STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

University Hill Neighborhood Association

Plaintiffs,

vs.

City of Columbia, City of Columbia Design and Development Review Commission, and Trinitas Ventures, LLC

Defendants.

IN THE COURT OF COMMON PLEAS

CA NO: 2020-CP-40-03475

PLAINTIFF'S ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

I. Introduction

On Friday, September 11, 2020, a hearing was held concerning Motions to Dismiss filed by the Defendant. Present by WebX for this hearing were: Peter M. Balthazor, attorney for Defendants City of Columbia Design/Development Review Commission; Lyndey R.Z. Bryant, attorney for Trinitas Ventures, LLC; M. McMullen Taylor, attorney for City of Columbia; Richard A. Harpootlian, attorney for University Hill Neighborhood Association; and F. Patrick Hubbard, attorney for University Hill Neighborhood Association. This Order is based on this hearing and on the filings by the parties.

A. The Motions to Dismiss filed by the Defendants

This appeal involves a decision by the City of Columbia Design and Development Review Commission (DDRC) granting final approvals for the construction of "Trinitas," an eight-story

apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) the DDRC, a "Board of Architectural Review" established pursuant to S.C. Code §§ 6-29-880 et seq. and Columbia City Code §§ 17-651 et seq.; (2) the City of Columbia (City), a municipality organized under the laws of South Carolina; and (3) Trinitas Ventures, LLC (Trinitas), a real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein. The DDRC, Trinitas, and the City have each filed a motion to dismiss.

B. The Importance of Distinguishing Between the Two Parts of the Appeal

Before addressing the specific grounds for dismissal in the motions to dismiss, it is important to review the differences between the two distinct claims made in Plaintiff's Complaint. As stated in the beginning of Paragraph 3 of the Complaint:

> This appeal of the DDRC decision concerning the Trinitas project has two parts. The first part involves an appeal pursuant to S.C. Code § 6-29-900(A) from the decision of the DDRC. The second part of this appeal concerns provisions of the *Guidelines* that require "site plan review" within the -DD area to be done by the DDRC rather than the City of Columbia Planning Commission.

The motions to dismiss fail to recognize the importance of the difference in these two parts. As a result, many of the arguments concerning site plan review issue are simply not relevant. For example, the motions filed by the DDRC and Trinitas argue that the appeal of the approval of the site plan is not timely because Plaintiff failed to satisfy the thirty day time limit for appeal in S.C.

Code § 6-29-900 (A). Similarly, the City argues that it "is not a proper party as it relates to an appeal of a DDRC decision" pursuant to Section 6-29-900 (A).

These arguments miss the point concerning the second claim in this appeal. The site plan review part of the Complaint: (1) asserts that the shifting by the City of the site plan review to the DDRC was *ultra vires*, and (2) relies on the general jurisdiction of the Circuit Court, not on the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A). This point, as well as the nature and role of site plan review, will be developed further below in Part II-B-2 of this Order.

Plaintiff's Memorandum in Opposition to Defendants' Motions to Dismiss indicates at page 3 that the site plan review claim has been combined with the appeal pursuant to Section 6–29–900(A) for three reasons. First, the facts of both parts of the Complaint are interconnected in the record concerning the appeal pursuant to Section 6-29-900(A). Second, combining the two parts enables Trinitas, a real party in interest in terms of the Section 6-29-900(A) appeal, to assert its interests in the *ultra vires* claim. Third, Plaintiff was motivated to assert the *ultra vires* claim at this point in time, rather than earlier, because there was no harm to substantial interests of Plaintiff and its members until the decision by the DDRC to approve the site plan for the Trinitas project.

C. Grounds for Dismissal

When considered together, the motions to dismiss filed by Defendants assert the following two grounds for dismissal of the appeal pursuant to Section 6-29-900(A): (1) Plaintiff lacks

standing to bring claims, and (2) Plaintiff has failed to state a claim.[1] None of the motions identifies the subsection of Rule 12(b) of the South Carolina Rules of Procedure which is relied upon. However, it appears that both grounds are based on subsection 12(b)(6), which addresses "failure to state facts sufficient to constitute a cause of action."

II. Summary of Facts and DDRC Decisions

A. The DD Overlay District and Guidelines for the District

The site for the apartment building proposed to be constructed by Trinitas is within an "overlay" district within the City of Columbia. Overlay districts are explicitly permitted under Section 6-29-720(C)(5) of the South Carolina Local Government Comprehensive Planning Enabling Act of 1994 [hereinafter "State Enabling Act"], which describes an overlay zone as a district that "imposes a set of requirements or relaxes a set of requirements by the underlying zoning district when there is a special public interest in a particular geographic area that does not coincide with the underlying zone boundaries. . . ."

The overlay district herein is termed as the "City Center Design/Development District of Columbia, South Carolina" and is referred to as "-DD area" in Sections 17-253 and 17-655(b) of

[1] Trinitas Motion to Dismiss, Part III.

the Columbia City Code.[2] An overlay district like the DD area is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists. The Guidelines for the DD area are adopted by reference in Columbia City Code § 17-253 (referring to "City Center Design/Development Guidelines") and § 17-655(b)(2) (referring to "requirements set forth in design guidelines adopted by the city council").

The guidelines that are incorporated by these references in the City Code are contained in a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [hereinafter *Guidelines*].[3] The *Guidelines* were prepared by planning experts and were prepared as a "planning document" rather than as an ordinance.[4] As a result, the *Guidelines* are unusual in that they contain only precatory terms like "non-binding" and "should" rather than mandatory terms like "must" and "shall." Chapter 5 of the *Guidelines* provides a supplementary regulatory framework for assessing the design of private development in the DD overlay district. In addition, Section 5.1 of this chapter of the *Guidelines* states: "The guidelines in this chapter are

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[2] The Parties have filed a "Joint Stipulation Regarding City of Columbia Ordinances." Exhibit A of these Stipulations contains selected portions of the City of Columbia Code of Ordinances, Chapter 17, Planning, Land Development and Zoning.

[3] *See* Exhibit B to Joint Stipulation, *supra* note 2.

[4] For example, in discussing "Building Heights" at page 5-2, the *Guidelines* state: "This section provides *non-binding* general direction for development within City Center, with the recommendation that the *City's regulatory plans and codes be amended* to reflect the guidance included here." (emphasis added).

illustrative rather than prescriptive." As indicated below at Part III-B-1-b of this Order, the precatory, non-binding nature of the *Guidelines* presents problems in their application.

The Introduction to Chapter 5 notes:

> The key emphasis of the guidelines in this chapter is to reinforce the existing fabric of City Center by ensuring that new projects are developed within the rhythm of the existing development pattern. This "contextual" approach to evaluating the design of new projects is fundamental to the implementation of the *Guidelines*.

Section 5.3.1 note that the height of proposed structures should "relate to the *adjacent* development context." (emphasis added)

The proposed Trinitas project would be constructed on a site at the northwest corner of the intersection of Gervais Street and Pickens Street in the block bounded by Gervais Street, Pickens Street, Senate Street, and Henderson Street. Paragraphs 14–20 of the Complaint address the "contextual" "rhythm of the existing development pattern" and "adjacent development context" surrounding the proposed apartment building.

B. The Trinitas Applications

In 2019, Trinitas filed its initial application for Design approval and for Site Plan approval with the DDRC for an eight-story apartment building at 1600–1620 Gervais Street in Columbia. The building would be 75 feet tall and would occupy virtually all of the land on the site. See Complaint ¶¶26, 29, Exhibit 2.

The DDRC conducted four public hearings to address the initial application and subsequent revised applications for design approval and for site plan approval filed by Trinitas. At the regular

January 2020 public hearing, both applications were denied. (Complaint ¶25a) Subsequently, these denials were rescinded at a special called meeting on February 7. (Complaint ¶25a). At the regular March hearing, the DDRC granted site plan approval for the project. Design approval was granted by the DDRC at the regular July public hearing. In addition to these four public hearings, the DDRC conducted a "work session" on the design approval on June 10, 2020.

III. Argument

A. Standard of Review for Motion to Dismiss

As indicated at Part I-C above, the Defendants have, in effect, filed Rule 12(b)(6) motions to dismiss. A Rule 12(b)(6) motion "tests the sufficiency of the allegations of the complaint. . . ." James F. Flanagan, South Carolina Civil Procedure 100 (3d. ed. 2010). Consequently, only the pleading is examined. *Crocker v. Barr*, 295 S.C. 195, 367 S.E.2d 471 (Ct. App. 1988). If material outside the Complaint is considered, the motion becomes a motion for summary judgment and must be addressed pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987).

B. Statement of Plaintiff's Claims

1. Appeal pursuant to S.C. Code Section 6-29-930(A)

Section 6-29-930(A) includes the following standard for appeals from a board of architectural review:

> The findings of fact by the board of architectural review are final and conclusive on the hearing of the appeal, and the court may not take additional evidence. In the event the judge determines that the certified record is insufficient for review, the matter must be remanded to the board of architectural review for rehearing. In determining the questions presented by the appeal, the court must determine only whether the decision of the board is correct as a matter of law.

The application of this standard of review was summarized in *Blind Tiger, LLC v. City of Charleston*, 366 S.C. 182, 621 S.E.2d 361, 362 (Ct. App. 2005) (citations omitted), as follows:

> In reviewing a decision by a board of architectural review, the circuit court should act when the board abuses its discretion by committing errors of law or bases its decision on findings of fact that are not supported by evidence. Furthermore, our standard of review of a board of architectural review's decision is the same as that of the trial court.

a. **Mistake of Law by DDRC in Addressing Building Height**

As indicated above at Part II-A, the *Guidelines* adopt a contextual approach to development. Where height is concerned, Section 5.3.1 of the *Guidelines* states:

> As a general rule, and consistent with current zoning provisions, buildings within most of City Center should be *no more than five stories*. . . . [I]t is not the intent of these Guidelines to establish new height standards for development in City Center. It is, however, critical that in applying these Guidelines—as well as other

> development regulations—the City be consistent in considering the height of proposed structures as they relate to the *adjacent development context*.

(emphasis added)

The DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, the decision was based on a legal misinterpretation by the staff of the DDRC. This interpretation took the position that the *Guidelines* did not regulate the height of the building. This interpretation was set forth in an email from Lucinda Statler (the City's Principal Planner/Urban Design) to Thomas Gottshall, President of the University Hill Neighborhood Association. (See Exhibit 1 to Complaint) Part of this latter states:

> The DDRC makes decisions as to whether a project meets or does not meet the design guidelines, which are qualitative measures for evaluating projects within the City Center Design District. The underlying [C-3, General Commercial Use] zoning provides quantitative measures by which a property owner has vested rights to pursue. When the design guidelines seem to conflict with the [underlying C-3 General Commercial Use] zoning, the [C-3] zoning prevails. Please refer to Section 5.3.1 *Building Heights*, in the City Center Design Guidelines. "The City's Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section provides *non-binding general direction* for development within City Center…"

(emphasis in original) This same interpretation was adopted in the *Staff Report* for the July 2020 meeting, which states: "The building height and mass remain the same [as earlier versions of the

proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance."

The Commission's reliance on Statler's interpretation and on the *Staff Report* was a mistake of law for a number of reasons. The initial problem with this interpretation is that the interpretation conflicts with Section 17-181 of the Columbia City Code, which states:

> Within each district, the regulations set forth by this article shall apply uniformly to each class or kind of structure or land. In their interpretation and application, the provisions of this article shall be held to be minimum requirements, adopted for the promotion of the public health, safety, morals or general welfare. *Wherever the requirements of this article are at variance with the requirements of any other lawfully adopted rules, regulations or ordinances, the most restrictive, or that imposing the higher standards, shall govern*. Unless deed restrictions, covenants or other contracts directly involve the city as a party in interest, the city shall have no administrative responsibility for enforcing such deed restrictions or covenants.

(emphasis added)

To the extent that the interpretation relies on the concept of "vested rights," the interpretation conflicts with the definition of vested rights in Columbia City Code, Section 17-2(a), which states: "A vested right is triggered only upon the approval or conditional approval of a site specific development plan." Section 17-1(b) defines a "site specific development plan" as follows: "Site specific development plan means those documents that comprise a complete application for a zoning permit, certificate of zoning compliance, variance, special exception, planned unit development, sketch plat or plan, or other similar approval that authorizes the

developer or landowner to proceed with investment in grading, installation of utilities, streets and other infrastructure, and to undertake other significant expenditures necessary to prepare for application for a building permit." An underlying zoning classification of C-3 zoning does not satisfy this definition of site specific development plan.

Another problem with the interpretation concerning height adopted by the DDRC is that it makes *all* the guidelines meaningless. Statler's letter states: "When the design guidelines seem to conflict with the [underlying] zoning, the zoning prevails." If this statement is valid, imposing any of the *Guidelines* would be impermissible because the underlying C-3 zoning does not have any limits on such concerns as façade proportion and rhythm, proportion of openings, horizontal rhythms, alignment of architectural elements, wall articulation, and roofs and upper story details—all of which are addressed in the *Guidelines*.

As indicated above in Part II-A of this Order, an overlay is described in Section 6-29-720(c)(5) of the State Enabling Act as a district that "imposes a set of requirements or relaxes a set of requirements imposed by the underlying zoning district." It is clear from the content of the *Guidelines* that the *Guidelines* are meant to impose requirements, not relax them. The interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay and the underlying zoning backwards. The design overlay involved herein is adopted to *increase* requirements by imposing *additional* requirements. If the underlying zoning will control, why bother with the time and expense of the overlay?

The general treatment of overlays in land use regulation parallels the language of S.C. Code § 6-29-720(c)(5). For example, John R. Nolan & Patricia E. Sallcin, *Land Use in a Nutshell* 218 (2006) describes an overlay as follows:

> Overlay zoning is a flexible zoning technique that allows a municipality either to encourage or to discourage development in certain areas An overlay zone is defined as a mapped overlay district superimposed on one or more established zoning districts. *A parcel within the overlay zone will thus be simultaneously subject to two sets of zoning regulations: the underlying and the overlay zoning requirements*.

(emphasis added)

South Carolina follows the approach of "two sets of zoning requirements" in overlay cases. For example, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) involved an "Airport Overlay District" (AO) which, among other things, restricted certain uses and expansions within the AO District. The church claimed it was entitled to a building permit for a proposed expansion because: (1) an earlier permit included the expansion[5]; and (2) an incorrect approach had been used in determining whether the expansion would increase the "occupant load" of the church's property. "Occupant load" in the area within the AO District was important because of a concern for a high potential for accidents affecting the public areas near a military airport. The defendants rejected both of the church's claims.

The church appealed and a master-in-equity ruled in favor of the church. The Court of Appeals reversed the decision of the master-in-equity. In terms of the "occupant load" concern of

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[5] In an opinion filed on September 16, 2020, the Supreme Court reversed the decision of the Court of Appeals and held that the earlier permit included the expansion. Opin. No. 27995 The Supreme Court did not address the overlay issue because "our determination concerning the validity of the original permit resolves this case . . . ." *Id*. at fn. 8.

the AO District, the Court held "the evidence in the record clearly supports the Planning Commission's finding that the [proposed] fellowship hall would increase the occupant load for the site." 828 S.E.2d at 241. In reaching this decision, the Court followed the general principle that, where an overlay imposes additional requirements, those additional requirements supplement or replace the underlying zoning.

Heilker v. Zoning Board of Appeals for City of Beaufort, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) involved the application of a "Highway Corridor Overlay Zoning" scheme adopted by the City of Beaufort. The overlay was concerned with the protection and promotion of aesthetics and safety. The overlay contained new restrictions concerning the outdoor display of certain type of merchandise in the "Highway Corridor" district. The central issue in the case was whether the outdoor displays at issue were: (1) part of the "use" of the land for retail sale, or (2) merely an "activity or practice" incidental to the "use." If the display was a use, the overlay did not apply; if it was a practice, the restrictions of the overlay applied.

The Zoning Board of Appeals (ZBA) ruled that it was a practice, and Heilker appealed. A special judge reversed the ZBA's finding, and the Court of Appeals reversed the special judge. As with *Grays Hill Baptist Church*, *Heilker* held that, where an overlay applied, restrictions supercede the underlying zoning.

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the *Guidelines*. As a result, the DDRC failed to follow the general rule of making the parcel within the overlay district "simultaneously subject to two sets of zoning regulations."

b. **Mistake of law in application of "non-binding" precatory standards—The problem of delegation of legislative power and lack of controls of discretion**

A fundamental problem plagues the application of a system of non-binding guidelines. As indicated above at Part II-A (footnote 2) of this Order, the planners who drafted the *Guidelines* addressed topics like the height of buildings in terms of "illustrative" "non-binding general direction for development within City Center, with the recommendation that the City's regulatory plans and codes be amended to reflect the guidance included here." (*Guidelines*, pp. 5-1, 5-2) However, instead of adopting "regulatory plans and codes," the City chose to forego exercising its legislative power in favor of simply adopting the *Guidelines* as the ordinance rather than develop and codify a regulatory scheme. See Columbia Code §§ 17-253, 17-655(b)(1).

As a result of this approach, the DDRC and its staff have been authorized to apply "non-binding" guidelines. However, such application presents the issue of whether the *Guidelines* constitute an improper delegation of the City's legislative power.

The framework for addressing issues concerning a claim of unlawful delegation of legislative power is set forth in *South Carolina State Highway Department v. Harbin*, 86 S.E.2d 466 (S.C. 1955), which held that a provision of the statute authorizing the highway department to suspend or revoke a driver's license *"for any cause satisfactory to"* the department was an unconstitutional delegation of legislative power. *Id.* at 468 (emphasis added)

Harbin summarized the principles concerning delegation of legislative power to an administrative agency as follows:

> The question of delegation of legislative power has confronted the courts with many perplexing problems, particularly during recent years when the complexities of

> government have been constantly on the increase. It is well settled that while the legislature may not delegate its power to make laws, in enacting a law complete in itself, it may authorize an administrative agency or board "to fill up the details" by prescribing rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. "However, it is necessary that the statute declare a legislative policy establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a property regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights shall have due consideration."

Id. at 470 (authorities deleted)

The Court's conclusion concerning the unconstitutionality of the delegation involved in *Hardin* was stated as follows:

> When the authority of the State Highway Department to suspend or revoke a license for any cause which it deems satisfactory is considered in the light of the foregoing principles, said provision must be declared invalid as an unlawful delegation of legislative power. It sets up no standard to guide the Department and contains no limitations. As a general rule, "A statute which in effect reposes an absolute, unregulated, an undefined discretion in an administrative body bestows arbitrary powers and is an unlawful delegation of legislative powers."

Id. at 370–71 (authority deleted)

In the regulation of land use, the unlawful delegation concern can also be expressed in terms of due process. For example, *Restaurant Row Associate v. Horry County*, 335 S.C. 209, 516 S.E.2d 4426, 445 (1999), stated: "When deciding whether to grant a variance, a local board must be guided by standards which are specific in order to prevent the ordinance from being invalid and arbitrary. *Hodge v. Pollock*, 223 S.C. 342, 75 S.E.2d 762 (1953); *Schloss Poster Adv. Co. v. City of Rock Hill*, 190 S.C. 92, 2 S.E.2d 392 (1939)."

The cited case of *Schloss Poster Advertising Co.* involved an ordinance providing as follows: "Hereafter it shall be unlawful to erect or maintain any billboard facing on any public street or other public place within the incorporate limits of the city of Rock Hill without having first obtained from the city council a permit to do so." In effect, the City Council had delegated to itself an unrestrained power to grant or deny permits to construct billboards. In holding that this "delegation" was unconstitutional, the Court noted:

> The ordinance before us is in no sense a zoning ordinance as provided in Sections 7390–7398, Code 1932, nor does it prescribe rules or conditions for the issuance of permits for the erection of billboards to which all persons similarly situated may conform. It does not profess to prescribe regulations for their location, construction, or maintenance, but it commits to the unrestrained will of the city authorities, for any reason deemed satisfactory to them, the right and power to absolutely prohibit the use of property for the erection of billboards.

> The ordinance in question in no way controls or guides the discretion vested thereby in the respondents. It prescribes not uniform rule upon which the special permission is to be granted.

2 S.E.2d at 394

In her email to Thomas Gottshall concerning the application of the *Guidelines*, Lucinda Statler described the decision-making process of the DDRC and its staff as follows:

> There are 17 pages of guidelines that pertain to new construction that are considered. The staff evaluations and the DDRC's decisions are based on the *overall determination* as to whether a project substantially meets– or does not meet– the design guidelines. This means that there are likely areas where the project may not be exactly what is recommended, and other areas where they meet and exceed what is recommended. It is an *overall assessment* of the project and of course, there are a variety of opinions on how well a project does or does not meet the guidelines, which is why we have a Commission making the decision, rather than only staff. In the almost 14 years that I have served as staff to this Commission, I would be hard pressed to think of a project that met every single guideline. This would be unattainable for most projects, as there are many factors that determine a development's feasibility. The design review process is built to provide some flexibility in this balancing act.

(Exhibit 1 to Complaint (emphasis added))

This "overall assessment" approach is, in effect, basically a "we know it when we assess it overall" test. Such a test recognizes "no standard to guide [decisions] . . . and contains no limitations." As a result, there is neither a meaningful standard to guide the exercise of discretion nor a framework to provide a workable basis for judicial review of the exercise of discretion.

As a result, the "overall assessment" approach is virtually the same as the legislative authorization in *Harbin* to suspend or revoke a license "for any cause satisfactory to" the Highway Department. The approach is also effectively the same as the ordinance granting the Rock Hill City Council the power to decide who could erect billboards without any provisions to limit and structure the exercise of discretion. Therefore, to the extent that the DDRC uses this approach, the Complaint has sufficiently pled this claim. See Complaint ¶¶ 23-25.

c. **Abuse of Discretion in Applying Guidelines**

Paragraphs 26-31 of the Complaint address abuse of discretion by the DDRC in applying the *Guidelines*. These paragraphs contain sufficient details and specificity concerning abuse of discretion and lack of factual basis to withstand a motion to dismiss.

2. **Ultra Vires Grant of Power to DDRC to Conduct Site Plan Review.**

a. **Ultra Vires nature of grant of power to DDRC to conduct Site Plan Review**

Article 7 of the State Enabling Act addresses land development regulation by local governments. In contrast, provisions concerning boards of architectural review are contained in Article 5 ("Local Planning – Zoning") of the State Enabling Act. The scope of Article 7 is very broad, partly because terms like "land development" and "subdivision" are defined very broadly. (See S.C. Code §§ 6-29-1110 (2), –(4)).

Planning commissions play a critical role under Article 7 in all the aspects of land development. Central to their role is the power to approve, or disapprove, plans for development. The phrase "plans for development" is very inclusive because numerous terms– e.g., "sketch plans, preliminary plans, and final plans" – are used to describe the plans involved. (See S.C. Code § 6-29-1150)

Under the Columbia scheme of land of development regulation set forth in Article IV of Chapter 17 ("Planning, Development and Zoning") of the City Code, the Planning Commission is charged with implementing the land development regulation. As a part of this scheme, terms like "sketch plan," "site plan," and "preliminary plat" are used to identify specific types of plans. See Columbia City Code § 17-464. For a category termed "Group Development,"[6] a system of plan

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[6] There are three categories of "group development" set forth within the definition of "subdivision, development type" in Columbia City Code § 17-464. These are:

Group development means a development such as shopping center, office buildings, industrial sites, mobile home parks and apartment complexes where the site is not subdivided in lots, blocks and streets, but includes two or more units designed or intended for separate occupancy.

Group commercial or industrial development means a single building or combination of buildings containing 25,000 square feet of gross floor area, or two or more buildings containing a combined total of 25,000 square feet gross floor area.

Group housing development means a single lot of record upon which are erected three or more dwelling units and all the structures thereon. This definition shall include apartments, condominiums and townhouses, whether rented or sold.

review termed "site plan review" is established. (See Columbia City Code §§ 17-464, 17-581 through § 17-589).

As indicated in Paragraph 32 of the Complaint, the *Guidelines* for the DD area shifted the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC. This approach to site plan review is *ultra vires* because it conflicts with explicit language in Section 6-29-1150(A) of the State Enabling Act, which addresses the submission of plans or plats to the planning commission. This section states: "The land development regulations adopted by the governing authority *must* include a specific procedure for the submission and approval or disapproval by the *planning commission or designated staff*." (emphasis added). The shifting of site plan review to the DDRC pursuant to the *Guidelines* conflicts with this clear mandate of Section 6-29-1150(A) concerning the role of the planning commission.

The purpose of the State Enabling Act is to enable or authorize local governments to engage in planning and regulating the use and development of land. As noted in Section 6-29-330(A) of the S.C. Code: "A municipality may exercise the powers granted *under the provisions of this chapter* in the total area within its corporate limits." (emphasis added).[7] The phrase "under the provisions of this chapter" indicates that the "powers granted" are defined by and limited by the Enabling Act.

[7] The State Enabling Act is contained in Title 6, Chapter 29

Thus, the provision in the portion of Section 6-29-1150(A) quoted above imposes an express requirement that local land development regulations "*must* include a specific procedure for the submission and approval or disapproval [of plans and plats] by the planning commission or designated staff." (emphasis added) In short, there *must* be: (1) a system for approval or disapproval of plans and plats; and (2) the procedure for this system *must* be undertaken by the planning commission.

The general principle for applying an enabling act was stated by the Rhode Island Supreme Court as follows: Where a local government "purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void." *Hardy v. Zoning Board of Review of the Town of Conventry*, 321 A.2d 289, 290–29 (R.I. 1974).

The South Carolina Supreme Court applied this principle in *Sinkler v. County of Charleston*, 387 S.C. 67, 690 S.E.2 777 (2010). At issue was the rezoning of a large parcel of land from the classification AG-15 (agricultural with minimum lot area of three acres) to PD ("planned development district"). This PD district would have 107 dwellings, which was the same number as would be allowed under AG-15. However, the minimum lot size for the PD was reduced to one acre.

Sinkler noted that Section 6-29-720(C)(4) of the Enabling Act explicitly authorizes the use of planned development schemes and quoted the following language:

> "[P]lanned development district" or a development project comprised of *housing of different types and densities and of compatible commercial uses*, or shopping

> centers, office parks, and mixed-use developments. A planned development district is established by rezoning prior to development *and is characterized by a unified site design for a mixed-use development*.

690 S.E.2d at 781 (emphasis in original). *Sinkler* also quoted Section 6-29-740, which contains additional details concerning a PD district. This section provides:

> In order to achieve the objectives of the comprehensive plan of the locality and to allow flexibility in development that *will result in improved design, character, and quality of new mixed use developments* and preserve natural and scenic features of open spaces, the local governing authority may provide for the establishment of planned development districts as amendments to a locally adopted zoning ordinance and official zoning map. The adopted planned development map is the zoning district map for the property. *The planned development provisions must encourage innovative site planning for residential, commercial, institutional, and industrial developments within planned development districts.*

690 S.E.2d at 779 (emphasis in original)

The Supreme Court, relying on the statutory language quoted above, held:

> [T]he [zoning] ordinance [with only residential uses] did not meet the parameters for a PD. . . . [H]aving invoked that technique, it could not arbitrarily fail to meet the requirements for a PD. Consequently, we hold the circuit court correctly ruled the ordinance is invalid because it did not properly establish a PD as contemplated by the terms of the Enabling Act.

Sinkler, 690 S.E.2d at 781, 782. In authorizing the DDRC to undertake site plan review, the City of Columbia, like Charleston County in *Sinkler*, failed "to meet the requirements" of the Enabling Act. Consequently, the authorization was *ultra vires*.

In addition, depending on the details of any specific application, many other provisions of the *Guidelines* are potentially *ultra vires* because these other provisions in the *Guidelines* could overlap with various aspects of the statutorily-mandated site plan review by the City of Columbia Planning Commission. More specifically, depending on the facts involved, potential conflicts could arise in terms of parking, location and screening of service and loading areas, other screening, setbacks, open spaces, and landscaping because these matters should be addressed in site plan review under some circumstances. *Compare* Columbia City Code §§ 17.464 (Definitions), -491, -492, -511, -531, -581, -582, -583, -586, -587, -588. -589 *with Guidelines* §§ 4.3, 4.4, 5.3.6, 5.4, 5.5, 5.6, 5.10.

Where a governmental entity engages in an *ultra vires* act, the remedy is to void the act involved. *See, e.g.*, *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854 (2017) (holding that expenditure of public funds for inspection of private bridges was *ultra vires*); *O'Brien v. South Carolina ORBIT,* 380 S.C. 38, 668 S.E.2d 396 (2008) (holding that city's decision to fund trust in a particular manner was *ultra vires* because it violated the S.C. Constitution, ordering that trust be dissolved, and ordering that funds must be returned to investors); *Evins v. Richland Historic Preservation Commission*, 341 S.C. 15, 532 S.E.2d 876 (2000) (holding that conveyance by commission was *ultra vires* and affirming voiding of conveyance by Circuit Court); *City of North Charleston v. North Charleston Distric*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342

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

b. **Jurisdiction of Circuit Court**

Article V, Section 11 of the South Carolina Constitution provides: "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have appellate jurisdiction as provided by law." Because this grant of general jurisdiction supports the filing of this *ultra vires* action in Circuit Courts, it was the basis of all of the South Carolina cases cited above in Part III-B-2-a of this Order, except *O'Brien v. South Carolina ORBIT,* which was filed in the original jurisdiction of the Supreme Court.

C. Standing

1. Statutory standing

Section 6-29-900(A) states, in relevant part, as follows: "A person who may have a *substantial interest* in any decision of the board of architectural review or any officer, or agent of the appropriate governing authority may appeal from any decision of the board to the circuit court in and for the county . . . ." (emphasis added). Defendant Trinitas asserts that Plaintiff does not adequately plead a substantial interest. This argument is addressed in the discussion of constitutional standing at Part III-C-2 below.

Defendant Trinitas also relies on *Graham v. Lloyd's of London*, 296 S.C. 249, 255, 371, S.E.2d 801, 804 (Ct. App. 1988), which states the following principle: "In the eye of the common law, the association itself is an 'airy nothing,' a 'nonexistent legal ghost having no capacity to

enjoy legal rights or to suffer legal wrongs.'" It is important to note that this principle was *not* applied in *Graham* because the common law had been changed by statute. The South Carolina Code contains numerous examples of this change. *See, e.g.*, S.C. Code § 33-31-140 (15)-(27) (defining "entity" and "person").

Defendant Trinitas also makes assertions attacking the lack of information about certain aspects of Plaintiff association. However, no authority is given concerning why the information is relevant.

The issue of personhood for an association is important because of the fundamental rights of association and petitioning of government. *See, e.g., U.S.* Const. Amend. 1 (right to "petition the Government for redress of grievances"; *Citizens United v. FEC*, 558 U.S. 310, 130 S.Ct. 876, 928 (2010) (Scalia, J. conc.); *NAACP v. State of Alabama*, 357 U.S. 449 (1958). Consequently, it would not be appropriate to grant Defendants' motions to dismiss simply on the basis of the common law view of unincorporated associations or on the basis of claims of lack of necessary information that are not supported by authority.

2. Constitutional Standing

In order to grant a motion to dismiss, it must be shown that these allegations are not sufficient to satisfy the requirements of constitutional standing. Paragraphs 4 and 5 of Plaintiff's complaint state:

> 4. Plaintiff University Hill Neighborhood Association (Association) is an unincorporated association. The boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly

overlapping historic districts–a local City of Columbia Historical District and a National Historic District. The City of Columbia has designated this residential area as local "Architectural Conservation District." Columbia City Code §§ 17-654(a)(3), 17-681(b)(1). This district is "identified as Architectural District No. 1" and is "bounded by Laurens, Senate, Henderson and Greene Streets. . . ." *Id*. at § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic Districts.

5. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed. Many resident members of the Association live in areas near the proposed Trinitas project. Substantial interests of the Association and of its members are affected by the decision of the DDRC to approve the Trinitas project.

Plaintiffs claim that these allegations place them within the well-established doctrine that associations have standing to bring a suit on behalf of their members. This doctrine has been summarized as follows:

> Sometimes, an organization initiates a lawsuit on behalf of a member or members. Like an individual party, the organization must also have sanding to file suit. The policy behind permitting associational standing is to allow a group with shared resources to pursue a common, collective interest. *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 713 S.E.2d 287 (2011) (Hearn, J., dissenting); *see also Intl Union, United Auto., Aerospace & Agric. Implement*

> *Workers of Am. v. Brock*, 477 U.S. 274 (1986) ("[T]he doctrine of associational standing recognizes that the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others."). An organization's mere interest in the litigation is not enough to confer standing. *Beaufort Realty Co.*, 346 S.C. 298, 551 S.E.2d 588; *Carolina Alliance for Fair Emp't v. S.C. Dep't of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999). An organization has proper standing to bring a suit on behalf of its members only when its members would otherwise have standing to sue in their own right; the interests at stake are germane to the organization's purpose; an neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Beaufort Realty Co.*, 346 S.C. 298, 551 S.E.2d 588; *see also Carnival Corp.*, 407 S.C. 67, 753 S.E.2d 846 (finding that the plaintiffs failed to allege a particularized injury either to themselves or their members because they asserted only generalized grievances suffered by the public as a whole).

Jean Hoefer Toal, Amelia Warring Walker & Margaret E. Baker, Appellate Practice in South Carolina 128–29 (3d ed. 2016).

Though the DDRC and the City claim that Plaintiff does not satisfy the standard of particularized injury, they do not provide any detailed arguments in support of their claims. Instead, the DDRC Motion to Dismiss incorporates the arguments of Trinitas, and the City's motion notes that its position "will be more fully argued in a subsequent memorandum and oral argument." The "subsequent memorandum" has now been filed. However, it has the same problem

as the motion—i.e., the City still fails to recognize how the claim against the City differs from the claim against the DDRC. (See Part I-B above)

Trinitas argues that its Motion to Dismiss should be granted because there is a lack of specific concrete, particularized injury to at least one member of the Plaintiff. Trinitas bases its position upon *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 753 S.E.2d 846 (2014) and *Preservation Soc'y of Charleston v. S.C. Dep't of Health and Envir. Control*, 845 S.E.2d 481 (2020). In particular, Trinitas argues that the association in *Carnival Corp.* did not have associational standing because it did not provide examples of specific individualized harms to members in its complaint. In contrast, argues Trinitas, the association in P*reservation Society* had associational standing because it had provided affidavits showing specific individualized harms.

The distinction stressed by Trinitas does not support its position in the matters before this court. The affidavits in *Preservation Society* had been filed in an administrative proceeding where the plaintiffs in *Preservation Society* were seeking a "contested case hearing." These affidavits were part of the record on appeal.

As indicated above at Part II-B of this Order, the DDRC conducted four public hearings and one work session in considering the Trinitas applications. The record for these meetings contains documents and testimony which: (1) provide specific evidence of concrete particularized harm, and (2) were sworn to be true. Thus, they are the equivalent of the affidavits which were filed at the administrative level in *Preservation Society*. Consequently, Plaintiff is in the same situation as the associations in *Preservation Society* because testimony and documents, submitted under oath, of individualized harm is in the record of the appeal before this Court.

3. Public Importance Standing

The South Carolina Supreme Court has held that "a court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance." *Baird v. Charleston Cnty.*, 333 S.C. 519, 511 S.E.2d 69 (1999). The approach for addressing a claim of public importance standing was addressed in *South Carolina Public Interest Foundation v. South Carolina Department of Transportation*, 421 S.C. 110, 804 S.E.2d 854, 859 (2017), as follows:

> [W]hen deciding whether to confer public importance standing, courts must take these competing policy concerns [of citizen access to courts and a need to achieve judicial economy and freedom from frivolous suits] into consideration, and must also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.

a. **Issues Involved**

This suit involves three important issues where future guidance is needed. These issues are:

(1) Whether important aspects of a development within the DD area, like height, are determined by the underlying zoning or by the *Guidelines*;

(2) Whether the grant by the City of the power of site plan review to the DDRC for development within the DD area was *ultra vires*; and

(3) Whether the "overall assessment" approach to the application of the precatory, non-binding language of the *Guidelines* constitutes an improper delegation of the City's legislative power and a denial of due process.

b. **Importance of Issues**

The DD area of Columbia regulated by the *Guidelines* "consists of approximately 1,400 acres in the area bounded as follows: on the North by Elmwood Avenue, east by Pickens Street, South by Blossom Street, and West by the Congaree River." Columbia City Code, Section § 17-253. Given the size of this area, issues concerning the validity, proper scope, and application of the *Guidelines* effectively determine important aspects of development in the downtown core of Columbia.

In addition, Columbia has many other overlay districts. *See, e.g.*, Columbia City Code §§ 17-306, 17-307, 17-308, 17-309, 17-310, 17-311, 17-312, 17-313, 17-314, 17-315, 17-322, 17-323, 17-324, 17-325, 17-326, 17-681 (historic districts). Important issues concerning the relationship between these overlays and the underlying zoning involved could arise under these schemes.

More broadly, issues concerning overlay schemes and underlying zoning could arise throughout South Carolina. Overlay schemes are authorized by Section 6-27-720(C)(5) of the State Enabling Act and are a generally recognized technique for land use regulation.[8]

c. **Need for Future Guidance Concerning Issues**

[8] *See, e.g.*, Julian Conrad Juergensmeyer & Thomas E. Roberts, Land Use Planning and Development Regulation Law 93–94 (3d ed. 2013); John R. Nolon, Land Use in a Nutshell 219–22 (2006); Peter W. Salsich, Jr. & Timothy J. Tryniecki, Land Use Regulation 222–23 (3d ed. 2015).

Future guidance in addressing these three issues is needed for the same reasons that these issues are important. More specifically, issues will arise concerning the validity, proper scope, and application of the *Guidelines* and concerning overlays generally because of: (1) the large area covered by the DD overlay, (2) other overlay schemes in Columbia, and (3) overlay schemes in South Carolina.

As indicated above in Part III-B-1-a of this Order, *Grays Hill Baptist Church v. Beaufort County*, 427 S.C. 57, 828 S.E.2d 234 (Ct. App. 2019) and *Heilker v. Zoning Board of Appeals for City of Beaufort*, 346 S.C. 401, 552 S.E.2d 42 (Ct. App. 2001) held that overlay schemes in South Carolina follow the general rule that an overlay zone is "simultaneously subject to two sets of zoning regulation." Thus, this appeal raises the issue of which approach will be followed in South Carolina: The approach used herein by the DDRC or the approach used in *Grays Hill Baptist Church* and *Heilker*?

Grays Hill Baptist Church involved an airport overlay district. Section 17-307 of the Columbia City Code contains an overlay district termed: "—AP airport height restrictive areas," which applies in the area around Owens Field Airport. If the approach adopted by the DDRC were applied to the AP overlay, the height restrictions of the overlay would not apply.

The City of Columbia also has overlay corridor districts designed to impose supplemental sign regulations (See Sections 17-310, 17-313, 17-314, 17-315). The concerns underlying these overlay districts are similar to those in *Heilker*. As a result, issues concerning the relationship of the overlay involved vis á vis the underlying zoning could arise in applying these corridor overlays.

IV. Conclusion

For reasons given in this Order, Defendants' Motions to Dismiss are denied. In particular, it is important to note that the position of the DDRC concerning height was a mistake of law and that the grant by the City of the power of site plan review within the DD overlay area to the DDRC was *ultra vires*.

_____

Hon. L. Casey Manning
Fifth Circuit Court

Richland Common Pleas

Case Caption: University Hill Neighborhood Association vs City Of Columbia , defendant, et al

Case Number: 2020CP4003475

Type: Order/Other

So Ordered

s/L. Casey Manning, 2061