

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

EVERETT BROTHERS RECYCLING, INC.
and WATERBLASTING TECHNOLOGIES, LLC,
Appellants,

v.

MARTIN COUNTY and
SA RECYCLING LLC,
Appellees.

No. 4D2023-2943
L.T. No. 432021CA001103

Appeal from the Nineteenth Judicial Circuit, Martin County.

APPELLANTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CITATIONS	iv
STATEMENT OF THE CASE AND OF THE FACTS	1
SUMMARY OF THE ARGUMENT	15
ARGUMENT	
STANDARDS OF REVIEW	18
I. THE TRIAL COURT’S ORDER ESTABLISHES THAT THE COURT EXCEEDED THE PROPER SCOPE OF REVIEW ON A MOTION TO DISMISS A PLEADING, AND THEREFORE COMMITTED ERROR REQUIRING REVERSAL OF THE ORDER.	20
II. THE TRIAL COURT ERRED IN DISMISSING THE SAC WITH PREJUDICE BASED ON THE PLAINTIFFS FAILING TO ALLEGE SPECIAL DAMAGES IN ACCORDANCE WITH <i>BOUCHER v. NOVOTNY</i> .	26
III. IN RULING THAT THE PLAINTIFFS DID NOT HAVE STANDING THE TRIAL COURT COMMITTED REVERSIBLE ERROR.	27
a. <u>According to <i>Renard</i>, the SAC properly alleges standing to bring Count I.</u>	31
b. <u>The SAC satisfies standing to bring Count II for declaratory judgment under the declaratory judgment law.</u>	

34

c. According to Renard, the SAC properly alleges standing to bring Count II.

37

d. According to Renard, Appellant Waterblasting Technologies has standing to bring its action in nuisance against Appellee SA Recycling because it is located directly across the street from SA Recycling, and it has alleged that the scrap metal salvage yard operation on the subject property creates special injury to Appellant and its property.

37

IV. THE TRIAL COURT ERRED WHEN IT DISMISSED THE SAC BASED ON ITS BELIEF THAT THE COUNTY STAFF'S INTERPRETATION WAS A PERMISSIBLE INTERPRETATION.

40

V. THE TRIAL COURT IMPROPERLY CONSIDERED AND RELIED ON MATTERS BEYOND THE FOUR CORNERS OF THE SAC IN RULING THAT THE APPELLANTS CASE IS MOOT AND THAT THE APPELLANTS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

48

VI. THE TRIAL COURT ERRED WHEN IT DISMISSED THE SAC WITH PREJUDICE BASED ON MOOTNESS.

49

VII. THE TRIAL COURT ERRED WHEN IT DISMISSED THE SAC WITH PREJUDICE BASED ON FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

51

VIII. THE TRIAL COURT ERRED IF IT DISMISSED THE SAC WITH PREJUDICE BASED ON “AFFIRM[ING] MARTIN COUNTY’S DISCRETION TO FILE, PROSECUTE, ABATE, SETTLE OR DISMISS ITS BUILDING AND ZONING ACTIONS ON THE SUBJECT PROPERTY”.	53
IX. THE TRIAL COURT’S ORDER SHOULD BE REVERSED BECAUSE THE COURT DID NOT AFFORD THE APPELLANTS AN OPPORTUNITY TO RE-PLEAD OR AMEND THEIR COMPLAINT.	59
CONCLUSION	60
CERTIFICATE OF SERVICE	60
CERTIFICATE OF COMPLIANCE	61

TABLE OF CITATIONS

CASES

<i>Argonaut Insurance Co. v. Commercial Standard Insurance Co.</i> , 380 So.2d 1066, 1067 (Fla. 2d DCA 1981)	36
<i>Bautista v. State</i> , 863 So. 3d 1180 (Fla. 2023)	46
<i>Boucher v. Novotny</i> , 102 So. 2d 132 (Fla. 1958)	26
<i>Braden Woods Homeowners Association, Inc. v. Mavard Trading, Ltd.</i> , 277 So.3d 664 (Fla. 2d DCA 2019)	52, 56, 57
<i>Broward County v. Florida Carry, Inc.</i> , 313 So. 3d 635 Fla. 4th DCA 2021)	21
<i>Canakaris v. Canakaris</i> , 382 So. 2d 1197 (Fla. 1980)	19
<i>Chodorow v. Porto Vita, Ltd.</i> , 954 So. 2d 1240 (Fla. 3d DCA 2007)	20
<i>Corona Properties of Florida v. Monroe County</i> , 485 So. 2d 1314 (Fla. 3d DCA 1986)	59
<i>Chung v. Sarasota County</i> , 686 So. 2d 1358 (Fla. 2d DCA 1996)	56
<i>City of Coral Gables Code Enforcement Board. v. Tien</i> , 967 So. 2d 963 (Fla. 3d DCA 2007)	44
<i>City of West Palm Beach v. Haver</i> , 330 So. 3d 860 (Fla. 2021)	54
<i>Combs v. City of Naples</i> , 834 So. 2d 194 (Fla. 2d DCA 2002)	35
<i>Conage v. United States</i> , 346 So. 3d 594 (Fla. 2022)	47
<i>David v. City of Dunedin</i> , 473 So. 2d 304 (Fla. 2d DCA 1985)	30

<i>Duncan v. Prudential Insurance Co.</i> , 690 So.2d 687 688 (Fla. 1st DCA 1997)	22
<i>Durand v. Metropolitan Dade County</i> , 472 So. 2d 865 (Fla. 3d DCA 1985)	41, 42
<i>East Naples Water Systems, Inc. v. Board of County Commissioners of Collier County</i> , 457 So. 2d 1057 (Fla. 2d DCA 1984)	41
<i>Elwyn v. City of Miami</i> , 113 So. 2d 849 (Fla 3d DCA 1959)	28
<i>Fla. Wildlife Federation v. State Department of Environmental Regulation</i> , 390 So. 2d 64 (Fla. 1980)	40
<i>Gieger v. Sun First National Bank of Orlando</i> , 427 So.2d 815, 817 (Fla. 5th DCA 1983)	36
<i>Grove Isle Association, Inc. v. Grove Isle Associates., LLLP</i> , 137 So. 3d 1081 (Fla. 3d DCA 2014)	22
<i>Ham v. Portfolio Recovery Associates, LLC</i> , 308 So. 3d 942 (Fla. 2020)	45
<i>Hartnett v. Austin</i> , 93 So. 2d 86 (Fla. 1956)	28
<i>Imhof v. Walton County</i> , 328 So. 3d 32 (Fla. 1st DCA 2021)	45
<i>Industrial Trucks of Florida, Inc. v. Gonzalez</i> , 351 So. 2d 744 (Fla. 3d DCA 1977)	19
<i>In re Doe 13-A</i> , 136 So. 3d 723 (mem) (Fla. 1st DCA 2014)	19
<i>Jezeq v. Vordemaier</i> , 227 So.2d 69 (Fla. 4th DCA 1969)	41
<i>Jones v. Trawick</i> , 75 So. 2d 785 (Fla. 1954)	39
<i>Josephson v. Autrey</i> , 96 So. 2d 784 (Fla. 1957)	28

<i>Kirkland By and Through Kirkland v. State Department of Health and Rehabilitative Services</i> , 424 So. 2d 925 (Fla. 1st DCA 1983)	60
<i>Kellerman v. Board of Trustees of the City of Hollywood Firefighters Pension System</i> , 336 So. 3d 39 (Fla. 4th DCA 2022)	45
<i>Kohl v. Blue Cross & Blue Shield of Fla., Inc.</i> , 988 So. 2d 654 (Fla. 4th DCA 2008)	49
<i>Knowles v. Central Allapattae Properties</i> , 145 Fla. 123, 145 So. 819 (1940)	39
<i>Laboratory Corporation of America v. Davis</i> , 339 So. 3d 318 (Fla. 2022)	45
<i>Levy v. Levy</i> , 326 So. 3d 678 (Fla. 2021)	46
<i>Miller v. Greene</i> , 104 So. 2d 457 (Fla. 1958)	60
<i>Mortham v. Milligan</i> , 704 So. 2d 152 (Fla. 1st DCA 1997)	44
<i>Murphy v. Bay Colony Prop. Owners Association & Victor Coveduck</i> , 12 So. 3d 924 (Fla. 2d DCA 2009)	35
<i>National Collegiate Student Loan Tr. 2006-4 v. Meyer</i> , 265 So. 3d 715 (Fla. 2d DCA 2019)	22
<i>Nero v. Cont'l Country Club R.O., Inc.</i> , 979 So. 2d 263 (Fla. 5th DCA 2007)	21
<i>Norwich v. Glob. Fin. Assocs., LLC</i> , 882 So. 2d 535 (Fla. 4th DCA 2004)	21
<i>Olive v. Maas</i> , 811 So.2d 644 (Fla. 2002)	35
<i>Page v. Niagara Chemical Division of Food Machinery & Chemical Corp.</i> , 68 So. 2d 382 (Fla. 1953)	39, 40

<i>Palumbo v. Moore</i> , 777 So. 2d 1177 (Fla. 5th DCA 2001)	19
<i>Paragon Group, Inc. v. Hoeksema</i> , 475 So. 2d 244 (Fla. 2d DCA 1985), <i>review denied</i> , 486 So. 2d 597 (Fla. 1986)	33
<i>Parsons v. City of Jacksonville</i> , 295 So. 3d 892 (Fla. 1st DCA 2020)	29
<i>Perry v. City of Ft. Lauderdale</i> , 387 So. 2d 518 (Fla. 4th DCA 1980)	35
<i>Provence v. Palm Beach Taverns, Inc.</i> , 676 So. 2d 1022 (Fla. 4th DCA 1996)	36
<i>Pruitt v. Sands</i> , 84 So. 3d 1267 (Fla. 4th DCA 2012)	40
<i>Rayan Corp. Inc. v. Board of County Commissioners of Dade County</i> , 356 So. 2d 1276 (Fla. 3d DCA 1978)	34
<i>Renard v. Dade County</i> , 261 So. 2d 832 (Fla. 1972)	passim
<i>Renard v. Dade Cnty.</i> , 249 So. 2d 500, 502 (Fla. 3d DCA 1971), <i>aff'd</i> , 261 So. 2d 832 (Fla. 1972)	32
<i>Rennoc, Inc. v. Merica, Burch & Dickerson, Inc.</i> , 914 So. 2d 1107, 1108 (Fla. 4th DCA 2005)	21
<i>Rhiner v. Koyama</i> , 327 So. 3d 314 (Fla. 4th DCA 2021)	20
<i>Rinker Materials Corp. v. Metropolitan Dade County</i> , 528 So. 2d 904 (Fla. 3d DCA 1987)	29
<i>Robinson v. Town of Palm Beach Shores</i> , 388 So. 2d 314 (Fla. 4th DCA 1980)	35
<i>Rosenhouse v. 1950 Spring term Grand Jury, in and for Dade County</i> , 56 So. 2d 445 (Fla. 1952)	41
<i>Royal Selections, Inc. v. Florida Department of Revenue</i> ,	

687 So. 2d 893 (Fla. 4th DCA 1997)	41, 42
<i>Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.</i> , 742 So.2d 381, 383 (Fla. 4th DCA 1999)	20
<i>Scott v. Progressive Express Ins. Co.</i> , 932 So. 2d 475 (Fla. 4th DCA 2006)	20
<i>Sealy v. Perdido Key Oyster Bar & Marina, LLC</i> , 88 So. 3d 366 (Fla. 1st DCA 2012)	21
<i>Shamrock-Shamrock, Inc. v. City of Daytona Beach</i> , 169 So. 3d 1253 (Fla. 5th DCA 2015)	44
<i>Sierra Club v. Morton</i> , 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)	36
<i>Skaggs-Albertson’s v. ABC Liquors, Inc.</i> , 363 So. 2d 1082 (Fla. 1978)	33
<i>Slater v. State</i> , 349 So. 3d 873, 879 (Fla. 2022)	46
<i>Stuart Yacht Club & Marina v. Department of Natural Resources</i> , 625 So. 2d 1263 (Fla. 4th DCA 1993)	45
<i>State v. Crose</i> , _ So, 3d ___, 49 Fla. L. Weekly D421, 2024 WL 292231 (Fla. 2d DCA January 26, 2024)	46, 47, 48
<i>Surf Works, LLC v. City of Jacksonville Beach</i> , 230 So. 3d 925 (Fla. 1st DCA 2017)	45
<i>Therlonge v. State</i> , 184 So. 3d 1120 (Fla. 4th DCA 2015)	20
<i>Town of Longboat Key v. Landside Property Owners Coalition, LLC</i> , 95 So. 3d 1037 (Fla. 2d DCA 2012)	45
<i>Town of Surfside v. County Line Land Co.</i> , 340 So. 2d 1287 (Fla. 3d DCA 1997)	39
<i>Upper Keys Citizens Association, Inc. v. Wedel</i> ,	

341 So. 2d 1062 (Fla. 3d DCA 1977)	30
<i>Value Rent-A-Car, Inc. v. Grace</i> , 794 So. 2d 619 (Fla. 2d DCA 2001)	22
<i>Verdecia v. American Risk Assurance Co.</i> , 494 So. 2d 294 (Fla. 3d DCA 1986)	41, 42
<i>Wags Transportation System v. City of Miami Beach</i> , 88 So. 2d 751 (Fla. 1956)	28
<i>Wildflower, LLC, v St. Johns River Water Management District</i> , 179 So. 3d 369 (Fla. 5th DCA 2015)	21
<i>Wilson v. County of Orange</i> , 881 So. 2d 625 (Fla. 5th DCA 2004)	20, 21

STATUTES

Ch. 86, <i>Fla. Stat.</i> (2024)	34
§ 86.021, <i>Fla. Stat.</i> (2023)	34

STATEMENT OF THE CASE AND OF THE FACTS

This appeal centers on the dismissal of a complaint, and whether the reasons set forth by the trial court are proper grounds for dismissing the complaint with prejudice. They are not. The justifications given by the trial court show that the court did not limit its examination to the four corners of the complaint and consider the allegations of the complaint in the light most favorable to the pleader. Likewise, the order on appeal also demonstrates that the court applied the wrong case precedents in justifying its erroneous conclusions, and incorrectly believed that the plaintiffs' claims were all moot because a development order for site improvements had been issued after the plaintiffs brought their action, and the plaintiffs had not challenged the development order.

This appeal has been taken because the trial court dismissed the Plaintiffs' Second Amended Complaint with prejudice based on erroneous conclusions that the Plaintiffs (Appellants) lacked standing, that the Plaintiffs' claims were moot, that the Appellants failed to exhaust administrative remedies, and that the Defendant (Appellee Martin County), county staff's interpretation of its code is within the range of possible interpretations. In reaching these

erroneous conclusions, the court failed to follow the law and went far beyond the four corners of the Second Amended Complaint. In addition, the court did not afford the Appellants an opportunity to amend their complaint. The dismissal with prejudice is a travesty of justice.

On November 9, 2021, the Appellants commenced this action against Appellee Martin County, seeking declaratory and injunctive relief. (R. 22). The Appellants brought this action because two members of the County's staff had established an interpretation of the County's zoning ordinance that permitted a salvage yard use and operation on a property not zoned or sized for such use. (R. 22-59). The County's zoning ordinance has a specific zoning district, SY Salvage Yard, where this use and operation must be located, but the staff had inexplicably decided that the code permitted a salvage yard use and operation on land zoned M-2 (Manufacturing). (R. 41-42). Neither a scrap metal salvage yard nor a scrap metal salvage recycling yard is a listed permitted use in the M-2 zoning district. (R. 37-39). Manufacturing operations conducted inside buildings are permitted uses in the M-2 zoning district. (Id.) The acts of the staff

are *ultra vires* and void and usurped the authority and jurisdiction of the board of county commissioners. (R. 44).

The Appellants filed an Amended Complaint on December 8, 2021. (R. 67-104). Appellee Martin County answered the Amended Complaint (R. 110-120). Appellee SA Recycling LLC filed a motion to intervene on January 14, 2022 (R. 135-139), which was granted by agreed order on February 28, 2022, (R. 149). SA Recycling then moved to dismiss the Amended Complaint, arguing that the trial court lacked jurisdiction because the matter involved code enforcement. (R. 170-174). Trial court Judge Sweet denied the motion on September 22, 2022. (R. 259). SA Recycling filed an answer to the Amended Complaint on October 10, 2022. (R. 275-282).

On March 3, 2023, the Appellants moved for leave to amend their complaint, attaching their Second Amended Complaint (SAC) to the motion. (R. 445-494). Trial court Judge Metzger entered an Agreed Order Granting Plaintiffs' Motion for Leave to Amend the Complaint on March 13, 2023. (R. 511-512).

The Appellants' SAC is the same as their Amended Complaint, except that the SAC adds a third count (Count III) by Appellant Waterblasting Technologies LLC against Appellee SA Recycling LLC

for injunctive relief based on nuisance, (R. 491-493), adds 3971 SE Commerce Avenue to the location of the illegal scrap metal salvage yard to correctly identify the location of the operation, and identifies SA Recycling as a defendant in the caption based on this count. (R. 449).

The SAC sets forth the Appellants standing, the court's jurisdiction, and the Appellants claims and bases therefore, in great detail over 45 pages, in 114 paragraphs and 21 photographs. (Id.). Regarding (and establishing) their standing, the Appellants' SAC set forth 20 paragraphs of facts and photographs:

7. The Plaintiffs are two businesses in Martin County. One business is operated directly across SE Commerce Avenue from the subject salvage yard. The other is lawfully engaged in the business of scrap metal salvage in Martin County on a property in compliance with the Martin County Zoning Ordinance and the Martin County Land Development Regulations. The latter's compliance with the zoning ordinance and land development regulations has restricted its use and operations on its property and required the expenditure of enormous sums on site improvements and other measures required by the County that have not been applied or enforced on the owner of the property at 3951 SE Commerce Avenue.

8. The favorable treatment accorded by the Defendant's employees and code enforcement magistrate to the operator of the scrap metal salvage yard operation at 3951 SE Commerce Avenue has placed the owner and operator of that property at great financial advantage over Plaintiff Everett Brothers Recycling, Inc.

9. Plaintiff, Everett Brothers Recycling, Inc. has operated a scrap metal salvage yard at 1650 SE Salerno Road since 1947. The operation is on 14.27 acres.

10. To comply with the Martin County Zoning Ordinance and the Martin County Land Development Regulations for their scrap metal salvage use, Everett Brothers Recycling, Inc. was required by Martin County to construct, and constructed (among other things) a 40-foot-wide landscaping buffer and an 8-foot-high concrete block wall and berm around the entire perimeter of the property. The cost of these improvements alone exceeded \$800,000.00. None of these requirements have been required on the owners and operators of the scrap metal salvage yard on 3951 SE Commerce Avenue property.

11. Plaintiff, Waterblasting Technologies LLC, d/b/a Hog Technologies, has built its headquarters and 100,000 square foot manufacturing plant at 3920 SE Commerce Avenue, Stuart, FL, directly across Commerce Avenue from the scrap metal salvage yard operation being conducted on the 3951 SE Commerce Avenue property. Waterblasting Technologies LLC is the worldwide market leader in water blasting products and vehicles. Following is a recent photograph of Hog Technologies campus:



12. The salvage yard operation at 3951 SE Commerce Avenue is an eyesore for visitors, clients, and customers of Waterblasting Technologies LLC, and the traffic, noise, dust, grime, dirt, and smoke from fires emanating from the property negatively affects Hog Technologies, and its staff, visitors, clients, and customers. Dust and smoke are blown onto the Hog Technologies, often covering the vehicles in the Hog Technologies parking lot. Trucks attempting to enter (or entering) and leaving the scrap metal salvage yard site routinely block traffic on SE Commerce Avenue (which is a 2-lane road with sloping grass shoulders) resulting in scores of vehicles entering and travelling through the Hog Technologies parking lot to get around the blockage. The following photographs are typical examples of the impacts of the salvage yard on Hog Technologies:





13. To comply with the County's requirements, and at the County's insistence, Plaintiff Everett Brothers has spent

enormous sums to operate a metal salvage yard use. It expended huge sums to comply with the property size requirements of the Zoning Ordinance (the Ordinance requires at least 10 acres); in constructing hundreds of feet of expensive masonry walls around the perimeters of its property; in paying for and constructing buildings to code, paved areas, hazardous waste containment facilities, and site improvements required by the County; and in submitting detailed site plans, construction plans, and building permit applications to the County for approval. **None** of these expenses have been incurred by the operator of the scrap metal salvage yard on the 3951 SE Commerce Avenue property, and none of these expenses will affect its (or its successors) bottom line. Without the Defendant's employees' actions, the operator at 3951 SE Commerce Avenue would be treated the same by the County, and would be subject to (and following) the expensive requirements imposed by the County's zoning regulations, and would be subject to the same expenditures. The financial advantage accorded the operator at 3951 SE Commerce Avenue, and the operator's unlawful operation on the subject property, have resulted in significant lost business for Plaintiff Everett Brothers.

14. There are fewer than five businesses in Martin County in the scrap metal business. The scrap metal salvage business is a highly regulated business. As property and business owners for whose benefit the void acts have been taken to allow the property owner to engage in a use and activity not allowed by the County Zoning Ordinance, and under conditions more favorable than the Ordinance conditions that are applied to the Plaintiffs, the Plaintiffs have standing.

15. The Plaintiffs were prohibited by the County from participating in or being heard at any of the code enforcement hearings that led to the Stipulation and Order that are the subject of this action.

16. The Defendant's employees' actions allowing the subject scrap metal salvage yard use on the 3951 SE Commerce

Avenue property has done palpable harm to Plaintiff, who has a lawful salvage and recycling operation having followed all the requirements of the zoning law to conduct its businesses. The Plaintiffs have suffered, and are suffering, damages and injuries differing in kind from the damages suffered by the people as a whole.

17. The Plaintiffs have standing as aggrieved or adversely affected by the Stipulation, the Final Order, and the conditions and operation at the subject property.

18. The Plaintiffs have standing to challenge the *ultra vires* and void acts of the assistant county attorney, code enforcement officer, and code enforcement magistrate.

...

60. The acts of the Shilling, Storey, and the magistrate have the legal and practical effect of amending the Martin County Zoning Ordinance by amending and adding this salvage yard use to the permitted uses in the M-2 zoning district. Only the Board of County Commissioners can amend the Martin County Zoning Ordinance to permit a salvage yard use in the M-2 zoning district.

61. The acts deprived the Plaintiffs, as well as all other citizens and interested parties in Martin County, of their rights under the Florida Statutes and the Martin County Code to be notified of, to participate and to be heard in the legislative hearings on, and to contest the request to amend the Martin County Zoning Ordinance to permit salvage yards on property zoned M-2.

62. The Plaintiffs are aggrieved by the use and operation of the scrap metal salvage yard on the subject property in violation of the Zoning LDC. The Plaintiffs contend they are entitled to a declaratory judgment that Schilling's, Storey's and the special magistrate's actions allowing a scrap metal salvage yard use on the subject property are *ultra vires* and void *ab initio* and of no force or effect.

63. The County disputes the contentions of the Plaintiffs, and has failed and refused to correct Schilling's unauthorized and illegal actions or to correct the unlawful use of the subject property.

64. The Plaintiffs have a real, immediate and present need for a declaration of their rights under the LDC and Chapter 125 of the Florida Statutes, and to be free from the adverse impacts of the use and operation of the scrap metal salvage yard on the subject property under the *ultra vires* and unlawful actions by Schilling.

65. The Plaintiffs are aggrieved by the violations of the LDC that have been committed, are being committed and will be committed by the scrap metal salvage yard at the subject property. The Plaintiffs are adversely affected by the *ultra vires* changes to the Zoning LDC made by Schilling to allow the otherwise illegal scrap metal salvage yard on the subject property.

(R. 453-459 (¶¶ 7-18), 477-478 (¶¶ 60-65)).

Central to the SAC are the illegal, *ultra vires* acts of two members of the county's staff, who decided that a scrap metal salvage yard operation conducted entirely outside in the yard is a permitted use on a property zoned M-2 because the B-1 (Business) zoning district permits "refuse and storage areas which shall be screened from use." These two staff members further decided that the scrap metal salvage yard use, shown in the photographs of the SA Recycling use and operation in the SAC, is not in fact a salvage yard because "the use and operation on the property did not include junk cars and

hazardous motor vehicle fluids.” (R. 473 (¶ 37)). The zoning ordinance does not list scrap metal salvage yard (or scrap metal recycling yard as the two staff put it) as a permitted use in either the M-2 zoning district or the B-1 zoning district. (R. 464-466 (¶ 31), 481-482 (¶¶ 73-77)). In fact, the zoning ordinance has a specific district for this use – SY Salvage Yard. (R. 483-484 (¶¶ 79-81)).

It is further alleged in the SAC that, using this addition to the list of permitted uses in the M-2 zoning district, the same staff signed a stipulation and a County code enforcement special magistrate signed a Stipulation and Agreed Order allowing the scrap metal salvage yard use and operation on the property directly across the street from Appellant Waterblasting Technologies if the operator merely placed mesh screening on its fence. The acts of all three are *ultra vires* and void. (R. 474-475 (¶¶ 48-53)). Their actions usurped the legislating authority of the board of county commissioners and violated the ordinance amendment requirements of law. (R. 475-477 (¶¶ 54-61)).

The SAC also sets forth in detail the factual and legal basis for Appellant Waterblasting Technologies’ claim of nuisance. The allegations in the SAC show that the scrap metal salvage yard

operation on the 3951-3971 SE Commerce Avenue property across the street from Waterblasting Technologies violates the property's M-2 zoning. Furthermore, the SAC alleges, in text and in photographs, that "The salvage yard operation at 3951 SE Commerce Avenue is an eyesore for visitors, clients, and customers of Waterblasting Technologies LLC, and the traffic, noise, dust, grime, dirt, and smoke from fires emanating from the property negatively affects Hog Technologies¹, and its staff, visitors, clients, and customers. Dust and smoke are blown onto the Hog Technologies property, often covering the vehicles in the Hog Technologies parking lot. Trucks attempting to enter (or entering) and leaving the scrap metal salvage yard site routinely block traffic on SE Commerce Avenue (which is a 2-lane road with sloping grass shoulders) resulting in scores of vehicles entering and travelling through the Hog Technologies parking lot to get around the blockage." (R. 455-458 (¶ 12)).

Instead of answering the SAC, the Appellees each moved to dismiss. On March 23, 2023, SA Recycling made the same motion as had been denied by the court on September 22, 2022. (R. 259). Again,

¹ Waterblasting Technologies LLC's operation at its property is called Hog Technologies.

the motion argued that the court lacked subject matter jurisdiction because the matter involved code enforcement. (R. 516-523). SA Recycling attached the Stipulation and Agreed Final Order signed by staff and the magistrate. (R. 522-523). On April 6, 2023, Martin County moved to dismiss for failure to state a cause of action and lack of subject matter jurisdiction, the latter based on separation of powers, mootness, and failure to exhaust administrative remedies. (R. 525-536). Attached to, and submitted with the motion are a purported code enforcement order (R. 537-538 (Exhibit A)), a purported development review application for “Revised Minor Final Site Plan” (R. 539-543 (Exhibit B)), a purported “Zoning Review and Compliance Determination” (R. 544-551 (Exhibit C)), a purported “Development Order” “Regarding a Minor Development Final Site Plan Approval for SA Recycling”. (R. 552-557 (Exhibit D)), signed by Paul Schilling – the same staff member who committed the *ultra vires* acts in the SAC, a purported “Affidavit of Publication” (R. 558 (Exhibit E)), a purported “Affidavit Attesting to Notice of Development Application” (R. 558-561 (Exhibit F)), and eighteen pages of excerpts of county staff depositions taken in discovery in the case (R. 562-577

(Exhibit G)). On May 5, 2023, SA Recycling filed a notice of joinder in the County's motion to dismiss. (R. 583-584).

The Appellants filed memoranda in opposition to the motions on June 6, 2023 (R. 585-607) and June 22, 2023 (R. 608-616) and supplemented the responses with supplemental authority. (R. 617-632).

Trial court Judge McNicholas held a hearing on the motions on June 26, 2023. The hearing was recorded and transcribed. (R. 690-717). Judge McNicholas heard arguments from counsel, and asked no questions. (Id.). On November 13, Judge McNicholas issued the court's order, granting the Appellees' motions and dismissing the case with prejudice.

The Appellants filed their Notice of Appeal in the trial court on December 5, 2023. This Court issued an Order on December 8, 2023 directing the Appellants to obtain a final order and file a copy with the Court. (R. 679). On January 4, 2024, the trial court entered an Amended Final Order on Defendant, Martin County's and SA Recycling's Motions to Dismiss, (R. 685), which was filed with this Court on the same day.

SUMMARY OF THE ARGUMENT

The trial court's order should be reversed. The court considered matters and documents outside the four corners of the Appellants Second Amended Complaint (SAC), failed to take the allegations of the SAC as true, decided factual issues in dispute, and also decided issues of statutory construction and the merits of the Appellants' claims that are in dispute.

In addition, the trial court reversibly erred in each of the reasons given for granting the Appellees' motions to dismiss, and for dismissing the case with prejudice. The court based its finding on standing on the ruling in *Boucher v. Novotny*, which the Florida Supreme Court later found in *Renard v. Dade County* would be sufficient to establish standing. Appellants' SAC sets forth allegations on standing that satisfy the applicable standards for the Appellants' three claims. In fact, though it is not applicable, the allegations satisfy even the most rigorous standard for standing. The court also erred in dismissing the SAC on the basis that the County staff's interpretation of the ordinances is a permissible interpretation. Appellants' SAC demonstrated that the interpretation is *ultra vires*, as well as clearly erroneous and unauthorized.

The trial court's ruling that the Appellants' case is moot because of a site plan approval is also clearly erroneous. The site plan (which is outside the four corners of the SAC) simply provides for construction of pavement and a 1.5 square-foot shed on the subject property, and is plainly use-neutral. It does not render moot the *ultra vires* acts of the County staff or the illegal application of the County's zoning ordinance adding scrap metal salvage (or recycling) yard to the list of permitted uses in the M-2 zoning district.

The trial court's ruling that the Appellants' case is dismissed, with prejudice, because the Appellants failed to exhaust administrative remedies is also clearly erroneous. The SAC alleges that there are no administrative remedies available to the Appellants to make the challenges in their SAC. Moreover, the administrative remedies argument is based on the irrelevant site plan approval, not the actions on which the SAC is based. Furthermore, exhaustion of administrative remedies is not necessary when the challenge is to *ultra vires* acts of a county's staff, and section 86.111 provides that the existence of another adequate remedy does not preclude a judgment for declaratory relief.

If the trial court based its decision on discretion to file, dismiss, abate, or settle zoning actions, the decision is clearly erroneous. The SAC is addressed to *ultra vires*, void acts of County staff, the first of which is creating, without authority, a new permitted use added to the expressed ordinance list of permitted uses in the M-2 zoning district, and the second of which is using that newly created permitted use to permit the use on the 3951-3971 Commerce Avenue property. County staff and a code enforcement magistrate do not have authority to settle a case by creating a new permitted use that is not in the zoning ordinance. Only the Board of County Commissioners can add a new permitted use to the ordinance. In addition, the SAC does not seek an injunction to compel Martin County to enforce its zoning ordinance, and thus does not conflict with *City of West Palm Beach v. Haver*.

Finally, the trial court erred in dismissing the Appellants' case with prejudice without permitting the Appellants an opportunity to amend their pleading to address any deficiencies.

ARGUMENT

STANDARDS OF REVIEW

Appellants' SAC had causes of action for declaratory judgment (Counts I and II), and for injunctive relief to abate a nuisance (Count III). The trial court dismissed all three counts, with prejudice.

There are two standards of review applicable to the trial court's decision dismissing Appellants' SAC with prejudice: one for the causes of action for declaratory judgment (Counts I and II) and another for the cause of action for nuisance (Count III).

As to the dismissal of the declaratory relief claims, the standard of review is whether the trial court abused its discretion. *Palumbo v. Moore*, 777 So. 2d 1177 (Fla. 5th DCA 2001). The trial court's discretion is not unbridled. A trial court's failure to follow the law and controlling precedent is an abuse of discretion. *In re Doe*, 113 So. 3d 882 (Fla. 2d DCA 2012); *In re Doe 13-A*, 136 So. 3d 723 (mem) (Fla. 1st DCA 2014); *Industrial Trucks of Florida, Inc. v. Gonzalez*, 351 So. 2d 744 (Fla. 3d DCA 1977); *see also Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) ("Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness.").

As for the nuisance claim, the standard of review is that of an order granting a motion to dismiss: *de novo*. *Wilson v. County of Orange*, 881 So. 2d 625 (Fla. 5th DCA 2004); *Rhiner v. Koyama*, 327 So. 3d 314 (Fla. 4th DCA 2021); *Scott v. Progressive Express Ins. Co.*, 932 So. 2d 475, 477 (Fla. 4th DCA 2006).

Lower court rulings on issues of statutory interpretation are reviewed *de novo*. *Therlonge v. State*, 184 So. 3d 1120, 1121 (Fla. 4th DCA 2015).

- I. THE TRIAL COURT'S ORDER ESTABLISHES THAT THE COURT EXCEEDED THE PROPER SCOPE OF REVIEW ON A MOTION TO DISMISS A PLEADING, AND THEREFORE COMMITTED ERROR REQUIRING REVERSAL OF THE ORDER.

The fundamental law governing motions to dismiss a plaintiff's pleading is well established. Any motion to dismiss for failure to state a cause of action admits all well pleaded facts in the complaint as true, as well as reasonable inferences that may arise from those facts. *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So.2d 381, 383 (Fla. 4th DCA 1999). "All allegations of the complaint must be taken as true and all reasonable inferences drawn therefrom must be construed in favor of the non-moving party." *Chodorow v. Porto Vita, Ltd.*, 954 So. 2d 1240, 1242 (Fla. 3d DCA 2007). And "if the

analysis of a claim is factually intensive, it is better addressed on a summary judgment motion, or at trial, but certainly not on a motion to dismiss.” *Id.* “The trial court should not determine whether the allegations are true or whether the pleader will be able to prove the allegations. Rather, the trial court must decide whether the pleader would be entitled to the relief requested.” *Nero v. Cont'l Country Club R.O., Inc.*, 979 So. 2d 263, 267 (Fla. 5th DCA 2007).

“The purpose of a motion to dismiss is to test the legal sufficiency of [the] complaint, not to determine factual issues.” *Sealy v. Perdido Key Oyster Bar & Marina, LLC*, 88 So. 3d 366, 367–68 (Fla. 1st DCA 2012); *see also Rennoc, Inc. v. Merica, Burch & Dickerson, Inc.*, 914 So. 2d 1107, 1108 (Fla. 4th DCA 2005). “The trial court may not look beyond the four corners of [the] complaint when ruling on a motion to dismiss.” *Norwich v. Glob. Fin. Assocs., LLC*, 882 So. 2d 535, 536 (Fla. 4th DCA 2004).

Standing is an affirmative defense, *Broward County v. Florida Carry, Inc.*, 313 So. 3d 635, 641 (Fla. 4th DCA 2021), that must be pled and is dependent on proof of facts, *Wildflower, LLC, v St. Johns River Water Management District*, 179 So. 3d 369, 373-74 (Fla. 5th DCA 2015), so is failure to exhaust administrative remedies. *Wilson*

v. County of Orange, 881 So. 2d 625 (Fla. 5th DCA 2004). Affirmative defenses “ordinarily cannot be raised by motion to dismiss”, *Duncan v. Prudential Insurance Co.*, 690 So.2d 687, 688 (Fla. 1st DCA 1997), but can be raised in a motion to dismiss only when “the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the defense bars the action.” *Grove Isle Association, Inc. v. Grove Isle Associates., LLLP*, 137 So. 3d 1081, 1089 (Fla. 3d DCA 2014). Additionally, “because affirmative defenses may be avoided by facts pled in a reply, the allegations of the complaint must also **conclusively** negate the plaintiff’s ability to allege facts in avoidance of the defense by way of reply or dismissal is inappropriate.” *Id.* (emphasis added). The law is well settled that “[a]ffirmative defenses and the existence of facts which have bearing on the viability of an action are best fleshed out in the litigation process by way of motions for summary judgment or judgment on the pleadings.” *Value Rent-A-Car, Inc. v. Grace*, 794 So. 2d 619, 621 (Fla. 2d DCA 2001). “Generally, dismissals with prejudice based upon the affirmative defense of a lack of standing are not proper.” *National Collegiate Student Loan Tr. 2006-4 v. Meyer*, 265 So. 3d 715, 718 (Fla. 2d DCA 2019).

The SAC states that the County's zoning ordinance expressly provides that the scrap metal salvaging use and operation depicted on the 3951-3791 SE Commerce Avenue property cannot be conducted on land zoned M-2, and must be conducted on land zoned SY, (R. 483 (§ 80-81)), or on land zoned Category A districts GH, HI, or PS2. Additionally, the scrap metal salvaging operation must satisfy the minimum acreage requirements of the code, which require greater amounts of acreage than the 3951-3971 property has. (R. 486 (§ 90), 488-499 (§§ 96,97)). That is, the scrap metal salvage yard use cannot be made on this property unless (a) the Board of County Commissioners rezoned the property to SY, GH, HI, or PS2; and (b) the Board of County Commissioners amended the zoning ordinance to allow a scrap metal salvage yard operation on a parcel as small as the property; or (c) the Board of County Commissioners amended the M-2 zoning district to list scrap metal salvage yard uses and operations as a listed permitted use in the M-2 district. (R. 490 (§ 98)).

The SAC further alleges that two members of the County staff made an "about-face" on the zoning code and decided – without any authority or authorization, as well as in the face of the plain language

of the zoning ordinance - that a scrap metal salvage yard (or “scrap metal recycling yard” as they called it) is a permitted use in the M-2 zoning district because the B-1 zoning district permits “refuse and storage areas.” (R. 473 (§§ 42-44)). They also decided – without any authority or authorization, as well as in the face of the plain language of the zoning ordinance - that a salvage yard use or operation is only a use or operation involving junk cars. (R. 473 (§ 44)). In doing so, they amended the zoning ordinance themselves. Neither member of the staff is authorized by the code to make a decision adding a use to the list of permitted uses in a district. (R. 474 (§§ 48-51), 475-476 (§§ 54-58)). Only the Board of County Commissioners can do that. (R. 476 (§ 58)).

The SAC further alleges that, using that *ultra vires* addition to the zoning ordinance which made the scrap metal salvage yard use on the subject property a permitted use, the same staff thereafter submitted a Stipulation and Agreed Order to a code enforcement magistrate allowing the use if a screen was placed on the fence of the property. Both the action of the staff members adding the scrap metal salvage yard use to the list of permitted uses in the M-2 district, and the Stipulation and Agreed Order permitting the use if it was shielded

by a screen, are completely unauthorized and void. The use and operation on the subject property shown in the photographs is a permitted use according to the staff's addition of this use to the list of permitted uses.

The Appellants' SAC sets forth seven full pages of factual allegations and photographs spelling out in detail the Appellants' standing to bring its three claims. (R. 453-459 (¶¶ 7-18)). The trial court did not look solely to the four corners of those allegations and photographs, nor regard those allegations and photographs as true. On the contrary, the court received and heard extraneous materials and arguments and clearly determined facts that were in dispute. "Where a complaint is dismissed based on extraneous evidence leading the judge to believe that the plaintiff is not entitled to relief, the judge has reversibly erred." *Fish v. Post of Amvets No. 85*, 560 So.2d 337, 339 (Fla. 1st DCA 1990); *see also Mancher v. Seminole Tribe of Fla., Inc.*, 708 So.2d 327, 327 (Fla. 4th DCA 1998) (reversing dismissal for lack of personal jurisdiction where the trial court had considered sworn affidavits filed on behalf of the defendant, which tended to show that it was protected from the suit by sovereign immunity); *Williams v. Gaffin Industrial Services, Inc.*, 88 So. 3d 1027

(Fla. 2d DCA 2012) (order granting motion to dismiss reversed because the trial court considered documents and an affidavit defendant attached to the motion). Here, the trial court undeniably considered and relied on the matters and documents outside the SAC that were attached to the County's Motion to Dismiss as exhibits A through G, and the arguments that the Appellees made based on those matters and documents. Therefore, the court's order must be reversed.

II. THE TRIAL COURT ERRED IN DISMISSING THE SAC WITH PREJUDICE BASED ON THE PLAINTIFFS FAILING TO ALLEGE SPECIAL DAMAGES IN ACCORDANCE WITH *BOUCHER v. NOVOTNY*.

The trial court concluded that the plaintiffs lacked standing to bring their claims because of the decision in *Boucher v. Novotny*. (R. 685). However, the trial court's reliance on "*Boucher v. Novotny* (sp.), 102 So. 2d 132 (Fla. 1958)" (id.) is clearly erroneous because the ruling in *Boucher* on that appellant's standing was expressly receded from by the Florida Supreme Court in *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972). In *Boucher*, which was decided in 1958, the Court ruled that a property owner seeking to challenge the issuance of a zoning permit by a city council on a property directly across the

street lacked standing because he failed to show injury “special and peculiar to himself and not merely different in degree from that suffered by the remainder of the community.” *Boucher*, 102 So. 2d at 135. Being in close proximity was ruled to be inadequate to afford standing.

Renard v. Dade County, 261 So. 2d 832 (Fla. 1972), revisited the standard for standing which had been examined in and ruled on in *Boucher*, and concluded that “The facts of the *Boucher* case, if presented today, would probably be sufficient to show special damage.” *Id.* at 838. Therefore, the ruling on the plaintiff’s standing in *Boucher* that an adjacent landowner does not have standing is not controlling. By failing to follow the correct controlling law, the trial court’s order must be reversed.

III. IN RULING THAT THE PLAINTIFFS DID NOT HAVE STANDING THE TRIAL COURT COMMITTED REVERSIBLE ERROR.

Renard establishes the pleading requirements for standing based on the specifics of the claim, and places them in three categories. The first category is a party challenging the validity of an action of the zoning authority, i.e., the board of county commissioners or municipal council. Examples of such a challenge

are a challenge to a rezoning, a variance. or a board or council' reinstatement of a permit allowing encroachments into required setbacks. A party making a challenge in this category must allege special damages peculiar to himself differing in kind as distinguished from damages differing in degree suffered by the community as a whole. *Renard*, 261 So. 2d at 837. In the second category are challenges to a validly enacted zoning ordinance on grounds it is an unreasonable exercise of legislative power. Examples are challenges to use variances allowing less restrictive uses, *id.* (citing *Hartnett v. Austin*, 93 So. 2d 86 (Fla. 1956), *Wags Transportation System v. City of Miami Beach*, 88 So. 2d 751 (Fla. 1956) (finding that property owners in the same residential zoning district as the subject property that a judicial decree ordered to be used for construction of hotels had standing to intervene in the case for the purpose of appealing the decision); *Elwyn v. City of Miami*, 113 So. 2d 849 (Fla 3d DCA 1959) (not following *Boucher* and finding the plaintiffs had standing to challenge a use variance because their properties abutted the subject property); and *Josephson v. Autrey*, 96 So. 2d 784 (Fla. 1957) (finding that a property owner within 363 feet of a property granted a use variance approved by a zoning board of appeals had standing to

challenge the variance), and ordinances challenged on constitutional or statutory grounds. *Rinker Materials Corp. v. Metropolitan Dade County*, 528 So. 2d 904 (Fla. 3d DCA 1987) (suit for declaratory and injunctive relief challenging a county zoning ordinance as an unreasonable and arbitrary exercise of the county's authority). A party making such a challenge must show that they have a "legally recognizable interest which is or will be affected by the action of the zoning authority in question. The interest may be one shared in common with a number of other members of the community as where an entire neighborhood is affected, but not every resident and property owner of a municipality can, as a general rule, claim such an interest. An individual having standing must have a definite interest exceeding the general interest in community good shared in common with all citizens." *Id.* at 837, 838.

In the third category are challenges attacking zoning actions which are void. The example given by the *Renard* court is a zoning ordinance that was not properly enacted, "as where required notice was not given." *Id.* at 838. Another example is a challenge to an ordinance on the basis that it is in excess of power or jurisdiction. *See Parsons v. City of Jacksonville*, 295 So. 3d 892 (Fla. 1st DCA

2020). In this category, “Any affected resident, citizen or property owner of the governmental unit in question has standing to challenge such an ordinance.” *Renard*, 261 So. 2d at 838.

Renard’s progeny since 1972 has established a body of law and precedent regarding this third category. Notably, those cases rule that where the cause is brought to challenge and correct any alleged *ultra vires* act, a plaintiff is not required to allege any particular damage – or special damage - to satisfy standing. *See e.g., Upper Keys Citizens Association, Inc. v. Wedel*, 341 So. 2d 1062 (Fla. 3d DCA 1977); *Albright v. Hensley*, 492 So. 2d 852, 855 (Fla. 5th DCA 1986) (“If the attack is a fundamental, procedural one that would make the zoning [action] void, then a person has standing . . . by simply being a taxpayer or owner of property in the same governmental unit issuing the ordinance or [authorization].”); *David v. City of Dunedin*, 473 So. 2d 304, 305–06 (Fla. 2d DCA 1985) (no special injury required for general attack on validity of ordinance for failure to comply with section 166.041(3)).

Here the Appellants are not contesting the validity of the zoning ordinance or a decision of the governing body approving an amendment of a zoning ordinance or granting a variance or a special

exception. On the contrary, the requests for declarations center on illegal, *ultra vires* acts by county staff adding a use to the list of permitted uses in a district in a zoning ordinance, and that illegal use now being made on a parcel that is not zoned for such use. The Appellants' SAC explicitly alleges that the actions are *ultra vires* and void because they are unauthorized in law and effected an amendment to an ordinance that can only be made by the Board of County Commissioners.

- a. According to *Renard*, the SAC properly alleges standing to bring Count I.

According to *Renard*, the Plaintiffs have alleged standing for Count I because they are challenging a zoning action that is “*void*.” *Renard* gave as an example of a void action a case where the ordinance was not properly enacted or where required notice was not given. *Renard*, 261 So. 2d at 838. The same holds true for void actions by staff in excess of their authority or the law, or in usurpation of the jurisdiction of the Board of County Commissioners. Standing therefore is under *Renard*'s third category. In such circumstances, *Renard* holds that “any affected resident, citizen, or property owner of the governmental unit in question has standing to

challenge such an [action].” *Id.*; see also *Renard v. Dade Cnty.*, 249 So. 2d 500, 502 (Fla. 3d DCA 1971), *aff’d*, 261 So. 2d 832 (Fla. 1972) (“no special damage is necessary when a plaintiff seeks to have an act of a zoning authority declared void”).

The SAC sets forth overwhelming allegations, even in the form of photographs, establishing that the Appellants are affected residents, citizens, or property owners of the county. Both Plaintiffs have plainly alleged that they are property owners in the county and have therefore established standing for a declaratory judgment that the actions of county staff are *ultra vires* and void, as well as that the zoning district for Defendant SA’s land does not permit salvage yards, or the scrap metal salvage yard operation SA has established on the property. Both Plaintiffs also establish standing because they are affected in a real, concrete way by the *ultra vires* acts of these members of county staff. Everett Brothers Recycling was made to comply with the County’s duly enacted zoning and land development and use regulations for its salvage yard operation, at an enormous cost not required at all of SA Recycling. Additionally, SA Recycling is not required by staff’s actions to comply with the stringent environmental regulations placed on scrap metal operations. The

added expense of both also naturally places SA Recycling at an enormous financial advantage over Everett Brothers, and gives SA the ability to pay a much lower price for the scrap metal it receives.

Yet, even assuming, *arguendo*, that Appellants' claims do not fall into *Renard's* third category, the Appellants' allegations for standing in the SAC have even satisfied *Renard's* most stringent standard. Appellant Waterblasting Technologies is directly across the two-lane street from the subject property and has standing to bring Count I even under the most rigorous, though inapplicable, *Renard* standard. *See also Paragon Group, Inc. v. Hoeksema*, 475 So. 2d 244, 246 (Fla. 2d DCA 1985), *review denied*, 486 So. 2d 597 (Fla. 1986). Appellant Everett Brothers also satisfied *Renard's* most demanding test by alleging that it has been required to spend hundreds of thousands of dollars to comply with the county's zoning requirements for a scrap metal salvage (recycling) use which the owner of the subject property has not been required to spend to operate the same scrap metal salvage operation, and that the scrap metal salvage use business is highly regulated and there are fewer than five such operations in the county. *See Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So. 2d 1082 (Fla. 1978) (finding that entities with the same

highly regulated businesses have aggrieved person and special damage standing to intervene in a challenge to a zoning decision by the Board of County Commissioners); *Rayan Corp. Inc. v. Board of County Commissioners of Dade County*, 356 So. 2d 1276 (Fla. 3d DCA 1978).

- b. The SAC satisfies standing to bring Count II for declaratory judgment under the declaratory judgment law.

The Appellants are travelling under the Declaratory Judgment Statute. Ch. 86, *Fla. Stat.* (2024). Section 86.021 of the statute addresses standing to seek a declaratory judgment and it contains no requirement that a special injury be established. Rather, it provides:

Any person ***claiming to be interested or who may be in doubt about his or her rights*** under a ... contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable ***or legal relations are affected by a regulation made under statutory authority, or by municipal ordinance***, . . . may have determined any question ***of construction*** or ***validity*** arising under such statute, regulation, municipal ordinance, . . . and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

§ 86.021, *Fla. Stat.* (2023) (emphasis added).

There is no doubt that actions for declaratory judgment to determine the construction and application of ordinances or rights and responsibilities under ordinances are within the parameters of the declaratory judgment law. *See e.g., Robinson v. Town of Palm Beach hores*, 388 So. 2d 314 (Fla 4th DCA 1980); *Perry v. City of Ft. Lauderdale*, 387 So. 2d 518 (Fla. 4th DCA 1980).

Courts have repeatedly stated that the declaratory judgment statute should be liberally construed. *See Olive v. Maas*, 811 So.2d 644 (Fla. 2002), and this also applies to standing. *See, e.g., Combs v. City of Naples*, 834 So. 2d 194, 197 (Fla. 2d DCA 2002) (ruling that a not-for profit association formed by homeowners in a subdivision has standing to maintain an action for declaratory judgment challenging a development agreement “[g]iven the liberal construction to be afforded chapter 86”). “A complaint for declaratory judgment should not be dismissed if the plaintiff established the existence of a justiciable controversy cognizable under the Declaratory Judgment Act, chapter 86, Florida Statutes.” *Murphy v. Bay Colony Prop. Owners Association & Victor Coveduck*, 12 So. 3d 924, 926 (Fla. 2d DCA 2009). Standing to maintain a cause of action for declaratory judgment is satisfied if the plaintiff “has a sufficient

interest at stake in the controversy which will be affected by the outcome of the litigation.” *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996). In its broadest sense, standing is no more than having, or representing one who has, “a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.” *Sierra Club v. Morton*, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636, 641 (1972); see also *Argonaut Insurance Co. v. Commercial Standard Insurance Co.*, 380 So.2d 1066, 1067 (Fla. 2d DCA 1981) (a party has standing when it has such a legitimate interest in a matter as to warrant asking a court to entertain it); *Gieger v. Sun First National Bank of Orlando*, 427 So.2d 815, 817 (Fla. 5th DCA 1983) (a party has standing where there is alleged a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation). The Appellants’ SAC adequately shows that there is a bona fide dispute with an actual present need for judicial intervention to determine the proper application of the zoning ordinance with respect to scrap metal salvage yard use and whether such use is a permitted use in the M-2 district merely by placing a screen on the property’s fence. The Plaintiffs have clearly alleged standing under this standard. They

have shown unique injuries and a special, significant (and perhaps compelling) interest in the outcome of this case.

- c. According to *Renard*, the SAC properly alleges standing to bring Count II.

Likewise, even assuming, *arguendo*, that the Appellants had to satisfy *Renard* standing, the SAC satisfies standing. Count II does not seek to *enforce* the zoning ordinance. On the contrary, it seeks a declaration whether scrap metal salvage yard (or recycling yard as the Appellees call it) use is a permitted use in the M-2 zoning district and whether the use on the subject property complies with the M-2 zoning district ordinance. So, *Renard's* category one standing rule does not apply.

the Appellants had to satisfy standing under *Renard*, for the same reasons set forth in the preceding discussion such standing has been sufficiently pled. The trial court's decision dismissing the Appellants' SAC with prejudice because the Appellants lack standing is simply wrong and it must be reversed.

- d. According to *Renard*, Appellant Waterblasting Technologies has standing to bring its action in nuisance against Appellee SA Recycling because it is located directly across the street from SA Recycling, and it has alleged that the scrap metal salvage yard

operation on the subject property creates special injury to Appellant and its property.

It might be that the trial court simply overlooked Count III because Appellant Waterblasting Technologies, through allegations of fact and even photographs of the subject property's impacts on its property and quiet enjoyment, so completely and compellingly set forth standing to bring its claim. Regardless, the court committed reversible error when it dismissed Waterblasting's claim for nuisance because Waterblasting plainly alleged that the scrap metal salvage yard operation on the subject property directly across the road from its property

creates dust and dirt on Plaintiff Waterblasting Technologies' property, pollution of waters on and around Plaintiff's property, noise and traffic congestion, including causing vehicles using SE Commerce Avenue to drive through Plaintiff's property to avoid jams caused by vehicles entering (or seeking to enter) Defendant's property or to avoid debris dropped on SE Commerce Avenue by vehicles carrying loose scrap to Defendant's property, and has interfered with the Plaintiff's lawful use of its property for manufacturing, and has diminished the value of Plaintiff's property, and has changed the character of the Plaintiff's property such that its value as lawfully zoned is threatened to be destroyed.

(R. 455 (¶ 12), 491 (¶ 107)).

Waterblasting Technologies has properly pled standing to bring its private nuisance claim. “The law of private nuisance is bottomed on the fundamental rule that every person should so use his own property as not to injure that of another, as expressed in the maxim *sic utere tuo ut alienum non laedas*.” *Jones v. Trawick*, 75 So. 2d 785 (Fla. 1954). And, under Florida law “[a]nything which annoys or disturbs one in the free use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable may become a nuisance and may be restrained.” *Knowles v. Central Allapattae Properties*, 145 Fla. 123, 145 So. 819, 822 (1940). Waterblasting Technologies alleged that it is the owner of its property across the road from SA Recycling’s operation, *see Page v. Niagara Chemical Division of Food Machinery & Chemical Corp.*, 68 So. 2d 382 (Fla. 1953) (standing to sue to enjoin a private nuisance requires an estate in the land subjected to the noxious impacts), and that the effects of SA’s operation, as well as in violation of the subject property’s zoning, harms it in a concrete way. Waterblasting Technologies also has pled standing to maintain its public nuisance claim. *See Town of Surfside v. County Line Land Co.*, 340 So. 2d 1287 (Fla. 3d DCA 1997) (acknowledging standing of property owner in

close proximity to alleged public nuisance which showed that the nuisance interfered with the enjoyment and value of its property); see also *Fla. Wildlife Federation v. State Department of Environmental Regulation*, 390 So. 2d 64, 67 (Fla. 1980); *Page v. Niagara Chem. Div. of Food Mach. & Chem. Corp.*, 68 So. 2d at 384.

The trial court's dismissal of Count III on the basis of standing is wrong and must be reversed.

IV. THE TRIAL COURT ERRED WHEN IT DISMISSED THE SAC BASED ON ITS BELIEF THAT THE COUNTY STAFF'S INTERPRETATION WAS A PERMISSIBLE INTERPRETATION.

The trial court's ruling dismissing the SAC with prejudice because "Defendant, Martin County's interpretation of its code is within the range of possible interpretations pursuant to *Pruitt v. Sands*, 84 So. 3d 1267, 1268-69 (Fla. 4th DCA 2012)" violated a bedrock principle of ruling on a motion to dismiss claims for declaratory judgment.

It is axiomatic that "[i]n testing the sufficiency of a complaint for declaratory judgment, the merits of a claim are not to be weighed; rather, the question before a trial court is whether the plaintiff is entitled to a declaration of rights at all." *East Naples Water Systems*,

Inc. v. Board of County Commissioners of Collier County, 457 So. 2d 1057, 1059 (Fla. 2d DCA 1984); see also *Rosenhouse v. 1950 Spring term Grand Jury, in and for Dade County*, 56 So. 2d 445 (Fla. 1952); *Jezeck v. Vordemaier*, 227 So.2d 69 (Fla. 4th DCA 1969). By dismissing the Second Amended Complaint because the county's interpretation of its code is within the range of possible interpretations, the trial court clearly exceeded the parameters for deciding a motion to dismiss by considering instead whether a rule of construction could defeat the merits of the Appellants' case. The decisions in *Durand v. Metropolitan Dade County*, 472 So. 2d 865 (Fla. 3d DCA 1985), *Verdecia v. American Risk Assurance Co.*, 494 So. 2d 294 (Fla. 3d DCA 1986), and *Royal Selections, Inc. v. Florida Department of Revenue*, 687 So. 2d 893 (Fla. 4th DCA 1997) are directly on point. All three cases involved complaints for declaratory judgment regarding the interpretation and application of statutes. In all three cases the appeals court reversed dismissals of the actions because the trial court had based its dismissal on the merits of the plaintiff's claimed interpretation of the statute. In *Durand*, the plaintiffs stated a claim for a declaratory judgment as to their rights under a section of the Florida Statutes. The trial court dismissed the

case on the ground that the plaintiffs were wrong on the merits. *Durand*, 472 So. 2d at 865-66. In *Verdecia*, the plaintiffs properly stated a claim for declaratory judgment as to the constitutionality as applied of several sections of the Florida Statutes. The trial court dismissed the complaint with prejudice on the ground that the statutes were constitutional and therefore the plaintiff was wrong on the merits. *Verdecia*, 494 So. 2d at 294. In *Royal Selections*, the plaintiff's complaint stated a claim for a declaratory judgment as to whether sums collected by the tax collector under a statute were unlawful and unconstitutional. In dismissing the complaint, the trial court had construed the merits of the claim and decided that the collections were lawful. Noting that "this is the very question sought to be answered in the declaratory action", *Royal Selections*, 687 So. 2d at 893, this Court reversed the dismissal.

Not only did the trial court go too far by considering Appellees' argument and deciding that it must defer to any application by the staff, but the SAC also explicitly alleged – and showed – that the staff's application of the zoning is clearly erroneous and unauthorized, as well as that it was illegal as a matter of law. (R. 464-468 (¶¶ 29-34), 470 (¶40), 473 (¶ 43)) ("The Plaintiffs contend that

Schilling's Determination is *ultra vires*, void *ab initio* and of no effect because the County's Zoning Ordinance does not contain a provision authorizing Shilling (or any staff member) to make such a determination, or for any staff member to authorize a use in a zoning district not explicitly provided for in the district's governing text.") ("The Plaintiffs contend that Storey's actions consistent with Schilling's Determination (or her actions under the same opinion) are *ultra vires*, void *ab initio* and of no effect because the County's ordinances do not contain a provision authorizing Storey (or any staff member) to make such a determination or pursue such an opinion authorizing a use in a zoning district not explicitly provided for in the district's governing text."), (R. 481-483 (¶¶ 72-79), 483 (¶ 80) ("The county commissioners who enacted the 1967 code were aware of scrap metal salvaging (or "recycling" as Schilling and Storey would appear to prefer to call it), and where such salvage yard activity and operations should occur, and plainly established that salvage yards were to be located and zoned a specific and independent district – the SY district - and were to be placed in specific locations for these activities on lands zoned SY. By establishing a separate, distinct zoning district for these uses and activities, and not listing it as a

permissible use in any other district, scrap metal salvaging was neither intended to be nor in any way allowed in any other zoning district.”), (R. 483-484 (¶¶ 80-85), 485 (¶ 86) (“ “A ‘catchall’ or ‘similar use’ provision in an ordinance that allows certain uses that are not otherwise delineated in the comprehensive zoning ordinance; however, the ‘catch all’ or ‘similar use’ provision should not be used where, like here, the particular use is described elsewhere in the LDC.” *Shamrock-Shamrock, Inc. v. City of Daytona Beach*, 169 So. 3d 1253, 1256 (Fla. 5th DCA 2015) (quoting from *City of Miami Beach v. Sunset Islands 3 & 4 Prop. Owners Ass’n*, 216 So.2d 509, 512 (Fla. 3d DCA 1968). Even if the zoning ordinance contained a catchall or similar use provision (and it irrefutably does not), the zoning ordinance explicitly provides for the use in the SY zoning district.”), 89-98). The law is absolutely clear that a court cannot defer to an agency interpretation that violates, alters, amends or ignores the statute or ordinance. *See Mortham v. Milligan*, 704 So. 2d 152, 157 (Fla. 1st DCA 1997) (“there is no obligation to defer to an agency interpretation that results in a statute being voided by administrative fiat”). *City of Coral Gables Code Enforcement Board. v. Tien*, 967 So. 2d 963 (Fla. 3d DCA 2007) (no deference to interpretation that

conflicts with the plain and ordinary meaning of a statute); *Stuart Yacht Club & Marina v. Department of Natural Resources*, 625 So. 2d 1263, 1267-68 (Fla. 4th DCA 1993) (an interpretation contrary to plain meaning is clearly erroneous and there is no deference to such an interpretation by the agency).

Additionally, a successful argument can be made that the rule of deference used by the trial court is not controlling law. The Florida Supreme Court and the district courts of appeal have otherwise established the doctrine of textualism for statutory and ordinance interpretation, which does not afford deference to the local government interpretations. See e.g., *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942 (Fla. 2020); *Laboratory Corporation of America v. Davis*, 339 So. 3d 318 (Fla. 2022); *Surf Works, LLC v. City of Jacksonville Beach*, 230 So. 3d 925 (Fla. 1st DCA 2017); *Town of Longboat Key v. Landside Property Owners Coalition, LLC*, 95 So. 3d 1037 (Fla. 2d DCA 2012); *Kellerman v. Board of Trustees of the City of Hollywood Firefighters Pension System*, 336 So. 3d 39 (Fla. 4th DCA 2022); *Imhof v. Walton County*, 328 So. 3d 32 (Fla. 1st DCA 2021). Under the law of textualism, courts are to apply the “supremacy-of-the-text principle” that “the words of a governing text

are of paramount concern, what they convey, in their context, is what the text means.” *Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021). Words are not added to a statute in the guise of interpreting it. *Slater v. State*, 349 So. 3d 873, 879 (Fla. 2022). Words used in the statute are given their ordinary meaning. If (and only if) the statutory language is unclear, the court applies rules of statutory construction and explores legislative history to determine legislative intent. *Bautista v. State*, 863 So. 3d 1180 (Fla. 2023). The rule cited by the trial court is not in any way tied to the text of the ordinance or discerning what the text means. It is a rule of deference. Consequently, the rule is no longer viable or applicable. An example of this distinction where a previously applied rule of construction was found to be no longer viable is found in the recent case *State v. Crose*, ___ So. 3d ___, 49 Fla. L. Weekly D421, 2024 WL 292231 (Fla. 2d DCA January 26, 2024) (*en banc*). In *Crose*, the District Court of Appeal ruled that a court cannot consider a clarifying amendment to a statute, made soon after a controversy as to the interpretation of the statute arose, in determining the meaning of the original statute, and found that the “recent controversy rule” of statutory construction was no longer viable after the establishment of the supremacy-of-the-text rule. The

recent controversy rule was a rule of “great deference” to the legislature’s statement. *State v. Lanier*, 464 So. 2d 1192 (Fla. 1985). Citing *Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942 (Fla. 2020). The Court noted that in 2020, the Florida Supreme Court “began to reformulate the paradigm of statutory interpretation.” *Id.* at ___, 2024 WL 292231 at 12. In *Ham*, the Florida Supreme Court stated that

the goal of interpretation is to arrive at a “fair reading” of the text by “determining the application of [the] text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued.” This requires a methodical and consistent approach involving “faithful reliance upon the natural or reasonable meanings of language” and “choosing always a meaning that the text will sensibly bear by the fair use of language.”

Ham, 308 So. 3d at 946 (citations omitted).

Subsequent to *Ham*, the Florida Supreme Court had decided *Conage v. United States*, 346 So. 3d 594 (Fla. 2022), further explaining that supremacy-of-the-text required focus on the text and only those rules of construction that were focused on the text itself could be considered in determining the meaning of a statute. *Id.* at ____, 2024 WL 292231 at 13. The *Croce* Court found that *Conage* had “unequivocally abandoned the legislative intent approach” to

statutory construction, *id.* and a court's task in interpreting legislation is to "look to the text itself, as understood in its context, not to any purported intent underlying the text." *Id.* Based on this assessment, the Court ruled that the recent controversy rule of statutory construction is no longer valid or viable. *Id.*, at 15. As the Court put it: "A court using an atextual, intent-centric tool in a supremacy-of-text analysis would be like a homeowner trying to hammer a lightbulb into a socket to gain more illumination." *Id.* at 14.

V. THE TRIAL COURT IMPROPERLY CONSIDERED AND RELIED ON MATTERS BEYOND THE FOUR CORNERS OF THE SAC IN RULING THAT THE APPELLANTS CASE IS MOOT AND THAT THE APPELLANTS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES.

In ruling that (1) "the controversy in regard to the Subject Property is now moot because Intervenor/Defendant SA Recycling is operating under a properly approved Development Order which was entered subsequent to the factual allegations in the Complaint" (R. 682); and (2) "Plaintiffs have failed to exhaust the administrative remedies that were available to them as a result of the Development Order on the Subject Property", (*Id.*), the trial court went outside the

four corners of the SAC and considered extraneous matters and argument. Moreover, the court ruled on matters that were, at best, in dispute as to the facts and the law. In so doing, the court exceeded the proper standards for ruling on a motion to dismiss and its order must be reversed.

It is axiomatic that when ruling on a motion to dismiss, “[a] court may not go beyond the four corners of the complaint and exhibits attached thereto.” *Kohl v. Blue Cross & Blue Shield of Fla., Inc.*, 988 So. 2d 654, 658 (Fla. 4th DCA 2008). Appellants’ SAC alleged a live controversy. Appellees’ mootness argument was based entirely on claimed facts and documents completely outside the four corners of the SAC. The trial court clearly erred when it considered and based its ruling on these claims and documents.

VI. THE TRIAL COURT ERRED WHEN IT DISMISSED THE SAC WITH PREJUDICE BASED ON MOOTNESS.

The trial court’s ruling that the case is moot because SA received a site plan approval is clearly erroneous. The County argued that a Revised Minor Site Plan application had been allegedly made by SA Recycling on or about September 2021, and the application had been approved by the Growth Management Director (the same

Paul Shilling who had unlawfully allowed the scrap metal salvage yard use as a permitted use not found in the M-2 district ordinance) on or about December 7, 2022. (R. 530-531), and that somehow that approval made the *ultra vires* acts moot. (R. 701 (line 25)-702 (line 2)). The trial court did not ask any questions at the hearing and did not provide any explanation for its ruling. (R. 690-717). And the County's arguments are clearly wrong. The approved site plan provided for construction of horizontal improvements on the subject property – pavement – and a vertical improvement - a 1.50 square foot shed. (R. 552, 556 (Exhibit B to Exhibit D); 557 (Site Data – Proposed Building)). The alleged site plan and the documents purporting to show the application, and the approval by the Growth Management Director were all extraneous to the SAC, and were submitted by Appellee County. Neither the argument of mootness, nor the materials submitted by the County, should have been considered by the trial court and the trial court committed reversible error when it considered them and grounded its ruling on them.

Additionally, the purported approval of the site plan does not moot the Appellants' claims. Nor does it moot this case. The site plan approved, i.e., for paving part of the subject property and addition of

a 1.5 square foot shed, comprises *improvements* to the property, not any approval of a specific or particular *use*. It has no effect whatsoever on the live controversy set forth in the SAC. The SAC is based on the illegal *use* of a scrap metal salvage yard operation on the subject property, not the *improvements* on the property. The improvements are use-neutral, and can be made to accommodate any lawful use expressly permitted in the M-2 zone. In short, the matter of the alleged approved site plan is, in any event, a red herring that never should have been followed by the trial court.

In addition, the approval does not moot the *ultra vires* acts of adding the scrap metal salvage yard use to the list of permitted uses in the M-2 district and re-writing the zoning ordinance to say that only a salvage yard operation with junk cars is a salvage yard according to the ordinance and the SY zoning district.

VII. THE TRIAL COURT ERRED WHEN IT DISMISSED THE SAC WITH PREJUDICE BASED ON FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.

The trial court dismissed the SAC on the basis that the Appellants had failed to exhaust administrative remedies to contest the purported Revised Minor Site Plan. The code remedy Appellee County argued the Appellants failed to exhaust plainly shows it does

not apply because it affords a remedy to an “Adversely Affected Person”, who is defined as a “person who will suffer an adverse effect to an interest protected or furthered by the Comprehensive Plan.” (Defendant County’s Motion to Dismiss and Strike, p. 9). The county’s Comprehensive Plan is an entirely separate, entirely different ordinance. Given the exhaustion argument is inextricably tied to the red herring, it follows that its failure to exhaust administrative remedies argument is also unavailing and the trial court reversibly erred in dismissing the SAC for this reason.

Additionally, exhaustion of administrative remedies is irrelevant to the Appellants’ case. Not only did the Appellants specifically allege that the County staff prohibited them from participating in or being heard in the code enforcement proceedings, R. 459 (§ 15)), but there simply are no administrative remedies available to the Appellants. Moreover, even if there were any such remedies, *Braden Woods Homeowners Association, Inc. v. Mavard Trading, Ltd.*, 277 So.3d 664 (Fla. 2d DCA 2019) plainly shows that the Appellants are not required to exhaust administrative remedies because they are contesting *ultra vires* acts. *Id.* at 675 (“the alleged *ultra vires* acts provide an

exception to the requirement to exhaust available administrative remedies.”)

Lastly, section 86.111 of the Declaratory Judgment statute provides that “The existence of another adequate remedy does not preclude a judgment for declaratory relief.” It follows that in any event the exhaustion argument was simply wrong.

VIII. THE TRIAL COURT ERRED IF IT DISMISSED THE SAC WITH PREJUDICE BASED ON “AFFIRM[ING] MARTIN COUNTY’S DISCRETION TO FILE, PROSECUTE, ABATE, SETTLE OR DISMISS ITS BUILDING AND ZONING ACTIONS ON THE SUBJECT PROPERTY”.

It is unclear whether the trial court separately based its ruling dismissing the SAC with prejudice on “Martin County’s discretion to file, prosecute, abate, settle or dismiss its . . . zoning actions on the Subject Property.” Given this statement follows the court’s finding that the interpretation is within the range of possible interpretations, and begins with the word “Therefore”, it would appear this statement is simply part of the ruling dismissing the case for that reason. However, if the trial court independently dismissed the SAC with prejudice “affirming” the County’s discretion to file, prosecute, abate, or dismiss a zoning action, this ruling would be wrong, and the trial court erred.

Appellants' SAC was carefully written, and its counts were carefully drafted, after the Florida Supreme Court decided *City of West Palm Beach v. Haver*, 330 So. 3d 860 (Fla. 2021), and it steers clear of the ruling in *Haver*. The SAC does not seek an injunction to compel Martin County to enforce its zoning ordinance against Appellee SA Recycling. Rather it seeks declaratory judgments with regard to *ultra vires*, void acts of county staff which effected an amendment to the county's zoning ordinance permitting a noxious use in a zoning district where, according to the plain text of the ordinance, it was not permitted. The SAC does not contain a claim or request for relief directing or compelling Martin County to do any affirmative or negative act. If the *ultra vires* acts are voided, the ordinances themselves will be unchanged. Only the proper text, interpretation, and application of the ordinances will be established.

It is critical to note that the SAC alleges, and is based on, two independent *ultra vires* acts by County staff that occurred in a specific chronological order. First, with neither authority under the zoning ordinance to make a similar use interpretation to add a use not expressly listed in the ordinance, nor to amend the zoning ordinance themselves, two County staff added scrap metal salvage

yard (or scrap metal recycling yard) to the permitted uses in the M-2 zoning district. (R. 473 (§§ 42-44)). After they did this, they used that addition of the scrap metal salvage yard use shown in the photographs in the SAC as a permitted use in the M-2 zoning district, in a Stipulation and Agreed Final Order that was signed, again with no authority or right to amend an ordinance, by a code enforcement special magistrate under contract with the county. (R. 473 (§ 45), 475-477 (§§ 56-59)). Each action amended the county zoning ordinance without an act of the Board of County Commissioners, and without following the ordinance adoption procedures of the statutes. Both actions are *independently* contested in the SAC, each on the basis that the individual's acts were *ultra vires* and void. The claims in the SAC do not contest the ability of the county to prosecute or not prosecute violations, or the ability of the county to settle code enforcement prosecutions. Rather, they contest the amendment to the zoning ordinance that added scrap metal salvage yard to the list of permitted uses in the M-2 zoning district. Appellants are not challenging a decision not to prosecute Appellee SA Recycling for violating the zoning ordinance. They have set forth their claims in the

SAC to challenge the *ultra vires* addition of its scrap metal salvage yard use to the list of permitted uses.

Appellants' case has direct support in *Chung v. Sarasota County*, 686 So. 2d 1358 (Fla. 2d DCA 1996), and *Braden Woods Homeowners Association, Inc. v. Mavard Trading, Ltd.*, 277 So.3d 664, 673 (Fla. 2d DCA 2019).

Chung brought an action against Sarasota County challenging the county's denial of his rezoning petition. The parties entered into a settlement agreement that was entered by the court as a stipulated final judgment, wherein the county agreed to rezone Chung's property. A third party intervened in the case and contested the settlement agreement and stipulated final judgment as improper, *ultra vires*, contract zoning. The trial court vacated the final judgment. The District Court of Appeal rejected the argument that the trial court erred in vacating the final judgment because counties have authority to enter into contracts to settle litigation. *Chung*, 686 So. 2d at 1359. It ruled that both the stipulation and the stipulated final judgment were improper because they constituted contract zoning, which contracts are "*ultra vires* and all proceedings to effectuate it are *coram non judice* and utterly void." *Id.* (quoting from

E.C. Yokley, 4 *Zoning Law & Practice* § 25-11, at 321 (4th ed. 1979). Accordingly, the Court affirmed the vacatur. A county's authority to prosecute, defend, or settle litigation does not insulate an *ultra vires* act from challenge.

Braden Woods also proves that this court has subject matter jurisdiction over Plaintiffs' case. In *Braden Woods*, the plaintiffs sued under the Declaratory Judgment Statute to declare the county planning director's approval of an emergency room use on property zoned planned unit development *ultra vires* and void. *Id.* at 667. The planned development zoning district permitted clinics but not hospitals. *Id.* at 668. As in this case, the planning director contended he made the decision on similar use grounds. *Id.* The defendants moved to dismiss based on lack of subject matter jurisdiction due to failure to exhaust administrative remedies and failure to seek review by certiorari, *id.* at 669, and the trial court granted the motion. *Id.* The District Court of Appeal reversed. The Court ruled that the trial court had jurisdiction, and that the plaintiffs declaratory judgment was proper. Additionally, the Court ruled that the plaintiffs did not have to seek administrative remedies or pursue certiorari because the plaintiffs' action centered on the planning director's alleged *ultra*

vires acts. *Id.* at 675. The Court further found that the planning director “did not have authority” to make the decision he made, *id.* at 674, since “[t]he LDC clearly did not allow him to find a use that was not expressly listed for a planned development district to be similar to another permitted use so as to allow the unlisted use.” *Id.* at 675. Moreover, the court found that the director “had no authority to administratively change the PSP permitted use from retail to an FSER, or something that he determined was similar to an urgent care clinic.” *Id.*

This, of course, is precisely the same as what the Appellants have alleged and claimed in the SAC. Indeed, the Second Amended Complaint lays out in great detail the zoning district regulations demonstrating that the scrap metal salvage yard use on the subject property is not a permitted use, Schilling’s and Storey’s about-face “similar use” addition of scrap metal salvage yard (or “scrap metal recycling yard”) to the list of permitted uses in the M-2 zoning district, and the fact that there is no provision in law that authorizes Schilling, Storey, or the magistrate to engage in or make a “similar use” decision. (Second Amended Complaint, ¶¶ 29-34, 35-41, 42-45, 46-60). Therefore, according to *Braden Woods*, the trial court clearly

has jurisdiction for Appellants' claims. *See also Corona Properties of Florida v. Monroe County*, 485 So. 2d 1314 (Fla. 3d DCA 1986) (affirming a declaratory judgment declaring a building permit issued by the county's zoning official void *ab initio* because the zoning official had no authority to make a vested rights determination or to exempt a property from the terms of the county's zoning ordinance).

Count III of the SAC is for an injunction against Appellee, SA Recycling based on nuisance. *Haver* holds, at its broadest, that there is no claim against a local government for an injunction to take code enforcement action against a third party and enforce its ordinances. *Haver*, 330 So. 3d at 886. The claim does not seek any affirmative relief against Appellee Martin County, and therefore does not conflict with *Haver*.

In sum, if the trial court dismissed the SAC with prejudice because Appellee County has un-challengeable discretion to pursue or settle code enforcement matters, the court was incorrect and such decision must be reversed.

IX. THE TRIAL COURT'S ORDER SHOULD BE REVERSED BECAUSE THE COURT DID NOT AFFORD THE APPELLANTS AN OPPORTUNITY TO RE-PLEAD OR AMEND THEIR COMPLAINT.

The trial court's order dismissed the case with prejudice, without affording the Appellants an opportunity to amend their complaint to address any perceived deficiencies in stating standing, or the County's claims of mootness and exhaustion, or Appellants' showing of the lawfully correct interpretation of the ordinances. This was a reversible error. *See e.g., Kirkland By and Through Kirkland v. State Department of Health and Rehabilitative Services*, 424 So. 2d 925 (Fla. 1st DCA 1983); *Miller v. Greene*, 104 So. 2d 457 (Fla. 1958).

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that this Court reverse the order of the trial court dismissing their action with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed on the Florida Courts E-Portal and furnished this 14th day of March 2024, via email upon:

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**CERTIFICATE OF COMPLIANCE
FOR COMPUTER-GENERATED BRIEFS**

I certify that the document complies with the applicable font, line spacing, and word count limit requirements of Rule 9.045. This brief is in Bookman Old Style 14-point font and contains 12,280 words.

/s/ Gary K. Oldehoff
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