the Attorney General has not held residential property is prohibited in a Park. Rather, the Attorney General was emphatic the issue is open for review:

> [O]ne may argue that the Legislature did not intend for residential property to be included in an industrial or business park created pursuant to section 4-7-170. Nonetheless, because the type of property that may be

> included in a multicounty park is not specified in section 4-7-170, an argument can also be made that residential property is not prohibited from being included in a multicounty park.

2010 WL 1370089, at p. 2 (S.C.A.G. Mar. 1, 2010)

Third, unlike the factual circumstances here under review of Private Dormitories for Students, the opinion does not address multi-storied facilities containing hundreds of rental units with occupants' payments being not only rent, but also for security services, property management, and planned recreational activities. Thus, the opinion does not address the matter before this Court. Therefore, the Court should give the opinion no weight.

d. The Statutory Requirements of S.C. Code § 4-1-175 Are Satisfied for Issuing Special Source Revenue Credits to the Private Dormitories for Students

Appellants suggest "Special Source Revenue Credits, granted under § 4-1-175 must be 'for the purposes outlined in Section 4-29-68 [and that statute] establishes the 'purposes' to which the bond proceeds may be applied, and they do not include residential student housing projects." (Appellants' Initial Brief p. 15). Appellants are mistaken.

S.C. Code Ann. §4-1-175 states:

> A county . . . that receives and retains revenues from a payment in lieu of taxes pursuant to Section 13 of Article VIII of the Constitution of this State may use a portion of this revenue for the purposes outlined in Section 4-29-68 without the requirement of issuing the special source revenue bonds or meeting the requirements of Section 4-29-68(A)(4) by providing a credit against or payment derived from the revenues received and retained under Section 13 of Article VIII of the Constitution of this State.

The requirements of S.C. Code Ann. §4-1-175 are satisfied.

First, the revenue source against which the Special Source Revenue Credit is applied is the payment to the Counties flowing from the Private Dormitories for Students located in the Park. The Ordinances adopted by Richland County authorizing the credit to the Private Dormitories for Students each state the Special Source Revenue Credits reduce the in-lieu-of-tax payments due from the owners of the Private Dormitories for Students to Richland County. (*See* R. pp. 443–446).

Second, the proceeds of the credit must be used by the owners of the Private Dormitories for Students for the "purposes" outlined in Section 4-29-68. A valid purpose in S.C. Code Ann. §4-29-68(2)(i) is using the Special Source Revenue Credits to pay for "improved or unimproved real estate and personal property . . . used in the operation of a . . . commercial enterprise." Consistent with that requirement, the Private Dormitories for Students are commercial enterprises and the Ordinances adopted by Richland County which authorizes the Special Source Revenue Credit for the Private Dormitories for Students each show the Special Source Revenue Credit is to be utilized to pay for improved or unimproved real estate and personal property used in the operation of the Private Dormitories for Students. (*See* pp. 443–446).

Therefore, the Special Source Revenue Credit extended to the Private Dormitories for Students meets the requirements of S.C. Code Ann. §4-1-175 and satisfies the purposes outlined in S.C. Code Ann. §4-29-68. Thus, the Special Source Revenue Credit offered to the Private Dormitories for Students is proper and violates no statute or constitutional provision.

B. Conclusion on Placement Question and Credit Question

While the Placement Question and the Credit Question have not been preserved for appeal, should the Court review those questions, Appellants have failed to establish Private Dormitories for Students are prohibited in the Park and failed to establish Special Source Revenue Credits are denied to such properties. The analysis above establishes Chapter 1, Title 4 is not controlled by Chapter 29, Title 4 and the General Assembly has expressed no intention to exclude Private Dormitories for Students from a Park nor deny Special Source Revenue Credits to such property. Thus, the lower court's decision should be upheld in full.

IV. THE APPELLANTS DO NOT POSSESS STANDING

The circuit courts of South Carolina have authority to issue declaratory judgments. S.C. Code Ann. § 15-53-20 ("Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.") However, before the court may exercise its authority, the party seeking declaratory judgment must invoke the court's declaratory judgment jurisdiction by proving standing. *Bodman v. State of South Carolina*, 403 S.C. 60, 742 S.E.2d 363, 366 (2013) ("Standing to sue is a fundamental requirement in instituting an action.). Standing sufficient to invoke jurisdiction is granted only "(1) by statute; (2) through the rubric of 'constitutional standing'; or (3) under the 'public importance' exception." *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337, 339 (2008). None of the three are present here.

Appellants achieve no standing by statute. Appellants rely only upon S.C. Code Ann. § 15-53-20 of the Declaratory Judgment Act in seeking to invoke the lower court's jurisdiction. That statute confers no standing. *See Bodman v. State*, 403 S.C. 60, 67, 742

S.E.2d 363, 366 (2013) ("We reject any averment that the fact Bodman is proceeding under the Declaratory Judgment Act has any impact on our standing analysis.").

Appellants achieve no "constitutional standing." "[A] private person [such as Appellants] may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom." *ATC South, Inc. v. Charleston County,* 380 S.C. 191, 195-96, 669 S.E.2d 337, 339-40 (2008), citing *Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 21, 532 S.E.2d 876, 879* (2000). "Such imminent prejudice must be of a personal nature to the party laying claim to standing and not merely of general interest common to all members of the public." *Baird v. Charleston County,* 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999).[1]

No immediate danger exists to the Appellants from Richland and Fairfield Counties placing Private Dormitories for Students in the Park. Rather, Appellants experience no harm other than that experienced by any citizen. That lack of individualized harm denies them standing. *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014) (" '[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not' possess standing.")

[1] The duty of showing "immediate prejudice . . .of a personal nature" cannot be meet by merely claiming—as is the case here—status as "taxpayers." *See Bodman v. State.* 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013) ("We reaffirm this principle today and hold that Bodman's status as a mere taxpayer is insufficient to confer standing upon him.").

Finally, while "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance," Appellants do not fall into that category. *ATC,* 669 S.E. 2d at 341. "[T]he very nature of the public importance exception to general standing requirements resists a formulaic approach, as each case must turn on 'the competing policy concerns' as we expressed in *Sloan v. Sanford*, 357 S.C. 431, 434, 593 S.E.2d 470, 472 (2004)."[2] Here, the balance of concerns weighs against granting standing on the ground of public importance.

Appellants' Amended Complaint at paragraph 8 "ask[s] the Court to grant them standing based upon the great public importance of the Constitutional and statutory issues this action raises." Appellants continue that argument before this Court. (Initial Brief of Appellants, p. 17 – 22). However, rather than any challenge to "constitutional and statutory issues," Appellants' complaint is more accurately characterized as a disagreement with a discretionary judgment decision made by governmental officials seeking economic development for their citizens. In enacting ordinances placing Private Dormitories for Students in the Park, both Richland County and Fairfield County exercised their best policy judgment and acted within their plenary constitutional authority. Doing so does not raise "an issue . . . of such public importance as to require its resolution for future guidance." *ATC,* 669 S.E. 2d at 341. Rather, in such discretionary judgment decisions, no standing for public importance exists since "[h]arms suffered by the public at large, like those [Appellants] allege here, are to be remedied by the legislative and executive branches [and] it is incumbent upon the public to seek reform

[2] *Sloan* states "[a]n appropriate balance between the competing policy concerns underlying the issue of standing must be realized" between access to the judicial process and the avoidance of "numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits." *Sloan v. Sanford, Id.*

through their elected officials or failing that, at the ballot box.") *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 81, 753 S.E.2d 846, 853 (2014).

CONCLUSION

The Appellants' Statement of Issues on Appeal requests no review of the Credit Question. Hence, Appellants fail to preserve that issue for appellate review. Further, the "two-issue" rule prevents appellate review of the Placement Question. Because the lower court answered only the Credit Question and the Placement Question and neither question has been preserved for review, Respondents ask the Court to affirm the lower court's order granting summary judgment to Respondents.

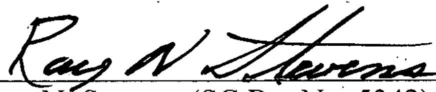
If the Court extends appellate review to either the Credit Question or Placement Question, Respondents ask the Court to uphold the lower court on both issues. Appellants primarily argue two positions on the Credit Question and the Placement Question.

First, Appellants seek to apply the definitions of Chapter 29, Title 4 to Chapter 1, Title 4. Such is incorrect for the reasons expressed in Argument III of this brief but particularly so given §4-29-150's explicit direction that Chapter 29 cannot be construed to limit or restrict such powers to counties as those granted in §4-1-170 and §4-1-175.

Second, Appellants argue the statutory language involved in the Credit Question and the Placement Question requires a review of the intent of the General Assembly with that review showing an intent to prohibit residential property in a Park. Again, Appellants are incorrect for the reasons expressed in Argument III of this brief. No review of intent is required since the SC Constitution and statutes are plain—counties may create a Park and grant credits with no explicit restriction imposed on the type of property placed in the

Park. Furthermore, the lower court holds (and correctly so) the Private Dormitories for Students are not residential, they are commercial and well within the generic label of the Park as a business Park. Therefore, for the reasons more fully developed in the body of this brief, Respondents ask the Court to uphold the lower court's granting of summary judgment to Respondents.

Respectfully submitted,



Ray N. Stevens (SC Bar No. 5342)
Ray E. Jones (SC Bar No. 11322)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: 803.255.8000
Facsimile: 803.255.8017
raystevens@parkerpoe.com
rayjones@parkerpoe.com

Attorneys for Respondents
Richland County and Fairfield County

November 6, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE RICHLAND COUNTY CIRCUIT COURT
L. CASEY MANNING, Richland County Circuit Court Judge

Case No. 2016-CP-40-00946
Appellate Case No. 2017-000617

South Carolina Public Interest Foundation and William B. DePass, Jr., individually, and on behalf of all others similarly situated........................ Appellants,

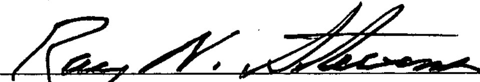
v.

The City of Columbia, Richland County, and Fairfield County................Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondents Richland County and Fairfield County complies with Rule 211(b), SCACR.

Respectfully submitted,



Ray N. Stevens (SC Bar No. 5342)
Ray E. Jones (SC Bar No. 11322)
Parker Poe Adams & Bernstein LLP
1221 Main Street, Suite 1100 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
Telephone: 803.255.8000
Facsimile: 803.255.8017
raystevens@parkerpoe.com
rayjones@parkerpoe.com

Attorneys for Respondents
Richland County and Fairfield County

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