Exhibit 1

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

CA NO: 2020-CP-40-03475

University Hill Neighborhood Association

Plaintiffs/Appellant

vs.

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

Defendants/Respondents

ORDER

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Parties

This case involves two decisions by the City of Columbia Design and Development Review Commission (DDRC) that granted final approvals for the construction of "Trinitas," an eight-story, 750 feet tall apartment building on the northwest corner of the intersection of Gervais Street and Pickens Street in Columbia. There are three defendants: (1) 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), the real estate development company (with a home office in Indiana) which received the approvals by the DDRC at issue herein.

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 in Columbia. One is a local City of Columbia Historical District; the other is 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 local district is "identified as Architectural District No. 1" and is "bounded by Laurens, Senate, Henderson and Greene Streets. . . ." *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District, named University Neighborhood Historic District, by the National Register of Historic Districts. U.S. Dept. of the Interior, National Park Service, certified Aug. 8, 2004.

B. Procedural History

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. (Exhibit 6, at pp. 43–46, filed as Supplement to Record on Appeal by DDRC, Apr. 20, 2021 [hereinafter Supplement to Record]. Subsequently, these denials were rescinded at a special called meeting on February 7. (Supplement to Record, Exhibit 7, at pp. 15–16). At the regular March hearing, the DDRC granted site plan approval for the project (Supplement to Record, Exhibit 8, at pp. 76–77). Design approval was granted by the DDRC at the regular July public hearing (Supplement to Record, Exhibit 10, at pp. 18–19).

In addition to these four public hearings, the DDRC conducted a "work session" on the design approval on June 10, 2020 (*See* Supplement to Record, Exhibit 9).

On July 23, 2020, the Association filed a complaint/appeal in Circuit Court. The DDRC, Trinitas, and the City each filed an answer and a Motion to Dismiss. The motions to dismiss were denied. (Order filed Oct. 7, 2020) The denial of these motions was appealed. The Court of Appeals dismissed the appeal on the ground that the order was not immediately appealable. (Appellate Case No. 2020-001586, Order filed Jan. 14, 2021).

On September 13, 2021, the DDRC and Trinitas filed a Petition for Writ of Mandamus pursuant to 245(B) SCACR, or, in the alternative, Petition for Certification pursuant to Rule 245(A) SCACR. University Hill Neighborhood Association file a Return to this filing.

On September 30, 2021, the parties in this action requested the Supreme Court to hold in abeyance all deadlines associated with the Petition for Writ of Mandamus and Petition for Certification. The Court granted the request. The parties informed the Supreme Court that on October 14, 2021, Circuit Court Judge Casey L. Manning held a final merits hearing to consider

all issues in the case. The Circuit Court requested proposed orders from the parties by November 4, 2021.

Due to these continuing developments in the case, the parties again requested the Supreme Court to hold all current deadlines in abeyance until the Circuit Court issues an order. Petitioners contend that while an order by the Circuit Court may resolve the Petition for Mandamus, such an order may not resolve the Petition for Certification. By letter of October 15, 2021, the Clerk of the Supreme Court advised the parties that this matter will be continued to be held in abeyance until November 12, 2021, and that the Court should be notified of the status of this matter at that time.

C. Facts

The site for the proposed Trinitas apartment building 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 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*. . . ." (emphasis added).

The overlay district herein is termed 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)(2) of the Columbia City Code.[1] As indicated in Argument Three below, an overlay district like the

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

-DD area is designed to impose design requirements in addition to the requirements of the underlying zoning that already exists.

The City Council of Columbia did not draft a zoning ordinance to govern decisions in the -DD area. Instead, it simply adopted a lengthy document titled *City of Columbia City Center Design Development Guidelines* (Nov. 1998) [*Guidelines*].[2] This result was accomplished by adopting the *Guidelines* 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").

This approach was chosen even though the *Guidelines*: (1) were prepared by planning experts to guide the drafting of an ordinance, and (2) explicitly state that the *Guidelines* are "non-binding" and are not meant to serve as an ordinance. To this end, Section 3.5.2 of the *Guidelines* states, "*It is through the Zoning Ordinance that the Design Development Guidelines will be implemented. . . .*" (emphasis added) As an example of this non-binding process, the discussion of "Building Heights" at page 5-2 of the *Guidelines* states: "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).

As a result of this use of a planning guide as an ordinance, design in the -DD area is based on precatory terms like "non-binding" and "should" rather than mandatory terms like "must" and "shall." For example, Section 5.1 of the *Guidelines*, which addresses the design of private development in the -DD overlay district, states: "The guidelines in this chapter are *illustrative rather than prescriptive*." (emphasis added)

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[2] *See* Exhibit B to Joint Stipulation, *supra* note 1.

D. Summary of Challenges to Approvals

It is important to distinguish among the Association's three distinct challenges to the approvals of the Trinitas project. One challenge concerns provisions of the *Guidelines* that require "site plan review" within the -DD area to be done by the DDRC rather than by the City of Columbia Planning Commission. The site plan review part of the Complaint: (1) asserts that the shift 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. Thus, it is not governed by the statutory provisions for appeal from the DDRC pursuant to Section 6-29-900(A).

Another challenge asserts that, because the *Guidelines* were intended to guide the drafting of an ordinance rather than to serve as an ordinance, the adoption of the non-binding *Guidelines* as the ordinance was an unlawful delegation of the legislative power of the City of Columbia. Jurisdiction on this claim is based on the general jurisdiction of the Circuit Court.

The Association asserts that the site plan review claim and the unlawful delegation claim were combined with the appeal pursuant to Section 6–29–900(A) for three reasons. First, the facts concerning all three of the Association's claims are interconnected in the record concerning the appeal of the decisions pursuant to Section 6-29-900(A). Second, combining these two claims enables Trinitas, a real party in interest in terms of the Section 6-29-900(A) appeal, to assert its interests in these two claims. Third, the Association was motivated to assert the *ultra vires* claim and the unlawful delegation claim at the point in time when the Complaint was filed, rather than earlier, because there was no harm to substantial interests of the Association and its members until the DDRC approved the site plan and the design for the Trinitas project.

The third challenge involves an appeal pursuant to S.C. Code § 6-29-900(A from the decision of the DDRC. This challenge asserts that the DDRC abused its discretion in approving the height of the Trinitas apartment building because it made a mistake of law in deciding that the

height of the proposed Trinitas project should be determined by the underlying zoning rather than the -DD overlay zoning.

The Association claims it has standing to bring the three challenges summarized above. The Defendants/Respondents dispute this claim.

E. Standard of Review

The Standard of Review for Arguments One and Two involves matters of law and statutory interpretation. Therefore, the standard of review is de novo. *South Carolina Public Interest Foundation v. Calhoun County Council*, 432 S.C. 492, 854 S.E. 2d 836, 837 (2021) ("[T]he interpretation of a statute is a question of law for the Court to review de novo.")

The Standard of Review for Argument Three is set for the in Section 6-29-930(A) of the South Carolina Code:

> 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.

(emphasis added) This third challenge asserts that the DDRC abused its discretion by committing an error of law in its decision that the underlying zoning controlled the determination of the height of the building.

The determination of whether standing requirements are satisfied is a matter for the court addressing the issues. *See, e.g.*, *Preservation Society of Charleston v. South Carolina Department of Health and Environmental Control*, 430 S.C. 200, 845 S.E.2d 481, 489 (S.C. 2020) (Based on review of evidence involved, the Court concluded: "We find Petitioner's allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative").

II. SITE PLAN REVIEW CHALLENGE

A. Site Plan Review by DDRC

Title 6, Chapter 29 of the South Carolina Code contains the Enabling Act. Article 7 (titled as "Local Planning – Local Development") of the Enabling Act addresses land development regulation by local governments. In contrast, provisions concerning boards of architectural review like the DDRC are contained in Article 5 ("Local Planning – Zoning") of the Enabling Act. The scope of Article 7 is very broad, largely 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 regulations. As a part of this scheme, terms like "sketch plan," "site plan," and "preliminary plat" are used to identify specific types of plans. Columbia City Code § 17-464. For a category termed "Group Development,"[3] a system of plan

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

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

Section 3.5.4 of the *Guidelines* for the -DD area shifts the responsibility for site plan review for group developments from the City of Columbia Planning Commission to the DDRC.[4] This approach to site plan review is *ultra vires* because it conflicts with explicit language in subsection

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> *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.

[4] Section 3.5.4 of the *Guidelines* states:

> Within City Center, the D/DRC and Design/Development Review staff *will* assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

(emphasis added). This section is one of the rare instances where the *Guidelines* use a mandatory term like "will" rather than a precatory term like "should."

6-29-1150(A) of the Enabling Act, which addresses the submission of plans or plats to the planning commission. This subsection addresses "Submission of plan or plat to planning commission" and states: "The land development regulations adopted by the governing authority *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). The shifting of site plan review to the DDRC pursuant to the *Guidelines* conflicts with this clear mandate that the planning commission must approve or disapprove plans.[5]

The purpose of the Enabling Act is to enable or authorize local governments to engage in planning and in regulating the use and development of land. As noted in Section 6-29-330(A) 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). The phrase "under the provisions of this chapter" indicates that the "powers granted" are both defined by and limited by the Enabling Act.

Thus, 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) Thus, the section imposes the following two requirements: (1) There *must* be a system for approval or disapproval of plans and plats; and (2) this system *must* be undertaken by the planning commission.

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[5] When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the DDRC stated that the question of the validity of the grant of this power is "out of our hands." (Supplement to Record, Exhibit 8, at pp.14–16).

The Rhode Island Supreme Court stated the general principle for applying an enabling act 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 (emphasis added).

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, this grant of power to the DDRC was *ultra vires* and is, therefore, invalid because the authorization did not satisfy "the terms of the Enabling Act."

B. Arguments of Defendants/Respondents

Defendants/Respondents make five arguments concerning the issue of whether the grant of power to the DDRC was ultra vires:

(1) The issue is moot,

(2) The Association does not have standing under S.C. Code §6-29-1150,

(3) Appellant failed to preserve the issue, and

(4) The DDRC never decided the issue.

(5) This court lacks jurisdiction.

As indicated below, none of these arguments is valid.

1. Mootness

Section 3.5.4 of the Guidelines provides/includes the following provision: "Within the City Center, the DDRC and the Design/Development Review staff will assume responsibility for site plan review."[6] Respondents argue that, because the City has deleted Section 3.5.4 of the *Guidelines*, the site plan issue is moot.

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[6] Section 3.5.4 provides as follows:

3.5.4 Site Plan Review

Site plan review in Columbia is handled by the City's Planning Department, which has authority to approve site plans for building projects of 25,000 square feet or less; larger projects must go before the City's Planning Commission. Once applications are accepted, the Planning Department has 10 days to review the project, including evaluation of the site plan and preparation of a staff report for

This ordinance amendment does **not** moot the site review issue because eliminating the grant of the responsibility for site plan review to the DDRC does not eliminate the ultra vires problem. In fact, it makes the situation worse because the process of site plan review by Planning Commission involves matters that are also authorized for review by the DDRC under the *Guidelines*.

a. Planning Commission Site Plan Review

The Columbia City Code provisions concerning site review of "group developments"[7] by the City of Columbia Planning Commission involve a number of concerns, including the following:

(1) Procedures and requirements for specific plans and constructions drawings (§ 17-582);

(2) Off-street parking (§ 17-583);

(3) Water and Sewer Service (§ 17-584);

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the Planning Commission. The Commission may then approve, approve with conditions, or deny the project. Planning Commission decisions are appealable to the circuit court, not the City Council.

Within City Center, the D/DRC and Design/Development Review staff will assume responsibility for site plan review. This would streamline the overall development review process. Building inspections, fire, floodplain, traffic and other reviews that may need to be performed would still be completed by the respective City departments, however, a Design/Development Coordinator will provide assistance by expediting the development through this process.

[7] See Columbia Zoning Ordinance § 17-464 (establishing the three types of "group development" quoted in note 3 *supra*).

(4) Storm Drainage (§ 17-585);

(5) Parking areas, driveways, and internal street (§ 17-586);

(6) Building setbacks (§ 17-587);

(7) Internal design and spacing (§ 17-588); and

(8) Screening (§17-589).

b. DDRC Site Plan Review

Even though Section 3.5.4 has been deleted from the *Guidelines*, there are other sections of the *Guidelines* which implement the now-deleted Section 3.5.4 by addressing the same site plan review concerns that are addressed by the Planning Commission. More specifically, these sections provide for DDRC approval of the following:

(1) Subsection 5.4.1 of the *Guidelines* sets out a scheme to determine setbacks, which are also regulated by the Planning Commission.[8]

(2) Subsection 5.4.2 addresses "building orientation," which is also involved in Planning Commission review.[9]

(3) Section 5.5 addresses "open spaces," which are also a matter for Planning Commission review.[10]

(4) Section 5.10 addresses parking and screening, which are also reviewed by the Planning Commission.[11]

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[8] Columbia City Code §17-587.

[9] *See id.* § 17-582.

[10] *Id.* §§ 17-582, 17-588.

[11] *See id.* §§ 17-582, 17-583, 17-586, & 17-589.

c. Conclusion

This overlap of review authority by both the Planning Commission and the DDRC conflicts with the Enabling Act.

d. Likelihood of Conflicts in Site Plan Review

Because of the overlap, the Association asserts that there is also a substantial likelihood that an application receiving a decision by the Planning Commission on a particular concern will conflict with a decision by the DDRC on the same concern. Such a result is obviously undesirable. At oral argument, Defendants/Respondents argued that the argument concerning overlap was speculative and hypothetical. However, given the number of important areas of overlap, the concerns for overlap appears to be justified.

This problem of overlap of review by both the DDRC and the Planning Commission was identified at page 18 of Plaintiff's Memorandum in Opposition to Motion to Dismiss. This Memorandum was filed on September 2, 2020. Thus, Respondents were on notice that Section 3.5.4 was not the only section involving an ultra vires grant of power.

2. Section 6-29-1150

Section 6-29-1150 is not relevant to the ultra vires argument. Jurisdiction is based upon Article V, Section 11 of the South Carolina Constitution.

3. Failure to Preserve Ultra Vires Issue

Various arguments in the Brief of Respondents fail to distinguish between deciding on the basis of adjudication and deciding on the basis of a public hearing. For example, in footnote 23 on page 19, Defendants/Respondents argue:

> "Testimony by the University of South Carolina and Historic Columbia, referenced on page 36 of Appellant's Brief, is irrelevant, as neither entity appealed either of the DDRC's decisions."[12]

Respondents provide no authority for this assertion.

Kurshner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E.2d 346 (2008) addressed the issue of the due process rights of a landowner's request to subdivide his property. The court stressed that adjudication is very different from decisions by discretionary zoning boards and commissions. See 656 S.E.2d at 350–51. It is generally accepted that "the purpose of holding a public hearing is for the government to obtain public testimony or comment on a particular matter."[13] Given this goal, it is absurd to say that a person's testimony only counts if that person appeals.

4. Failure of DDRC to Address Issue

This is a puzzling argument. The parties agree that the "DDRC does not have authority to determine its own authority. . . ." Brief of Respondents, p. 28. When the issue of the validity of the grant of power to conduct site plan review was raised at the March 12 meeting, the Chair of the

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[12] For additional examples, see footnote 11 at page 8 of Brief of Defendants/Respondents ("A representative of Historic Columbia, John Shearer, also objected to Trinitas' application for design approval quote based on . . . scale and on mass and height." *Id.* at 51:5-6. Historic Columbia did not appeal the DDRC's Design Approval Decision as to the Proposed Construction."); page 15 (reliance on *Powell ex rel. Kelly v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), which was decided within the context of adjudication); pages 26–28 (relying on adjudicative concepts of preservation of issue to challenge position of appellants).

[13] New Hampshire Municipal Association, Running a Smooth Public Hearing, p. 2, available at https://www.nhmunicipal.org/town-city-article/running-smooth-public-hearing.

DDRC states that the question of the validity of the grant of this power is "out of our hands." (Supplement to Record, Exhibit 8, at pp. 14–16). This lack of authority is the reason jurisdiction on this issue is based upon Article V, Section 11 of the South Carolina Constitution rather than on S.C. Code §6-29-1150.

5. Jurisdiction

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

C. Remedy for Ultra Vires Act

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

conveyance by Circuit Court); *City of North Charleston v. North Charleston District*, 346 S.E.2d 712 (1986) (holding that provision in contract concerning assessment of *ad valorem* taxes was *ultra vires* and, therefore, unenforceable), *Sloan v. School District of Greenville*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000) (recognizing in claim for declaratory judgement that certain contracts entered into by school district were *ultra vires* and, therefore, invalid). Because the grant of power to the DDRC to address site plan review was ultra vires, that grant of power is invalid.

III. MISTAKE OF LAW IN DECIDING THAT THE HEIGHT OF THE PROPOSED BUILDING WAS DETERMINED BY THE UNDERLYING C-3 ZONING RATHER THAN THE -DD OVERLAY ZONING

A. The Height Restrictions in the *Guidelines*

Chapter 5 of the *Guidelines* contains the "Guidelines for Private Development." The Introduction to this chapter notes:

> The key emphasis of the guidelines in the chapter is to reinforce the exiting 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*.

(emphasis added) Thus, the *Guidelines* view this contextual approach as fundamental to design review. 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 Association argues that the DDRC abused its discretion by a mistake of law concerning these height guidelines. More specifically, even though height "should be no more than five stories

and the DDRC should use the "contextual approach" to evaluating the design of new projects is *"critical"* and *"fundamental"* to the implementation of the *Guidelines*, the decision was based on a mistaken legal interpretation by the staff of the DDRC that the five-story guideline and the contextual approach of the *Guidelines* did not regulate the height of the building. The basis of 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 email 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 [5.3.1] provides *non-binding general direction* for development within City Center . . . ."[14]

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

[14] Similar language is contained in Lucinda Statler's comments at the July 2020 DDRC meeting. (Supplemental Record, Exhibit 10 at 2–3)

the proposed project], consistent with the allowable envelope provided by the [underlying] zoning ordinance." (Record, Exhibit 5 at 5)

The Brief of Defendants/Respondents argues that nothing in the DDRC's Design Approval Decision states that it was based on positions or conclusions of staff or on staff recommendations. The Record does not support this argument.

The Record makes it clear that the DDRC had been told by the staff that it could not apply the *Guidelines* because height was to be determined by the underlying C-3 zoning. For example, the DDRC "Staff Comments" consistently stated that the underlying C-3 zoning controlled the decision on height.[15] In addition, at the June 10, 2020, "work session," the staff of the DDRC stated that it wanted to "ensure that we all understand that the DDRC can't require a reduction in the allowable height or the allowable building envelope that's permitted by zoning." The chairman of the DDRC replied to this statement as follows: "Right. And I appreciate that. Understand that." (Supplement to Record, Exhibit 9, at pp. 69–70).

The motion to approve the height incorporates this understanding about the allowable building envelope. As to height and mass, the motion stated the following:

> "It meets the following sections of section 5.3, building mass and organization which are 5.3.1 building height, in which is stated, quote, *The city's comprehensive*

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[15] The written comments from the staff at the July meeting included the following:

> While the building is 8 stories, its total height is 75', meeting the C-3 zoning requirement. The U of SC law school, across Pickens Street, is 58' to the top of the third floor, and 70' to the roof pitch; the Hilton Garden Inn is just under 75'.
>
> . . .
>
> The building height and mass remain the same, consistent with the allowable envelope provided by the Zoning ordinance.

(Record, July DDRC 011)

> *plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of buildings.*"

Supplemental Record, Exhibit 10 at p. 18 (emphasis added). Given exchanges between staff and the DDRC like that quoted in the preceding paragraph, it is clear that the reference to the quote from Section 5.3.1 was intended to implement the understanding that "the DDRC can't require a reduction in the allowable building envelope that's permitted by [the underlying C-3] zoning."

In addition Defendants/Respondents concede that the DDRC approval of the height was based on the current underlying zoning, not the current overlay zoning. The Brief of Defendants/Respondents makes this clear at p. 42, which includes the following:

> The applicable City zoning ordinance, City Code Section 17-275, allows for buildings in the C-3 zoning section to be between 50 and 75 feet. Columbia, S.C., Code of Ordinances § 17-275 at note c ("Buildings between the height of 50 and 75 feet may be allowed[.]"). Since the height of the structure at issue is undisputedly within this limit, the Proposed Construction is compliant with [the] City's zoning ordinance and therefore is also compliant with the *Guidelines*.

B. The DDRC Interpretation Was a Mistake of Law

Because the DDRC interpretation was a mistake of law, approval based on this mistake was an abuse of discretion.

1. Provisions in the Enabling Act and in the Columbia Zoning Code Concerning Conflicts Between Requirements

The Commission's reliance on the staff's interpretation was a mistake of law because the interpretation conflicts with provisions in the Enabling Act and in the Columbia City Code concerning conflicts between requirements.

Section 6-29-960 of the Enabling Act states the following approach to be used when requirements conflict:

> When the regulations made under the authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or smaller number of stories, or require a greater percentage of lot to be left unoccupied, or impose other more restrictive standards than are required in or under another statute, or local ordinance or regulation, the regulations made under authority of this chapter govern. When the provisions of another statute require more restrictive standards than are required by the regulations made under authority of this chapter, the provisions of that statute govern.

Section 17-181 of the Columbia City Code 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)

Article V of the Columbia City Code addresses "Historic Preservation and Architectural Review." Section 17-675 contains the following specific provision concerning conflicts in requirements where design review is involved:

> The most restrictive regulations of the zoning ordinance or any other ordinance of the city or those included in this division shall prevail. However, if the commission finds it desirable to impose less restrictive requirements than the zoning ordinance, such deviation shall by referred to the zoning board of adjustment for review as a special exception.

The *Guidelines* provide two standards for determining the permissible height of a building. First, Section 5.3.1 of the *Guidelines* adopts "a general rule [that] . . . buildings within most of the City Center should be no more than five stories." *Guidelines* § 5.3.1. Second, Section 5.3.1 notes that a "contextual approach is fundamental to the implementation of the Guidelines" and that this approach is "critical that in applying these Guidelines . . . the City be consistent in considering the height of proposed structures as they relate to the adjacent development context." The adjacent

development is mostly one, two, and three story buildings.[16] The only exception to this pattern is a hotel, which is: (1) across a wide, very busy street and (2) is outside the -DD district.[17] Based on these two quantitative measures of adjacent development, the maximum height would either be three stories or five stories.

These two *Guidelines* standards for determining height are more restrictive than the underlying zoning of 75 feet. Given the requirements that the "more restrictive" standards shall govern, the more restrictive *Guideline* approach should have determined the height rather than the less restrictive underlying zoning.

2. The DDRC analysis of "vested rights" conflicts with the Columbia Zoning Code

To the extent that the staff 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). This section 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

[16] *See* "Analysis of Application of Certificate of Design Approval for Trinitas," Record, Exhibit 3, at pp. 50, 135.

[17] *Id.*

application for a building permit." An underlying zoning classification of C-3 zoning does not satisfy this definition of site-specific development plan.

3. The DDRC Interpretation Is Fallacious

Another problem with the interpretation concerning height adopted by the DDRC is that the "logic" of the argument makes *all* the guidelines meaningless. Statler's email states: "When the design guidelines seem to conflict with the [underlying] zoning, the zoning prevails." If this general statement were 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, roofs, and upper story details. *See* Chapter 5 of the *Guidelines*.

The distinction between "qualitative measures" and "quantitative measures" in the Statler email has two flaws. First, the email does not provide a reason for regarding the distinction as relevant to the question of whether the *Guidelines* or the underlying zoning should determine height. Second, the *Guidelines* contain quantitative measures for concerns other than height. For example, Section 5.3.3 address "Proportion of Openings" as follows:

> Maintain the predominant difference between upper story openings and street level storefront openings (windows and doors). Usually, there is a much greater window area *(70 percent)* at the storefront level for pedestrians to have a better view of the merchandise displayed behind as opposed to upper stories which have smaller window openings *(40 percent)*.
>
> Whenever an infill building is proposed between two adjacent commercial structures, the characteristic rhythm, proportion and spacing of existing door and window openings should be maintained.

(emphasis added) Despite the quantitative nature of this guideline, the DDRC used it rather than the underlying zoning to address the proportion of openings. (Supplemental Record, Exhibit 10 at 10–11)

4. The DDRC Interpretation Conflicts with the Enabling Act and with Doctrine Concerning Overlay Districts

The *Guidelines* state: (1) that "zoning should be consistent with *current zoning provisions*" and (2) that "the City's comprehensive plan and zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of building." (emphasis added) (Guidelines § 5.3.1 at p. 5-2). The term "current zoning provisions" requires further analysis because there are two separate "current zoning provisions" involved.

When the City Council adopted the *Guidelines* as a part of its zoning code by reference in Columbia City Code Section 17-253 and Section 17-655(b)(2), the *Guidelines* became a part of Columbia's "current zoning provisions." As a result, the *Guidelines* are now a part of Columbia's "current zoning provisions." If the *Guidelines* were not part of today's current zoning provisions, the DDRC could not apply them in the -DD overlay area.

The result of the adoption by reference is that, under today's current zoning provisions, the site of the proposed Trinitas project is subject to two distinct zoning schemes: (1) the regulations for the underlying zoning category of C-3 and (2) the -DD overlay zoning provisions of the *Guidelines*. Thus, the question in this litigations is: Should the determination of height be based on the current underlying zoning provisions or on the current overlay -DD provisions?

As indicated above at Part I-C, an overlay is described in Section 6-29-720(C)(5) of the Enabling Act as a district that "*imposes* a set of requirements *or relaxes* a set of requirements imposed by the underlying zoning district." (emphasis added) It is clear from the content of the

Guidelines that the *Guidelines* are meant to impose requirements, not relax them. The legal interpretation adopted by the DDRC is mistaken because it treats the relationship between a design overlay like that involved herein and the underlying zoning backwards. The -DD design overlay involved herein is adopted to *increase* requirements by imposing *additional* requirements in order to address design concerns. If the underlying zoning will control where there is a conflict with the additional requirements of the overlay zoning, there is no reason to bother with the time and expense of applying the increased requirements 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 this 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;[18] 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 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 and contained new restrictions concerning the outdoor display of certain types 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

[18] In an opinion filed on September 16, 2020, the South Carolina Supreme Court reversed the decision of the Court of Appeals and held that the earlier permit included the expansion. *Grays Hill Baptist Church v. Beaufort Country*, 431 S.C. 630, 850 S.E.2d 29 (2020). The Supreme Court did not address the overlay issue because "our determination concerning the validity of the original permit resolves this case . . . ." *Id.* at 850 S.E.2d 32, fn. 8.

"activity or practice" incidental to the "use." If the display was a use, the overlay did not apply; if it was an activity or 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. *Heilker* adopted the same approach as *Grays Hill Baptist Church* and held that, where an overlay applied, the restrictions in the overlay supersede the underlying zoning.

In contrast to the general rule stated and applied in the authorities discussed above, the DDRC ignored the legal effect of the adoption of the *Guidelines* by reference. As a result, the DDRC interpretation of the height restrictions constituted a mistake of law because the interpretation resulted in the elimination of any consideration of the height requirements in the *Guidelines* even though the *Guidelines* constitute the overlay part of current zoning. (See Part III-B-1 above for discussion of height requirement in the *Guidelines*.) Because the DDRC failed to follow the general rule of making the parcel within the overlay district "simultaneously subject to two sets of zoning regulations," the DDRC made an error of law. This error constitutes an abuse of discretion.

5. Arguments of Defendants/Respondents

The Brief of Defendants/Respondents relies on generic rules of statutory instruction rather than the explicit provisions in the Enabling Act and the Columbia City Codes. Underlying their approach is a failure to appreciate the legal effect in terms of "current zoning" of the adoption of the *Guidelines* by reference. As a result, their arguments do not address the question of whether the underlying C-3 zoning or the overlay zoning of the *Guidelines* should prevail.

They also fail to address the problems concerning vested rights under the City Zoning Code and the fallacious nature of the argument concerning the flaw in the quantitative/qualitative distinction. Many courts have noted that where an important point is not addressed in a party's argument, the point is deemed to have been abandoned. *E.g.*, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); *Finch v. Finch*, 442 S.W.3d 209, 233 (Mo. App. 2014)

Defendants/Respondents also argue that the Association's positions on the role of the *Guidelines* as to the overlay zoning is inconsistent with its position on the issue of unlawful delegation. To the extent that consistency is a problem, both sides have this problem.

If the adoption of the *Guidelines* by reference was not an improper delegation, the *Guidelines* provide the legal framework for the overlay zoning. As a result, Defendants/Respondents cannot logically claim that the height provisions in Section 5.3.1 of the *Guidelines* are not more restrictive than the underlying C-3 zoning. Because these provisions are more restrictive, the Section 6-29-960 of the Enabling Act and Sections 17-181 and 16-675 of the City Code are applicable.

IV. STANDING

A. Associational Standing

1. Doctrine

The doctrine of associational standing was recently summarized by the Supreme Court as follows:

> [A]n organization has associational standing to bring suit on behalf of its members when (1) at least one member would otherwise have standing (statutory, constitutional, or otherwise) to sue in his or her own right, (2) the interests at stake are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control, 430 S.C. 200, 211, 845 S.E.2d 481, 487 (2020). The associations in *Preservation Society* were:

> [seeking] a contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston. Petitioners maintain they have standing to seek this hearing as "affected persons" under section 44-1-60 (G) of the South Carolina Code (2018). The ALC concluded Petitioners did not have standing and granted summary judgment to Respondents.

Id. at 483.

The Supreme Court decision focused on the first standing requirement—i.e., on whether any member of the petitioning organizations had standing as individuals under the statutory term of "affected persons." In addressing this issue, the Court noted:

> Petitioners are community and neighborhood organizations comprised primarily of members who own property near the proposed passenger cruise facility. . . . [T]he court of appeals acknowledged Petitioners presented affidavits from individual members expressing concern over their reduced quality of life arising from the effects upon them *individually*, such as pollution and health effects, traffic congestion, property values, effects on their businesses in the area, and effects on the historical integrity of the area where they resided. . . . Nevertheless, the court of appeals, relying on *Carnival Corp*., agreed with the ALC that the claims of possible environmental and personal harm were purely speculative or were merely generalized grievances equally affecting the public as a whole.

Id. at 488.

The Supreme Court concluded that the associations' "allegations of potential harm to members in nearby neighborhoods, through affidavits and other filings, are not speculative." *Id.* at 489. The proximity of the members of the associations to the terminal involved play a role in this conclusion. The court noted:

> While geographic proximity may not be a determinative factor in every case, it is highly relevant to our analysis in this case. Here members would suffer the environmental consequences Petitioners allege the project will create, such as

> breathing problems and other adverse health effects; increases in hazardous diesel soot; and increases in noise, traffic, and water pollution.

Id. at 489–90.

Defendants/Respondents primarily rely on two cases in their challenge to the Association's standing: *Carnival Corp. v. Historic Ansonborough Neighborhood Association*, 407 S.C. 67, 753 S.E.2d 846 (2014) and *Beaufort Realty Co. v. Beaufort County*, 346 S.C. 298, 551 S.E.2d 588 (Ct. App. 2001).

Carnival Corp. involved a suit brought by two neighborhood associations, a historic preservation society, and the Coastal Conservation Society. The alleged injuries involved were essentially public nuisance claims. 753 S.E.2d at 851. Because the plaintiffs lacked the special injury required for bringing a public nuisance claim, the court held that the plaintiffs lacked standing. *Id.* at 852. The court also held that public importance standing did not apply because of the nature of the claims involved and because the claims could be brought by persons who could show the required injuries, the public importance exception did not apply. *Id.* at 853.

Beaufort Realty Co. involved a challenge to a decision by the County Zoning Administrator that plats filed for a subdivision were exempt from the need for approval. The court held that the League did not have standing because there was no evidence of harm to individual members and that a "severe concern" for potential harm was, by itself, inadequate to satisfy the standard of concrete particular harm. 551 S.E.2d at 590.

The Association relies primarily on the following two cases: *Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control*, 430 S.C. 200, 845 S.E.2d 481 (2020) and *Citizens for Quality Rural Living, Inc.*, 426 S.C. 97, 825 S.E2d 721 (Ct. App. 2019).

Preservation Society of Charleston addressed the procedural issue of whether the organizational plaintiffs had standing to request a "contested case hearing in the administrative law court (ALC) to challenge the propriety of state environmental authorizations issued by the South Carolina Department of Health and Environmental Control (DHEC) for a project relocating and expanding the passenger cruise facility at the Union Pier Terminal (the Terminal) in downtown Charleston." 845 S.E.2d at 483. As indicated above, the court held that the plaintiffs had standing because: (1) the organizations had members who owned property near the "proposed passenger cruise facility" at issue; and (2) the associations' allegations of potential harm to members in the nearby neighborhoods "through affidavits and other filings, are not speculative." 845 S.E.2d at 488–89. The harms were not speculative because, given the proximity to the facility, the members would be exposed to adverse health effects and increases in traffic and noise.

Citizens for Quality Rural Living, like *Preservation Society of Charleston*, focused on: (1) the fact that plaintiffs owned property in a defined neighborhood that was in the immediate vicinity of the proposed subdivision at issue in the case, and (2) members of the neighborhood "will be impacted by the additional traffic" and by the incompatibility of the subdivision with the surrounding rural community. 825 S.E.2d at 723, 730.

All four cases focus on a common concern: Is there evidence to show a reasonable likelihood of specific, serious injury to individuals in the association that are not experienced by the general public? In *Carnival Corp.* and *Beaufort Realty*, there was no such evidence. In *Preservation Society of Charleston* and *Citizens for Quality Rural Living*, such evidence had been shown. As indicated in Part IV-A-2 below, members of the Association have satisfied the requirement of showing likelihood of substantial injury different from that suffered by the general public.

2. Standing—"Substantial Interest"

Section 6-29-900(A) of the Enabling Act addresses standing to appeal from a design decision by an architectural review board 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 . . . ." (emphasis added)

Citizens for Quality Rural Living, Ins., v. Greenville County Planning Commission, 426 S.C. 97, 825 S.E.2d 721 (S.C. Ct. App. 2019) addressed the issue of standing in the context of an appeal from a decision by a planning commission. The Court held that Section 6-29-1150 of the Enabling Act granted "any party in interest" a right to appeal from a decision of a planning commission. In terms of the meaning of the term "party in interest," the court adopted the approach of *Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013), which defined "a real party in interest for purposes of standing as 'a party with a real, material, or *substantial interest* in the outcome of the litigation (quoting *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E. 2d 612, 623 (2010))." 825 S.E. 2d at 727, n.6 (emphasis added). *Citizens for Quality Rural Living* also noted that the association involved had a substantial interest, and thus standing, because "its *members include persons who own property and live in the immediate vicinity of the proposed subdivision*." *Id.* (emphasis added)

Plaintiff University Hill Neighborhood Association is an unincorporated association. As indicated above in Part I-C of the Statement of Case, the boundaries of the area represented by the Association are approximately the same as the boundaries of two roughly overlapping historic district—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 "bound by Laurens, Senate, Henderson, and Greene Streets. . . ." *Id.* § 17-681(b)(1). Nearly all of this area is also recognized as a National Historic District by the National Register of Historic Districts. The boundaries of the Association include properties across an intersection from the block where the Trinitas project would be constructed. Given these boundaries, it is clear that this association, like the associations in *Preservation Society of Charleston* and *Citizens for Quality Living*, contains individuals who live in a defined area in proximity to a proposed use.

The record herein shows that these individuals will suffer non-speculative harm from the Trinitas proposal. Numerous residents of the University Hill Neighborhood testified under oath at public hearings concerning the Trinitas project that: (1) they lived within the boundaries of the University Hill Neighborhood Association, and (2) they as individuals and the neighborhood area as a whole would experience substantial negative impacts from the proposed project. These

testifying residents include the following: Tom Gottshall,[19] John McGill,[20] Beth Richardson,[21] Catherine Fenner,[22] April Lucas,[23] Douglas Carlisle,[24] John Stucker,[25] and Bobby Lyles.[26]

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[19] Supplemental Record, Exhibit 6, at pp. 17-20 (noting, inter alia, that the proposed project is "adjacent to our neighborhood" and that, as a result of students in the proposed projects, hundreds of students will be "moving . . . through our neighborhood at night."; Supplemental Record, Exhibit 8, at pp. 43-46, 48-50 (noting that the project did not meet *Guidelines*, that the project "is to be marketed to students"); Supplemental Record, Exhibit 9, at pp. 9-11 (emphasizing objections to height as violating *Guidelines*). Mr. Gottschall also submitted written materials to the DDRC. *See* Record, Exhibit 1, at p. 4; Record, Exhibit 2, at p. 9; Record, Exhibit 3, at p. 46; Record, Exhibit 4, at p. 22; Record, Exhibit 5, at p. 86.

[20] Supplemental Record, Exhibit 6, at pp. 23-25 (noting investment in homes in neighborhood, size of proposed building, and negative impacts of auto, bike, and pedestrian traffic).

[21] Supplemental Record, Exhibit 6, at pp. 25-26 (noting size of proposed building and reasons why residents of proposed project are likely to be mostly students, expressing concern for "overloading the neighborhood," and describing significant investments in homes in the neighborhood).

[22] Supplemental Record, Exhibit 6, at pp. 26-27 (noting concern for negative impacts of students returning to campus area from Five Points late at night and concern that project will "smother our historic neighborhood"); Exhibit 8, at pp. 59-61 (referring to "people staggering home" in early hours of the day).

[23] Supplemental Record, Exhibit 6, at pp. 27-28 (noting problems resulting from students returning from Five Points and "banging on our doors at 2:30 in the morning").

[24] Supplemental Record, Exhibit 6, at pp. 30-31 (giving reasons to believe students will reside in proposed project and describing specific problems from drunken students "who have trooped through the neighborhood").

[25] Supplemental Record, Exhibit 6, at pp. 41-43 (expressing concern for negative impact of auto and pedestrian traffic by students).

Among their concerns were an increase in vehicular and pedestrian traffic through the neighborhood. Because Trinitas is a "university centric developer,"[27] it is likely that students will reside in the proposed project. As a result, pedestrian traffic from students going to and from class would flow through the neighborhood. In addition, because of topography and a railroad, the route for these students and other young adults living in the proposed project returning from the bars in the "Five Points" area of Columbia to the proposed Trinitas project would be through the University Hill neighborhood. These people "moving . . . through our neighborhood at night"[28] would inevitably include some drunken and rowdy students who will, like many young people before them, engage in things like the following:

- conduct involving "damage and vandalism and just altogether bad behavior in the small hours of the morning,"[29]
- "people banging on our doors at 2:30 in the morning,"[30]
- "people staggering home at" 5:00 am,[31] and

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[26] Supplemental Record, Exhibit 8, at pp. 57-59 (stating that he was a resident of the Heritage and president of the homeowners' association and expressing concern that the scale of the proposed project would "overload" the neighborhood).

[27] Testimony of Linda Irving, Trinitas's representative, Supplemental Record, Exhibit 6, at p. 29; Supplemental Record, Exhibit 8, at p. 6.

[28] Testimony of Tom Gottschall, Supplemental Record, Exhibit 6, at pp. 17-20.

[29] Testimony of John McGill, Supplemental Record, Exhibit 6, at pp. 23-25.

[30] Testimony of April Lucas, Supplemental Record, Exhibit 6, at pp. 27-28.

[31] Testimony of Catherine Fenner, Supplemental Record, Exhibit 8, at pp. 59-61.

– students who have appeared "to be dead," engaged in yelling and "waking me up" at 2:30 in the morning, and "urinating in my driveway."[32]

The residents also expressed concern for the visual impact of a large, monolithic building looming over the area.

The University of South Carolina owns two properties adjacent to the proposed building. Representatives of the University of South Carolina also gave testimony concerning the negative impacts of the proposed Trinitas project on the historical and residential character of the University Hill Neighborhood and concerning the negative impact on joint plans between the University and the neighborhood.[33] Representatives of Historic Columbia gave testimony objecting to failure to follow the *Guidelines* and negative impact on historical character of the area.[34] The evidence also

[32] Testimony of Douglas Carlisle, Supplemental Record, Exhibit 6, at pp. 30-31.

[33] Derek Bruner, Supplemental Record, Exhibit 6, at pp. 22-23 (indicating negative impact on University Hill neighborhood from "student presence adjacent to and throughout their neighborhood," stressing conflicts with University's master plan, and noting that "height and scale and the mass" does not balance with neighborhood); see Letter from Bruner to Lucinda Statler, Record, Mar. 4, 2020, Exhibit 3, at p. 44; Dan D'Alberto, Supplemental Record, Exhibit 8, at pp. 56-57 (noting the plans of the University and stressing that the University "is in lockstep with University Hill Neighborhood in that we agree with the letter they submitted.").

[34] Robin Waites, Supplemental Record, Exhibit 6, at pp. 20-22 (describing historical character of area and negative impact of scale of proposed building, and objecting to violation of *Guidelines*); John Sherer, Supplemental Record, Exhibit 8, at pp. 50-53 (describing factual errors in the Trinitas presentation, stressing the negative impact of the "view shed" of the project, and noting that the church building south of the project is historic).

includes a detailed written review of the historic importance of the buildings and surrounding area in the vicinity of the Trinitas project.[35]

Defendants/Respondents argue that this detailed factual testimony is "speculative," "conclusory," and "hypothetical." However, the number of specific points made in the sworn testimony before the DDRC are, like the record in *Preservation Society*, "not speculative" and affect the residents "individually."

3. Conclusion

The evidence in the record on appeal contains sworn testimony concerning the harmful impacts on the members of the University Hill Neighborhood Association. As in *Preservation Society* and *Citizens for Quality Living*, their neighborhood is adjacent to the block where the project would be built. As a result, they have "geographic proximity" and "live in the immediate vicinity of the proposed" building. In addition, their concerns for increased traffic are the same as the concerns of the members of the associations in these two cases. As in *Preservation Society*, the residents of the University Hill Neighborhood are concerned about "traffic congestion, property values . . . and effects on the historical integrity of the area where they resided." 845 S.E.2d at 488. Like the residents in *Citizens for Quality Living*, the residents are concerned about the traffic and "incompatibility of the subdivision with the surrounding" community. 825 S.E.2d at 721.

[35] Testimony and written analysis of Patrick Hubbard, Record, Exhibit 8, at pp. 53-56, 167-69, 206-09; *see* "Analysis of Application of Certificate of Design Approval for Trinitas," Record, Exhibit 3, at pp. 50, 135.

In addition, at the March 12, 2020, Hearing, Linda Irving, speaking as "Trinitas's representative,"[36] recognized the importance of considering the negative impacts on the neighborhood. Ms. Irving stated: "The site is not within the bounds of a historic district or within a residential neighborhood, though *their proximity must absolutely be factored heavily*."[37]

Given the testimony of residents in the immediate vicinity of the project and of representatives of the University of South Carolina and Historic Columbia, combined with the admission by the Trinitas representative that the proximity of historic districts and residential neighborhoods "must be absolutely factored heavily," the Association and its members have shown a substantial interest in the decisions of the DDRC concerning the Trinitas project.

B. 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 County*, 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

[36] Supplemental Record, Exhibit 8, at p. 6.

[37] Supplemental Record, Exhibit 8, at p. 35. (emphasis added)

also determine whether the party presents an issue of public importance and whether future guidance on that issue is needed.

1. 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 overlay zoning of 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 determination" 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.

2. 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, § 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 6-29-720(C)(5) of the Enabling Act and are a generally recognized technique for land use regulation.[38]

3. Need for Future Guidance

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, *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 fo1lowed 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,"

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[38] *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).

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 Columbia City Code, §§ 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.

4. Agreement on Public Importance

On September 13, 2021, Trinitas and the DDRC filed a Petition for Writ of Mandamus Pursuant to 245(B), SCACR, or, in the alternative, Petition for Certification Pursuant to Rule 245(A), SCACR.[39] At pages 10–17 of this filing, Trinitas and the DDRC argue: (1) that "[t]his case involves issues of significant public interest,"[40] and (2) that "this case has the potential to affect every board of architectural review established by governmental bodies throughout the state and all applicants who file applications through those boards."[41] Given these statements, the parties are in agreement that this case satisfies the public important test for standing.

[39] The City did not join in this filing. However, the attorney for the City indicated in a letter dated September 22, 2021, that "the City of Columbia does not oppose the petition."

[40] Page 10.

[41] Page 17.

V. IMPROPER DELEGATION OF LEGISLATIVE POWER

As indicated above at Part I-C, the drafters of the *Guidelines* viewed the *Guidelines* as "illustrative" rather than prescriptive. *Guidelines* § 5.1 at p. 5-1. The drafters also stated that "it is not the intent of these Guidelines to establish new height standards for City Center." *Guidelines*, § 5.3 at 5-3. Instead, the purpose of the *Guidelines* was to provide "*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*, § 5.3.1 at p. 5-2 (emphasis added). Thus, the intent of the *Guidelines* was that "*the Design Development Guidelines will be implemented*" by amending the regulatory "Zoning Ordinance." See *Guidelines* § 3.5.2 (emphasis added.

However, despite this explicit language concerning the need for "regulatory plans and codes" in a "Zoning Ordinance," the City Council chose to bypass the necessary steps of drafting and adopting an ordinance. Instead, the Council simply adopted the non-binding *Guidelines* as the ordinance. As indicated above in Part I-C, this outcome was achieved by adopting the *Guidelines* by reference. *See* Columbia City Code §§ 17-253, 17-655(b)(1). The Association argues that a result of this approach, the DDRC and its staff have been authorized to apply a scheme of "illustrative" "non-binding" guidelines and that such an open-ended authorization constitutes an improper delegation of the City's legislative power.

A. Unlawful Delegation

The framework for addressing issues 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 proper 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 *Harbin* 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*. We have held invalid municipal ordinances attempting to vest such arbitrary powers in municipal authorities."

Id. at 370–71 (emphasis added) (authorities 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)." (emphasis added) Because the ordinance at issue was sufficiently specific, the decision at issue in *Restaurant Row Associates* was upheld.

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 (emphasis added).

B. Association's Argument

In an email to Thomas Gottshall, the President of the University Hill Neighborhood Association, concerning the application of the *Guidelines*, Lucinda Statler, the Principal Planner/Urban Design for the City, stressed that Section 5.3.1 of the *Guidelines* stated: "The City's Comprehensive Plan and Zoning ordinance are the primary legal vehicles for expressing regulations concerning the height of the buildings. This section [5.3.1] provides *non-binding general direction* for development within City Center. . . ." (emphasis in original)

In this email, Ms. 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))

The Association argues that this "overall assessment-overall determination-substantially meets-cannot meet every single guideline" approach of "general direction" to "non-binding guidelines," is, in effect, a "we know it when we see it" test. As such, argues the Association, the test is contrary to the holding of *Harbin* because it sets up "no standard to guide [decisions] . . . and contains no limitations" and, as in the ordinance in *Schloss Poster Advertising Co*., the *Guidelines* do "not profess to prescribe regulations."

The Association argues that, as a result of this approach, there is neither a meaningful standard to guide the exercise of discretion nor a framework to provide a workable regulatory framework for judicial review of the exercise of discretion. For example, even though there has never been a "project that met every single guideline," the *Guidelines* contain no standards to guide the DDRC in assessing whether and how much guidelines can be waived or softened in deciding whether a project "substantially meets" the design guidelines.

The Association also questions the expertise of the Commission because there is no reason to simply assume that the Commission possesses the extreme wisdom necessary for such unlimited discretion. The treatment of the Trinitas project is claimed to illustrate the human fallibility of the Commission. At the January 9, 2020, meeting, the Commission rejected the staff recommendation of approval with restrictions and voted to deny the requests for design approval and for site plan approval of the Trinitas project. Subsequently, a special meeting was called for February 7 to receive legal advice and to consider rescinding the January denials of approval. At the February 7 meeting, the Commission went into executive session to receive legal advice relating to a pending, threatened, or potential claim. The Commission then moved out of executive session and moved to rescind its own decision to deny design approval and site plan approval.

The Association also argues that the lack of any meaningful standard to limit and structure discretion is reflected in the following comments by Lyndey Bryant, counsel for Trinitas, at the March 21, 2020, DDRC Hearing:

> As to building height, the guidelines clearly express a *nonbinding general direction* for buildings within the city center expressly recognizing that zoning ordinances are the primary legal vehicle for expressing regulations concerning the height of buildings. Although there is a recommendation that building not exceed five stories, there is a specific preference in the guidelines at Section 5.3.1, which says, low profile office buildings, commercial buildings and residences will not yield the density, urban scale and character which is desired for the city center and should therefore be discouraged. *In other words, the opposite proposition also holds true*.

(Supplement to Record, Exhibit 8, at pp. 47–48 (emphasis added). At this hearing, Ms. Bryant also noted: "The guidelines are illustrative rather than prescriptive, and do not set forth detailed or rigid

standards." (Supplement to Record, Exhibit 8, at p. 41) The Association asserts that this assessment of the contradictory, standardless nature of the *Guidelines* by counsel for Trinitas is virtually the same as the claim of the Association that the City Council has delegated its legislative power to the DDRC.

C. Argument of Defendants/Respondents

The Defendants/Respondents argue that the *Guidelines* contain numerous specific policies and standards that are sufficient to structure decisions concerning design. They also argue that the expertise of the members of the DDRC helps guard against abuse.

D. A "Perplexing" Problem

As noted in *Harbin*, the "question of delegation of legislative power has confronted the courts with many perplexing problems. . . ." 86 S.E.2d at 470. *Harbin* also notes:

> The difficulty is in the application of these general principles, for there is no fixed formula for determining the powers which must be exercised by the legislature itself and those which may be delegated to an administrative agency. The degree to which a legislative body must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegations of its own legislative power is not capable of precise definition.

86 S.E.2d at 470.

This challenge is particularly perplexing in the case at issue. On the one hand, there are "standards" and "policies." On the other hand, the *Guidelines* explicitly state that these standards and policies are nonbinding. Moreover, a ruling in favor of the Association's claim would result

in a situation where the City would have virtually no design controls for the downtown area of Columbia.

It is important to note that the Association is challenging two specific approvals: (1) site plan approval and (2) design approval. This court has determined that the Association has standing to challenge these approvals and that both approvals are invalid. As a result, the Association has prevailed in terms of the approvals of the Trinitas project.

The Supreme Court has noted that, where a court addressing an appeal has disposed of the issues involved, it "need not address remaining issues when disposition of prior issue is dispositive." *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591, 598 (1999); *accord, e.g., Whiteside v. Cherokee County School District No. One*, 311 S.C. 335, 428 S.E.2d 886, 889 (1993). This principle has been applied in zoning cases. *E.g., Heilker v. Zoning Board of Appeals*, 346 S.C. 401, 552 S.E.2d 42, 48 (2001). Because the issues of site plan approval and design approval have been resolved in the Association's favor, the best approach for the perplexing issue of nondelegation in this case is to adopt the approach of these cases and not address the delegation of legislative authority issue.

VI. CONCLUSION

For the reasons stated in this Brief, this Court holds:

(1) the Association has standing,

(2) because the decision by the City of Columbia to grant the authority to conduct site plan review to the DDRC was ultra vires and, therefore, void, the approval of the site plan is reversed,

(3) because the DDRC abused its discretion by making a mistake of law in deciding that the height of the proposed building was determined by the underlying zoning rather than the -DD overlay, the design approval of the Trinitas proposal by the DDRC is invalid, and, therefore, is reversed, and

(4) it is not necessary or useful to address the issue of whether the adoption of the *Guidelines* as an ordinance was an unlawful delegation of the legislative power of the City.

_____

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/Relief

So Ordered

s/L. Casey Manning, 2061

Exhibit 2

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
University Hill Neighborhood Association, Plaintiff, v. City of Columbia, City of Columbia Design and Development Review Committee, and Trinitas Ventures, LLC, Defendant.		C/A No.: 2020-CP-40-03475 **ORDER**

Respondents have filed a rule 59(e), SCRP, Motion to Reconsider. Plaintiff has filed a Response to the Motion to Reconsider. For the reasons given in this Order, the Motion to Reconsider is denied.

I. DISCUSSION

The Motion to Reconsider is based on six separate grounds. These grounds are addressed below in the order they are addressed in the Motion.

A. Argument 1: "This Court misunderstood or failed to fully consider Respondents' arguments concerning mootness."

The court understood and fully considered the mootness arguments. *See* Order 13–16.

Eliminating Section 3.5.4 did not moot the ultra vires problem because Sections 5.4.1, 5.4.2, 5.5, and 5.10 grant the DDRC the authority to undertake site plan review of site plan concerns that are also reviewed by the Planning Commission.

Section 6-29-1150(a) explicitly states 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). Thus, the section imposes the

following two requirements: (1) There *must* be a system for approval or disapproval of plans and plats; and (2) this system *must* be applied by the Planning Commission.

It is very likely that at some point, an applicant will be faced with conflicting decisions by the overlap of site plan review concerns between the DDRC and the Planning Commission. However, the legal effect of the ultra vires argument is not altered by the likelihood of conflicting decisions. The ultra vires effect results from granting the DDRC the power to review the same concerns as those that must be addressed by the Planning Commission.

B. Argument 2: "The Order fails to fully consider whether alleged overlaps in authority between the Planning Commission and the DDRC actually conflicts [sic] with the Enabling Act."

Defendants/Respondents argue the explicit language in Section 1150(A) quoted above just not apply because:

> Appellant did not argue that Sections 5.4, 5.5 and 5.10 of the Guidelines unlawfully confer authority to the DDRC to review site plans within the City Center, nor can it, because nothing in these provisions even referenced the DDRC, much less delegate authority to review site plans. Sections 5.4, 5.5 and 5.10 of the Guidelines concern substantive elements of a site plan. See Guidelines, pp. 5-7–5-8, p. 5-9, p. 5-21.

Mot. Reconsider 5–6.

The first sentence in this second argument ignores what happened as the DDRC considered whether to approve the site plan involved. At the March 12, 2020, DDRC meeting, the DDRC considered the "Site/Subdivision Plan" for the Trinitas project. Record, March 12, 2020, DDRC 68-70; Supplement to Record, March 12, 2020, at 156. (Jonathan Chambers, a DDRC staff member, notes that the DDRC was considering site plan review for the Trinitas project.) At the end of the consideration of the site plan for Trinitas, the DDRC voted to approve the site plan. Supplemental Record, March 12, 2020, DDRC Meeting, at 28-29. If "nothing in . . . [Sections 5.4,

5.5, and 5.10] delegates authority to [the DDRC]" to review site plans, what was the point of the DDRC hearing and decision?

The second sentence in the argument is puzzling because it concedes that "Sections 5.4, 5.5 and 5.10 of the Guidelines concern substantive elements of a site plan." As indicated at pages 14-16 of the Order, Sections 5.4, 5.5, and 5.10 address concerns that are a part of site plan review by the Planning Commission. As a result, Sections 5.4, 5.5, and 5.10 are ultra vires because Section 6-29-1150(A) of the Enabling Act states that the Planning Commission must review site plans.

C. Argument 3: "The order mistakenly applied the wrong remedy concerning Appellant's claim that the City of Columbia's delegation of site plan review to the DDRC is ultra vires."

Defendants/Respondents argue that, because the "ultra vires claim was against the City of Columbia, not the DDRC," the "reversal of the DDRC's site plan approval was in error."

This argument ignores the following: Because the grant of power to the DDRC to conduct site plan review was ultra vires, the DDRC could not validly conduct aspects of site plan review. As a result, the DDRC had no lawful power to make a "quasi- adjudicative decision" to grant or to deny approval of a site plan. Since the DDRC had no such power, the proper remedy was to reverse the decision.

D. Argument 4: "The Order failed to rule on Respondents' arguments concerning Appellant's claim that the Guidelines constitute unlawful delegation of legislative authority by City Council."

The approach used in addressing the unlawful delegation issue is well-established. In addition to the authorities cited in the Order, the South Carolina Supreme Court recently used this approach in a zoning case filed on December 8, 2021. *Greenville Bistro, LLC v. Greenville County*, 435 S.C. 146, 164 n.6, 866 S.E.2d 562, 175 n.6 (2021).

E. Argument 5: "The Order failed to rule on Respondent's [sic] argument that Appellant lacked standing to hear its *ultra vires* claim against the City because Appellant made no showing of the traceability and redressability elements of standing."

The order properly applied the standard for associational standing set forth in the cases discussed at pages 33–37 of the Order. As in *Preservation Society of Charleston v. South Carolina Department of Health & Environmental Control*, 430 S.C. 211, 845 S.E.2d 481, 488 (2020), members of the University Hill Neighborhood Association provided sworn "allegations of potential harm to members" near the proposed project. *See* Order 37–44. Their testimony was supplemented by sworn testimony from officials from the University of South Carolina and Historic Columbia. *See* Order 41–42. In addition, Trinitas's representative gave testimony concerning the student orientation of the project and of the need to consider the proximity of the project to the University Hill Neighborhood. *See* Order 40, 43.

The Motion to Reconsider argues that the plaintiff was required to show that the decision by the Planning Commission "would be different in substance than a site plan approved by the Planning Commission . . . ." Mot. Reconsider 15–16. This argument misses the point that, because the grant of site plan review power to the DDRC was ultra vires, the decision was void. Nothing more is necessary. More specifically, there is no requirement of showing that the Planning Commission would have been decided differently.

F. Argument 6: "This Court misunderstood or failed to fully consider issues concerning the 'public importance' exception to standing."

Argument 6 is based on a confusion on the part of the Defendants/Respondents concerning the issues involved.

The ultra vires issue is not limited to Section 3.5.4 of the Guidelines. It also concerns Sections 5.4.1, 5.4.2, 5.5, and 5.10. *See* Order 13–16. Issues concerning the legality of these sections are important and are likely to recur.

The overlay issue is also important and likely to recur. *See* Order 43–46.

Defendants/Respondents argue that statements in their Petition for Writ of Mandamus pursuant to 245(B), SCACR, or, in the alternative, Petition for Certification pursuant to Rule 245(A), SCACR, are not relevant to show agreement on the issues involved. However, the discussion at pages 15–17 of the Petition indicates that the substantive issues involved include questions concerning the role of overlay zoning, an issue of public importance that is likely to recur. For example, this discussion argues:

> The case at bar . . . seeks to test the limits of municipal rule-making authority and scope of review of a board of architectural review. The case further raises questions about the relationship between City and the DDRC. It involves that board's interpretation of municipal guidelines regarding architectural design, which apply throughout City's jurisdiction.
>
> . . .
>
> [A] decision in this case has the potential to affect every board of architectural review established by governmental bodies throughout the State and all applicants who file applications through those boards.

The broad, sweeping language in these quotes applies to public importance standing as well as to the issue of certification.

II. CONCLUSION

For the reasons given in this Order, the Motion to Reconsider is denied.

The Honorable L. Casey Manning
Circuit Court Judge

March 8, 2022
Columbia, South Carolina.

Manning, L. Casey Law Clerk (Victoria Elgin)

From: Holli Miller <holli@harpootlianlaw.com>
Sent: Tuesday, March 8, 2022 10:25 AM
To: Manning, L. Casey Law Clerk (Victoria Elgin); Manning, L. Casey
Cc: Lyndey R. Z. Bryant; Dick Harpootlian; HUBBARD, PATRICK; Pete Balthazor; mary.taylor@columbiasc.gov; cliff.moore@arlaw.com; jennifer.shirey@arlaw.com
Subject: University Hill Neighborhood Association v. City of Columbia, et al.; C/A No. 2020-CP-40-03475
Attachments: 2022-03-08 PL Mot to Recon Order FINAL.docx

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*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Dear Judge Manning,

Attached please find University Hill Neighborhood Association's proposed order in this matter.

Holli

Holli Miller
Paralegal at Richard A. Harpootlian, PA

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Exhibit 3

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

Exhibit 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Richland
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP4003475

University Hill Neighborhood Association
PLAINTIFF(S)

City Of Columbia et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

A hearing was held by Webex on September 11, 2020 on Motions to Dismiss filed by City of Columbia, City of Columbia Design and Development Review Commission (DDRC), and Trinitas Ventures, LLC. Dick Harpootlian was present on behalf of Plaintiff University Hill Neighborhood Association, Lyndey R.Z. Bryant on behalf of Trinitas Ventures, LLC, Peter Balthazor on behalf of DDRC, and M. McMullen Taylor on behalf of City of Columbia. The Court entered an Order Denying Defendants' Motions to Dismiss on October 7, 2020. Subsequently, Trinitas Ventures, LLC and DDRC filed a joint Rule 59(e) Motion to Alter or Amend the October 7 Order, and City of Columbia filed a solo Rule 59(e) Motion. Plaintiff filed a Response to Defendants' Rule 59(e), SCRCP, Motions to Alter or Amend Order on November 10, 2020. After consideration of the October 7 Order, the Rule 59(e) Motions from all Defendants, and Plaintiff's Response, the Court DENIES both Rule 59(e) Motions to Alter or Amend.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/18/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Richland Common Pleas

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

Case Number: 2020CP4003475

Type: Order/Electronic Form 4

So Ordered

s/L. Casey Manning, 2061