IN THE SUPERIOR COURT OF MCINTOSH COUNTY
STATE OF GEORGIA

Georgette "Sharron" Grovner, Marvin "Kent" Grovner Sr., Lula B. Walker, Francine Bailey, Mary Bailey, Merden Hall, Florence Hall, Yvonne Grovner, and Ire Gene Grovner Sr.;

Plaintiffs,

v.

McIntosh County, Georgia,

Defendant.

Civil Action No. SUV2024000058

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

COME NOW GEORGETTE "SHARRON" GROVNER, MARVIN "KENT" GROVNER SR., LULA B. WALKER, FRANCINE BAILEY, MARY BAILEY, MERDEN HALL, FLORENCE HALL, YVONNE GROVNER, AND IRE GENE GROVNER SR. (collectively, "Plaintiffs"), by and through their attorneys, and timely file this Response in Opposition to the Motion to Dismiss filed by Defendant McIntosh County, Georgia on July 12, 2024.

I. Relevant Facts and Procedural History

This case challenges an unlawful zoning amendment that threatens Georgia's historic Hogg Hummock district and community on Sapelo Island.[1] Hogg Hummock, which is listed on the National Register of Historic Places, is the last intact Gullah-Geechee community in the Sea Islands of Georgia. Amended Compl. ¶¶ 25, 30. Its residents include direct descendants of enslaved

[1] Plaintiffs herein refer to this historic district as "Hogg Hummock" (instead of "Hog Hammock") according to its ancestral name and meaning. *See* Amended Compl. ¶ 2 n.1.

people who were brought to Sapelo Island from West Africa in 1802 and, due to the Island's isolation, retained many attributes of their African language, culture, and traditions. Amended Compl. ¶¶ 25–26. Several Plaintiffs have held their land in their family for generations and, in turn, plan on passing it on to their children. Amended Compl. ¶ 44.

Following meetings on September 7, 11, and 12, 2023, the McIntosh County Board of Commissioners passed amendments to its zoning ordinance, formerly Section 16 to Appendix C of McIntosh County's Zoning Ordinance. Amended Compl. ¶¶ 31, 74–125. The new provision regulating Hogg Hummock, now numbered Section 219, changes the permissible land uses in Georgia's historic Hogg Hummock community including, among other things, increasing the maximum square footage per home and revising the purpose and intent of the ordinance. Amended Compl. ¶¶ 106, 116–117. Along with the text of Section 219, the Board of Commissioners also changed Table 2.1, which sets forth permissible land uses in Hogg Hummock. Amended Compl. ¶¶ 83–84, 95. Plaintiffs collectively refer to the changes made to Section 219 and Table 2.1 and adopted by the County on September 12, 2023, as "the Amendments."[2]

On October 12, 2023, thirty days after the Amendments passed, Plaintiffs appealed by filing a Complaint for Declaratory Judgment, Injunctive Relief, and Equitable Relief against McIntosh County and the five individual Commissioners of the McIntosh County Board of Commissioners (the "Original Action"). Amended Compl. ¶ 18. On November 20, 2023, Defendant filed a motion to dismiss the Original Action on the basis that Article 1, Section 2, Paragraph V of the Georgia Constitution required Plaintiffs to sue only McIntosh County. On

[2] The County reordered the Zoning Ordinance in January 2024, and Table 2.1 is now located within Section 221 of the Zoning Ordinance. *See* Amended Compl. ¶ 83 n.2.

March 12, 2024, the Court dismissed the Original Action without prejudice on this basis without reaching the merits of Plaintiffs' claims. Amended Compl. ¶ 20.

On May 24, 2024, just under three months after the Original Action's dismissal, Plaintiffs filed a Renewed Complaint (the "Renewed Action") pursuant to Georgia's renewal statute, O.C.G.A. § 9-2-61, correcting this procedural error by naming only McIntosh County as a Defendant as required by Article 1, Section 2, Paragraph V of the Georgia Constitution. The Renewed Action sought a declaratory judgment pursuant to O.C.G.A. § 9-4-1, *et seq.*, that the Amendments and the process by which they were enacted violated 1) the Georgia Zoning Procedures Law; 2) the Open Meetings Act; 3) substantive and procedural Due Process under Georgia's Constitution; and 4) equal protection under the Fourteenth Amendment to the United States and Georgia constitutions. The Renewed Action further prayed that the Court issue an injunction prohibiting enforcement of the Amendments after granting declaratory judgment in favor of the Plaintiffs.

Defendant McIntosh County now moves to dismiss the Renewed Action on the grounds that: 1) Plaintiffs failed to state a claim for declaratory relief for failing to allege a justiciable controversy; 2) the Court lacks jurisdiction over Plaintiffs' Zoning Procedures Law claim because it was untimely; and 3) Plaintiffs' Open Meetings Act claim was also untimely. Plaintiffs filed an Amended Complaint ("Amended Complaint") on August 12, 2024.[3] They now submit this Response in Opposition to Defendant's Motion to Dismiss. For the following reasons, this Court should deny Defendant's Motion to Dismiss in full.

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[3] Amendment of a renewal complaint is proper pursuant to O.C.G.A. §§ 9-2-61 and 9-11-15(c). *See Strikland v. Geico General Insurance Co*., 358 Ga. App. 158, 160 (2021) (amendment of renewal complaint was proper where "amended renewal complaint arose out of the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original renewal complaint" (internal citations omitted)).

II. Standard of Review

A. Dismissal Standard

"In deciding a motion to dismiss, the court must construe all pleadings most favorably to the party who filed them and must resolve all doubts about such pleadings in the filing party's favor." *Bynum v. Horizon Staffing*, 266 Ga. App. 337, 338 (2004). A motion to dismiss for failure to state a claim should be denied "if, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant ... [.]" *Sherman v. Fulton Cnty. Bd. of Assessors*, 288 Ga. 88, 90 (2010) (quoting *Anderson v. Flake*, 267 Ga. 498, 501 (1997)). Stated differently, such a motion "should not be sustained unless . . . the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *Mooney v. Mooney*, 235 Ga. App. 117, 117 (1998) (emphasis added).

B. Renewal Standard

Under Georgia law, a plaintiff has a liberal right to renew an action. O.C.G.A. § 9-2-61. Section 9-2-61(a) provides that:

> When any case has been commenced in either a state or federal court within the applicable statute of limitations and the plaintiff discontinues or dismisses the same, it may be recommenced in a court of this state or in a federal court either within the original applicable period of limitations or within six months after the discontinuance or dismissal, whichever is later . . . [.]

(emphasis added). Additionally, Section 9-2-61(c) provides that:

> The provisions of subsection (a) of this Code section granting a privilege of renewal shall apply if an action is discontinued or dismissed without prejudice for lack of subject matter jurisdiction in either a court of this state or a federal court in this state.

(emphasis added). "The renewal statute is remedial in nature; it is construed liberally to allow renewal where a suit is disposed of on any ground not affecting its merits." *Hobbs v. Arthur*, 264 Ga. 359, 360 (1994).

III. Argument and Authority

A. An Actual and Justiciable Controversy Exists under OCGA § 9-4-2(a).

Plaintiffs have alleged an actual and justiciable controversy under Georgia law. The Declaratory Judgment Act "settle[s] and afford[s] relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and this chapter is to be liberally construed and administered." O.C.G.A. § 9-4-1. "In cases of actual controversy, the respective superior courts of this state . . . shall have power, . . . to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed . . . [.]" O.C.G.A. § 9-4-2(a). For an actual controversy to exist, "[t]he Declaratory Judgment Act merely requires the presence in the declaratory action of a party with an interest in the controversy adverse to that of the petitioner." *RTS Landfill, Inc. v. Appalachian Waste Sys., LLC Inc.*, 267 Ga. App. 56, 63 (2004) (internal citations omitted).

Georgia's Declaratory Judgment Act further "broadens the scope of the Declaratory Judgment Act beyond actual controversies to include justiciable controversies" under O.C.G.A. § 9-4-2(b). *Baker v. City of Marietta*, 271 Ga. 210, 214 (1999) (internal citations and quotation marks omitted). Section § 9-4-2(b) permits courts to issue a declaratory judgment where there is a justiciable controversy and "it appears to the court that the ends of justice require that the declaration should be made." O.C.G.A. § 9-4-2(b). A justiciable controversy exists and "[a] declaratory judgment is authorized when there are circumstances showing [a] necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with

regard to the propriety of some future act or conduct, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest . . . [.]" *Morgan v. Guaranty Nat. Cos.*, 268 Ga. 343, 344 (1997) (internal citations and quotation marks omitted).

Defendant incorrectly asserts that Plaintiffs solely challenge the County's past conduct in passing the Amendments. Def. Br. at 8. That is simply wrong. Plaintiffs have alleged an actual and justiciable controversy under Georgia law. First, Plaintiffs have an interest in this Court declaring the Amendments unconstitutional and invalid to protect and preserve their existing land rights and the character, tradition, and culture of Hogg Hummock. Plaintiffs' interest is adverse to the County's interest in seeing the Amendments upheld and to the County's interest in continuing to issue building permits with damaging impacts on Plaintiffs and their rights. As Defendant itself points out, the "uncertainty about the constitutionality of [a zoning] condition is a continuing one." *See* Def. Br. at 8 n.2 (quoting *Kammerer Real Est. Holdings, LLC v. Forsyth Cnty. Bd. of Commissioners*, 302 Ga. 284, 285 n.2 (2017)).

Second, Plaintiffs have alleged a need for clarity with respect to their current and future land use rights under the Amendments. "Under the present law you take a step in the dark then turn on the light to see if you stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step." *Shippen v. Folsom*, 200 Ga. 58, 67–68 (1945). Plaintiffs seek to do just that by "turn[ing] on the light and then tak[ing] the step" regarding their rights under the Amendments. *Id.* They seek clarification on the "propriety of some future act or conduct, . . . which if taken without direction might reasonably jeopardize [Plaintiffs'] interest[s]." *DeKalb County. v. City of Chamblee*, 369 Ga. App. 503, 505 (2023) (internal citations omitted).

Uncertainty and insecurity are at the heart of both the Original Action and the Renewed Action. Plaintiffs clearly face uncertainty as to their own future conduct with the County's

adoption of the Amendments. The Amendments regulate every aspect of how Plaintiffs can use their land in Hogg Hummock, and they deviate significantly from land uses that have been permitted by the County in the past and from what is currently reflected in the County's municipal code.[4] Plaintiffs do not know what land uses are permitted, prohibited, or require an application for a special use permit; they do not know what impact larger structures and lots will have on the character of the historical Hogg Hummock district or their community; and they do not know if they will be able to generate sufficient income to retain their ancestral land in the face of increasing and unbearable property values and taxes. *See, e.g.*, Amended Compl. ¶¶ 83, 84, 95, 96 (describing in detail the changes made by the County to the allowed land uses in Hogg Hummock).

Plaintiffs do not know, broadly, whether the Amendments will destroy or damage the tourism industry Sapelo attracts due to its unique ecological charm and the rich culture and history of Hogg Hummock and its Gullah-Geechee community. They are also uncertain whether they can continue to engage in cultural and personal uses of their land that are meaningful and necessary to their existing lifestyles. Plaintiffs desire to continue and/or expand their existing businesses,[5] to open gift shops, to host Gullah-Geechee basketweaving classes for tourists, to take tourists crabbing and fishing, and to expand their tourism businesses. *See, e.g.,* Amended Compl. ¶¶ 35–45, 96; *see also* Aff. Francine Bailey (discussing plans for a crabbing and fishing business from

[4]As set forth in the Amended Complaint at ¶ 94 n.3, the land use designations in Table 2.1 that are viewable on the County's Zoning Ordinance website differ from the amendments presented to the public and discussed by the County in September 2023, causing even greater uncertainty as to Plaintiffs' rights under the zoning amendments. *See also* https://library.municode.com/ga/mcintosh_county/codes/code_of_ordinances?nodeId=PTIICOGEOR_APXCZOOR_ART2ESLAUSDIINLAUSDIBO_S221SUTALLLAUSZODI.

[5] For example, Plaintiff Georgette "Sharron" Grovner currently engages in tourism and catering for groups visiting Sapelo Island. *See* Amended Compl. ¶ 35. Plaintiff Marvin "Kent" Grovner Sr. is Ms. Sharron's husband and assists her with her businesses. Amended Compl. ¶ 36. Plaintiff Lula B. Walker owns and operates Lula's Kitchen. Amended Compl. ¶ 37.

her home); Aff. of Yvonne Grovner (discussing her tourism business and plans for cultural basketweaving classes). The Amendments create uncertainty as to whether Plaintiffs can continue operating their businesses or start the new ones they plan to engage in.[6]

The uncertainties created by the Amendments are concrete and of critical importance to Plaintiffs, especially where they concern the ability of Plaintiffs to generate additional income that will be necessary to offset increased property taxes resulting from the increased building sizes permitted by the Amendments. *See, e.g.,* Amended Compl. ¶ 96. The uncertainty of Plaintiffs' rights and property in light of the Amendments make the legality of such actions unclear. The Amended Complaint demonstrates precisely why the Renewed Action brings a justiciable issue. As one Gullah-Geechee community member stated at the County's September 7, 2023, meeting, "We are just making sure we get a clear understanding so we can follow the rules." Amended Compl. ¶ 84. Plaintiffs need to clarify these land uses before they take "a step in the dark." *Shippen* 200 Ga. at 67–68; *see also A & H Sod, Inc. v. Johnson*, 279 Ga. App. 252, 253, (2006) ("The object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated." (emphasis added) (internal citations omitted)).

Plaintiffs' confusion was created in large part by Defendant's rushed and chaotic attempts to push the Amendments through without meaningfully involving Plaintiffs and the wider Gullah-Geechee community of Hogg Hummock. Plaintiffs' uncertainty surrounding the Amendments is further compounded by the County's lack of notice to Plaintiffs and the Gullah-Geechee

[6] For example, at its September 7, 2023, business meeting, the Planning and Zoning Commission recommended several changes to the allowed land uses for Hogg Hummock, including scenic and sightseeing transportation companies (tours), Airbnb and VRBO bed and breakfast establishments, caterers, temporary outdoor sales events, and seasonal outdoor events. Amended Compl. ¶ 83. However, some of these and other land use designations were subsequently amended at the September 11, 2023, workshop. Amended Compl. ¶ 95 & n.3.

community of the proposed changes it planned to make; the County's ad hoc changes to the Amendments at the September 7 and 11 meetings; and the fact that the zoning ordinance currently available on the County's municipal code does not reflect the proposed changes presented to the public at any of the meetings. *See* Amended Compl. ¶¶ 74–125.

Having received no "clear understanding" from the County about the allowable land uses in Hogg Hummock so that they "can follow the rules," *see* Amended Compl. ¶ 84, the Plaintiffs now seek a declaratory judgment from this Court about their right to use their land and to continue to live in a historical district that retains the integrity of its character. *See Shippen*, 200 Ga. at 67–68. Under Georgia law, this is exactly the purpose of a declaratory action. This Court can and should issue a declaratory judgment "to permit determination of a controversy before obligations are repudiated or rights are violated." *A & H Sod, Inc.*, 279 Ga. App. at 253 (emphasis added) (internal citations omitted). Plaintiffs need to clarify their rights under the Amendments before taking "a step in the dark," *Shippen* 200 Ga. at 67–68, and "the ends of justice require that the declaration should be made." O.C.G.A. § 9-4-2(b). For these reasons, the Court should find that Plaintiffs have alleged an actual and justiciable controversy and deny Defendant's Motion to Dismiss.

B. Plaintiffs Timely Filed Their Zoning Procedures Law Claim.

On September 12, 2023, the McIntosh County Board of Commissioners passed the Amendments, altering twenty-year-old zoning regulations put in place to protect the Gullah-Geechee residents of Hogg Hummock. On October 12, 2023, thirty days later, Plaintiffs filed an appeal containing a Zoning Procedures Law claim (Count 1) through the Original Action within the 30-day statutory period to challenge zoning decisions. *See* O.C.G.A. § 36-66-5.1; Amended Compl. ¶¶ 137–64. On March 12, 2024, the Court dismissed the Original Action without prejudice

based on a lack of subject matter jurisdiction, without reaching the merits of Plaintiffs' claims. On May 24, 2024, less than three months later, Plaintiffs filed the Renewed Action, well within the statutory period to file a renewed action. *See* O.C.G.A § 9-2-61.

Georgia courts liberally allow renewal complaints. Georgia's renewal statute permits a cause to be recommenced "in effect de novo, except that the statute of limitation does not run, provided it is brought within six months from the time of the dismissal." *Baskin v. Georgia Dep't of Corr.*, 272 Ga. App. 355, 356 (2005). That is exactly what the Renewed Action is—it renews the Original Action properly brought within the allowable statute of limitations and fixes the subject matter jurisdiction defect that led to the initial dismissal because it was filed within six months of the dismissal. The Renewed Action is therefore entirely proper. Yet Defendant completely ignores well-settled law to argue otherwise, contending that Plaintiffs did not file their zoning procedure claim within thirty days of the zoning decision based on the Renewed Action's filing date. Defendant's argument ignores that the renewal statute tethers the Renewed Action to the filing date of the Original Action for statute of limitations purposes and fails to use the Original Action's filing date as the operative date. Stated differently, for Plaintiffs' zoning procedure claim, the operative filing date is October 12, 2023, the date that the Original Action was filed.

Defendant mistakenly relies on *Rowell v. Parker*, 192 Ga. App. 215 (1989), to argue that Plaintiffs cannot avail themselves of the Georgia renewal statute here. This argument fails for three main reasons. First, *Rowell* concerns a since-abrogated statute, O.C.G.A. § 5-3-20(a), that is no longer the law. *Rowell* does not discuss O.C.G.A. § 36-66-5.1, the current statute governing the time period to challenge zoning decisions, so its holding does not apply. Second, renewal is in line with the new statute's goal of "ensur[ing] that the general public is afforded due process in an orderly way to petition the courts." O.C.G.A. § 36-66-5.1(a). Third, Defendant has provided no

other case law affirmatively stating that Georgia's renewal statute would not apply to O.C.G.A. § 36-66-5.1.

Indeed, Georgia law suggests the exact opposite—zoning appeals that have been dismissed, whether voluntarily or involuntarily for lack of subject matter jurisdiction, may be renewed under Georgia's renewal statute. The court in *Forsyth County v. Mommies Properties, LLC*, 359 Ga. App. 175 (2021), permitted renewal of a zoning challenge that had been dismissed without prejudice because it was renewed within the six-month period required by the renewal statute. Indeed, the Court of Appeals rejected exactly what Defendant argues here—that Plaintiffs cannot rely on the renewal statute because the underlying action was not brought within 30 days of the zoning decision. The *Forsyth* court held that the renewal statute applied to writs of certiorari to superior courts under the now-repealed O.C.G.A. § 5-4-1. Similar to O.C.G.A. § 36-66-5.1, Section § 5-4-1, required that zoning appeals to superior court commence within 30 days of the zoning decision by the County's zoning board. The language of O.C.G.A. § 5-4-1 was even stricter than the language at issue here.[7] Still, the court in *Forsyth*, applying the renewal statute liberally, allowed renewal of the Complaint. *See Forsyth Cnty.*, 359 Ga. App. at 181–83. Here, as in *Forsyth*, Plaintiffs' Original Action was dismissed without prejudice for lack of subject matter jurisdiction, and Plaintiffs properly renewed their action within the six-month period under O.C.G.A. § 9-2-61. Just as nearly identical arguments failed in *Forsyth,* Defendant's arguments must fail here, too.

[7] *Compare Forsyth Cnty.*, 359 Ga. App. at 181 (citing O.C.G.A. § 5-4-1 (mandating that "[a]ll writs of certiorari shall be applied for within 30 days after the final determination of the case in which the error is alleged to have been committed. Applications made after 30 days are not timely and shall be dismissed by the court." (emphasis added)), *with* O.C.G.A. § 36-66-5.1(b) ("All such challenges or appeals shall be brought within 30 days of the written decision of the challenged or appealed action.").

Without question, the Renewed Action timely asserts Plaintiffs' Zoning Procedures Law claim. Plaintiffs filed a timely appeal of the Amendments in the Original Action and timely renewed those claims in the Renewed Action. For these reasons, the Court should deny Defendant's Motion to Dismiss.

C. Plaintiffs Timely Filed Their Open Meetings Act Claim.

Defendant also seeks to dismiss Plaintiffs' Open Meetings Act claim as untimely, but these arguments fail for similar reasons. *See* Def. Br. at 12. The Open Meetings Act permits challenges brought "within the time allowed by law for appeal of such zoning decision." O.C.G.A. §50-14-1(b)(1)(c). As relevant here, so long as Plaintiffs' appeal of the Amendments—that is the Renewed Action—is timely, so too is Plaintiffs' Open Meeting Act Claim. *See* Amended Compl. ¶¶ 165–82 (Count 2). Because the Renewed Action is timely, as explained above, Defendant's argument lacks merit.

Just as the renewal statute applies to the 30-day filing requirement for zoning decisions under O.C.G.A. § 36-66-5.1(b), *see Hobbs*, 264 Ga. at 360; *Buckler v. DeKalb Cnty.*, 290 Ga. App. 190, 191 (2008), there is no reason it should not apply to the Open Meetings Act, too. As discussed above, the renewal statute is remedial in nature and is to be "construed liberally to allow renewal where a suit is disposed of on any ground not affecting its merits." *See Hobbs*, 264 Ga. 359 at 360; *Clark v. Newsome*, 180 Ga. 97(1935); *Cox v. Strickland*, 120 Ga. 104(7) (1904); *Atlanta K & N Ry. Co. v. Wilson*, 119 Ga. 781 (1904). As with Plaintiffs' Zoning Procedures Law claim, Defendant's position ignores the Original Action's filing date, which is improper based on the renewal statute.

Defendant cites *Tisdale v. City of Cummings*, 326 Ga. App. 19 (2014), to support the proposition that the Open Meeting Act's six-month statute of repose would absolutely bar the

Plaintiffs' Open Meetings Act claim against McIntosh County. *See* Def. Br. at 14. However, *Tisdale* is clearly distinguishable for two reasons. First, the *Tisdale* court never reached the issue as to whether the Open Meetings Act barred the plaintiff from renewing her claims under O.C.G.A. § 9-2-61, because that issue was not before the court. Second, the plaintiff in *Tisdale* undisputedly missed the statute of limitations for filing her action and asked the Court to apply the statute of repose instead.[8] The plaintiff's action was clearly beyond the jurisdiction of the superior court because it was beyond the jurisdictional 90-day limits of the O.C.G.A. § 50–14–1(b)(2).[9] Unlike in *Tisdale*, Plaintiffs here filed their Original Action within thirty days of the Defendant's zoning Amendments and therefore met O.C.G.A. § 50-14-1's 90-day statute of limitations for challenges under the Open Meetings Act.

Defendant cites no case law holding that Georgia's renewal statute bars filing renewed claims under the Open Meetings Act. Instead, Defendant cites to a series of cases interpreting statutes of repose as being an absolute bar to renewal actions—but only where claims have been brought under medical malpractice and products liability statutes. In considering Defendant's Motion to Dismiss, this Court must "resolve all doubts" in Plaintiffs' favor. *Bynum*, 266 Ga. App. at 338; *see also Mooney*, 235 Ga. App. at 117. The Court should decline to extend the reasoning in these unrelated cases where it is clearly inapplicable here.

The case that Defendant principally relies upon, *Wright v. Robinson*, 262 Ga. 844 (1993), involved Georgia's medical malpractice statute, which provided for a five-year "statute of ultimate

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[8] The *Tisdale* plaintiff did not file her initial action until 6 or 7 months after the city's challenged decision. By contrast, Plaintiffs here filed their Original Action within the mandatory thirty-day timeframe to challenge the Amendments, and their Renewed Action is tied to that date.

[9] The *Tisdale* court did not make a specific finding that the plaintiff violated the statute of repose, even though her action was filed approximately six or seven months after the city's challenged decision.

repose and abrogation," notwithstanding the two-year statute of limitation.[10] *See* Def. Br. at 13. However, this case is inapposite for two reasons, First, the medical malpractice statute of repose at issue in *Wright* contained stricter language than the Open Meetings Act, stating that, "*in no event* may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." *Id*. at 845 (emphasis in the original) (internal citation omitted). By contrast, the Open Meetings Act includes no such exacting language, suggesting that, with respect to certain events, the six-month period may not always be an absolute bar. Second, the procedural posture of the two cases is markedly different. While the *Wright* plaintiff voluntarily dismissed the case after litigation had been ongoing for more than six years and a jury had been selected, *see id*. at 844, there would be no similar prejudice to the parties here, as the parties have not even begun to engage in discovery. For these reasons, the Court should limit the *Wright* holding to the interpretation of the medical malpractice five-year statute of repose and find that it cannot be applied here to the Open Meetings Act.

Defendant also relies on *Osburn v. Goldman*, 269 Ga. App. 303 (2004) and *Simmons v. Sonyika*, 279 Ga. 378 (2005),[11] *see* Def. Br. at 13, but these cases are of limited application here for the same reasons as *Wright*. This trio of cases—*Wright*, *Osburn*, and *Simmons*—is also

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[10] While the *Tisdale* court decided that the Open Meetings Act's six-month limitation period was a statute of repose, the Open Meetings Act does not include the express "ultimate repose and abrogation" language found in Georgia's medical malpractice statute of repose.

[11] *Simmons* is also factually distinguishable from the instant case because it involved the filing of an amended complaint and whether Georgia's unrepresented estate statute could toll the medical malpractice five-year statute of repose. The *Simmons* court did not address Georgia's renewal statute because it was not at issue.

substantively distinguishable from this one because none of the cases involve the constitutional issues at stake here.[12]

Where Defendant is unable to offer case law directly on point, it offers only disingenuous public policy arguments. *See, e.g.*, Def. Br. at 12 (permitting renewal creates risks for people "otherwise desiring to take action in reliance of the zoning decision" and "hamstrings economic development and commerce"); 14–15 ("to hold otherwise would hamstring effective government in Georgia"). Defendant cannot truly believe its own arguments, as Defendant has continued unabated in issuing building permits in Hogg Hummock under the Amendments.[13] Defendant cannot have it both ways—suggesting to this Court that a jurisdictional deadline is necessary to create stability and certainty in commerce, while simultaneously relying on the newly enacted jurisdictional requirements to permit development under the very Amendments at issue in this lawsuit. Here, public policy arguments fall firmly on the side of the Gullah-Geechee community that is being harmed by the County's Amendments—not on the side of the government that failed to adhere to the Open Meetings Act in adopting these unwise and discriminatory Amendments. The Defendant's Motion to Dismiss must be denied.

IV. Conclusion

Defendant's Motion to Dismiss is a simple attempt to distract the Court from the County's glaring violations of Plaintiff's procedural and substantive rights and to delay an adjudication on

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[12] The purpose of the medical malpractice five-year statute of repose was to "eliminat[e] stale claims and stabiliz[e] medical insurance underwriting[.]" *See Love v. Whirlpool*, 264 Ga. 701, 703 (1994). The *Love* court went on to apply this same rationale in upholding the ten-year statute of repose in products liability actions, only. *See id*. No such rationale can apply to the six-month statute of repose in the Open Meetings Act because it does not involve these issues or rationales.

[13] *See* Def. Answer ¶ 122 (admitting that it has approved additional building permits in Hogg Hummock under Section 219).

the merits while the County enforces the Amendments and Plaintiffs remain uncertain of their rights. Because Defendant presents no legitimate grounds for dismissal, the parties should proceed to the merits of this case so the Court can provide Plaintiffs the clarity they want, need, and have sought for nearly a year. For these reasons, Plaintiffs respectfully request that the Court grant the parties an opportunity for oral argument, deny the Motion to Dismiss, and let the Renewed Action proceed.

Dated: August 12, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that Defendant's counsel has been served electronically with a true and correct copy of the attached Response in Opposition to Defendant's Motion to Dismiss via the Peachcourt electronic filing system, which will make automatic electronic delivery to all parties, and via electronic mail to counsel of record as follows:

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