STATE OF NORTH CAROLINA COUNTY OF WAKE GEORGE C. VENTERS and wife NICKYE Y. VENTERS; GREG LINCOLN PIERCE and wife AMY J. PIERCE; JOHN SOLIC and wife SAMANTHA SOLIC; Plaintiffs, v. CITY OF RALEIGH, a body politic and corporate; 908 WILLIAMSON, LLC, a North Carolina limited liability company; RDU CONSULTING, PLLC, a North Carolina limited liability company; and CONCEPT 8, LLC, a North Carolina limited liability company; Defendants.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 004711-910 **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

NOW COME Plaintiffs George C. Venters and wife Nickye Y. Venters, Greg Lincoln Pierce and wife Amy J. Pierce, and John Solic and wife Samantha Solic, (hereinafter collectively "Plaintiffs"), and hereby submit the following memorandum of law in opposition to Defendants' Motions to Dismiss ("Motion") pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

INTRODUCTION

The Hayes Barton neighborhood is an old neighborhood in Raleigh made up of historic single-family detached homes on relatively large lots. The Plaintiffs own homes in one quadrant of this old neighborhood. One morning, the Plaintiffs woke up to the news that a large historic home was to be torn down on their street and

replaced with 17 multi-family housing or townhouse units. How did this happen? This Complaint focuses on the how and the City's failure to check common procedural boxes such as providing reasonable notice to an area that someone high up in City government was considering (and later allowing) opening the regulatory gates that have for a considerable time protected traditional single-family neighborhoods and the fair expectations of those buying into and living there to suddenly allow the influx of dense apartment housing or multi-family housing.

The City asks this Court to prematurely end the Complaint even though the nature of the claims is well-spelled out under our State's notice pleading requirements. The City cries out that Plaintiffs lack the legal right to ask this Court for relief even though the Plaintiffs are the very model of persons who should have been provided reasonable notice that their traditional single-family neighborhood may dramatically change. Such notice would have then served the whole point of having a legislative hearing in the first place for possible zoning changes where feedback and various perspectives are presented and where fair debate can ensue with the City leaders before the development rules are (and were) amended.

At the origins of zoning, the case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114 (1926) was decided. In that opinion, zoning laws were legitimized by our highest court as a proper exercise of police powers. In *Euclid*, the battle was over the separation of multi-family apartment housing from single-family housing. *Id.* at 394, 47 S. Ct. 120. Almost fifty years ago, our State's highest court then took up two cases involving rezoning challenges where Raleigh City leaders initially allowed the

introduction of multi-family apartments and townhouse developments into single-family neighborhoods in Raleigh[1]. *Blades v. Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972); *Allred v. Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971).

In *Blades*, the North Carolina Supreme Court first found that "owners of property [single family residences] in the adjoining area [to the townhouse project] affected by the ordinance are parties in interest entitled to maintain" a declaratory judgment challenge. *Id*. at 544, 187 S.E.2d at 42. Then, the *Blades* Court quoted from *Euclid* as follows:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Under these circumstances, apartment houses, which in a different environment would be not only entirely objectionable but highly desirable, come very near to be nuisances.

Id. at 546, 187 S.E.2d at 44.

Fast forward fifty years, Raleigh amended its zoning laws to open the single-family neighborhoods like Hayes Barton to dense multi-family housing but buried the notice of doing so in the back pages of the newspaper with a small, printed description of the proposed change resembling a clue in a National Treasure movie. Rather than saying "apartments, townhouses or multi-family use or buildings," Raleigh obscured the message with the following language: "permitting more housing types in certain

[1] In both cases, the properties were originally zoned R-4, like the properties in the case at hand.

residential districts." (Amended Complaint, "Compl.", ¶36). Nothing is mentioned of multi-family uses.

Defendants' motion is premature and an interlocutory effort to have this Court determine the merits of the appeal, which is highly disfavored at a motion to dismiss stage, especially here where the application of detailed circumstances and facts to various statutes and ordinances is presented, without the benefit of a fully developed record. *Estate of Long v. Fowler*, 270 N.C. App. 241, 251, 841 S.E.2d 290, 298 (2020) (cite omitted); *Fagundes v. Ammons Dev. Grp.*, 261 N.C. App. 138, 156, 820 S.E.2d 350, 363 (2018) (*citing Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 228, 695 S.E.2d 437, 441 (2010)).

STATEMENT OF THE FACTS

All Plaintiffs own real property located within the Hayes Barton neighborhood that runs along Williamson Drive and Iredell Drive in the City of Raleigh that is made up primarily of older, historic homes on relatively large lots. (Compl. ¶14). The Plaintiffs' properties are all zoned R-4. (Compl. ¶13). Historically, buildings with multiple dwelling units attached such as duplexes, triplexes and quadraplexes along with use of property for multi-unit living were severely restricted, if not prohibited, in R-4 within the developed areas of Raleigh, including the Hayes Barton neighborhood. (Compl.¶15). Prior to the below mentioned changes in the Unified Development Ordinance ("UDO"), the use of property for "multi-unit living" was not allowed in R-4 or other residential districts except in a conservation development. (Compl. ¶26).

The Property located at 908 Williamson Drive, Raleigh, North Carolina ("Site"), also zoned R-4, is the location of a planned intense townhouse development which consists of the tearing down of one (1) longstanding residence and replacing it with seventeen (17) multi-unit attached housing dwellings on 2.4 acres ("Project"). (Compl. ¶¶7, 16). The Plaintiffs' properties either adjoin the Site or are in the adjoining area to the Site that will suffer from increased traffic and parking, increased rate and flow of stormwater, noise and light pollution, and a diminution in the value of those properties. (Compl. ¶20).

On or about July 6, 2021, the City adopted an ordinance commonly referred to as TC-5-20 which purports to adopt what the City refers to as the "Missing Middle Housing 1.0" ordinance with the purpose and intent to "expand[ ] missing middle housing options in many residential zoning districts." (Compl. ¶¶28-29).

The Middle Housing 1.0 ordinance was enacted by the City of Raleigh under the procedures associated with "text changes" as compared to map amendments. (Compl. ¶36). As such, the mandated public legislative hearing before the Raleigh City Council according to N.C.G.S. §160D-601 was advertised by way of a legal ad or notice in the Raleigh News & Observer, that stated,

TEXT CHANGE CASES

> TC-8-20 Missing Middle Housing. Amends the Part 10 Unified Development Ordinance to permit more housing types in certain residential districts, amends the methodology for determining how many units can be built on a lot or a site, and adjusts minimum lot and site sizes, and setbacks (Staff Contact: Justin Rametta, justin.rametta@raleighnc.gov 919 996.2665)

(Compl. ¶36).

Only five (5) persons appeared at the July 6th hearing to speak in opposition to the zoning change for the Missing Middle Housing 1.0 ordinance while four (4) people spoke in favor of the ordinance despite the approximately 470,000 people comprising the population of Raleigh. (Compl. ¶44).

On or about May 10, 2022, the City adopted an ordinance commonly referred to as TC-20-21 which purports to adopt what the City refers to as the "Missing Middle Housing 2.0" ordinance, with the purpose and intent for this ordinance to be the next step toward a more flexible zoning code designed to allow for denser development near high-frequency transit. (Compl. ¶¶29-30).

By virtue of the Missing Middle Housing 1.0 ordinance and/or Missing Middle Housing 2.0 ordinance, the City's UDO was changed to potentially allow, among other things:

i. Multi-unit living use of property in the form of large-scale townhouse projects, row housing and multi-family apartment building development in R-4 zoning districts;

ii. Duplexes in R-2 and R-4 zoned areas;

iii. Narrower lot width requirements and "flag lots," thereby increasing allowable lot yields in R-4, R-6, and R-10 zoning districts;

iv. Reduced or eliminated minimum lot size requirements and dimensional standards, thereby increasing allowable density yields in R-4, R-6, and R-10 zoning districts;

v. Townhouse building types to have up to two (2) ADUs (Accessory Dwelling Units) on the same townhouse lot; and

vi. Lots developed with either a detached house, a tiny house or attached house building type to have two (2) ADUs per lot.

(Compl. ¶32).

On or about November 15, 2022, the City Council adopted Ordinance NO. (2022) 440 TC 475 also known as TC-3-22 that made various text changes to the UDO ("Omnibus Ordinance"). (Compl. ¶62). Prior to this ordinance, the Table of Allowable Uses in the form of building types per district did limit the density of townhouses in R-4 districts to two (2) within a development, except in a Transit Overlay District (not applicable) or in a Frequent Transit Area. (Compl. ¶62). The Omnibus Ordinance substantially changed the allowable townhouse densities regardless of whether the property falls within a Transit Overlay District or in a Frequent Transit Area. (Compl. ¶62).

On December 30, 2022, the City by and through its City staff ministerially issued a development approval for the Project at 908 Williamson Drive ("December 2022 Approval"). The development approval allows, from the City's perspective, the Site to be developed with seventeen (17) lots to be used for multi-unit living within a townhouse style of buildings, including 2, 3 and 4 multi-unit townhouse buildings. (Compl. ¶11). Plaintiffs were not aware of the Project until after the application was filed on June 31, 2022. (Compl. ¶12).

On or about January 17, 2023, the City Council adopted Ordinance NO. (2023) 457 TC 476 also known as TC-6-22 that purported to "replace" Section 1.4.2 of the UDO dealing with a table showing allowable uses. (Compl. ¶65). No substantive changes to the prior UDO version were made ("2023 Ordinance").

The above-described ordinance changes are being challenged by way of a Declaratory Judgment action as authorized by N.C.G.S. §160D-1401 and Article 26 of Chapter 1 of the North Carolina General Statutes. Prior to these ordinances, the Project was not allowed. (Compl. ¶¶11, 15, 18, 20). After these ordinances, the City has authorized the Project to be developed. (Compl. ¶18).

STANDARD OF REVIEW

The standard of review in North Carolina for a Rule 12(b)(6) motion to dismiss is as follows:

> On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law, the allegations of the complaint, treated as true, state a claim upon which relief can be granted . . . [cite omitted] . . . Dismissal under Rule 12(b)(6) is proper when one of the following conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wood v. Guilford County, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002).

"The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. The function of a motion to dismiss is to test the law of the claim, not the facts which support it." *Feltman v. City of Wilson*, 238 N.C. App. 246, 251, 767 S.E.2d 615, 619 (2014) (cite omitted). As such, the reviewing court is limited to an examination of the allegations made in the complaint, *Blue v. Bhiro*, 381 N.C. 1, 5, 871 S.E.2d 691, 694 (2022), and the question is whether such allegations are sufficient to state a claim upon which relief can be granted under some legal theory. *Thompson v. Waters*, 351 N.C. 462, 463, 526 S.E.2d 650 (2000).

In determining whether a complaint does or does not state a claim, "[t]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

"In ruling upon [a motion to dismiss], the complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Shepard v. Ocwen Federal Bank, FSB*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006) (*citing Meyer v. Walls*, 347 N.C. 97, 111–12, 489 S.E.2d 880, 888 (1997)). Stated another way, "Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Meadows v. Iredell County*, 187 N.C. App. 785, 787, 653 S.E.2d 925, 927 (2007) (*citing Sutton v. Duke*, 277 N.C. at 102, 176 S.E.2d at 166). A Rule 12(b)(6) motion "does not present the merits, but only whether the merits may be reached." *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758 (1986) (cite omitted) ("The policy behind the Rules of Civil Procedure is to resolve controversies on the merits, not on technicalities of pleading."). A reviewing court must review the face of the complaint and determine whether the asserted facts, if true, would support "any viable theory," regardless of how labeled in the complaint. *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 795, 618 S.E.2d 201, 210 (2005),

"The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Evans v. Lochmere Recreation Club, Inc.*, 176 N.C. App. 724, 727, 627 S.E.2d 340, 341 (2006) (*citing Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985)). "[T]he motion does not present the merits, but only whether the merits may be reached. Thus, the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380–81 (1987)); *Bill Clark Homes of Raleigh, LLC v. Town of Fuquay-Varina*, 281 N.C. App. 1, 4, 8, 869 S.E.2d 1, 5-6 (2021).

ARGUMENT

I. GRANTING A RULE 12(b)(6) MOTION TO DISMISS IS NOT PROPER IN A DECLARATORY JUDGMENT ACTION

The North Carolina Constitution provides that "every person for an injury done to him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. Art. I, §18. Consistent with this mandate, the North Carolina Uniform Declaratory Judgment Act (NCUDJA) provides:

> [A]ny person . . . whose rights, status or legal relations are affected by a statute, municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute, ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder.

N.C.G.S. §1-254; *Goldston v. State*, 361 N.C. 26, 33, 627 S.E.2d 876, 881 (2006).

In the context of a declaratory judgment action, a complaint is sufficient if it "alleges the existence of a real controversy arising out of the parties' opposing contentions and respective legal rights under a" statute, ordinance or other

instrument. *Morris v. Plyler Paper Stock Co.*, 89 N.C. App. 555, 557, 366 S.E.2d 556, 558 (1988).

A declaratory judgment action is a proper means to challenge the validity of a city zoning ordinance or amendment thereto, especially by owners of property within a rezoned area or those directly and adversely affected by legislative zoning changes. *Blades*, 280 N.C. at 544, 187 S.E.2d at 42; *Unruh v. City of Asheville*, 97 N.C. App. 287, 291, 388 S.E.2d 235, 237 (1990); *Morris Communs. Corp. v. City of Asheville*, 356 N.C. 103, 104, 565 S.E.2d 70, 71 (2002).

A declaratory judgment action is intended to be remedial, to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and is to be liberally construed and administered. *Woodard v. Carteret County*, 270 N.C. 55, 59, 153 S.E.2d 809, 812 (*citing* N.C.G.S. §1-264).

On multiple occasions, our Supreme Court and Court of Appeals have held that where a complaint alleges a justiciable controversy under the NCUDJA, and where necessary parties are not absent, a demurrer or dismissal of the complaint under Rule 12(b)(6) should not occur. *Id.* at 61, 153 S.E.2d at 813 (*citing Nationwide Mutual Insurance Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654(1964)); *Conner v. North Carolina Council of State*, 365 N.C. 242, 259, 716 S.E.2d 836, 847 (2011); *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 439, 206 S.E.2d 178, 182 (1974); *Hubbard v. Josey*, 267 N.C. 651, 652, 148 S.E.2d 638, 639 (1966); *Walker v. Charlotte*, 268 N.C. 345, 348, 150 S.E.2d 493, 495 (1966); *Morris*, 89 N.C. App. at 557, 366 S.E.2d at 558; *Town of Apex v. Rubin*, 277 N.C. App. 357, 368, 858

S.E.2d 364, 373 fn4 (2021), *Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, 256 N.C. App. 625, 631-632, 808 S.E.2d 576, 581-582 (2017); *Sanders v. State Personnel Comm'n*, 197 N.C. App. 314, 322-323, 677 S.E.2d 182, 188 (2009); *Johnson's Landing Homeowners Ass'n v. Hotwire Communs., LLC*, 2018 NCBC LEXIS 113, ¶11.

> The general rule is that where plaintiff's pleading, in an action for a declaratory judgment, sets forth an actual or justiciable controversy, or a bona fide justiciable controversy, it is not subject to demurrer since it sets forth a cause of action. This is true even though plaintiff is not entitled to a favorable declaration on the facts stated in his complaint, or to any relief, or is wrong in his contention as to his ultimate rights, since, in passing on the demurrer, the court is not concerned with the question of whether plaintiff is right in the controversy, but is only concerned with whether he is entitled to a declaration of rights with respect to the matters alleged.

Walker, 268 N.C. at 348, 150 S.E.2d at 495 (*citing* 26 C.J.S. 334, Declaratory Judgments, Sec. 141).

> The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff is entitled to the declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all, so that even if the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled, he states a cause of suit for a declaratory judgment.

Nationwide Mut. Ins. Co., 261 N.C. at 288, 134 S.E.2d at 657.

> The [Rule 12(b)(6)] Motion is seldom an appropriate pleading in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail. It is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual, genuine existing controversy.

North Carolina Consumers Power, Inc., 285 N.C. at 439, 206 S.E.2d at 182

In the case at bar, the Defendants are attempting in their Rule 12(b)(6) motions to have this Court prematurely determine the merits of the Plaintiffs' contentions

regarding the validity of the amendments to the City's zoning ordinance or UDO. Plaintiffs are entitled to have the applicable laws declared under the facts and the ordinances' validity so judged. The Plaintiffs have set forth sufficient allegations showing a justiciable controversy. (E.g., Complaint, ¶¶11, 13-24). As immediate neighbors to a multi-family project purportedly authorized in traditional single-family areas by changes to Raleigh laws, this case presents Chapter 3 to the prior cases of *Blades* and *Allred*. In accordance with the clear holdings of the above cases, the Defendants' motions at this stage should, therefore, be denied.

II. PLAINTIFFS HAVE SET FORTH PROPER ALLEGATIONS FOR PURPOSES OF STANDING.

In *Comm. to Elect Forest v. Employees PAC*, our Supreme Court properly characterized the rules on standing as a "thorny thicket," compelling a "tortuous track" to explain it. 376 N.C. 558, 608, 853 S.E.2d 698, 734 (2021). In several key ways, which will be explained below, the North Carolina Supreme Court in this opinion clarified the law on standing.

Like many areas of the law, there are or have been split lines of appellate cases setting forth standards for a person seeking to challenge the validity of a municipal ordinance. Regardless of which "thorny thicket" stemming from varied lines of cases the Defendants attempt to throw Plaintiffs into, Plaintiffs have set forth sufficient allegations to satisfy the threshold of standing. Let's start with the basics that we should all agree with.

"A suit to determine the validity of a city zoning ordinance is a proper case for declaratory judgment." N.C.G.S. §1-254; *Blades*, 280 N.C. at 544, 187 S.E.2d at 42;

Woodard v. Carteret County, *supra*. In an action for declaratory judgment, the validity of a statute when directly and necessarily involved may be considered only if challenged by a person who is directly and adversely affected thereby. *Greensboro v. Wall*, 247 N.C. 516, 520, 101 S.E.2d 413, 416 (1958). "Such persons are entitled to their day in court to show . . . that the enforcement of all or any of its provisions will result in an invasion or denial of their specific personal or property rights under the Constitution." *Id.* at 522, 101 S.E. 2d at 418.

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Edwards v. Town of Louisburg*, 892 S.E.2d 76, 80 (N.C. Ct. App. 2023) (*citing Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 823, 611 S.E.2d 191, 193 (2005) (citations omitted)). "Standing is initially determined by whether an actual controversy exists between the parties when the action is filed." *Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997). In order to satisfy the jurisdictional requirement of an "actual controversy," a mere difference of opinion on the law, or its application, is not enough; it is necessary that litigation appear unavoidable." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 589, 347 S.E.2d 25, 32 (1986).

A. <u>The Standing Principles from Comm. To Elect Forest</u>.

The Supreme Court in *Comm. to Elect Forest* stated:

> The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of

> issues upon which the court so largely depends for illumination of difficult constitutional questions.

376 N.C. at 594-595, 853 S.E.2d at 725 (quoting *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 28, 199 S.E.2d 641 (1973)). In this vein, standing addresses whether there are "actual antagonistic interests" between the parties. *Id.* (cite omitted). The "concrete adverseness" principle for standing is "grounded on prudential principles of self-restraint in exercise of" a court's power of judicial review. *Id.* To satisfy this "concrete adverseness," one must allege a "direct injury" to pass on the constitutionality of a legislative or executive act. *Id.* at 599, 853 S.E.2d at 728. "Direct injury" is akin to being "adversely affected." *Id.* at 594, 853 S.E.2d at 724. For purposes of "direct injury," where a statutory, common law or constitutional right is at issue, a showing of a violation or impairment of that right should be sufficient. *Id.* at 600, 607-608, 853 S.E.2d at 728, 733. This is known as an impairment of a "legal right." *Id.* at 599, 853 S.E.2d at 728. Allegations of factual harm or injury is not required. *Id.* at 607, 853 S.E.2d at 732-733[2].

Significantly, the North Carolina Supreme Court in *Comm. to Elect Forest* eschewed a line of cases originating from the Court of Appeals that required allegation and showing of an "injury-in-fact," which is akin to a showing of "actual injury." *Id.* at 599-600, 853 S.E.2d at 728.

[2] A good example of the impairment of common law "legal right" discussed in *Comm. to Elect Forest* is trespass. Someone may enter your property without consent, cause no factual injury or damages, and the property owner would still be entitled or have standing to bring a claim. *Id.* at 605-606, 853 S.E.2d at 732.

For the case at hand and Defendants' objections based on standing, several important clarifications came out of *Comm. to Elect Forest*.

One, the general rule of standing to challenge the validity of a statute or ordinance is one of "concrete adverseness" (i.e., allegations of being directly injured or adversely affected by a law).

Two, the infringement of a legal right stemming from a statute, common law or the constitution should suffice for purposes of "direct injury."

Three, the "injury-in-fact standard" is not good law.[3]

Four, a determination of "concrete adverseness" should be liberal and construed in favor of resolving cases on their merits. *Id.* at 604, 853 S.E.2d at 731. This follows the clear signal given by our State Supreme Court in *Mangum v. Raleigh Bd. of Adj.* that standing and the related allegations in a complaint or petition should be viewed "in the light most favorable to the non-moving party" so that a party is not denied his or her day in court based on some "imprecision of the pen." 362 N.C. 640, 644, 669 S.E.2d 288 (2008).

[3] This standard originated from the United States Supreme Court opinion in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed 2d 351 (1992). *Comm. to Elect Forest*, 376 N.C. at 588, 853 S.E.2d at 720. It was subsequently adopted by the North Carolina Court of Appeals starting with *Neuse River Found., Inc. v. Smithfield Foods, Inc.,* 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002). While the North Carolina Supreme Court disclaimed this line of cases in *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006), it continued, unfortunately, to be relied upon by the Court of Appeals in several opinions after 2006. The court in *Comm. to Elect Forest*, hopefully, killed this legal zombie that helped muddy the law on standing. A list of cases from the Court of Appeals that erroneously rely upon *Neuse River* and the actual injury requirement include *Ring v. Moore Cty*, 257 N.C. App. 168, 171-172, 809 S.E.2d 11, 13-14 (2017) and *Morgan v. Nash County*, 224 N.C. App. 60, 66, 735 S.E.2d 615, 620 (2012).

Finally, the *Comm. to Elect Forest* Court in several instances pointed out that the "special damages" or "special injury" requirement for standing stems from a statutory directive that pertains only to writ of certiorari appeals of quasi-judicial zoning actions. 376 N.C. at 602, 853 S.E.2d at 730, fn 45 and 376 N.C. at 608, 853 S.E.2d at 7733 fn 51. This will, hopefully, squash another aberrant line of cases from the Court of Appeals holding that "special damages" is a component of standing for declaratory judgment challenges to the validity of legislative rezoning actions. These cases include *Cherry Cmty. Org. v. City of Charlotte*, 257 N.C. 579, 809 S.E.2d 397 (2018); *Violette v. Town of Cornelius*, 283 N.C. App. 565, 874 S.E.2d 217 (2022) and *Davis v. Archdale*, 81 N.C. App. 505, 344 S.E.2d 369 (1986).[4]

B. <u>Plaintiffs have satisfied the Blades-Taylor Supreme Court standing test</u>.

In an action for declaratory judgment, a party has standing to challenge a zoning ordinance only when they have a specific personal and legal interest in the subject matter impacted by the zoning ordinance and is directly and adversely affected thereby. *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972); *Village Creek Prop. Owners Ass'n v. Town of Edenton*, 135 N.C. App. 482, 485-86, 520 S.E.2d 793, 795-96 (1999). In the latter case of *Village Creek*, the Court of Appeals eschewed a

[4] In *County of Lancaster v. Mecklenburg County*, the Supreme Court in a footnote addressed standing to challenge a legislative zoning decision and referred to *the Blades-Taylor* Supreme Court opinions that will be cited later in this brief. The *County of Lancaster* Court mentions *Davis v. Archdale* and its "special damages" test as one arising from challenges to quasi-judicial zoning decisions. 334 N.C. 496, 503, 434 S.E.2d 604, 610 fn4 (1993).

requirement of alleging and showing "special damages." "Because the zoning statute . . . does not require parties to be 'aggrieved' in order to file a declaratory judgment action and because the Declaratory Judgment Act does not require a pleading of special damages, we hold it is not required." *Village Creek* at 486, 520 S.E.2d at 796 (where the court held that Plaintiffs' complaint should not be dismissed for lack of standing based on Plaintiffs' failure to allege special damages).[5]

In *Blades*, the City of Raleigh passed an ordinance after a realty company's application that rezoned property from R-4 which allowed for single family residences to R-6 which permitted the construction of townhouses and other buildings. 280 N.C. 531, 187 S.E.2d 35 (1972). Plaintiffs who owned property in the adjoining area challenged the ordinance claiming it was invalid. *Id.* In regard to standing, the court stated that the plaintiffs, as owners of property in the adjoining area affected by the ordinance, are parties in interest entitled to maintain the action. *Id.* at 544, 187 S.E.2d. at 42.

In another case from our Supreme Court, *Taylor v. Raleigh*, the City of Raleigh adopted two rezoning ordinances changing the zoning class from R-4 to R-6 where the

[5] As noted by the *Comm. to Elect Forest* Court, the requirement of "special damages" arises from a statutory mandate in the context of appeals of quasi-judicial decisions. *See* N.C.G.S. §160D-1402(c)(2). From the list in this statute of standing criteria, the "special damages" standard obviously refers to challenges brought by neighbors, rather than permit applicants or owners of property that are the subject of an enforcement action. Notably, this "special damages" requirement is absent from N.C.G.S. §160D-1401, which addresses declaratory judgment challenges concerning the validity of ordinances. This language differential is evidence of the intent of the General Assembly to not require a "special damages" factor for legislative rezoning challenges. *State v. Mylett*, 253 N.C. App. 198, 207, 799 S.E.2d 419, 425 (2017) (legislative intent is shown by General Assembly including particular language in one statutory section but not another). This point was made by the Court of Appeals in *Village Creek*.

landowner planned to build an apartment complex. 290 N.C. 608, 227 S.E.2d 576 (1976). Plaintiffs were located within the same zoning area. First, the court considered whether Plaintiffs had standing to attack the zoning ordinance. *Id.* at 620, 187 S.E.2d at 24. The court reasoned that for the validity of a municipal zoning ordinance to be properly decided under the Declaratory Judgment Act, the person challenging the Act must be one who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly affected hereby. *Id.* Together, *Blades* and *Taylor* developed a two-part analysis for determining whether standing exists to challenge a rezoning decision under the Declaratory Judgment Act: first, a plaintiff must demonstrate a specific personal and legal interest in the subject matter affected by the zoning ordinance and second, the plaintiff must show that that they are directly and adversely affected thereby.

In *Taylor*, the Court held that plaintiffs lacked standing where (1) the nearest plaintiff lived one-half mile from the rezoned property and (2) multi-family dwellings were already permitted on the rezoned land before the City of Raleigh amended the zoning ordinance – the amended zoning ordinance merely increased the type and number of units permitted. *Id.* However, the factual scenario that lacked standing in *Taylor* is different from the case at bar. Here, Plaintiffs are neighboring property owners within the same zoning district, adjoining the Site or across the street and not half a mile away or more. Further, the zoning amendments here do more than simply increase the type and number of units permitted; they permit a new type of development or use (i.e., multi-family).

The *Blades-Taylor* holding has been repeated in multiple cases from our appellate courts: *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 66, 344 S.E.2d 272, 281 (1986) (neighbors adjoining grain storage facility that was subject of challenged rezoning); *Thrash Ltd P'ship v. County of Buncombe*, 195 N.C. App. 727, 731, 673 S.E.2d 689, 692 (2009) (owner of property subject to new zoning laws imposed by County); *Musi v. Town of Shallotte*, 200 N.C. App. 379, 382, 684 S.E.2d 892, 895 (2009) (nearby neighbors of high density housing project); *Budd v. Davie County*, 116 N.C. App. 168, 171-172, 447 S.E.2d 449, 451 (1994)(adjoining neighbor of sand dredging operation); *Concerned Citizens of Downtown Asheville v. Board of Adjustment of Asheville*, 94 N.C. App. 364, 366, 380 S.E.2d 130, 132 (1989) (citing *Taylor* for proposition that allegations of proximity to controversial project may be enough to challenge rezoning decision).

However, in conflict with the above binding precedent is a case from our Court of Appeals, *Cherry Cmty. Org. v. City of Charlotte*, 257 N.C. App. 579, 809 S.E.2d 397 (2018). *Cherry* holds that neighboring property owners must suffer "special damages" from a zoning decision to have standing to challenge it in an action for declaratory judgment. *Violette v. Town of Cornelius*, 283 N.C. App. 565, 874 S.E.2d 217 (2022) (*citing Cherry*, at 584, 809 S.E.2d 401). *Violette*, relying on *Cherry*, also articulates the idea that neighboring property owners must suffer "special damages" from a zoning decision to have standing to challenge it in an action for declaratory judgment. 283 N.C. App. 565, 569, 874 S.E.2d 217, 221 (2022). "[S]pecial damage[s] are defined as a reduction in the value of his [petitioner's] own property." *Sarda v. City/Cty. of*

Durham Bd. of Adjust., 156 N.C. App. 213, 215, 575 S.E.2d 829, 831 (2003) (internal quotations and citations omitted).[6]

Despite the conflicting opinions, the *Blades* and *Taylor* cases are controlling. According to *Respess v. Respess*, the Court of Appeals has no authority to reverse existing Supreme Court precedent. 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014) (*citing Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1966)). Of course, as discussed above, the *Comm. to Elect Forest* opinion eschewed an injury-in-fact criteria for standing and specifically highlighted that the "special damages" formula arises from a statutory mandate concerning challenges to quasi-judicial decisions.

Assuming *arguendo* that Plaintiffs would need to allege or show "special damages," Plaintiffs would still have standing.[7] Plaintiffs as owners of property either adjoining the Site or in the adjoining area to the Site will suffer special damages different than the rest of the community or the public at large, in the form of increased traffic and parking on Williamson and Iredell Drives, the decreased safety of the intersection of Williamson and Iredell (which is in the vicinity of the driveway

[6] Any reliance on cases concerning quasi-judicial appeals to discern standing is simply misplaced. Cases that are typically cited in error in the context of a declaratory judgment action regarding the validity of an ordinance include the opinions of *Cherry v. Wiesner*, 245 N.C. App. 339, 781 S.E.2d 871 (2016) and *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 489 S.E.2d 898 (1997), both of which dealt with quasi-judicial appeals which is inapposite to the case at hand.

[7] In *Cherry Cmty. Org.*, 257 N.C. App. at 583, 809 S.E.2d at 400, the Court of Appeals, while following the erroneous "special damages" standard for standing, as noted above, did state that the allegations of special damages in the complaint would be sufficient to survive a motion to dismiss.

entrances to Plaintiffs' properties), increases in the rate and flow of stormwater, and a diminution in the value of Plaintiffs' properties, especially the Solics whose property immediately adjoins the Site. (Compl. ¶20). Additionally, the Solics will uniquely experience noise and light pollution from the townhouse Project on the Site. *Id.* Overall, the Project will substantially change the nature and character of the immediate Williamson and Iredell streets and specifically the character of the R-4 district relating to the Plaintiffs' properties. *Id.*

Our Supreme Court in *Cheape v. Chapel Hill*, 320 N.C. 549, 556, 359 S.E.2d 792, 796-797 (1987), held that the following allegations in a complaint sufficed for the "direct injury or adversely affected" threshold of bringing a declaratory judgment action concerning the construction or validity of a statute:

> [P]laintiffs alleged that the Rosemary Street project, if constructed, would increase pollution, traffic, danger to pedestrians, and crime in their neighborhood and would decrease their property values.

In the *Thrash* case, *supra.*, a plaintiff was determined to have standing to raise procedural defects in the adoption of a zoning ordinance as a result of owning property that fell within the scope of the changes. 195 N.C. App. 727, 731, 673 S.E.2d 689, 692 (2009). In the case at bar, Plaintiffs have alleged owning properties zoned R-4 that fall within the scope of the challenged ordinances. (E.g., Compl. ¶¶17, 22, 26-32, 37, 39, 41-42, 43, 46, 50, 63-64).[8]

[8] The Defendants may argue that, based on *Ring v. Moore County* (footnote 3), only owners of properties where zoning restrictions were enacted or made more stringent have standing, and not neighbors where zoning changes have allowed more development. This would run into the face of legal history and common sense. Most cases that the undersigned have reviewed are cases involving neighbors opposing some project that was rezoned to allow more development claimed to be incongruous with the surrounding area. Some of these cases

Plaintiffs are also asserting a right established by statute as interpreted by *Sellers* as to the requirement of a notice of hearing in N.C.G.S. §160D-601. *Comm. to Elect Forest* holds that for common law or statutory rights, the legal injury itself gives rise to standing. *Comm. to Elect Forest*, 376 N.C. at 599.

Circling back to the "actual controversy" aspect of standing, it is true that the status of being a taxpayer or a resident of a county is not enough to challenge the adoption of or changes to ordinances affecting the county or a large geographical area thereof. *Greensboro v. Wall*, 247 N.C. at 521, 101 S.E.2d at 417; *Fox v. Board of Comm'rs*, 244 N.C. 497, 501, 94 S.E.2d 482, 486 (1956). A mere difference in opinion

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are cited already. Others include: *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988), *Good Neighbors of S. Davidson v. Town of Denton*, 355 N.C. 254, 559 S.E.2d 768 (2002), *Etheridge v. County of Currituck*, 235 N.C. App. 469, 762 S.E.2d 289 (2014), *Atkinson v. City of Charlotte*, 235 N.C. App. 1, 760 S.E.2d 395 (2014), *Covington v. Apex*, 108 N.C. App. 231, 423 S.E.2d 537 (1992), *Lee v. Simpson*, 44 N.C. App. 611, 261 S.E.2d 295 (1980). Many of these cases, including *Blades*, raise claims of illegal spot zoning to defeat a rezoning. An analysis of spot zoning requires a review of the potential negative impacts that may flow from the proposed zoning change, and the benefitted development project, on the surrounding area. Inherently, a spot zoning claim is one brought by neighbors to show that a rezoning change was arbitrarily beneficial to a relatively small tract when compared to the consistency of zoning surrounding the rezoned property. Following Defendants' argument that narrowly construes standing as a bar to neighbor suits is an afront to a cause of action for spot zoning that has been recognized by our courts for a long time, including in the environment of *Blades* which occurred in the City of Raleigh. Defendants may argue that in these cases the issue of standing was not directly addressed by the courts. This is a non-starter. In every instance, a court has the responsibility to determine its subject matter jurisdiction, including party standing, which issue can be raised at any time, even *sua sponte* by the courts. *In re Custodial Law Enf't Agency Recordings*, 287 N.C. App. 566, 576, 884 S.E.2d 455, 462 (2023). It is common sense that the "concrete adverseness" between parties mentioned in *Comm. To Elect Forest* that comes out of a rezoning beneficial to a controversial project typically has the owners of property adjoining or neighboring the project playing the role of challenger. Several of the Court of Appeals' opinion that create disparate lines arise from the "looseness of language" in judicial opinions that become "silently acquiesced in or perpetuated by inadvertent repetition." *Smith v. R.R.*, 114 N.C. 728, 749-750, 19 S.E. 863, 869 (1894).

as to the legality of a law is not enough. *Tryon v. Duke Power Co.*, 222 N.C. 200, 205, 22 S.E.2d 450, 453 (1942).

Until the ordinance is applied or enforced in some way, such status does not alone imbue those persons with the necessary "concrete adverseness" as "antagonistic litigants." *Angell v. Raleigh*, 267 N.C. 387, 389-390, 148 S.E.2d 233, 234-235 (1966).[9] "The validity or invalidity of a statute" or ordinance "is to be determined in respect of its adverse impact upon personal or property rights in a specific factual situation." *Id.* at 391, 148 S.E.2d at 236. Only one "personally injured" or with a "genuine grievance" can be trusted to "battle the issue" of the validity of a law. *Willowmere*

[9] Two Supreme Court cases in North Carolina distinguish *Angell* concerning the validity of an ordinance by showing that the adopted ordinance was later applied or enforced to grant approvals to various defendants to a specific set of facts. *Shaw v. Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967); *Kornegay v. Raleigh*, 269 N.C. 155, 152 S.E.2d 186 (1967). A property owner whose property is the subject matter of an enforcement action or whose permit has been denied or illegally conditioned has standing under N.C.G.S. §160D-1403.1(b) to challenge the validity of the underlying ordinances. Such action must be brought within 1-year of the zoning decision. N.C.G.S. §160D-1403.1(c). This statute reflects an awareness that developers and property owners have standing triggered upon the actual application or enforcement of ordinances. For neighbors complaining of a legislative rezoning action, if a zoning map was altered, the statute of limitations would be 60 days from adoption of the ordinance. N.C.G.S. §160D-1405(a). This is significantly juxtaposed to a challenge to a zoning text amendment where there is a 1-year limitation period accruing from when the challenger first has standing. N.C.G.S. §160D-1405(b). This recent change to the statutes (Session Law 2011-384) contains a proviso that challenges to procedural defects must be brought within 3-years of the ordinance adoption, which essentially serves as a statute of repose. Id. These statutes reflect that standing – which takes into account the "concrete sharpness" factor – is the trigger for a statute of limitations, not the mere adoption of an ordinance. This is also borne out by the 3-year proviso. In the case at bar, the Plaintiffs have brought their complaint within 1 year of the accrual of the necessary adversity stemming from the application of the challenged ordinances with the arrival of the Project on the nearby Site, which challenge falls within the 3-year window to raise procedural defects in the underlying ordinances enabling this development. (Compl. ¶¶18-19). Of course, Defendants contend that Plaintiffs still don't have standing, which, ironically, would mean that the 1-year statute of limitation has not been triggered.

Cmty. Ass'n v. City of Charlotte, 370 N.C. 553, 556-557, 809 S.E.2d 558, 561 (2018) (citing *Stanly v. Dep't of Conservation & Dev.*, *supra*.)

However, as confirmed by *Comm. To Elect Forest*, actual harm, economic injury or special damages is not required to have a court review the merits of a legislative rezoning challenge.

> The essential distinction between an action for Declaratory Judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action, but there must be no uncertainty that the loss will occur or that the asserted right will be invaded.

Emerald Isle v. State, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987); *See also Texfi Industries v. Fayetteville*, 44 N.C. App. 268, 261 S.E.2d 21 (1979), *aff'm*, 301 N.C. 1, 269 S.E.2d 142 (1980) (While a declaratory judgment action requires adverse parties with substantial interests affected, direct economic injury is not necessary); *Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n*, 336 N.C. 200, 214, 443 S.E.2d 716, 725 (1994) (If a court required a showing of actual loss to bring a declaratory judgment action to challenge the validity of a regulation, that would "thwart the remedial purposes of" such action).

The case of *Josephson v. Planning Board of Stamford*, 151 Conn. 489, 199 A.2d 690 (1964) was cited by the *Taylor* Court for its holding on standing necessary to attack a rezoning ordinance. *Taylor*, 290 N.C. at 620, 227 S.E.2d at 583. There, the Connecticut court stated that "to be an aggrieved person one must establish a specific person and legal interest in the subject matter of a decision as distinguished from a

general interest such as is the concern of all members of the community." 151 Conn. at 492, 199 A.2d at 692.

The spark of possible impacts to the personal and property interests of Plaintiffs from the statutory defects in the City's adoption of the ordinances discussed in the Amended Complaint later burst into the flames of "concrete adverseness" when the Project presented itself and was approved based on those new ordinances that apparently opened the gates to the entry of multi-family development in the historic Hayes Barton neighborhood. Plaintiffs have alleged more than a mere difference of opinion as to the legality of the City's legislative decisions; rather, the Plaintiffs have alleged how the Project and the underlying ordinances enabling its application directly and adversely affected them in their personal and property interests. (E.g., Compl. ¶20, 37). As noted below, the Plaintiffs fall within the scope of protections that N.C.G.S. §160D-601 and other statutes were meant to convey as to notice and the solicitation of opinions that could "prevent hasty or ill-conceived amendments." *Walker v. Elkin*, 254 N.C. 85, 89, 118 S.E.2d 1, 4 (1961) (notice with an opportunity to be heard is a prerequisite of zoning changes).

In the case at bar, Plaintiffs are not located across town or across the city. Plaintiffs are not located in a different zoning district. Plaintiffs are located within the same R-4 district as the Site and have been directly impacted by the zoning changes as it is a change to their own district. Plaintiffs' properties either adjoins the Site or is in the area adjoining the Site. Who else would have standing if not those with a sharpened interest in the same zoning district with property adjoining the

site? As such, Plaintiffs have standing as parties with a specific personal and legal interest in the subject matter affected by the City's zoning ordinances at issue in this case and are directly and adversely affected thereby. (Compl. ¶21).

III. THE AMENDED COMPLAINT CHALLENGES THE VALIDITY OF LEGISLATIVE REZONING DECISIONS AND IS NOT A COLLATERAL ATTACK ON THE ADMINISTRATIVE APPROVAL AND SUBSEQUENT BOARD OF ADJUSTMENT APPEAL.

It is true that the Project and the related December 2022 Approval triggered the circumstances making the Plaintiffs and Defendants antagonistic parties or adversaries. This site-specific development rose from the shadows infusing Plaintiffs with the "specific personal and legal interest" for standing. It is in this instance that possibilities became realities, establishing facts whereby Plaintiffs were "directly and adversely affected" by the challenged UDO changes that opened the gates to the possible development of multi-family project in historic single-family neighborhoods.

However, the Defendants blow smoke in mischaracterizing the complaint as a "collateral attack" on the staff-level administrative decision to approve the Project based on their interpretation of the UDO. Staff interpretations were timely and properly challenged through the local board of adjustment and then appealed via a petition for writ of certiorari to Wake County Superior Court under N.C.G.S. §160D-1402. This present case is about the validity of the underlying ordinances that potentially authorized the Project in the first place.

Challenging the validity of underlying ordinances that enabled a controversial project is the set of facts presented in *Godfrey v. Zoning Bd. of Adj.*, 317 N.C. 51, 344 S.E.2d 272 (1986). In *Godfrey,* neighboring landowners filed suit to challenge the

validity of a County's decision to rezone a tract of nearby land for a grain storage facility development. *Id.* at 53, 344 S.E.2d at 273. It was later determined by the trial court to be illegal spot zoning and subsequently affirmed by the Court of Appeals. *Godfrey v. Union Co. Bd. of Commissioners*, 61 N.C. App. 100, 300 S.E.2d 273 (1983). The grain storage developer claimed to be vested by completing construction under the authority of the original rezoning that was subsequently invalidated. The North Carolina Supreme Court in *Godfrey* disagreed, holding that the developer may not be vested by expenditures made in reliance upon what was later determined to be an unlawful ordinance. *Godfrey*, 317 N.C. at 65-67, 344 S.E.2d at 281-282; *see Letendre v. Currituck Cty.*, 259 N.C. App. 512, 562-563, 817 S.E.2d 73, 104-105 (2018) (citing with approval *Godfrey* for the proposition that a developer proceeds at his peril if he moves forward with development in the face of a challenge to the validity of an ordinance under which his development permit was issued).

As for the Defendants' vague claim regarding exhaustion of administrative remedies, this bald contention is specious for several reasons:

One, a challenge to the validity of the underlying zoning ordinances in question is properly done in a declaratory judgment action (N.C.G.S. §§160D-1401, 1-254). *See Blades*, *supra.*; *Dobo v. Zoning Bd. of Adj.*, 149 N.C. App. 701, 706, 562 S.E.2d 108, 112 (2002), *rev'd on other grounds*, 356 N.C. 656, 576 S.E.2d 324 (2003) (discussing that challenges to validity of ordinances is properly done by "separate civil action instituted in superior court."); *Unruh v. Asheville*, 97 N.C. App. 287, 290-291, 388 S.E.2d 235, 237 (1990) (rejecting an exhaustion of administrative remedies defense

to a declaratory judgment action to challenge the validity of a zoning ordinance); *See also Newberne*, 359 N.C. at 797-798, 618 S.E.2d at 211-212 (explaining in the context of whistleblower claims, that the General Assembly can provide multiple statutory routes to correct alleged wrongs); *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 661-662 (1990) (discussing an appeal of an administrative decision being separate from a complaint challenging the validity of the underlying ordinance);

Two, administrative bodies are not properly assigned the responsibility to tackle statutory or ordinance validity questions. *Great American Ins. Co. v. Gold*, 254 N.C. 168, 173, 118 S.E.2d 792, 796 (1961); *Meads v. North Carolina Dep't of Agric. Food & Drug Protection Div., Pesticide Sec.,* 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998); *Simpson v. City of Charlotte*, 115 N.C. App. 51, 55, 443 S.E.2d 772, 775 (1994); and *In re Redmond*, 369 N.C. App. 490, 493, 797 S.E.2d 275, 277 (2017).

Three, our cases clearly hold that administrative remedies are deemed inadequate, and exhaustion not required, when an aggrieved party challenges the validity of a statute, ordinance or regulation on constitutional grounds or otherwise, (in the case at hand, the specific administrative decision, which flowed from the challenged laws is challenged in a separate action). *City of Wilmington v. Hill*, 189 N.C. App. 173, 175, 657 S.E.2d 670, 671 (2008) (citing *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 224, 517 S.E.2d 406, 412 (1999)); *Wake Cares, Inc. v. Wake County Bd. of Educ.*, 190 N.C. App. 1, 13-14, 660 S.E.2d. 217, 224-225 (2008) (citing *Charlotte-Mecklenburg Hosp. Auth v. N.C. Indus. Comm'n.*, 336 N.C. 200, 209, 443 S.E.2d 716, 722 (1994)).

Finally, nothing appears from the face of the complaint to demonstrate the availability of adequate administrative remedies to exhaust. *Bill Clark Homes*, *supra*.

IV. THE AMENDED COMPLAINT ALLEGES COGNIZABLE STATUTORY CLAIMS[10].

As stated above, ours is a notice pleading State. Rarely should a Rule 12(b)(6) pleading work to undo a declaratory action challenging the validity of municipal ordinances where an actual controversy is presented in the facts. The power to zone, rezone and make changes to a zoning text or zoning map is subject to the limitations of the enabling legislation adopted by the North Carolina General Assembly. *Heaton v. Charlotte*, 277 N.C. 506, 513, 178 S.E.2d 352, 356 (1971); *Wally v. City of Kannapolis*, 365 N.C. 449, 452, 722 S.E.2d 481 483 (2012). Below is a summary of the claims and the applicable supporting law concerning the City's failure to abide by the applicable enabling legislation.

1. Notice required by N.C. Gen. Stat. §160D-601 concerning the challenged ordinances was not properly given in a local newspaper of the applicable legislative hearings conducted before the City Council and Planning Commission. (E.g., Compl. ¶¶ 35-45, 51, 62, 64, 65, 74-79).

Notice of a legislative public hearing preceding the adoption or amending of any zoning ordinance is mandated by N.C.G.S. § 160D-601 and by its predecessor statutes (e.g., G.S. 160A-364). A "legislative hearing" is "a hearing to solicit public comment on a proposed legislative decision." N.C.G.S. §160D-102(20). Our courts have said that notice of such hearing "must fairly and sufficiently apprise those whose

[10] Multiple legal citations are included in the Amended Complaint to provide guidance on the legal grounds for the claims being asserted.

rights may be affected of the nature and character of the action proposed." *Sellers v. Asheville*, 33 N.C. App. 544, 549, 236 S.E.2d 283, 286 (1977); *Board of Adjustment v. Town of Swansboro*, 108 N.C. App. 198, 204, 423 S.E.2d 498, 501 (1992); *Lake Waccamaw v. Savage*, 86 N.C. App. 211, 214, 356 S.E.2d 810, 811 (1987); *Molamphy v. Town of S. Pines*, 2004 U.S. Dist. LEXIS 3594, *23-26 (M.D.N.C. 2004).

> . . . To be adequate, the notice is required to fairly and sufficiently apprise those who may be affected of the nature and character of the action proposed, to make possible intelligent preparation for participation in the hearing. . . . The very purpose of the hearing was to afford an opportunity to interested parties to make known their views and to enable the board to be guided by them.

Heaton, 277 N.C. at 516, 178 S.E.2d at 358(*quoting Neuger v. Zoning Board*, 145 A.2d 738 (Conn. Super Ct. Err. 1958)).

"The manifest intention of the General Assembly was that a public hearing be conducted at which those who opposed and those who favored adoption of the ordinance would have a fair opportunity to present their respective views. The requirement that such a public hearing be conducted is mandatory." *Orange County v. Heath*, 278 N.C. 688, 693, 180 S.E.2d 810, 813 (1971) (*quoting Freeland v. Orange County*, 273 N.C. 452, 456, 160 S.E.2d 282, 286 (1968)).

"The statute is explicit. Notice with an opportunity to be heard must be given before the zoning ordinance can be modified. An ordinance adopted without notice as required by the statute can have no validity." *Walker v. Elkin*, 254 N.C. 85, 87, 118 S.E.2d 1, 2 (1961) (*citing Eldridge v. Mangum*, 216 N.C. 532, 5 S.E.2d 721 (1939)).

The published notice must provide sufficient detail to apprise interested parties of the nature of the proposed action. David W. Owens, LAND USE LAW IN

NORTH CAROLINA 73 (2006). "The notice should clearly indicate (1) what property is potentially affected, (2) the nature of the proposed regulation, and (3) the time and place of the public hearing on the proposal." *Id.*

Although not required for "notice pleading," the Amended Complaint is replete with the allegations of why the legal notice of the applicable legislative hearings were not adequate under North Carolina law. (E.g., Compl. ¶¶35-45, 50-51, 62, 65). City of Raleigh failed to provide an adequate warning to its citizens and particularly those that would be impacted by the amended ordinances. It is evident that the City's notice did not give the average reader reasonable warning that property in which the reader has an interest may be affected as only a few people actually attended of the 470,000 people and more that comprise. (Compl. ¶44).

Regarding guidance on the sufficiency of notice, other States have also addressed the issue and are in accord with North Carolina law. Said notice must set forth the information reasonably necessary to provide adequate warning to all persons whose rights may be affected by the proposed action and apprise the public of the nature of the proposed zoning change. *Hallmark Builders & Realty v. Gunnison*, 650 P.2d 556, 559 (Colo. Sup. Ct. 1982). Notice should also give "the average reader reasonable warning that property in which the reader has an interest may be affected by the proposed zoning legislation, and afford[] that person an opportunity by the exercise of reasonable diligence to determine whether such is the fact[]." *Bigwood v. City of Wahpeton*, 565 N.W.2d 498, 503 (N.D. Sup. Ct. 1997); *Quigley v. Glocester*, 520 A.2d 975, 977 (R.I.S.C. 1987) (notice of zoning change must

inform landowners in the community of the nature of the proposed change and the zoning classifications that will be effected thereby, how it affects the use of land and be readily understandable to the average citizen); *Holly Development, Inc. v. Board of County Comm'rs*, 140 Colo. 95, 100-101, 342 P.2d 1032. 1036 (1959); *Brown v. County of Charleston/Charleston County Council*, 303 S.C. 245, 247, 399 S.E.2d 784, 785-786 (S.C. Ct. App. 1990) (citing to *Sellers v. Asheville*, under due process principles, notice of zoning changes must indicate whether the character of use will be changed).

A "legislative hearing" is a "hearing to solicit public comment on a proposed legislative decision." N.C. Gen. Stat. §160D-102(20). The purpose of the hearing is to apprise fairly and sufficiently those persons who may be affected by zoning action so that they may intelligently prepare for the hearing on the matter. Another reason is to allow local leaders to solicit information from the public to make informed and reasonable land use decisions. The content of a notice of a hearing describing proposed UDO changes must be reasonably understood by the ordinary person or layman. In that regard, the common person must at a minimum be informed of what properties are potentially affected by a zoning change and the nature or effect of the proposed change, including, but not limited to, whether new uses of buildings or land are being proposed or prior uses prohibited. (Compl. ¶35).

Zoning, by definition, is the regulation of the use of land and the buildings and structures located thereon. *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988). Principally, zoning districts are established to set aside

lawful uses while simultaneously separating out uses determined to be incompatible. *Id*. The "primary purpose" of zoning is "to specify the types of land use activities that are permitted and prohibited within particular zoning districts." *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 158, 731 S.E.2d 800, 812 (2012). In the case at bar, Raleigh's UDO separately defined "single family" living from "multi-unit living" (aka "multi-family). (Compl. ¶26). The latter is defined as "three or more dwelling units in a single principal structure." *Id*.

As noted, the complaint is very detailed, explaining the inadequacy of notice. One critical defect goes to the heart of zoning in the first place. The threat upsetting the legitimate expectations of single-family neighborhoods in *Euclid*, *Blades* and *Allred* were townhouses, apartment houses and other multi-unit uses or development of property. The legal notices that are the focal point of this case did not even mention a possible change in use occurring within R-4 neighborhoods like Hayes Barton. (Compl. ¶¶35, 39). The notices did not mention townhouses, apartments, etc. *Id*. The average reader can appreciate the distinction between single family and multi-family. The City hid or confoundingly omitted that simple characterization.

Whether or not Plaintiffs are correct on the merits, this stage is not the proper one for determining that as noted in Argument, Section I. *See Woodard v. Carteret County* and other cited cases. A justiciable controversy has been demonstrated and sufficient allegations made, which is what is necessary to move forward at this point.

2. Although the challenged ordinances were adopted as text changes, they should have been treated as zoning map amendments instead and followed the procedures for such map amendments.

The Amended Complaint reflects that each of the challenged ordinances – Middle Housing 1.0 ordinance, Middle Housing 2.0 ordinance, the Omnibus Ordinance and the 2023 Ordinance --- were adopted as text amendments to the City's UDO. (E.g., Compl. ¶¶28-32, 36-47, 52, 63, 65). The first three (3) – Middle Housing 1.0 ordinance, Middle Housing 2.0 ordinance, and the Omnibus Ordinance --- changed the "entire nature of the existing zoning district [R-4] such that" they essentially "created a new land use district within a district." (Compl. ¶¶46, 63).

While no North Carolina case has directly addressed the issue, several cases from Pennsylvania have held that where "an ordinance contains [textual] changes that are so comprehensive in nature as to result in a substantial change to the manner in which the tract of land is zoned" so as to essentially "create a new zoning district" that such ordinance should follow the procedures for adopting a zoning map change.[11] *Embreeville Redevelopment, L.P. v. Bd. of Supervisors of W. Bradford Twp*., 134 A.3d 1122, 1127-1129 (P.A. Commw. 2016); *Shaw v. Twp. Of Upper St. Clair Zoning Hearing Bd., 71 A.3d 1103, 1109-1110* (P.A. Commw. 2013) (the Township

[11] A "zoning map amendment or rezoning" is defined to be "an amendment to a zoning regulation for the purpose of changing the zoning district that is applied to a specified property or properties." N.C.G.S. §160D-102(34). This definition begs the question of what "changing the zoning district" means and whether a local government by effectively flipping the types of uses allowed in an historical zoning district like R-4 from single family to multi-family is effectively "changing the zoning district". If it only means a label change, then a local government could install industrial operations, adult entertainment, and other traditionally considered obnoxious uses in residential areas without specific directed notice to property owners. While that would not be politically wise, it is essentially creating a new zoning district, which is what *Embreeville* and *Shaw* are addressing.

accomplished through a purported text amendment what should have been done properly through a map change).

As alleged in the Amended Complaint, procedural steps for a zoning map amendment (that were not followed) include more direct notice (mailed and/or larger publication print and presence) of possible changes to property owners and the adoption of statements of reasonableness by the City Council. (Compl. ¶¶46, 54-55, 73, 76-78). *See* N.C.G.S. §160D-602 (a), (b) and (c) and §160D-605(b).

As noted above, whether or not the Plaintiffs ultimately can prevail is not to be decided at this Rule 12(b)(6) stage. A local government is beholden to limitations, including procedural ones, set out in the North Carolina General Statutes (e.g., Chapter 160D). *Wally*, 365 N.C. at 452, 722 S.E.2d at 483. Plaintiffs have set forth allegations under our notice pleading requirements of the asserted claims.[12]

3. The Middle Housing 2.0 Ordinance violates the uniformity requirements of N.C.G.S. §160D-703(c) and requires the use of an overlay district, which did not occur.

N.C.G.S. §160D-703(c) states: "Except as authorized by the foregoing, all regulations shall be uniform for each class or kind of building throughout each district but the regulations in one district may differ from those in other districts." The "foregoing" was use of "conditional districts" or "overlay districts" to impose site-specific standards for development that would be different than the underlying general use district. *See* N.C.G.S. §160D-703(a), (b).

[12] Ironically, Defendants will know the claims asserted well-enough to then argue why North Carolina law does not support them. But, this is not the stage for addressing the merits.

The law of uniformity requires that, when the local government has zoned property, all areas subject to that choice of a district must abide by the same or uniform development restrictions. *Kerik v. Davidson County*, 145 N.C. App. 222, 234, 551 S.E.2d 186, 194 (2001) (citing *Walker v. Elkin*, 254 N.C. 85, 87, 118 S.E.2d 1, 3 (1961)). In *Kerik*, a rezoning on a specific property imposed a buffer requirement that was different than "similarly zoned property" in the County. *Id.* The Court invalided that condition as violating the uniformity standard. *Id.*; *See also Henry v. White*, 194 Tenn. 192, 250 S.W.2d 70 (1952) (allowing a different building or use within similarly zoned property for some but not all would violate uniformity requirement); *Boerschinger v. Elkay Enterprises, Inc.*, 32 Wis. 2d 168, 145 N.W.2d 108 (1966) (same); *Jachimek v. Superior Court*, 169 Ariz. 317, 819 P.2d 487 (1991) (concluding that an overlay district imposing different development standards violated uniformity requirement; in N.C., the General Assembly allows overlay districts as an exception to uniformity).

As noted in the Amended Complaint in the case at hand, Middle Housing 2.0 Ordinance established a condition that triggered a substantial density bonus depending on proximity to a "Transit Emphasis Corridor" or stated another way, within a "Frequent Transit Area." (Compl. ¶¶50, 57-58-59).

The underlying standards in R-4 were not changed; meaning, that different conditions or development standards are imposed on similarly situated or zoned properties. (Compl. ¶¶ 58-59, 61). The only way by statute to create site specific conditions that may differ or be non-uniform within the same area subject to the same

underlying zone (such as R-4) is either through conditional zoning or an overlay district (which adds a blanket of different regulations to an underlying zone). N.C.G.S. §160D-703(a).

N.C.G.S. 160D-703 allows local government to establish "zoning districts" and to establish regulations for the use of property within each district. *Massey v. City of Charlotte*, 145 N.C. App. 345, 354 550 S.E.2d 838, 845 (2001). Unlike steep slope or riparian buffer requirements that are generally applied throughout the city (where the conditions fall on the property to be regulated and whatever district it is zoned, and are fixed land constraints), the Frequent Transit corridor proximity standard operates outside of each district and varies depending on the whims of State or local officials in creating bus friendly routes.

Like the adequate public facility standards at stake in *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 731 S.E.2d 800 (2012), the Frequent Transit corridor regulations link City approval of density to conditions that don't fall within a zone. In the case of *Lanvale*, it was the availability of space for students in public schools that affected land use and development. It could have just as easily been proximity to schools with sufficient capacity. Either way, such standards float outside of any discernable zone, are not part of a conditional district, nor mapped as an overlay district. A local government is limited to the zoning tools provided to it in the enabling legislation. *Lanvale*, 366 N.C. at 156, 731 S.E.2d at 810.

As noted in the Amended Complaint, the City, alternatively, could attempt to map out the area designated for upgrades in density based on proximity to bus stops,

etc. (Compl. ¶¶48-50). This may not have been done because a zoning map amendment requires more detailed notice be given (mailed or larger publication print) to the public of a possible change.

Again, at this stage, the Plaintiffs must lay out notice of claims, which they have done. An examination of the merits would be at a different stage, presumably after discovery that would further support the claims or defenses.

4. The 2023 Ordinance followed no procedure.

As alleged in the Amended Complaint, this Ordinance adopted a new table of allowable uses, without following in its adoption any known procedure set by N.C.G.S. §§160D-601, 602 or 605. (Compl. ¶¶65, 79).

V. PLAINTIFFS HAVE ADEQUATELY ALLEGED A VIOLATION OF DUE PROCESS STEMMING FROM INADEQUATE NOTICE OF A HEARING TO ADOPT ZONING CHANGES

Our appellate courts have held that due process is implicated, and its requisite notice is triggered, whenever a city makes legislative-type decisions to impose local laws on citizens. *Frizelle v. Harnett County*, 106 N.C. App. 234, 238-239, 416 S.E.2d 421, 423 (1992) (zoning changes); *Texfi Industries, Inc. v. Fayetteville*, 301 N.C. App. 1, 9, 269 S.E.2d 142, 148 (1980) (annexing property); *In Re Appeal of McElwee*, 304 N.C. 68, 79-80, 283 S.E.2d 115, 122-123 (1981) (revisions to ad valorem tax schedules); *See also Kennon & Associates, Inc. v. Gentry*, 492 So.2d 312, 316 (Al. S. Ct. 1986) (zoning changes); *Skaggs v. Key West*, 312 So. 2d 549, 552 (Fl. Ct. App. 1975) (same); *Hart v. Bayless Inv. & Trading Co.*, 86 Ariz. 379, 346 P.2d 1101, 1110-1109 (1959) (same); *Bell v. Studdard*, 220 Ga. 756, 758-759, 141 S.2d 536, 539 (1965).

Defendants contend that Plaintiffs did not allege a "constitutionally protected right" for due process purposes. This is incorrect. Plaintiffs allege:

> The Plaintiffs have an expectation and right that the zoning of their properties and those of the adjoining area will not be materially altered to detrimentally affect the character of the district, the suitability of uses therein and the value of buildings and land without, at a minimum, notice of such proposed changes adequate enough to alert them that their rights might be affected.

(Compl. ¶37). This allegation is incorporated within the Second Claim regarding due process. The above language tracks the language in N.C.G.S. §160D-701 underlying the purposes of zoning and is a correct statement of the law. The above language tracks the mandatory limits set by the General Assembly in N.C.G.S. §160D-601 for notifying affected persons of a legislative hearing as a precondition of adopting zoning changes. It is axiomatic that property rights or entitlements protected by due process can be created by statute or ordinance. *DeBruhl v. Mecklenburg Cty. Sheriff's Office*, 259 N.C. App. 50, 56, 815 S.E.2d 1, 6 (2018) 9cites omitted); *N.C. Ass'n of Educators, Inc. v. State*, 241 N.C. App. 284, 295, 776 S.E.2d 1, 9 (2015); *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 308-309, 750 S.E.2d 46, 48-49 (2013) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d. 548, 561 (1972)). In the case at bar, Plaintiffs contend that their right to notice under G.S. 160D-601 (among other provisions) was denied.

While it is true that Plaintiffs have no vested right in laws remaining unchanged, they do have a right to expect (and through proper proceedings enforce) that laws will only be changed in accordance with enabling act and constitutional requirements, including procedural hurdles. *Zopfi v. Wilmington*, 273 N.C. 430, 434,

160 S.E.2d 325, 330-331(1968); *Allgood v. Tarboro*, 281 N.C. 430, 434, 189 S.E.2d 255, 330 (1972).[13]

As a guarantee of due process under Article I, Section 19 of the North Carolina Constitution and the 14th Amendment of the U.S. Constitution, parties whose rights are to be affected are entitled to be heard, including property owners like the Plaintiffs when zoning changes occur that apply to their properties. (Compl. ¶82). Due process requires adequate notice and an opportunity to be heard. *Frizzelle v. Harnett County*, 106 N.C. App. 234, 239, 416 S.E.2d 421, 423 (1992).

The notices given for the legislative hearings for the ordinance changes referred to above in terms of size of the published notice and the vagueness or generalities of wording were not reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an

[13] From reading their motion, Defendants appear to argue that Plaintiffs were required to plead the absence of an adequate state remedy to assert a due process claim. This is misplaced for several reasons: (1) The "absence of an adequate state remedy" principle arises in the context of a "*Corum*-type claim", where a plaintiff seeks to recover compensation for a violation of a state constitutional right for which there is no available state remedy. *Taylor v. Wake Cty*, 258 N.C. App. 178, 183, 811 S.E.2d 648, 652 (2018). Plaintiffs do not seek compensation or damages, only declaratory and injunctive relief; (2) None of the above cited cases from North Carolina dealing with notice in the due process context seeking declaratory/injunctive relief have required an allegation of "adequate state remedy"; and (3) If the court should find that notice was sufficient under N.C.G.S. §160D-601, the applicable statute, then a constitutional claim would still remain as-applied to the facts in the case. At a minimum, the constitutional grounds serve as a backdrop for informing the Courts to read the statute in such as way to avoid the constitutional question as-applied to the case at hand (i.e., Compl. ¶82 discussing size of publication and vagueness in wording). *Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465, 223 S.E.2d 323, 328-329 (1976) (when constitutional basis is provided as an alternative ground to lack of statutory authority, the latter should be construed with that in mind and if reasonable, adopt a construction of the statute that avoids the constitutional dilemma); *See Cryan v. Nat'l Council of YMCA of the United States*, 280 N.C. App. 309, 867 S.E.2d 354 (2021), aff'm, 384 N.C. 569, 887 S.E.2d 848 (2023) (discussing difference between as-applied challenges to a statute and facial ones that would be handled by 3-judge panel per N.C.G.S. §1-267.1(a1)).

opportunity to present their objections. *Id*; *In re Appeal of McElwee*, 304 N.C. 68, 81, 283 S.E.2d 115, 123-24 (1981).

VI. ZONING MAP AMENDMENT CLAIM IS WITHIN THE STATUTE OF LIMITATIONS

In their motion to dismiss, Defendants assert a statute of limitations defense if Plaintiffs prevail on the claim that the challenged zoning text changes were essentially map amendments. According to N.C.G.S. §160D-1405(a), a cause of action as to the validity of any regulation adopting or amending a zoning map adopted under this Chapter or other applicable law or a development agreement adopted under Article 10 of this Chapter accrues upon adoption of the ordinance and shall be brought within 60 days as provided in G.S. 1-54.1.[14]

This claim is obviously stated in the alternative to the Court concluding that the zoning changes were meant to be textual changes only. (Compl. ¶¶73-74). Plaintiffs acknowledge that the City adopted the changes as if they were text changes, not zoning map changes. However, due to the comprehensive nature of the regulatory alterations and effect thereof, the City should have actually amended the City zoning map and memorialized a new zoning district, following proper procedures, but it did not. *Embreeville Redevelopment*, *supra*. The changes were, however, still changes to

[14] N.C.G.S. §160D-1405(b) reads that except as otherwise provided in subsection (a) of this section, an action challenging the validity of a development regulation adopted under this Chapter or other applicable law shall be brought within one year of the accrual of the action as provided in G.S. 1-54(10). The action accrues when the party bringing the action first has standing to challenge the ordinance. A challenge to an ordinance on the basis of an alleged defect in the adoption process shall be brought within three years after the adoption of the ordinance as provided in G.S. 1-54(10).

the City's development regulations, and, therefore, N.C.G.S. 160D-1405(b)'s 1 year limitations period is the applicable period. See N.C.G.S. §160D-102 (14) (defining "development regulation" to include a UDO).

On the face of the complaint, there is no insurmountable bar shown based on a statute of limitations, and, therefore, the City's efforts to dismiss the *Embreeville Redevelopment* contentions should be denied. *Federal Deposit Ins. Corp. v. Loft Apartments Ltd Partnership*, 39 N.C. App. 473, 250 S.E.2d 693 (1979); *Flexolite Electrical, Ltd v. Gilliam*, 55 N.C. App. 86, 284 S.E.2d 523 (1981). When there is any doubt over which statute of limitations should apply, our courts direct the application of the longer one. *Martin Marietta Materials, Inc. v. Bondhu*, LLC, 241 N.C. App. 81, 87, 772 S.E.2d 143, 147 (2015) (cite omitted).

CONCLUSION

This Court should deny the Defendants' motions in their entirety. The Plaintiffs have adequately given notice of its various claims and supported each with allegations supporting the necessary elements. The case should move forward to the development of an evidentiary record. [15]

[15] Defendant Developers have claimed that they are not proper parties to this lawsuit. This is a head-scratcher. Plaintiffs seek to invalidate the very ordinances that they relied on to move forward with the Project. Since the relief requested is to enjoin their project, if the ordinances are in fact invalidated, it reasonably seems that under G.S. 1-260 that they would have an interest in this case. *See Durham County v. Graham*, 191 N.C. App. 600, 663 S.E.2d 467 (2008) (a lender who has a lien interest in property is interested party to determine a development permit's validity as the legality of the use of the land was at stake). It is very typical that developers are initially made parties to complaints challenging rezoning decisions that benefit them or are allowed to intervene. *E.g., Atkinson v. City of Charlotte*, 235 N.C. 1, 760 S.E.2d 395 (2014); *Godfrey v. Union County Bd. of Comm'rs*, 61 N.C. App. 100, 300 S.E.2d 273 (1983); *Village Creek Prop. Owners Ass'n v. Town of Edenton*, 135 N.C. App. 482, 520 S.E.2d 793 (1999). Nothing requires Defendant Developers to prepare a defense or incur any costs if they choose to stand on the sidelines.

Respectfully submitted, this 27th day of November 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss** was served upon all other parties to the above-cited actions via email and by depositing a copy of same in a postpaid wrapper, in an official depository under the exclusive care and custody of the United States Postal Service, properly addressed to the attorney(s) of record for all other parties as follows:

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This the 27th day of November 2023.

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