

STATE OF SOUTH CAROLINA	:	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	:	FIFTEENTH JUDICIAL CIRCUIT
	:	
Ernest F. Middleton, III, and Joyce J. Middleton,	:	
Michael J. Farrar and Diana Farrar, Robert E. Hunt	:	
and Jeane M. Sullivan, The Colony Homeowners	:	CASE NO. 2022 CP 2200032
Association, Inc., and Keep It Green, Inc.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	<b>PLAINTIFFS' MEMORANDUM</b>
	:	<b>OF LAW IN OPPOSITION TO</b>
Georgetown County, Georgetown County Council,	:	<b>MOTION TO DISMISS BY</b>
Louis Morant, Lillie Jean Johnson, Raymond	:	<b>DEFENDANT GOFF TRUST</b>
Newton, Steve Goggans, Everett Carolina, John	:	
Thomas and Bob Anderson, in their capacities as	:	Declaratory Judgment
elected members of Georgetown County Council,	:	
Benjamin F. Goff, Sr., Trustee of the Benjamin F.	:	JURY TRIAL DEMANDED
Goff 2004 Revocable Trust dated June 18, 2004,	:	
	:	
Defendants	:	

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO  
MOTION TO DISMISS BY DEFENDANT GOFF TRUST**

Plaintiffs submit this Memorandum of Law in opposition to a *pro se* Motion to Dismiss pursuant to S.C.R.Civ.P 12(b)(6) and supporting Memorandum filed on January 25, 2022, by Defendant, Benjamin F. Goff, Sr., Trustee of the Benjamin F. Goff 2004 Revocable Trust dated June 18, 2004 (hereinafter "Defendant Goff Trust").

**SUMMARY OF ISSUES**

1. **Standing.** Plaintiffs' Complaint clearly establishes multiple sources of standing for each of the Plaintiffs for each cause of action.
  - a. **Statutory Standing.** When the legislature has conferred standing by statute, proof of separate constitutional or other standing is not required. In the present case, all Plaintiffs have statutory standing as follows:

- i. South Carolina Comprehensive Planning Enabling Act, Section 6-29-760(C):**

This statute confers standing to contest zoning ordinances or amendments on “owners of adjoining land or their representatives.” As clearly set forth in Plaintiffs’ Complaint Paragraphs 1-18, 113(a), 117-156, and supporting affidavits and exhibits, all Plaintiffs are either adjoining landowners or representatives and all claims involve the contesting of zoning ordinances or amendments.
  - ii. South Carolina Uniform Declaratory Judgments Act, Section 15-53-30:**

This statute confers standing on “any person whose rights are affected by a municipal ordinance.” As clearly set forth in Plaintiffs’ Complaint Paragraphs 1-18, 28-30, 113(b), 117-156, and supporting affidavits and exhibits, this broad statutory provision confers standing on all Plaintiffs for all claims relating to the municipal ordinances in question.
  - iii. South Carolina Freedom of Information Act, Section 30-4-100:**

This statute confers standing on “any citizen of the State” to enforce FOIA provisions. As clearly set forth in Plaintiffs’ Complaint Paragraphs 5-22, 113(c), 153-156 and supporting affidavits and exhibits, all Plaintiffs are citizens of the State and have standing to enforce FOIA violations.
- b. Associational Standing.** In addition to statutory standing, Plaintiff Keep It Green, Inc. (KIG) has associational standing as provided under South Carolina Law. As clearly set forth in Plaintiffs’ Complaint Paragraphs 5-18, 116 and supporting affidavits and exhibits, as at least one KIG member has standing in his or her own right, the interests at stake are germane to KIG’s purpose, and participation of all individual landowners is not required.

- c. **Constitutional Standing.** Under South Carolina law, it is not necessary to inquire beyond statutory standing; however, as clearly set forth in Plaintiffs' Complaint Paragraphs 1-18, 28-30, 114, and supporting affidavits and exhibits, all Plaintiffs nonetheless have alleged proper constitutional standing by establishing injury in fact, caused by the improper approval of the ordinances in question, and that injury is redressable by a favorable decision of this court.
- d. **Public Importance Standing.** South Carolina law also provides for a public importance exception to standing. In addition to the above, as clearly set forth in Plaintiffs' Complaint, Paragraphs 1-18, 24-27, 31-109, 115, and supporting affidavits and exhibits, all Plaintiffs have standing pursuant to the public importance doctrine in that future guidance by this court is necessary to determine the validity of the county's repeated disregard of explicit language in the Comprehensive Plan that restricts density increases in the South Waccamaw Neck. This issue has potentially far-reaching, widespread, devastating and irreversible negative impact on the public welfare by serving as a precedent for similar rezoning of many acres in the South Waccamaw Neck.
2. **Justiciability.** In order to state a cause of action under the Uniform Declaratory Judgments Act, Plaintiffs need only plead an "actual controversy." As hereinafter set forth, Plaintiffs' complaint, including affidavits and exhibits, contains allegations that far exceed the minimum requirements to establish an actual controversy regarding the validity of Ordinances 21-24 and 21-25.
3. **Necessary Parties.** As clearly set forth in Plaintiffs' Complaint Paragraph 19-27, under the Uniform Declaratory Judgments Act, any person who has a claim or interest that would be affected by the requested declaration must be made a party to the action. The Goff Trust

owns the property that is the subject of the ordinances in question and under the Act must be made a party.

## **LEGAL ARGUMENT**

### **I. Standard of Review and Matters Properly Considered**

In the context of a Motion to Dismiss, all of the allegations in Plaintiffs' Complaint and supporting affidavits and exhibits must be accepted as true. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Doe v. Marion, 373 S.C. 390, 398, 645 S.E.2d 245, 247-248 (S.C. Supreme Ct. 2007) (citations omitted) (emphasis added).

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint ..." Id. (emphasis added). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." Id. (emphasis added). See also Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (S.C. Supreme Ct. 2007).

South Carolina law is very clear that the purpose of a Motion to Dismiss under Rule 12(b)(6) is for "the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim." Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (S.C. Supreme Court 2019).

Defendant Goff Trust raises a number of matters in its motion and memorandum that relate to the merits of the underlying claim and/or are otherwise extraneous or irrelevant. Many of Defendant's arguments imply questions of fact which are not proper to consider. Under South

Carolina law, the court’s review is limited to the face of the complaint and whether it properly states a cause of action. Accordingly, arguments relating to the merits and questions of fact are not proper in the context of a Motion to Dismiss pursuant to Rule 12(b)(6), and may not be considered.

## II. Standing

“In its most basic sense, standing refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right ... and may be acquired (1) by statute, (2) under the principle of constitutional standing, or (3) via the public importance exception to general standing requirements.” Preservation Society of Charleston v. South Carolina Department of Health and Environmental Control, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (S.C. Supreme Ct. 2020) (citations omitted).

### A. Statutory Standing

Under South Carolina law, once statutory standing has been established for all parties and all causes of action, it is not necessary to inquire further.

“Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and . . . [t]he traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.” Preservation Society of Charleston, *supra*. at 210, 486 (citations omitted). In other words, “[t]he concept of Article III [constitutional] standing as applied in the federal courts does not limit a state’s ability to statutorily formulate [its own] standing criteria.” Id. at 210-211, 486 (citations omitted).

In Preservation Society of Charleston, the South Carolina Supreme Court reviewed a long list of South Carolina cases confirming that “it is unnecessary to address constitutional standing or the public importance exception when the basis for the independent concept of statutory

standing exists.” Id. at 210, 486 (citations omitted). One of the most frequently cited cases in support of this principle is Freemantle v. Preston, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (S.C. Supreme Ct. 2012), which held that “[t]he traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.”

In Freemantle, the Supreme Court specifically noted that once the criteria of statutory standing have been met, “[n]othing more is required” for standing. Id. at 195, 45. In other words, “the appellant did not have to show that he had a personal stake in the outcome of the matter.” Preservation Society of Charleston at 210, 486.

The following statutes confer standing upon Plaintiffs in this case:

**1. Comprehensive Planning Enabling Act, Section 6-29-760(C)**

The South Carolina Comprehensive Planning Enabling Act (hereinafter “CPEA”), S.C. Code Ann., Section 6-29-760(C), states that in the context of a zoning ordinance or amendment, “[a]n owner of adjoining land or his representative has standing to bring an action contesting the ordinance or amendment.” According to the plain language of this statute, the two simple requirements for statutory standing are: (1) being an adjoining landowner or the representative of an adjoining landowner, and (2) contesting a zoning ordinance or amendment.

Complaint Paragraphs 5-11, 28-30 and supporting affidavits and exhibits establish that Plaintiffs Middleton, Farr, Hunt/Sullivan, and Colony Homeowners’ Association (CHA) are owners of land that directly adjoins the Goff Trust parcel. Complaint Paragraphs 17, 18, 56, 65, 68, 76, 78, 113(a) and supporting affidavits and exhibits establish that Plaintiff KIG is and has been the representative of these adjoining landowners. Paragraphs 18 and 113(a) further allege that Plaintiff KIG represents the interests of all adjoining landowners, even those not specifically named in the complaint. Accordingly, the first requirement has been established for all Plaintiffs.

All causes of action in Plaintiffs' Complaint contest the validity of zoning ordinances 21-24 and 21-25. Accordingly, the second requirement for statutory standing under CPEA has been met as well.

The standing inquiry should end at this point as statutory standing has been established for all Plaintiffs and all causes of action.

## **2. Uniform Declaratory Judgments Act**

South Carolina Uniform Declaratory Judgments Act (hereinafter "UDJA"), S.C. Code Ann., Section 15-53-30, states "[a]ny person . . . whose rights . . . are affected by a . . . municipal ordinance . . . may have determined any question of . . . validity arising under the . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder."

Under the UDJA, statutory standing is very broad and extends to any person whose rights are "affected" by a municipal ordinance. Standing is not limited to adjoining landowners. South Carolina courts have interpreted this provision and the word "affected" very liberally to include residents in the vicinity of a land use issue who are impacted by traffic, enjoyment, recreational uses, and aesthetics, as well as organizations whose members are affected in these ways. Citizens for Quality Rural Living, Inc. v. Greenville County Planning Commission, 426 S.C. 97, 113, 825 S.E.2d 721, 731 (Ct. of App. 2019) and Preservation Society of Charleston, *supra*.

In the present case, Plaintiffs have specifically set forth in Complaint Paragraphs 5-18, 28-30 and supporting affidavits that they and their members have been and will be "affected" by approval of Ordinances 21-24 and 21-25, in the following ways: loss of premium payment, decrease in property value, overburdened infrastructure, increase in traffic, increase in stormwater and flooding, negative impact on character, aesthetics and enjoyment of their property, and precedent for similar zoning changes in vicinity.

The United States Supreme Court in Friends of the Earth, Inc. v. Laidlaw Environmental Services Inc., 528 U.S. 167, 170, 120 S.Ct. 693, 697, 145 L.Ed.2d 610 (2000), faced with a similar issue, found that “recreational, aesthetic, and economic interests” were sufficient to establish standing on nearby residents who had had been so “affected.” That same case also found that an organization has standing when its members have been “affected” in those same ways.

All causes of action in the Complaint are raised under the UDJA and, accordingly, all Plaintiffs have established standing with respect to all claims.

### **3. Freedom of Information Act**

South Carolina Freedom of Information Act (hereinafter “FOIA”), S.C. Code Ann., Section 30-4-100, states that “[a] citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter.”

The South Carolina Supreme Court has held that

[t]he legislature has specifically conferred standing upon any citizen of South Carolina to bring a FOIA claim against a public body for declaratory or injunctive relief, or both. Appellant has pled that he is a citizen of the State and that FOIA has been violated. Nothing more is required.

Freemantle v. Preston, 398 S.C. 186, 195, 728 S.E.2d 40, 45 (S.C. Supreme Court 2012). See also Preservation Society of Charleston *supra*. at 210-211, 486.

Standing under FOIA is very broad. In this case, Complaint Paragraphs 5, 6, 9-12 set forth that all Plaintiffs are citizens of South Carolina. Based on that fact alone, Plaintiffs have standing to request declaratory judgment to enforce the provisions of FOIA as requested in Count VI of the Complaint.

## **B. Associational Standing**

The South Carolina Supreme Court has adopted the associational standing criteria set forth by the United States Supreme Court in Friends of the Earth, Inc., *supra.* at 170, 697.

[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, *supra.* at 211, 487.

In addition to and independent of statutory standing, Plaintiff KIG has met the criteria for associational standing as follows: (a) at least one of its members is an affected person who has standing in his or her own right (Complaint Paragraphs 5-18, 116, and supporting affidavits and exhibits); (b) the interests at stake fall squarely within KIG's purpose of protecting and preserving the land, quality of life, and natural character of the Waccamaw Neck by monitoring county land use decisions, zoning change requests and proposed development for compliance with proper law and procedure (Complaint Paragraphs 12-18, 116, and Exhibit 10); and (c) neither the claim asserted nor the relief requested requires the participation of individual landowners as monetary damages are not being requested (Complaint Paragraphs 116-156).

In Preservation Society of Charleston, the Petitioners were found to have standing as community and neighborhood organizations comprised of members who owned property near, but not necessarily adjoining, the land use at issue. Similarly, many members of Plaintiff KIG own property that either adjoins or is located in the vicinity of the Goff Trust parcel.

There are many sound public policy reasons behind the concept of associational standing. “[I]t promotes judicial economy and efficiency by avoiding repetitive and costly independent

actions by individual members, and it allows members who would have standing in their own right to pool their financial resources and legal expertise to help ensure complete and vigorous litigation of the issues.” Preservation Society of Charleston, *supra.*, at 211, 487.

### **C. Constitutional Standing**

Although it is not necessary to inquire beyond statutory standing, Plaintiffs’ Complaint alleges proper constitutional standing for all Plaintiffs.

In Preservation Society of Charleston, *supra.*, the South Carolina Supreme Court, quoting the United States Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), stated that constitutional standing

contains three elements: (1) the plaintiff must have suffered an “injury in fact,” i.e., an invasion of a legally protected interest that is concrete and particularized, and actual or imminent; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision.

Id. at 210, 486 (citations omitted).

As set forth above, Plaintiffs complaint alleges the following injuries in fact: loss of premium payments, decrease in property values, overburdened infrastructure, increase in traffic, increase in stormwater and flooding, negative impact on character, aesthetics and enjoyment of their property, precedent for similar zoning changes in vicinity that would exacerbate all these injuries. Plaintiffs’ Complaint alleges that these injuries were caused by the improper approval ordinances 21-24 and 21-25 that more than doubled residential density and cut lot sizes in half on contiguous or nearby land; and that the injury is redressable by a favorable decision of this court declaring that these ordinances are improper, null and void.

#### **D. Public Importance Standing**

When a matter is of public importance, standing may be conferred by that fact alone.

[S]tanding is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. In cases falling within the ambit of important public interest, standing is conferred without requiring the plaintiff to show he has an interest greater than other potential plaintiffs . . . . For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.

Freemantle, *supra*. at 44, 193.

In the present case, future guidance by the court is necessary to determine the validity of these two ordinances which involve and are evidence of Georgetown County’s repeated disregard of explicit language in the Comprehensive Plan that restricts density increases in the South Waccamaw Neck. The issues in this case have potentially far-reaching, widespread, devastating and irreversible negative impact on the public welfare by serving as a precedent for similar rezoning of many acres in the South Waccamaw Neck. Accordingly, public importance standing is appropriate.

#### **III. Justiciability**

“A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character.” Farmer v. CAGC Insurance Company, 424 S.C. 579, 588, 819 S.E.2d 142, 147 (Ct. of App. 2018) (citations omitted). See also Jowers v. South Carolina Department of Health and Environmental Control, 423 S.C. 343, 354 815 S.E.2d 446, 452(S.C. Supreme Ct. 2018). “The Act is to be liberally construed and administered to achieve its intended purpose to settle and to afford relief from uncertainty and insecurity with respect to

rights, status and other legal relations.” Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 595, 748 S.E.2d 781, 786 (S.C. Supreme Ct. 2013) (citations omitted).

A justiciable controversy is defined as “an existing controversy or at least the ripening seeds of a controversy.” Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423-424, 593 S.E.2d 462, 467 (S.C. Supreme Ct. 2004) (citations omitted), and an “actual controversy as opposed to one that is contingent, hypothetical, or abstract.” Jowers, *supra.* at 354, 452.

In the present case, Plaintiffs’ Complaint enumerates the particulars of this “actual controversy” involving the alleged invalidity of two ordinances and sets forth the bases for this declaratory judgment action by pleading all the concrete facts pertaining to the who, what, where, when, why and how of this controversy.

- A. Paragraph 1 identifies the two ordinances in question, 21-24 and 21-25.
- B. Paragraphs 2 and 3 explain the effect of these ordinances and attach copies.
- C. Paragraph 4 sets forth the “actual” controversy, i.e., that the “ordinances were improperly approved and are null, void and of no force and effect.”
- D. Paragraphs 5–23 identify the parties in detail and explain why each is named.
- E. Paragraphs 24–30 set forth details about the parcel in question and contiguous parcels.
- F. Paragraphs 31–52 set forth the application details as well as relevant facts and law.
- G. Paragraphs 53–109 set forth facts relevant to the Planning Commission Hearing, the three County Council readings and the subsequent council meeting on November 9, 2021.
- H. Paragraphs 110–116 detail the specific bases for jurisdiction, venue and standing, all of which have been reiterated here in response to this motion.
- I. Paragraphs 117–156 set forth six separate counts under the UDJA requesting the court to declare the ordinances null, void and of no force or effect for reasons set forth.

There is nothing contingent, hypothetical or abstract about the controversy in this case. Plaintiffs' Complaint clearly and unequivocally sets forth far more than the minimum required to establish an "actual controversy" as contemplated by UDJA.

#### **IV. Necessary Parties**

The Uniform Declaratory Judgments Act, S.C. Code, Section 15-53-80 requires that

[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise the municipality shall be made a party and shall be entitled to be heard.

As owner of the land in question, Defendant Goff Trust has a claim or interest that would be affected by a declaration, and, therefore, is required to be named as a party in the action.

#### **V. Conclusion**

For the foregoing reasons, Plaintiffs respectfully request this Honorable Court to deny the Motion to Dismiss of Defendant Goff Trust.

Respectfully submitted,

/s/ Cynthia Ranck Person  
Cynthia Ranck Person, Esquire (SC Bar #105126)

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February 25, 2022  
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