RECEIVED

Jul 15 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge, Sr.

Appellate Case No. 2022-000020

Braden's Folly, LLC, ...Respondent,

v.

City of Folly Beach, ...Appellant.

BRIEF OF APPELLANT

Joseph C. Wilson, IV, Esquire
City Attorney, City of Folly Beach
Post Office Box 178
Folly Beach, South Carolina 29439
(843) 834-2390
joe@follybeachlaw.com

Danny C. Crowe, Esquire
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5728
danny@crowelafave.com

Attorneys for Appellant City of Folly Beach

TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 1

Standard of Review 2

Statement of Facts 3

I. BRADEN'S FOLLY'S LOT B WAS UNDEVELOPABLE UNTIL FOLLY BEACH STARTED RENOURISHING THE BEACH IN FRONT OF IT 3

II. BRADEN'S FOLLY'S LOTS HAVE ALWAYS BEEN DEEDED AND TITLED TOGETHER, GENERATE SIGNIFICANT INCOME, AND RETAIN SIGNIFICANT VALUE 7

III. BRADEN'S FOLLY LISTED THE LOTS FOR SALE ELEVEN YEARS AFTER BUILDING HOUSES ON BOTH LOTS BUT IGNORED ALL OFFERS FOR THE HOUSES, INCLUDING A FULL PRICE OFFER FOR BOTH HOUSES 9

IV. BRADEN'S FOLLY'S LOTS ARE UNDERSIZED AND NONCONFORMING, BUT THE DWELLINGS ARE "GRANDFATHERED IN" 11

V. LOT B AND THE OTHER SUPER-BEACHFRONT LOTS ARE A PUBLIC NUISANCE AND A THREAT TO CONTINUED RENOURISHMENT 13

VI. SUPER-BEACHFRONT HOMES AND THE SEAWALLS REQUIRED TO PROTECT THOSE HOMES ARE BAD FOR THE BEACH AND THE ISLAND AS A WHOLE .. 15

VII. THE MERGER ORDINANCE SERVES IMPORTANT GOVERNMENT INTERESTS 16

Arguments 18

I. SUMMARY OF ARGUMENT 18

II. GENERAL PRINCIPLES OF REGULATORY TAKING 23

III. RESTRICTIONS ON THE SALE OF MERGED LOTS ARE NOT REGULATORY TAKINGS 27

IV. BRADEN'S FOLLY'S ACQUISITION AND DEVELOPMENT OF THE PARCELS PRIOR TO PASSAGE OF THE MERGER ORDINANCE DOES NOT DISTINGUISH THIS MATTER FROM *MURR* AND *QUINN* 30

V. FOLLY BEACH HAS NOT INTERFERED WITH BRADEN'S FOLLY'S INVESTMENT-BACKED EXPECTATIONS 33

VI. BRADEN'S FOLLY'S MERGED PROPERTY RETAINS SIGNIFICANT VALUE 40

VII. FOLLY BEACH'S MERGER ORDINANCE DOES NOT RESEMBLE A PHYSICAL INVASION OF THE PROPERTY 42

VIII. THE PUBLIC BENEFIT OF THE MERGER ORDINANCE FAR OUTWEIGHS ANY BURDEN PLACED ON BRADEN'S FOLLY 44

IX. THE MERGER ORDINANCE APPLIES TO A BROAD CROSS SECTION OF LOTS 46

Conclusion 47

TABLE OF AUTHORITIES

CASES

Agins v. City of Tiburon,
447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980).....21, 42

Andrus v. Allard,
444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).....18, 19, 21, 27, 28, 30, 33, 34, 40

Appolo Fuels, Inc. v. United States,
381 F.3d 1338 (Fed.Cir. 2004).....32

Beard v. South Carolina Coastal Council,
304 S.C. 205, 403 S.E.2d 620 (1991) 26, 27

Byrd v. City of Hartsville,
365 S.C. 650, 620 S.E.2d 76 (2005) 34

Carolina Chloride, Inc. v. Richland Cty.,
394 S.C. 154, 714 S.E.2d 869 (2011) 19, 29, 30, 34, 41

Chicago, B. & Q.R. Co. v. Chicago,
166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).....23, 24

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).....47

Clayland Farm Enterprises, LLC v. Talbot Cty., Maryland,
987 F.3d 346 (4th Cir. 2021) 42

Columbia Venture, LLC v. Richland Cty.,
413 S.C. 423, 776 S.E.2d 900 (2015) 32, 46

Dunes West Golf Club, LLC v. Town of Mount Pleasant,
401 S.C. 280, 737 S.E.2d 601 (2013) 24, 25, 31, 38, 43

Esposito v. S.C. Coastal Council,
939 F.2d 165 (4th Cir. 1991) 23, 27, 30, 33, 37, 45

Ex Parte Brown,
393 S.C. 214, 711 S.E.2d 899 (2011) 3

Goldblatt v. Town of Hempstead, N.Y.,
369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).....41

Hadacheck v. Sebastian,
239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) 42

Hardin v. S.C. Dep't of Transp.,
371 S.C. 598, 641 S.E.2d 437 (2007) 24

Henry v. Jefferson Cty. Comm'n,
637 F.3d 269 (4th Cir. 2011) 43

Iowa Coal Mining Co. v. Monroe County,
257 F.3d 846 (8th Cir. 2001) 42

Keystone Bituminous Coal Assn. v. DeBenedictis,
480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) 25, 41

Kiriakides v. Sch. Dist. of Greenville Cty.,
382 S.C. 8, 675 S.E.2d 439 (2009) 25

Kneer v. Zoning Bd. of Appeals of Norfolk,
93 Mass. App. Ct. 548, 107 N.E.3d 497 (2018) 13

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) 24, 43, 44, 46

Lucas v. South Carolina Coastal Council,
505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) 22, 23, 24

McNulty v. Town of Indialantic,
727 F.Supp. 604 (M.D. Fla. 1989) 27, 28, 30

Murr v. Wisconsin,
137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017) ..... *passim*

Palazzolo v. Rhode Island,
533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) 25, 30, 32

Penn Central Transp. Co. v. New York City,
438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) ..... *passim*

Pennell v. City of San Jose,
485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988) 46

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) 24, 41

Pulte Home Corp. v. Montgomery County,
909 F.3d 685 (4th Cir. 2018) 42

Quinn v. Bd. of Cty. Commissioners for Queen Anne's Cty., Maryland,
862 F.3d 433 (4th Cir. 2017) ..... *passim*

Ruckelshaus v. Monsanto Co.,
467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984).....38

Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach,
345 S.C. 418, 548 S.E.2d 595 (2001) 26, 43

Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,
535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002).....24, 25, 41

Tenn. Scrap Recyclers Ass'n v. Bredesen,
556 F.3d 442 (6th Cir. 2009) 42

Turner v. Milliman,
92 S.C. 116, 708 S.E.2d 766 (2011) 2, 3

Vill. of Euclid v. Ambler Realty Co.,
272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).....42

Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals,
342 S.C. 480, 536 S.E.2d 892 (Ct.App. 2000).....38

Williamson Planning Comm'n v. Hamilton Bank,
473 U.S. 172, 105 S.Ct. 3108, 3123, 87 L.Ed.2d 126 (1985).....33, 34

Woodale P'ship v. City of Charleston,
No. 2:07-CV-2025-MBS, 2010 WL 11661386 (D.S.C. Sept. 17, 2010).....34

Woods v. State,
314 S.C. 501, 431 S.E.2d 260 (Ct.App.1993).....

STATUTES AND RULES

Folly Beach Code of Ordinances, § 151.35 17

Folly Beach Code of Ordinances, § 165.01-02.....11

Folly Beach Code of Ordinances, Chapter 168 20

Folly Beach Code of Ordinances, § 168.03 12

Folly Beach Code of Ordinances, § 168.03-05 20

Folly Beach Code of Ordinances, § 168.04-01 ..... 11, 47

South Carolina Code § 27-50-40 10

Wis. Admin. Code NR § 118.08(4)(a)(2) 31

Rule 56, SCRP 2

OTHER AUTHORITIES

2 Am. Law. Zoning, *Substandard Lots*, § 12:12 (5th ed.) 12

Annotation, *Construction and Application of Zoning Laws Setting Minimum Lot Size Requirements*, 2 A.L.R.5th 553 (Originally published in 1992) 12

3 Rathkopf's The Law of Zoning and Planning, *Merger and subdivision requirements*, § 49:13 (4th ed.) 12

Matthew 7:26-27 (New International Version) 22

STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN FINDING THAT THE RESTRICTION ON THE SALE OF MERGED LOTS AMOUNTS TO A REGULATORY TAKING?

II. DID THE CIRCUIT COURT ERR IN FINDING THAT THE DECISIONS IN *MURR* AND *QUINN* DO NOT APPLY TO MERGED LOTS THAT WERE ACQUIRED OR DEVELOPED PRIOR TO ADOPTION OF THE MERGER ORDINANCE?

III. DID THE CIRCUIT COURT ERR IN FINDING THAT THE MERGER ORDINANCE INTERFERED WITH BRADEN'S FOLLY'S INVESTMENT-BACKED EXPECTATIONS EVEN THOUGH THE MERGER ORDINANCE DOES NOT PREVENT THE CURRENT USE OF THE PARCEL AS A RENTAL PROPERTY?

IV. DID THE CIRCUIT COURT ERR IN FINDING THAT BRADEN'S FOLLY'S ECONOMIC LOSS SUPPORTED A TAKING WHEN THE PARCEL RETAINED SIGNIFICANT VALUE?

V. DID THE CIRCUIT COURT APPLY THE WRONG LEGAL STANDARD IN ANALYZING THE CHARACTER OF THE GOVERNMENT ACTION?

VI. DID THE CIRCUIT COURT ERR IN FINDING THAT THE BURDEN ON BRADEN'S FOLLY OUTWEIGHS THE BENEFITS OF THE MERGER ORDINANCE?

IX. DID THE CIRCUIT COURT ERR IN FINDING THAT BRADEN'S FOLLY WAS "SINGLED OUT" BY THE MERGER ORDINANCE?

STATEMENT OF THE CASE

On December 23, 2019, Plaintiff-Respondent Braden's Folly, LLC, brought this action against Defendant-Appellant City of Folly Beach alleging an inverse condemnation, namely that Folly Beach's enforcement of a merger ordinance had created a compensable taking of two lots owned by Braden's Folly and located within the City. Complaint, R. pp. 26-28. The Complaint also requested a Declaratory Judgment that the City's merger ordinance was unconstitutional and a taking without just compensation, Complaint, R. pp. 25-26, and also alleged a tort claim for Interference with a Prospective Business Advantage, Complaint, R. pp. 28-29, which was

subsequently withdrawn. Plaintiff's Reply Memorandum, R. p. 664. Folly Beach filed its Answer on February 1, 2020, Answer, R. pp. 60-65, and an Amended Answer on July 23, 2021 adding a defense of failure to mitigate. Amended Answer, R. pp. 66-71.

On March 5, 2021, Braden's Folly filed a Motion for Partial Summary Judgment on the issue of whether a regulatory taking had occurred. Braden's Folly Motion for Partial Summary Judgment ("Braden's Folly Motion"). On May 5, 2021, Folly Beach filed a Motion for Summary Judgment and Memorandum ("Folly Beach's Motion"). The parties filed several memoranda on the pending cross-motions for summary judgment.

On August 30, 2021, the parties' cross-motions for summary judgment were heard by The Honorable Roger M. Young, Sr. in the Charleston County Circuit Court. Transcript, R. pp. 72-108. On November 17, 2021, Judge Young filed an Order Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Motion for Summary Judgment. Order, R. pp. 3-17.

On November 27, 2021, Folly Beach filed a Motion to Amend the Judgment, R. pp. 981-1011. On December 7, 2021, Judge Young filed an Order Denying Motion to Reconsider Pursuant to Rule 52(b) and 59(e). Order Denying Motion to Reconsider, R. pp. 18-20.

On January 5, 2021, Folly Beach timely filed its Notice of Appeal, R. pp. 1012-1034.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 708 S.E.2d 766, 769 (2011). "Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id*. at 769. "When determining if any triable issues

of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.* (citation omitted).

Determining whether a compensable taking has occurred is a question of law. *See, e.g., Ex Parte Brown,* 393 S.C. 214, 711 S.E.2d 899, 904 (2011).

STATEMENT OF FACTS

I. BRADEN'S FOLLY'S LOT B WAS UNDEVELOPABLE UNTIL FOLLY BEACH STARTED RENOURISHING THE BEACH IN FRONT OF IT.

Braden's Folly owns two adjacent lots on Folly Beach. 1681 East Ashley Avenue, also known as Lot 2166, 1681-A East Ashley Avenue, or simply "Lot A," is located directly adjacent to and seaward of East Ashley Avenue. Wilder Updated Survey, R. p. 554; Title Search, R. pp. 374-375. Lot A is developed and part of the traditional line of beachfront houses on Folly Beach that have been developed for decades.

The second lot sits between Lot A and the ocean and was not developed until 2006. Wilder Updated Survey, R. p. 554. It is referred to as Lot 2399, the Benket Drive lot, 1681-B East Ashley Avenue, or simply "Lot B." Title Search, R. pp. 374-375; Original 1951 Plat, Exhibit No. 9[1] to Affidavit of Dr. Nicole Elko,[2] R. p. 423. Lot B and the other lots adjacent to Benket Drive have come to be referred to as "super-beachfront" lots because they are an additional row of houses located in front of the long-standing beachfront houses. Aaron Pope[3] Affidavit, Paragraph 17, R. pp. 383-384.

Lot B and the other super-beachfront lots were on active beach and undeveloped for most

[1] Incorrectly marked as "Exhibit No. 8."
[2] Dr. Elko is Folly Beach's long-standing beach and renourishment consultant and expert.
[3] Aaron Pope is currently the Folly Beach City Administrator, and was the City's Zoning Administrator since 2005.

of their existence. 1994 and 2001 Overhead Photos, R. pp. 425-426.[4] Lot B had no value as an independent lot prior to renourishment. The history of how Lot B came to be developable following government-funded renourishment of the beach is important to understanding the expectations Braden's Folly had for the development of the lots, which historically supported a single house.

Braden's Folly's lots were platted in 1951 when the beach in the area was accretional. Elko Affidavit, Paragraphs 26-27, R. pp. 403-404. The original 1951 plat shows that Lot B was located on Benket Drive and that even more lots were platted seaward of Benket Drive. Original 1951 Plat, R. p. 423.

Unfortunately, the construction of the Charleston harbor jetties in the 1890's has caused long-term, chronic beachfront erosion on the east end of Folly Beach. Elko Affidavit, Paragraph 4, R. p. 396. The jetties cut off the natural accretion of sand that Folly Beach would expect. Sand that would normally travel southward along the coast is trapped by the jetties resulting in severe erosion of the east end of Folly Beach where Braden's Folly's lots are located.

As a result of this erosion, Lot B and all of the other lots on Benket Drive were lost to beach erosion and were underwater. Elko Affidavit, Paragraph 27, R. p. 404. Benket Drive was washed away entirely many decades ago. Remnants of Benket Drive, R. p. 424.

None of the Benket Drive lots were ever developed. Elko Affidavit, Paragraph 26, R. pp. 403-404; Pope Affidavit, Paragraph 9, R. pp. 379-380. Overhead Photos from 1994 and 2001 show that Lot B and its neighbors were all undeveloped and on active beach and that Benket Drive did not exist. 1994 and 2001 Overhead Photos, R. pp. 425-426. The lots directly adjacent to East

[4] On the Overhead Photos, Braden's Folly's house on 1681-A East Ashley Avenue is five houses east (to the right) of Ocean Street and is located between two houses with horseshoe driveways. 1681-B East Ashley Avenue, Lot B, is directly seaward of Lot A.

Ashley, including Lot A, were developed and were the "beachfront" lots for decades.

The 1994 Overhead Picture shows the escarpment line left by Hurricane Hugo. The escarpment line marks the boundary between developable uplands and active beachfront and would have been the sensible boundary for development after renourishment. Elko Affidavit, Paragraph 29, 32, R. pp. 404, 405.

Lot B and the other lots on Benket Drive are referred to as a "super-beachfront lots" because they are located seaward of the long-existing beachfront lots adjacent to East Ashley Avenue. These super-beachfront lots were owned by the same person who owned the beachfront lot adjacent to East Ashley Avenue and were passed down with the sale of those lots for no additional cost. The super-beachfront lots had tax values of less than $500 and were frequently abandoned to tax sales. Matt Napier[5] Affidavit, Paragraphs 7-8, R. pp. 434-435. The super-beachfront lots served no purpose other than to provide beach access to the developed lots directly adjacent to East Ashley Avenue.

This all changed with beach renourishment starting in 1993. Lot B and the other super-beachfront lots only became developable after Folly Beach and the United States Army Corps of Engineers started renourishing the beach at significant government cost in 1993. Elko Affidavit, Paragraph 37, R. p. 406-407; Pope Affidavit, Paragraphs 9, 17, R. pp. 379-380, 383-384; Napier Affidavit, Paragraph 9, R. p. 435; History of Beach Renourishment, R. p. 376.

There is no dispute that the super-beachfront lots are only developable due to renourishment. The intertwined history of government funded renourishment and development of the super-beachfront lots cannot be denied. Pope Affidavit, Paragraph 18, R. p. 384. Following

[5] Mr. Napier owns and resides at a beachfront house on the east side of Folly Beach, near Braden's Folly's property. He is also a real estate agent with knowledge of the history of development of the east side of Folly Beach.

the initial renourishment in 1993, adding 2,695,900 cubic yards to the beach at a cost of $11,700,000, the City issued the first permit for development of a super-beachfront lot in 1997. History of Beach Renourishment, R. p. 376.

Braden's Folly built its super-beachfront home on Lot B in 2006 following the second major renourishment in 2005, which placed 2,338,000 cubic yards at a cost of $12,115,200. Prior to the 2005 renourishment, none of the super-beachfront lots near Lot B were developed. 2001 Overhead, R. p. 426 (showing that the super-beachfront lots remained on active beach and undeveloped); Pope Affidavit, Paragraph 18, R. p. 384.

If there were no seawalls protecting the Folly Beach super-beachfront lots, they would all be consumed by erosion. Elko Affidavit, Paragraph 36, R. p. 406. Without renourishment or seawalls, the shoreline would have naturally eroded all the way to East Ashley Avenue. Elko Affidavit, Paragraph 37, R. p. 406-407.

Following renourishment, the City of Folly Beach resisted development of this entirely new line of houses on the newly renourished beach. It was quite obvious that the super-beachfront lots were subject to severe erosion and only developable due to the renourishment. Pope Affidavit, Paragraph 19, R. p. 384. However, in the face of repeated threats of litigation, the City felt at the time that it had no choice but to issue the permits. Pope Affidavit, Paragraph 9, R. pp. 379-380.

Since renourishment started, approximately a dozen of these super-beachfront lots have been developed in front of the traditional beachfront houses. Pope Affidavit, Paragraph 17, R. pp. 383-384. Most super-beachfront lots remain undeveloped and are frequently submerged due to beach erosion until there is a new renourishment. *Id.* Following each renourishment, owners start applying for building permits on the freshly created beach for the windfall of owning a second beach front home. *Id.* The City is attempting to prevent further development of these nuisance

lots and gradually push back unwise development of these lots that has already been allowed. *Id.*

At the same time, the United States Army Corps of Engineers (the "Corps") has specifically called out future super-beachfront development as a deal breaker for future renourishment projects. Elko Affidavit, Paragraph 13, R. 399. The Corps has threatened to eliminate federal renourishment funding for those "areas where additional development has occurred…too close to the PEL (perpetual easement line)." May 5, 2014 Corps Letter to City, R. pp. 415-416. Folly Beach has been engaged in a decades long balancing act of pushing against unwise beachfront development to protect future renourishment projects while trying to avoid owner lawsuits. Braden's Folly is the first beachfront owner to bring suit against the City.

II. BRADEN'S FOLLY'S LOTS HAVE ALWAYS BEEN DEEDED AND TITLED TOGETHER, GENERATE SIGNIFICANT INCOME, AND RETAIN SIGNIFICANT VALUE.

Like most other super-beachfront lots, Lot A and Lot B have always been under the same ownership and transferred by the same deed. Title Search. Even though the circuit court found that the "Properties have always been platted, deeded, and taxed separately," a title search shows that the two lots have always been titled as one, also known as "unity of title."

Margaret Braden, mother of the current owners of Braden's Folly, purchased Lot A and Lot B together in 1980 for $60,000. Title Search, R. pp. 374-375. At the time, Lot A was developed with a single-family home. Lot B, like all other super-beachfront lots on Benket Drive, had never been developed. There is no evidence that Lot B had any value as an independent, stand-alone lot. Its only value was to preserve Lot A's access to the beach.

As a condition of funding renourishment, the Corp would not place sand on privately owned or developable lots. Elko Affidavit, Paragraph 14, R. p. 399. Consequently, in 1992, Margaret Braden quitclaimed a small portion of Lot B to Folly Beach for beach renourishment.

Title Search, R. pp. 374-375; Wilder Updated Survey, R. 554. She also deeded a renourishment easement to Folly Beach, agreeing not to develop any portion of Lot B seaward of the Perpetual Easement Line ("PEL") which cut Lot B in half. In other words, Ms. Braden gave up the right to develop most of Lot B in order to allow the renourishment project to place sand in front of her house on Lot A.

In 1999, Ms. Braden passed away, and the lots were transferred to her sons Mark and Frank Braden, who subsequently transferred the lots to Braden's Folly, LLC. Title Search, R. pp. 374-375. Again, at this time, there was a house on Lot A, but no development on Lot B.

Following the second renourishment in 2005, and much to Mark Braden's surprise, July 30, 2020 Mark Braden Statement, R. pp. 393, Lot B became potentially developable for the first time ever. Braden's Folly has not contested the fact that Lot B was not developable prior to the government-funded renourishment.

In 2006, Braden's Folly applied for and received building permits for new houses on both Lot A and Lot B. As shown on the most recent survey, the super-beachfront house on Lot B is considerably smaller than the Lot A house and was squeezed onto Lot B behind the seawall and PEL line. Wilder Updated Survey, R. p. 554. The developable part of Lot B was so small that Lot B's septic field was placed on Lot A. *Id.* Since Lot B was adjacent to Benket Drive, which no longer existed, it had no access to a usable road. Consequently, Braden's Folly also had to create an access easement across Lot A so Lot B could reach East Ashley Avenue. In short, Lot B was only developable because both Lot A and Lot B had the same owner.

In addition, the seaward pilings under the house on Lot B are actually on the beach side of the seawall and frequently exposed to the tides, which wash all the way to the seawall. Exhibits

No. 2A-2C, Napier Affidavit, R. pp. 446-448; Exhibits No. 4A, 12A, 12B, Eric Lutz[6] Affidavit, R. pp. 472, 493-494.

Braden's Folly has asserted it spent approximately $1,100,000 on the construction of the two houses. Braden's Folly has rented the houses since their completion in 2007 earning upwards of $100,000 a year in short-term rental income. Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories, R. pp. 604-605. Extrapolating from the income numbers provided, Braden's Folly has earned approximately $1,400,000 in rent over the past 14 years from the two properties.

III. BRADEN'S FOLLY LISTED THE LOTS FOR SALE ELEVEN YEARS AFTER BUILDING HOUSES ON BOTH LOTS BUT IGNORED ALL OFFERS FOR THE HOUSES, INCLUDING A FULL-PRICE OFFER FOR BOTH HOUSES.

Braden's Folly's has asserted that it was always interested in selling one of the houses to cover its construction costs. However, even though the houses were completed in 2007, Braden's Folly took no action to hire a real estate agent, list the houses, or otherwise market them until 2018, eleven years after they were built. Kennedy Deposition, R. p. 781, line 23 - p. 782, line 10; Lot A and B Listing Agreements, R. pp. 783-792. Prior to 2018, there is no listing agreement, no agency agreement, no offers, no potential buyers, no letters, no emails, and no documents showing that any effort was made to sell or market the properties.

Even after the lots were listed in 2018, Braden's Folly did not act like an interested seller. The listing sat dormant for a year and a half with no offers, and no additional effort by Braden's Folly or its real estate agent to sell either property. Braden's Folly has presented no evidence that any funds were expended to market or sell the houses.

[6] Mr. Lutz is Folly Beach's Building Official.

On May 15, 2019, before Braden's Folly received an offer on its houses, Folly Beach sent a letter to Braden's Folly warning them that the sale of either lot individually would be in violation of the Merger Ordinance. May 15, 2019 Wilson Letter, R. pp. 148-149. Braden's Folly failed to disclose the letter from the City or the Merger Ordinance's impact on the lots in its South Carolina Residential Property Disclosure Statements required by South Carolina Code § 27-50-40. Braden's Folly Disclosure Statements, R. pp. 528-532, 612-616.

In August of 2019, potential buyers of Lot A reached out to Folly Beach to ask about a pending legal issue regarding the lot. August 23, 2029 Email Chain, R. pp. 628-629. Because Braden's Folly had not disclosed the Merger Ordinance or the letter from the City, Folly Beach provided the buyers with the May 15, 2019 Letter.

Even with Folly Beach's Merger Ordinance in place, the properties retain enormous value, especially as short-term rentals. Braden's Folly was offered the full asking price of $2,550,000 for the merged lots in January of 2021. January 28, 2021 Carlomany Email, R. pp. 364-366.[7] This potential buyer was fully aware of the pending litigation and Merger Ordinance but still wanted to close as soon as possible regardless of the outcome of this lawsuit. January 11, 2021 Carlomany Email, R. pp. 901. Braden's Folly inexplicably never responded to the full-price unconditional offer.

After receiving the full-price offer, Braden's Folly removed the listings and never attempted to sell the lots together even though there was obviously a market for the merged lots.

[7] Braden's Folly's attorney has continually denied that this full price offer was made with knowledge of the Merger Ordinance. This ignores the testimony and emails provided by the potential buyer's real estate agent repeatedly acknowledging that they were fully aware of both the Merger Ordinance and the litigation and were still desperate to purchase the merged properties. *See* Folly Beach's Supplemental Memorandum, Pages 10-16 and Exhibits referenced therein, R. pp. 706-712.

IV. BRADEN'S FOLLY'S LOTS ARE UNDERSIZED AND NONCONFORMING, BUT THE DWELLINGS ARE "GRANDFATHERED IN."

Neither of Braden's Folly's lots meets the City's lot size requirement. Folly Beach Code of Ordinances, § 165.01-02 requires a minimum lot area of 10,500 square feet per dwelling.[8] Lot A is 8,379 square feet, and Lot B is 8,150 square feet. Wilder Updated Survey, R. p. 554.

Folly Beach's Code of Ordinances allows construction of single-family dwellings on some, but not all, undersized lots:

> **§ 168.04 NONCONFORMING LOTS OF RECORD**
>
> **§ 168.04-01 LOTS RESIDENTIAL AND NONRESIDENTIAL DISTRICTS.**
>
> (A) *General.* Development of a single-family dwelling on the lot of record shall comply with the other standards in Chapter 165: Dimensional Standards, to the maximum extent practicable.[9]
>
> (B) *Combination of lots.* If two or more lots of record or combination of lots of record and portions of contiguous lots of record are in single ownership on or after March 1, 2019, or on the date one or more of the lots become nonconforming, and if all or part of one or more of these lots do not comply with the lot area standards in Chapter 165: Dimensional Standards; and if one or both of these lots are adjacent to either the OCRM Critical Line or the OCRM Baseline, the lots involved shall be considered to be an individual lot for the purposes of this ZDO, and no portion of these lots shall be used or sold which do not comply with the lot area standards in Chapter 165: Dimensional Standards, nor shall any division of the lots be made that leaves remaining any lot that fails to comply with the lot area standards. R. p. 735.

Section 168.04-01(B) is the so-called "Merger Ordinance" at the center of this litigation. While undersized lots are generally "grandfathered" in and can be developed, undersized lots lose this grandfather status when adjacent undersized lots are owned by the same person. If undersized lots are owned by the same person, the lots are deemed merged and only one lot can be developed

---

[8] The circuit court questioned how long the lot size ordinance was in place. Folly Beach produced versions of the ordinance going back to 1993. Folly Beach's Supplemental Memorandum, Pages 3-4, R. pp. 699-700. It is likely this size requirement goes back even before 1993. Pope Affidavit, Paragraph 26, R. p. 387.

[9] Although it is not a model of clarity, Folly Beach acknowledges that Subsection (A) allows for single-family dwellings on noncomplying lots subject to the limitations of Subsection (B).

or redeveloped if a house already exists on the lots. Since Braden's Folly's lots are undersized and owned by the same entity, they are deemed merged under the Merger Ordinance.

In other words, Braden's Folly's *lots* are nonconforming and have lost their "grandfathered" status under the Merger Ordinance. However, Braden's Folly's *dwellings* on the lots remain as legal nonconformities and are "grandfathered in." Folly Beach Code of Ordinances, § 168.03. This means the dwellings can continue to exist and continue to be rented until they are torn down or swept away by a weather event. Even though the *lots* have lost their legal nonconforming status, the *dwellings* on the lots have not lost their legal nonconforming status.

Furthermore, contiguous undersized lots subject to the Merger Ordinance cannot be sold separately in an effort to "unmerge" them. If this provision were not part of the Merger Ordinance, the owners of contiguous undersized lots could simply sell one of the lots to try to escape the limitations of the Merger Ordinance. Indeed, this is precisely what Braden's Folly has attempted to do in listing the two lots separately. The unfortunate result of such a sale would be that two different owners would own the merged lot. Neither lot could be redeveloped independently should something happen to the existing dwellings.

Allowing development of undersize lots but limiting such allowance by way of a Merger Ordinance is a common zoning ordinance found in most cities across the country. *See e.g.*, Annotation, *Construction and Application of Zoning Laws Setting Minimum Lot Size Requirements*, 2 A.L.R.5th 553 (Originally published in 1992); 2 Am. Law. Zoning, *Substandard Lots*, § 12:12 (5th ed.); 3 Rathkopf's The Law of Zoning and Planning, *Merger and subdivision requirements*, § 49:13 (4th ed.); Brief of *Amici Curiae* National Association of Counties, *et al.*, R. pp. 742-777. Even before merger ordinances were adopted, the common law "doctrine of merger"

merged adjacent lots in common ownership. *See, e.g., Kneer v. Zoning Bd. of Appeals of Norfolk*, 93 Mass. App. Ct. 548, 107 N.E.3d 497 (2018).

Both the U.S. Supreme Court and the Fourth Circuit Court of Appeals have approved such Merger Ordinances and found that they do not amount to a taking. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1947–48, 198 L. Ed. 2d 497 (2017); *Quinn v. Bd. of Cty. Commissioners for Queen Anne's Cty., Maryland*, 862 F.3d 433, 442 (4th Cir. 2017).

V. LOT B AND THE OTHER SUPER-BEACHFRONT LOTS ARE A PUBLIC NUISANCE AND A THREAT TO CONTINUED RENOURISHMENT.

Braden's Folly's super-beachfront Lot B and the neighboring super-beachfront lots have become a public nuisance due to the fact that they were built on the live beach and are under constant threat of water intrusion and beach erosion. Elko Affidavit, Paragraphs 26-41, R. pp. 403-408; Lutz Affidavit, Paragraphs 5-16, R. pp. 458-461; Pope Affidavit, Paragraphs 7-10, 16-19, R. pp. 379-380, 383-384; Napier Affidavit, Paragraphs 5-26, R. pp. 434-440. Since Braden's Folly developed Lot B in 2006, the Lot and the seawall necessary to protect the Lot from being washed away have been under repeated attacks by hurricanes, tropical storms, heavy rains, and King Tides. This problem has gotten worse over time and will continue to worsen in the future.

As noted above, most of Lot B is seaward of the post-Hugo escarpment and the dividing line between developable uplands and active beach. Elko Affidavit, Paragraph 30; 1994 Aerial Photo. In the last 12 years, the east end of Folly Beach where the subject lots are located has suffered severe erosion requiring both renourishments and mitigation and restoration projects. Lutz Affidavit, Paragraphs 6-16, R. pp. 458-461; Napier Affidavit, Paragraphs 11-26, R. pp. 435-440; Pope Affidavit, Paragraphs 7-10, 16-19, R. pp. 379-380, 383-384. The super-beachfront lots are frequently underwater or on active beach, particularly following storms and high tides, until

periodic government-funded renourishments re-build the beach on which they sit. This ebb and flow results in frequent exposures of foundations and septic systems on the beach.

More recently, the mean high tide typically is at or close to the seawall protecting Braden's Folly's Lot B. The Lot B seawall and the house's pilings located past the seawall are frequently underwater and exposed during weather events and high tides. Exhibits No. 2A-2C, Napier Affidavit, R. pp. 446-448; Exhibits No. 4A, 12A, 12B, Lutz Affidavit, R. pp. 472, 493, 494. In 2012, following Hurricane Sandy, Eric Lutz, Folly Beach's Building Official, surveyed and documented hurricane damage to properties in the vicinity of Braden's Folly's lots and listed eight properties "taken out of service due to being unfit for safe occupancy." One of those houses was 1681-B East Ashley Avenue. December 1, 2012 Lutz Memo, R. p. 536.

Development of the super-beachfront lots threatens continued renourishment of the beach. The renourishment projects are performed pursuant to a 50-year Local Cooperation Agreement ("LCA") between Folly Beach and the U.S. Army Corps of Engineers in the early 90's. Elko Affidavit, Paragraph 13, R. p. 339. The City cannot afford to continue renourishment without federal funding and is under no obligation to do so. The LCA specifically calls out future super-beachfront development as a deal breaker. The Corps has threatened to eliminate federal funding for those "areas where additional development has occurred…too close to the PEL (perpetual easement line)." May 5, 2014 Corps Letter, R. pp. 415-416. Thus, the continued existence of super-beachfront houses built right up to the PEL, like Lot B, threatens continued renourishment of the beach past 2030.

To keep pace with chronic long-term erosion, the federal government has placed nearly 9.5 million cubic yards of sand on Folly Beach since 1979. History of Beach Renourishment, R. p. 376. The renourishments in front of 1681 East Ashley Avenue are becoming more frequent and

more costly. These more frequent and more costly renourishments were a major factor causing Folly Beach to take stronger measures to limit and push back beachfront development. Elko Affidavit, Paragraph 18, R. p. 400-401.

None of these facts have been rebutted or even disputed by Braden's Folly.

VI. SUPER-BEACHFRONT HOMES AND THE SEAWALLS REQUIRED TO PROTECT THOSE HOMES ARE BAD FOR THE BEACH AND THE ISLAND AS A WHOLE.

The development of beachfront properties seaward of science-based setback lines, including development of the super-beachfront lots adjacent to Benket Drive, has a negative effect on the natural beach and dune system. Elko Affidavit, Paragraphs 32-37, R. pp. 405-407.

Naturally formed dunes protect low-lying, developed coastal areas from elevated water levels and wave erosion associated with coastal storms. The storm protection value of wide beaches and high dunes has been recognized for decades. Elko Affidavit, Paragraph 38, R. p. 407. Natural features like beaches and dunes are a better alternative for coastal protection than seawalls for many reasons. Elko Affidavit, Paragraph 40, R. p. 408. Beaches and dunes naturally dissipate wave energy during storms. *Id.* High tides and waves drag sand offshore, eroding the beach and building nearshore sand bars. *Id.* This "intelligent" natural response builds the sand bar which serves as protection to the beach (waves break on the sand bar, not on the houses). *Id.* Over time, during calm conditions, sand migrates back onshore, naturally rebuilding the beach and dunes. *Id.*

By contrast, the beach in front of seawalls tends to "scour" because there is no dune available to erode. Elko Affidavit, Paragraphs 41, R. p. 408. Scour occurs when waves remove sand in front of the wall leaving deep holes. *Id.* The deeper water results in higher waves and increases the risk of overtopping seawalls. *Id.* This is the situation in front of Folly Beach's seawalled, super-beachfront homes on East Ashley Avenue, including 1681 East Ashley. In

summary, when a storm is approaching, a coastal community wants as much sand between the ocean and its critical infrastructure as possible. *Id.* It is preferred for waves to be breaking on a sand bar and on the beach rather than on the seawalls and on the upland infrastructure. *Id.*

For parcels located next to seawalled super-beachfront lots, it is nearly impossible to maintain a sandy beach adjacent to the seawalls once the erosion line reaches the seawalls. Elko Affidavit, Paragraph 15, R. pp. 399-400. The seawalls make erosion worse on neighboring properties as erosion quickly consumes the lands next to the seawall. *Id.* This erosion occurs not just during a hurricane or other weather events, but can also occur during King Tide events. *Id.* King Tides are becoming more common and according to NOAA, are now competing with hurricanes for all-time water level records. *Id.* King Tide events are periodic, not episodic like hurricanes, and occur several times a year. *Id.*

Finally, the Corps will not nourish the beach on private lands, so properties adjacent to the federally funded renourishment often do not receive the benefits of the federal beach projects. Elko Affidavit, Paragraph 16, R. p. 400. This can lead to flooded areas behind the renourishment project on the super-beachfront lots. This further exacerbates the erosion problem.

Again, none of these facts have been rebutted or even disputed by Braden's Folly.

VII. THE MERGER ORDINANCE SERVES IMPORTANT GOVERNMENT INTERESTS.

The beach is Folly Beach's most important resource. Pope Affidavit, Paragraph 5, R. p. 378. Folly Beach is a city that depends almost entirely on tourism for its business. The City welcomes over 1,000,0000 visitors a year, and tourism generates over $200,000,000 for the local economy and approximately $4,000,000 per year in local taxes. *Id.* The primary driver of this tourism is the beach. As noted above, a healthy beach also serves the very important function of

protecting all development on the island from both severe episodic events, like hurricanes, and more common periodic events, like tropical storms and King Tides. *Id.*

Due to the importance of the beach to the City, to local tourism, and to protection of development on the island, protecting the beach from erosion and unwise development has been a top priority for the City for several decades. Pope Affidavit, Paragraph 11-13, R. pp. 380-382. Folly Beach has undertaken broad and frequently costly efforts to protect the beach from erosion, most significantly three decades of beach renourishment. Pope Affidavit, Paragraph 14, R. p. 382.

In addition, the City has passed legislative measures to protect the beach and push development back. The Merger Ordinance is just one measure in a much larger plan of action to address the threat created by development on the beach. In 1995, the City adopted a beach preservation ordinance, Folly Beach Code of Ordinances, § 151.35, *et seq.* Pope Affidavit, Paragraph 22, R. p. 385. Pursuant to that Ordinance, all beachfront land owned by Folly Beach or the State, including the land donated by owners, would be preserved, and no structures could be built on the land.

Folly Beach has also created a Dune Management Area or "DMA" to push back development. Pope Affidavit, Paragraph 23, R. pp. 385-386. The City adopted a variable 5 to 10 foot setback in 2010, which was amended to become the DMA in 2019. The DMA created a 40-foot setback from the perpetual easement line ("PEL") for all new development on the beach. *Id.* This establishes an area to protect the development of natural dunes by limiting development in those areas. *Id.* The DMA covers almost all of Lot B, so, even without the Merger Ordinance, Braden's Folly will not be able to re-build on Lot B without a variance. *Id.*

In 2010, Folly Beach adopted its Merger Ordinance, which has been amended in 2019 and 2020. Pope Affidavit, Paragraph 25, R. pp. 386-387. The City's enactment of a DMA and Merger

Ordinance both push development on the beach landward and away from the PEL, just as has been demanded by the Corps to continue funding renourishment. Pope Affidavit, Paragraph 29, R. p. 388. Moving development landward and away from the PEL serves to protect that beachfront development from damage and destruction.

Again, Braden's Folly has presented no evidence rebutting these facts.

ARGUMENTS

I. SUMMARY OF ARGUMENT

The circuit court in this matter has done something that no other court in the country has done: ruled that a merger ordinance is a taking. Both the U.S. Supreme Court and the Fourth Circuit Court of Appeals have ruled that merger ordinances do not effectuate a taking. *Murr v. Wisconsin*, 137 S. Ct. 1933, 198 L.Ed.2d 497 (2017); *Quinn v. Bd. of Cty. Commissioners for Queen Anne's Cty., Maryland*, 862 F.3d 433, 441-42 (4th Cir. 2017). To the City's knowledge, not one single court has found that a merger ordinance is unconstitutional or a taking. The end result of the circuit court's order is that Folly Beach is the only municipality in the entire country that cannot enforce its Merger Ordinance.

In reaching its decision, the circuit court ignores or fails to properly apply clear and binding precedent that controls any regulatory takings analysis. First and foremost, the circuit court focuses solely on the loss of a single strand of Braden's Folly's full bundle of rights, the right to sell the lots separately. The circuit court concludes that a taking has occurred because Folly Beach interfered with this single right held by Braden's Folly.

The circuit court's focus on this single strand held by Braden's Folly contradicts long-standing Supreme Court precedent holding that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate

must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

The appropriate focus is on the uses the regulations *permit*, not the single use that is denied. *Id.* at 131. In particular, in determining whether an owner's reasonable investment-backed expectations are met, the primary focus is on whether the regulations allow for the continuation of the existing use of the property, which is the owner's primary expectation. *Id.* at 136. "[C]ontinuation of the existing use of the property is the property owner's 'primary expectation' when considering an owner's investment-backed expectations for the property." *Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 714 S.E.2d 869, 878 (2011). Folly Beach's Merger Ordinance places no restriction on Braden's Folly's current use of the property as a short-term rental, and, thus, has not interfered with the owner's reasonable expectations.

Braden's Folly's only investment in this property is the construction of the two houses on the lots. Folly Beach does not interfere with this investment because the houses are grandfathered in and allowed to continue as legal nonconforming uses. Since 2007, the two dwellings on the subject property have been used as short-term rentals, earning $100,000 a year in income. Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories. The Merger Ordinance does not restrict this use or any other use of the houses. Rather, Braden's Folly, or anyone who might purchase these lots, can continue to rent the houses out and generate over $100,000 a year in income for the life of the houses. Braden's Folly, and any subsequent purchaser, can still profit and "obtain a 'reasonable return' on its investment. *Penn Central*, 438

U.S. at 136. As such, no taking has occurred because Braden's Folly's reasonable economic expectations have not been restricted by the Merger Ordinance.

The circuit court also fails to recognize that the dwellings on Braden's Folly's property, which represent Braden's Folly's sole investment, are in fact "grandfathered" in and allowed to continue as a legal nonconforming property. Like every other municipality, Folly Beach has a nonconformity ordinance that allows existing dwellings, uses, and lots to continue after a change in land use regulations. Folly Beach Code of Ordinances, Chapter 168. But Chapter 168, like every other nonconformity ordinance, does not allow the nonconformity to exist forever. Nonconforming properties must gradually be brought into compliance with existing land use ordinances. They are not "grandfathered" forever.

Legal nonconforming *lots* lose their protection from existing law when they are contiguous lots that are under common ownership. This is the point of Folly Beach's and every other merger ordinance: gradually bringing substandard lots into compliance with existing standards. *Murr*, 137 S.Ct. at 1947.

Braden's Folly's nonconforming *dwellings* are governed by different rules on when the nonconformity ends. The dwellings are allowed to continue in their nonconforming status until they are torn down, damaged more than 50% of their market value, or swept away by a weather event. Folly Beach Code of Ordinances, § 168.03-05. This end point for the nonconforming dwellings is not impacted in any way by the Merger Ordinance. The nonconforming dwellings can continue until they are torn down or damaged beyond repair. The trial court has applied the rules for nonconforming *dwellings* to nonconforming *lots* by holding that the lots can remain separate because they have been developed.

Braden's Folly's lots have never complied with the City's lot size requirements. The circuit court's ruling striking Folly Beach's merger ordinance has denied Folly Beach the right to set an endpoint for gradually bringing those substandard lots into compliance with long-standing land use regulations.

In addition, the Braden's Folly's property retains enormous value even after the Merger Ordinance. The property earns over $100,000 a year. In 2021, Braden's Folly was offered its full asking price of $2,550,000 for both lots merged together. January 28, 20201 Carlomany Email. Even the appraisal obtained by Braden's Folly values the merged lots at $2,177,000. Donato Appraisal, R. pp. 179-181.[10] Braden's Folly's loss is limited to Mr. Donato's speculation that the lots would sell for more if they were not merged.

The circuit court determined that this speculative loss from a future sale supported its finding that a taking has occurred. However, this finding is directly contradicted by decades of regulatory takings law. United States Supreme Court decisions sustaining land-use regulations "uniformly reject the proposition that diminution in property value, standing alone, can establish a taking." *Penn Central*, 438 U.S. at 131 (citations omitted). "[L]oss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim." *Andrus*, 444 U.S. at 66. Courts have repeatedly found that losses in excess of 50% do not support a taking. *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980) (no taking with an eighty-five percent reduction in value).

[10] To be clear, Folly Beach does not accept the Donato appraisal as a reliable measure of damages. Among other failings, the appraisal does not use an income valuation approach, Donato Appraisal, Page 5, R. p. 191, even though the primary use of the subject property is as income generating short-term rentals.

In balancing the public benefit against the alleged harm to Braden's Folly, the circuit court did not even consider the fact that government-funded renourishment made Lot B developable. The circuit court did not consider that Braden's Folly has already recouped its construction costs from rental income and will continue to do so in the future. Rather, based on the relatively minor restriction on the sale of the property, the circuit court decided a taking has occurred. This is not how takings law works. "To find a taking here [by a merger provision] would revolutionize zoning law and severely constrict local governments' ability to direct democratically the very nature and character of the community." *Quinn*, 862 F.3d at 443.

Finally, the circuit court ignored the wealth of unrebutted evidence submitted by Folly Beach showing that the subject property is located on a highly erosive section of beach and is under constant threat of inundation by hurricanes, storms, and high tides. Although Lot B and its neighbors were platted nearly a century ago, they have been underwater and without access to roads for most of their existence. Even after renourishment, Lot B has been under constant threat of inundation that grows every year with rising tides. As such, development of the super-beachfront lots on this highly erosive beach is a very risky proposition.[11]

Courts also have long recognized the hazards of building on sand, as well as the government's right to regulate such development. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (KENNEDY, J., concurring) ("Coastal

---

[11] Even the Bible warns against building a house on sand:

> But everyone who hears these words of mine and does not put them into practice is like a foolish man who built his house on sand. The rain came down, the streams rose, and the winds blew and beat against that house, and it fell with a great crash.

Matthew 7:26-27 (New International Version).

property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."); *Esposito v. S.C. Coastal Council*, 939 F.2d 165, 169 (4th Cir. 1991) ("[T]he decision to adopt a strategy of gradually withdrawing unwise development from the beach/dune system was a logical and sufficiently well-founded approach to dealing with beachfront erosion by attempting to restore the natural equilibrium between sand supply, wind, and waves."). The circuit court did not consider the fact that beachfront development is precarious and subject to appropriate governmental regulation, such as the Merger Ordinance.

In summary, Merger Ordinances have been ruled constitutional and not a taking by the U.S. Supreme Court and the Fourth Circuit Court of Appeals. To the City's knowledge, no court other than the circuit court has ever ruled that a merger ordinance is a taking. This is not surprising in that the Merger Ordinance has not interfered in any way with the property's existing use as a short-term rental, which is Braden's Folly's primary expectation. In addition, the property retains significant value. Any claimed loss is a small percentage of the remaining value of the merged parcel. Finally, Folly Beach's Merger Ordinance looks nothing like a traditional taking. Rather, it is in line with the government's long-established right to regulate lot size and development of environmentally sensitive areas, such as beaches. As such, the traditional regulatory takings analysis first set forth in *Penn Central*, and most recently clarified in *Murr*, requires a finding that no taking has occurred in this matter.

II. GENERAL PRINCIPLES OF REGULATORY TAKING

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." The Clause is made applicable to the States through the Fourteenth Amendment. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 17 S.Ct.

581, 41 L.Ed. 979 (1897). The plain language of the Takings Clause "requires the payment of compensation whenever the government acquires private property for a public purpose," *see Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002), but it does not address in specific terms the imposition of regulatory burdens on private property. Indeed, "[p]rior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), it was generally thought that the Takings Clause reached only a direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession." *Lucas*, 505 U.S. at 1014 (citation, brackets, and internal quotation marks omitted). *Mahon* initiated the U.S. Supreme Court's regulatory takings jurisprudence, declaring that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S., at 415.

The "common touchstone" of a regulatory taking is "to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005); *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601, 619 (2013).

Although no set formula exists for determining whether government action is functionally equivalent to a classic taking, the relevant jurisprudence does provide significant guideposts. *Penn Central*, 438 U.S. at 124; *Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437, 441 (2007). Determining whether government action effects a taking requires a court to examine the character of the government's action, that is whether it looks like a traditional taking, and the extent to which this action interferes with the owner's rights in the property as a whole. *Penn Central,* 438 U.S at 130–31.

These "ad hoc, factual inquiries [are] designed to allow careful examination and weighing of all the relevant circumstances." *Tahoe–Sierra*, 535 U.S. at 322 (citation and internal quotation marks omitted). When a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking may be found based on "a complex of factors," including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Murr*, 137 S.Ct. at 1933 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), and *Penn Central*, 438 U.S. at 124); *Kiriakides v. Sch. Dist. of Greenville Cty.*, 382 S.C. 8, 675 S.E.2d 439, 442–43 (2009). These three factors are known as the *Penn Central* factors. The economic impact of the Merger Ordinance is addressed in Section VI below, *infra* pp. 40-42. Braden's Folly's investment-backed expectations are addressed in Section V below, *infra* pp. 33-40. The character of the governmental action is addressed in Section VII below, *infra* pp. 42-44.

Before determining whether a taking has occurred, a court must first determine what, precisely, is the property at issue. *Dunes West*, 737 S.E.2d at 614–15. Put another way, "[b]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " *Murr*, 137 S.Ct. at 1943–44 (quoting *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)). "Piecemealing" various property interests is not permitted. *See Dunes West*, 737 S.E.2d at 615 (citing several U.S. Supreme Court opinions).

"The definition of the relevant parcel profoundly influences the outcome of the takings analysis." *Dunes West*, 737 S.E.2d at 614-615. Indeed, answering the question of what

parcel to consider can be outcome determinative in a takings analysis. *Murr*, 137 S.Ct. at 1943-44.

Helpfully, the Supreme Court's most recent opinion on identifying the relevant parcel involves a merger ordinance just like the one at issue here. *Murr*, 137 S.Ct. at 1943. The Court in *Murr* lists three factors that courts should consider in determining what is the denominator property. *Murr*, 137 S.Ct. at 1945-46. First and foremost, "courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law." *Id.* at 1945. Second, courts must look to the physical characteristics of the landowner's property, with special attention to environmental concerns and regulations. *Id.* Third, courts should assess the value of the property under the challenged regulation, with special attention to the benefits derived from joining the parcels. *Id.* at 1946.

Applying the factors in *Murr*, it is clear that the relevant parcel in this analysis is composed of *both* lots owned by Braden's Folly. First, Lot A and Lot B have unity of title, are undersized, and are physically adjacent to each other. Historically, the two lots have supported a single house and been subject to heavy regulation due to their location on the beach.

To be clear, the holdings in *Murr* and *Quinn* are not really new law. The U.S. Supreme Court and South Carolina Courts have long recognized the "whole parcel doctrine," which holds that "[i]n deciding whether a particular governmental action has effected a taking, [the Court] focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130–31; *Beard v. South Carolina Coastal Council*, 304 S.C. 205, 403 S.E.2d 620 (1991) (same); *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595, 603 (2001) (same). South Carolina has long recognized that the relevant parcel in a takings analysis

encompasses all of a landowner's contiguous lots, and damages to one of the lots may be offset by benefits to other lots. *Beard*, 403 S.E.2d at 622.

Braden's Folly has admitted that the "relevant parcel" in the takings analysis is the two merged lots. Braden's Folly Memorandum, Page 14, R. p. 546. As such, there is no doubt that the relevant parcel to assess is the merged lots.

III. RESTRICTIONS ON THE SALE OF MERGED LOTS ARE NOT REGULATORY TAKINGS.

The circuit court found that the Merger Ordinance was a taking because it denied Braden's Folly the right to sell its lots separately. The circuit court reached this conclusion even though Braden's Folly retains a full bundle of rights, including the right to occupy the property, exclude others from the property, and continue the existing use of the property as a short-term rental earning up to $100,000 a year in income.

This holding by the circuit court contradicts long-standing Supreme Court precedent holding that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus*, 444 U.S. at 65 (citing numerous prior U.S. Supreme Court opinions). *See also Esposito*, 939 F.2d at 170 ("[Plaintiffs] continued to retain the fundamental incidents of ownership, including the right to possess the property, exclude others from it, alienate the property and continue to use it for residential and recreational purposes; and they were significantly diminished only in their discretion to rebuild a structure in the speculative event of its virtually complete destruction."); *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D. Fla. 1989) (applying *Andrus* to beachfront property setback increases applied after acquisition of land to find no compensable taking).

In other words, "the submission that [landowners] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore

had believed was available for development is quite simply untenable." *Penn Central*, 438 U.S. at 130. In *Penn Central*, the City of New York restricted the construction of an office tower over the existing Terminal site. Even though this denied the plaintiff an enormously beneficial and profitable right, the Court found that no taking had occurred because the plaintiff retained its existing use and a full range of rights in the use of the parcel. *Penn Central*, 438 U.S. at 130 ("Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."); *id.* at 131 ("[T]he 'taking' issue in these contexts is resolved by focusing on the uses the regulations *permit* [as opposed to the diminution in value]."") (citations omitted).

In *Andrus*, the U.S. Supreme Court considered a complete ban on the sale of protected birds and bird parts under the Migratory Bird Treaty Act. The Court held that a complete ban on the sale of property, namely bald eagle feathers, and loss of anticipated future profits from such sale did not amount to a taking. "[L]oss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." *Andrus*, 444 U.S. at 66. Moreover, the Court in *Andrus* found that a ban on the sale of property acquired *before* the passage of the Migratory Bird Treaty Act, referred to as "pre-existing bird artifacts," was not a taking. *Andrus*, 444 U.S. at 56-64; *McNulty*, 727 F.Supp. at 609-14 (no taking even though plaintiff bought property prior to imposition of new setbacks).

Andrus is instructive here. The circuit court has found a taking based on the loss of single strand of Braden's Folly's bundle of rights – the right to sell the properties separately. The circuit court should have measured this small loss against the whole bundle of rights retained by Braden's

Folly. In addition, a taking is not found simply based on speculative lost future profits, which is all the Donato appraisal represents.

In 2017, the U.S. Supreme Court applied this reasoning to merger ordinances and found that restrictions on the sale of merged lots do not effectuate a taking. *Murr*, 137 S.Ct. at 1949-50 ("The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago."). Soon after, the Fourth Circuit Court of Appeals in *Quinn* reached the same conclusion:

> The Grandfather/Merger Provision is not a per se taking under *Lucas* or a taking under the *Penn Central* standard. It is, rather, a standard zoning provision designed to manage the density of development, a crucial part of local land use planning. To find a taking here would revolutionize zoning law and severely constrict local governments' ability to direct democratically the very nature and character of the community.

Quinn, 862 F.3d at 443.

As determined by the City, these are the only two opinions addressing the constitutionality of merger ordinances in the entire country. This case has been pending for over two years, and Braden's Folly has yet to locate a single case in the entire country that finds that merger ordinances are unconstitutional or a taking. The circuit court certainly does not cite any such case. This leaves Folly Beach as the sole municipality in the entire country that cannot enforce its Merger Ordinance.

The inescapable conclusion of *Murr*, *Quinn*, and *Andrus*, is that the relatively minor restriction on Braden's Folly's ability to sell the lots separately must be viewed in the larger context of the full bundle of rights that Braden's Folly retains. Braden's Folly can still occupy the property, exclude others from the property, sell the property as a single parcel, and, most importantly, continue the existing use of the parcel. *Carolina Chloride,* 714 S.E.2d at 878 ("[C]ontinuation of

the existing use of the property is the property owner's 'primary expectation' when considering an owner's investment-backed expectations for the property.").

In light of the broad range of rights withheld by Braden's Folly, the Merger Ordinances restriction on the sale of separate lots is not a taking.

IV. BRADEN'S FOLLY'S ACQUISITION AND DEVELOPMENT OF THE PARCELS PRIOR TO PASSAGE OF THE MERGER ORDINANCE DOES NOT DISTINGUISH THIS MATTER FROM *MURR* AND *QUINN.*

The circuit court attempts to distinguish this matter from *Murr* and *Quinn* on the grounds that the landowners in these opinions "acquired their properties after enactment of the at-issue merger provision" and that the lots were undevelopable prior to the enactment of the at-issue merger provision. Order, Pages 11-12, R. pp. 11-12. These distinctions are legally irrelevant and factually inaccurate.

First, new regulations restricting future uses on existing parcels can be and regularly are enacted without creating a taking. "[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central*, 438 U.S. at 130. "[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned." *Palazzolo*, 533 U.S. at 627. The overwhelming majority of takings cases involve properties that were owned prior to passage of the challenged regulation. *See, e.g., Penn Central*, 438 U.S. at 115-16 (terminal opened in 1913, law restricting construction of office tower adopted in 1967); *Andrus*, 444 U.S. at 56-64 (Migratory Bird Act applied to pre-existing bird artifacts); *Esposito*, 939 F.2d at 166-68 (plaintiffs obtained and developed property before Beachfront Management Act passed in 1988); *McNulty*, 727 F.Supp. at 609-14 (no taking even though plaintiff bought

property prior to imposition of new setbacks); *Dunes West*, 737 S.E.2d at 604-05 (golf courses rezoned to conservation district not allowing any future development). All of these cases found that no taking had occurred even though the subject property was acquired prior to the contested regulation.

The decisions in *Quinn* and *Murr* both involved situations in which the landowners or their families acquired the property prior to enactment of the merger ordinance. In *Quinn*, the landowner purchased his lots between 1984 and 2002. *Quinn*, 862 F.3d at 437. The Grandfather/Merger Provision was enacted in 2014. *Id.* at 438. In *Murr*, the lots in question were purchased in 1960 and 1963 by plaintiff-landowners' parents. *Murr*, 137 S.Ct. at 1940. The effective date of the merger ordinance was January 1, 1976. *Murr*, 137 S.Ct. at 1940.

Similarly, the merger ordinances at issue in both *Murr* and *Quinn* made no distinction between previously acquired and developed lots and undeveloped lots. Wis. Admin. Code NR § 118.08(4)(a)(2) ("Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area."). Just like Folly Beach's merger ordinance, the Wisconsin statute applies whether the merged lots are developed or not and only addresses future development of the lots. Just like Folly Beach, existing dwellings are "grandfathered" in. In fact, one of the two lots at issue in *Murr* was developed with a cabin, *Murr*, 137 S.Ct. at 1940, and the Court of course ultimately ruled that both the developed and the undeveloped lot could be merged without effectuating a taking.

Likewise, the Grandfather/Merger provision in *Quinn* applied to both undeveloped lots and developed lots with failing septic systems. *Quinn*, 862 F.3d at 437 ("Both developed and undeveloped lots on those streets would receive sewer service."); *id.* at 438 ("Taken together, the sewer extension and the Grandfather/Merger Provision would provide sewer service to the failing

septic systems on South Kent Island and 632 vacant lots, many of which could not have been developed without sewer service.").

More importantly, there is no language in *Murr* or *Quinn* (or any other opinion) that suggests that merger ordinances cannot apply to previously purchased or developed lots. No language in either opinion suggests that the date of acquisition somehow amounts to a determinative factor in the takings case. This is a distinction applied by the circuit court in this matter, but not recognized by any other court precedent.

To be sure, "the regulatory regime in place at the time the claimant acquires the property at issue *helps to shape* the reasonableness of those expectations." *Columbia Venture, LLC v. Richland Cty.*, 413 S.C. 423, 776 S.E.2d 900, 914 (2015) (quoting *Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1348 (Fed.Cir. 2004), and *Palazzolo,* 533 U.S. at 633 (O'Connor, J., concurring)). It is one factor to consider, but not a determinative one. *Palazzolo,* 533 U.S. at 627 ("[A] prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned."). Current owners are simply not insulated from all future regulations.

The circuit court's order elevates pre-existing ownership of property to a determining factor. The circuit court has effectively ruled that any effort by the government to impose a new regulation on an existing property is a taking. This is simply not the law. The existing legal regime at the time the owner purchased the property is but one factor among many for the court to consider.

Second, the circuit court fails to take into consideration the entire "regulatory regime" and the status of the property, both of which impact the landowner's reasonable expectations. When the Braden family acquired the subject property in 1980 for $65,000, it would only support a single

house. Lot B was underwater or on active beach. No super-beachfront lots had ever been developed. There was no reasonable expectation that Lot B would become developable.

Furthermore, at the time they were purchased, neither Lot A nor Lot B were in compliance with Folly Beach's lot size requirements. They were only developable due to an exemption from the lot size requirement. As such, Braden's Folly was on notice from the first day it owned the lots that they were nonconforming and did not meet lot size requirements. The Merger Ordinance, first adopted in 2010, merely narrowed the exemption from the lot size requirements.

V. FOLLY BEACH HAS NOT INTERFERED WITH BRADEN'S FOLLY'S INVESTMENT-BACKED EXPECTATIONS.

Primary among the *Penn Central* factors is "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The circuit court finds that the loss of a single strand of Braden's Folly's bundle of rights, namely the right to sell the properties separately, thwarts Braden's Folly's investment-backed expectations. Again, this ruling violates well-established precedent that the focus should not be on a single lost property right, especially a restriction on the transfer of the property. *Andrus*, 444 U.S. at 66.

In assessing an owner's investment-backed expectations, the primary focus should be on the *existing use* of the property. *Penn Cent.*, 438 U.S. at 136 ("[T]he New York City law does not interfere in any way with the present uses of the Terminal. . . . So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel."); *Esposito*, 939 F.2d at 170 ("In light of the plaintiffs' continued use of the property precisely as they used it prior to the passage of the Act, we are of opinion that the Esposito plaintiffs have not established that the regulation in question was 'so onerous that it [had] the same effect as an appropriation of the property through eminent domain or physical possession.' ") (quoting *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (esp. n. 17, at 199), 105 S.Ct.

3108, 3123, 87 L.Ed.2d 126 (1985); *Carolina Chloride,* 714 S.E.2d at 878 ("[C]ontinuation of the existing use of the property is the property owner's 'primary expectation' when considering an owner's investment-backed expectations for the property."); *Byrd v. City of Hartsville,* 365 S.C. 650, 620 S.E.2d 76, 82 (2005) (same); *Woodale P'ship v. City of Charleston,* No. 2:07-CV-2025-MBS, 2010 WL 11661386, at *20 (D.S.C. Sept. 17, 2010) ("[T]he City's decision to down zone the Property to Conservation would not have had any effect on the Plaintiffs' ability to continuing using the property 'precisely as they used it prior to the passage' of the 2007 Ordinance.' ").

In addition, there is no interference so long as the landowner can still profit and "obtain a 'reasonable return' on its investment." *Penn Cent.*, 438 U.S. at 136. This does not support a full-blown analysis of future profits. The Supreme Court in *Andrus* specifically eschews serious consideration of future profits and anticipated gains. *Andrus*, 444 U.S. at 66. "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." *Id.* As long as there is a reasonable return on the investment, the owner's expectations have been met.

First and foremost, the Merger Ordinance has obviously not interfered with the subject properties' *existing use* as a short-term rental and occasional vacation home. This fact alone should end the inquiry on investment-backed expectations. The houses are Braden's Folly's sole investment in this property. The houses have been used as short-term rentals for 15 years and counting. This is the highest and best use of the property, and certainly the most profitable use of the property. Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories, R. pp. 604-605. The Merger Ordinance does not require Braden's Folly to tear down or stop using or renting either dwelling. The houses are legal nonconformities, and their use as rentals can continue for the life of the structures. Their use as short-term rentals is the existing use, the only use, the

primary use of the property, and paramount in consideration of Braden's Folly's expectations. Because Folly Beach has done nothing to interfere with the existing use of the property, it has not interfered with any reasonable expectations that Braden's Folly may have.

Second, Braden's Folly's only complaint concerns regulation of the lots, not regulation of the houses. Braden's Folly made no investment in the lots, as they were donated to the entity. The Braden family obtained both lots for $65,000. When they were acquired, the lots only supported one house with no expectation of a second developable lot until after Folly Beach started renourishing the beach. In 2021, Braden's Folly was offered its full asking price of $2,550,000 for both lots together. January 28, 2021 Carlomany Email, R. p. 364. It is beyond dispute that the initial investment in the property has far exceeded Braden's Folly's expectations.

Additionally, it is clear that Braden's Folly had no expectations for development of Lot B until after the City began renourishing the beach in front of the properties. In 2005, Folly Beach renourished the beach in front of the lots, making Lot B developable. Twenty-five years after the family acquired the property, Mark Braden was "very surprised" to discover that Lot B had some value and could support a second house. July 30, 2020 Braden Statement, R. p. 393. Prior to 2006, Braden's Folly had no knowledge, and therefore no reasonable expectation, that two houses could be developed on the lots. Since Braden's Folly did not even have a reasonable expectation that it could develop Lot B, it should have no grounds to now complain that it cannot sell Lot B except as merged with Lot A.

Fourth, the circuit court also ignores the fact that Braden's Folly has numerous options to avoid any loss. Braden's Folly has asserted that it always wanted to sell one of the houses to cover construction costs. To the extent it still has any construction costs left (something that is not found in the record), it has many options to achieve its stated goal. Braden's Folly can continue to rent

both houses and use the income to pay off any remaining funds due for construction costs. It can sell the houses together, pay off the remaining construction costs, and buy a new single house on the beach. It can convert the two houses to a condominium and sell a half interest in the property without violating the Merger Ordinance. So, even Braden's Folly's stated goal is not thwarted by the City's actions. Even with the Merger Ordinance in place, Braden's Folly has several paths to achieving this rather specific goal of paying off the remaining construction costs and remaining on the beach.

Fifth, the circuit court has ignored or misconstrued Folly Beach's regulations governing noncompliant dwellings and lots. Braden's Folly's dwellings are "grandfathered" in as legal noncompliant dwellings. They have always been legal noncompliant dwellings because they were built on substandard lots. Folly Beach has not altered how it addresses legal noncompliant dwellings, so it has not interfered with any expectations regarding legal noncompliant dwellings like those owned by Braden's Folly.

Because they are legal noncompliant dwellings, Braden's Folly's houses can continue to legally exist, and earn money as rentals, until they are torn down or substantially damaged or swept away. Folly Beach Code of Ordinances, Chapter 168. However, these nonconformities are not allowed to exist forever. Nonconforming properties, including those acquired prior to enactment of a new ordinance, must gradually be brought into compliance with existing land use ordinances. *Murr*, 137 S.Ct. at 1947-48 ("When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in

separate ownership."); *Esposito*, 939 F.2d at 167-71 (approving Beachfront Management Act's provisions grandfathering in nonconforming dwellings until they are damaged beyond repair).

Legal nonconforming dwellings and lots both have an endpoint, but they are different endpoints. Legal nonconforming *dwellings* lose their protection from existing law when they are torn down or damaged more than 50% of their market value. Folly Beach Code of Ordinances, § 168.03-05. Any subsequent dwelling constructed must comply with existing law at the time of its construction. Thus, Braden's Folly was allowed to construct two houses on its lots in 2006 because it was allowed under Folly Beach's zoning ordinances at the time. However, the houses are not grandfathered in forever. When the houses are torn down, they cannot be redeveloped under 2006 regulations. Any redevelopment must comply with the law at that time. In other words, the building permits issued to Braden's Folly in 2006 allowed it to build the two dwellings at that time. The permits do not allow Braden's Folly to rebuild the same two houses on the lots in the future.

Legal nonconforming *lots* are controlled by a different endpoint than nonconforming dwellings and uses. Nonconforming *lots* lose their protection from existing law when they are contiguous lots under common ownership. This is the point of Folly Beach's and every other merger ordinance: gradually bringing substandard *lots* into compliance with existing standards. *Murr*, 137 S.Ct. at 1947 ("When States or localities first set a minimum lot size, there often are existing lots that do not meet the new requirements, and so local governments will strive to reduce substandard lots in a gradual manner. The regulations here represent a classic way of doing this: by implementing a merger provision, which combines contiguous substandard lots under common ownership, alongside a grandfather clause, which preserves adjacent substandard lots that are in separate ownership."). Again, this rule applies whether the lots were purchased before or after the

adoption of the new regulation. In short, nonconforming dwellings and nonconforming lots are governed by two different sets of rules.

The circuit court's ruling confuses the difference between nonconforming lots and nonconforming dwellings. The circuit court cites the existence of nonconforming dwellings, which remain legal, to extend the life of the nonconforming lots, which are no longer legal. Braden's Folly's lots have never complied with the City's lot size requirements. The circuit court's ruling striking Folly Beach's merger ordinance has denied Folly Beach the right to set an endpoint for gradually bringing those substandard lots into compliance with long-standing land use regulations. Allowing Braden's Folly to sell off one of the lots allows Braden's Folly to keep both lots in a perpetual noncompliance. The circuit court's ruling is contrary to the ultimate holding of *Murr* and *Quinn*: cities are entitled to merge lots regardless of when the lots were purchased.

Finally, the circuit court's erroneous analysis also runs afoul of the many holdings that a reasonable investment-backed expectation must be more than a speculative hope or an abstract need. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984); *Quinn*, 862 F.3d at 442-43; *Dunes West*, 737 S.E.2d at 618–22. In order to receive protection, a landowner's actions in the development of his land should rise beyond mere contemplated use or preparation. *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct.App. 2000). An anticipated development or use without concrete steps and an actual investment of funds into that anticipated development is a unilateral expectation, not an investment-backed expectation. *Dunes West*, 737 S.E.2d at 622-23.

The circuit court accepts at face value Mark Braden's testimony that he built the houses in 2006 with the intent of selling the lots separately. Mr. Braden is simply expressing a subjective, speculative hope that is devoid of any concrete steps or actual investment of funds. Braden's Folly

did not list the lots until 2018, eight years after adoption of the Merger Ordinance. Listing Agreements, R. pp. 783-792. The lots were not listed or marketed in any way for years prior to 2018. Deposition of LaJuan Kennedy, R. p. 781, line 23 - p. 782, line 10. Neither Braden's Folly nor its real estate agent have produced any documentation that they were actively selling or marketing the properties. There is no listing agreement, no agency agreement, no offers, no potential buyers, no letters, no emails, and no other documents showing that any effort was made to sell or market the properties prior to 2018.

Even after the lots were listed in 2018, Braden's Folly did not actively promote the lots. When Folly Beach amended the Merger Ordinance to make it clearly applicable to the Braden's Folly lots in April of 2019, Braden's Folly had not received a single offer on the lots and had invested no money in the sale of the lots. Braden's Folly received one offer in August of 2019, and no other offers the first two years the lots were listed.

In late 2020, Braden's Folly received two offers on the lots that it ignored. In January of 2021, a potential buyer offered $2,550,000 for both lots. This offer matched Braden's Folly's asking price for the two lots. The proposed offer would have complied with the Merger Ordinance because it was for both lots. Braden's Folly could have accepted the offer and concluded this litigation. Instead, Braden's Folly again ignored the offer and instead decided to continue the current litigation. Folly Beach's Supplemental Memorandum, Pages 10-16, R. pp. 706-712.

These facts contradict Mr. Braden's stated wish to sell the lots separately. Braden's Folly's refusal to accept or even respond to the full price offer shows that Braden's Folly was not truly interested in selling the properties. Rather, Braden's Folly was more interested in pursuing this lawsuit against the City, as suggested by their agent. August 24, 2019 Kennedy Email, R. p. 922 ("Use this contract to go after the city. You might get your money and not have to sell").

In short, the record shows that any desire to sell the lots separately was merely a "contemplated use." Mark Braden is simply stating a unilateral, subjective, not acted upon wish to sell one of the houses following their construction. Governmental interference with unilateral, unacted upon wishes does not support a taking. *Quinn*, 862 F.3d at 442-43. The circuit court's finding that an after-the-fact wish that is not supported by actions can support a takings claim opens the door to testimony from any landowner that any given regulation has thwarted his intended future use. This is precisely the conduct that courts have warned against.

In summary, Braden's Folly has presented no evidence that the Merger Ordinance has interfered with its reasonable investment-backed expectations. The only investment Braden's Folly has made in this property is the construction of two houses. The Merger Ordinance allows the existing use of these two dwellings to continue. Because the Merger Ordinance does not interfere with the existing use, this factor favors a finding of no taking.

VI. BRADEN'S FOLLY'S MERGED PROPERTY RETAINS SIGNIFICANT VALUE.

The minimal and speculative economic impact of the Merger Ordinance also supports a finding of no taking. Braden's Folly's only alleged loss from the Merger Ordinance is that it will receive less money if it is forced to sell its lots as a single unit at some point in the future. As pointed out above, "loss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim." *Andrus*, 444 U.S. at 66.

The circuit court's decision turns this speculative loss of future profits into a determinative factor in the takings analysis. There is simply no legal support for finding a compensable taking based solely on a speculative opinion that the lots will sell for less money due to the Merger Ordinance. To hold that such a minor restriction on Plaintiff's rights amounts to a taking would effectively bring an end to all zoning laws, which inevitably have an impact on a property's value.

In case this seems alarmist, the Fourth Circuit Court of Appeals agrees: "To find a taking here [by a merger provision] would revolutionize zoning law and severely constrict local governments' ability to direct democratically the very nature and character of the community." *Quinn*, 862 F.3d at 443.

"Not all damages suffered by a private property owner at the hands of [a] governmental agency are compensable." *Carolina Chloride*, 714 S.E.2d at 877 (quoting *Woods v. State*, 314 S.C. 501, 431 S.E.2d 260, 262 (Ct.App. 1993); internal quotations omitted). A mere decrease in property value is not enough to show a regulatory taking. A landowner is not entitled to the highest and best use of his property. *Penn Cent.*, 438 U.S. at 125; *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 592, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962).

United States Supreme Court decisions sustaining land-use regulations "uniformly reject the proposition that diminution in property value, standing alone, can establish a taking." *Penn Central*, 438 U.S. at 131 (citations omitted). As Justice Holmes declared, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Mahon*, 260 U.S. at 413. Regulation without compensation is permitted unless the regulation goes "too far." *Id.* at 415.

"Although a comparison of values before and after a regulatory action is relevant, it is by no means conclusive." *Keystone Bituminous*, 480 U.S. at 490. "[T]he extent of diminution [in value] is but 'one fact for consideration' in determining whether governmental action constitutes a taking." *Keystone Bituminous*, 771 F.2d at 713.

The United States Supreme Court repeatedly has declined to identify a specific threshold of interference with property rights below which no taking occurs and above which there is a taking. *See, e.g., Tahoe–Sierra*, 535 U.S. at 332–35 (holding that determining whether a

regulatory taking has occurred is not best served by categorical rules but rather "requires careful examination and weighing of all the relevant circumstances"). However, many Supreme Court opinions have found that even a significant reduction in the value of land did not amount to a compensable taking. *See, e.g., Agins*, 447 U.S. 255 (no taking with an eighty-five percent reduction in value); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (no taking with a seventy-five percent reduction in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (no taking with a 92.5% diminution in value). *See also Clayland Farm Enterprises, LLC v. Talbot Cty., Maryland*, 987 F.3d 346, 354 (4th Cir. 2021) (no taking with 40% diminishment in value); *Pulte Home Corp. v. Montgomery County*, 909 F.3d 685, 696 (4th Cir. 2018) (no taking with hypothetical 83% loss in value); *Tenn. Scrap Recyclers Ass'n v. Bredesen*, 556 F.3d 442, 456 & n.6 (6th Cir. 2009) (no taking with 75% loss in value); *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001) (no taking with 92.5% loss in value).

Braden's Folly was offered its full asking price of $2,550,000, for both lots together. January 28, 2021 Carlomany Email, R. p. 364. The houses continue to earn in excess of $100,000 a year in rental income. In short, by any reasonable metric, Braden's Folly has lost little or no value at all due to the Merger Ordinance. Even if Mr. Donato's appraisal is taken at face value, Braden's Folly has suffered a 19% loss in the value of its property based on a hypothetical future sale. This minimal impact does not support the circuit court's finding that a taking has occurred.

VII. FOLLY BEACH'S MERGER ORDINANCE DOES NOT RESEMBLE A PHYSICAL INVASION OF THE PROPERTY.

The third *Penn Central* factor is the "character of the government action." The character of the government action seeks to "identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the

owner from his domain." *Lingle*, 544 U.S. at 539; *Dunes West*, 737 S.E.2d at 619. "Interference with property is less likely to be considered a taking when it 'arises from some public program adjusting the benefits and burdens of economic life to promote the common good.' " *Quinn*, 862 F.3d at 443 (*quoting Penn Central*, 438 U.S. at 124). "Regulations [like merger ordinances] that control development based 'on density and other traditional zoning concerns' are the paradigm of this type of public program." *Id.* (quoting *Henry v. Jefferson Cty. Comm'n*, 637 F.3d 269, 277 (4th Cir. 2011)). Merger provisions are "a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land." *Murr*, 137 S.Ct. at 1949-50.

As both *Murr* and *Quinn* concluded, Folly Beach's Merger Ordinance looks nothing like a classic taking. The City has not appropriated private property. The City has not ousted the owner from his domain. The City has not interfered with the existing use of the property. The City has not banned the sale of the property. The City has merely banned the sale of the two lots separately. The Merger Ordinance is the quintessential zoning regulation that controls the density of future development and looks nothing like a class taking where the government occupies the subject property.

The circuit court did not address whether the Merger Ordinance was functionally equivalent to a classic taking as required by *Penn Central*, *Lingle*, *Murr*, and *Quinn*. Instead, the circuit court adopted a "strict scrutiny" analysis, relying on language in *Sea Cabins* that is no longer good law. *Sea Cabins* advocates an in-depth analysis of whether the land-use regulation "substantially advances legitimate state interests," citing the *Agins* opinion by the U.S. Supreme Court. *Sea Cabins*, 548 S.E.2d at 602. In 2005, the U.S. Supreme Court overturned *Agins*. *Lingle*,

544 U.S. at 539-48. The Court in *Lingle* held that government regulations do not have to undergo a judicial screening to determine if they "substantially advance" a state purpose:

> [T]he "substantially advances" inquiry reveals nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is distributed among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Lingle, 544 U.S. at 542.

In direct contradiction to the holding in *Lingle*, the circuit court follows *Agins* and *Sea Cabins* and finds that a taking has occurred because "the public is not benefited in any meaningful way by applying the ordinance to the Properties both because the Properties are already developed and because Defendant already has other regulatory measures in place to limit future beachfront development." Order, Page 10. This is precisely the type of analysis that was rejected by *Lingle.* Takings analysis does not include examination of whether the Merger Ordinance substantially advances Folly Beach's goals. Under *Lingle*, Folly Beach must simply show that it is pursuing a legitimate government interest and that the Merger Clause is not functionally equivalent to the classic taking. Because merger ordinances are not the functional equivalent of a classic taking, per the holdings in *Murr* and *Quinn*, this factor also favors a finding of no taking.

VIII. THE PUBLIC BENEFIT OF THE MERGER ORDINANCE FAR OUTWEIGHS ANY BURDEN PLACED ON BRADEN'S FOLLY.

The benefit of the Merger Ordinance far outweighs any burden placed on Braden's Folly. Folly Beach has an important and legitimate interest in moving development landward on the beach and preventing redevelopment of super-beachfront lots. Folly Beach has presented numerous affidavits and additional evidence showing that the current development of super-

beachfront lots threatens the beach, the environment, the natural growth of dunes, the City's beach renourishment projects, and the protection of all properties on the island from flooding events. *See supra* pp. 13-18. Courts have long recognized that the goal of rolling back unwise development on the beach is a legitimate government goal. *Esposito*, 939 F.2d at 169.

The Merger Ordinance supports these important goals by preventing redevelopment of any merged super-beachfront lots. In fact, Braden's Folly has repeatedly admitted that Folly Beach is pursuing a legitimate goal. Complaint, Paragraph 22(E), R. p. 26 ("Lot merger ordinances serve to prevent over-development."); Braden's Folly's Memorandum, Page 11, R. p. 543 ("Defendant cites legitimate and substantial public policies").

Braden's Folly has presented no evidence rebutting the importance of the above-cited goals. Rather, mimicking the language of the now overturned *Agins* opinion, Braden's Folly claims, and the circuit court ruled, that the Merger Ordinance does not advance the City's goals because the properties are already developed, and there are other regulations in place, such as the Dune Management Area, limiting development. Order, Page 10, R. p. 13; Braden's Folly's Memorandum, Page 11, R. p. 543.

The fact that Braden's Folly's lots are already developed does not counter the effectiveness of the Merger Ordinance. As stated in *Esposito*, the goal of beachfront regulation is to *gradually* roll back unwise development. *Esposito*, 939 F.2d at 169. Folly Beach is not trying to tear down the existing dwellings, but the Merger Ordinance will prevent the re-development of both lots in the future.

If the circuit court's order is allowed to stand, and Braden's Folly sells one of its lots, enforcement of the DMA on Lot B alone becomes more likely to create a total loss for the single lot.[12] Folly Beach has a compelling interest to prevent this total loss.

Braden's Folly has suffered little or no economic loss from the Merger Ordinance. The Merger Ordinance has not interfered with Braden's Folly's reasonable investment-backed expectations. In short, the minimal burden placed on Braden's Folly is far outweighed by the important public interests advanced by the Merger Ordinance.

IX. THE MERGER ORDINANCE APPLIES TO A BROAD CROSS SECTION OF LOTS.

Braden's Folly and the circuit court also assert that the Merger Ordinance impacts only Braden's Folly's lots, and that this somehow amounts to a taking. Order, Page 10-11, R. pp. 13-14; Braden's Folly Memorandum, Pages 11-12, R. pp. 543-544. This position is of questionable relevance and is factually inaccurate.

Although there is some general language in *Lingle*, 544 U.S. at 542, and *Columbia Venture*, 776 S.E.2d at 915-16, about spreading the regulatory burden, so long as "the prohibition applies over a broad cross section of land," a taking does not take place. *Penn Central*, 438 U.S. at 147. *See also Pennell v. City of San Jose*, 485 U.S. 1, 20, 108 S. Ct. 849, 99 L. Ed. 2d 1 (1988) (Scalia, J., dissenting) ("Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly."); *Quinn*, 862 F.3d at 444 ("[T]he County enacted the Grandfather/Merger Provision to limit development on sub-sized lots. Any difference in treatment Quinn suffered was thus 'rationally related to a

[12] As noted above, the DMA covers most of Lot B and likely renders Lot B undevelopable without a variance.

legitimate state interest,' [*City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)], and is not a violation of his equal protection rights.").

Folly Beach's current Merger Ordinance applies to all lots adjacent to either the OCRM Critical Line (the marsh), or the OCRM Baseline (the beach). Folly Beach Code of Ordinances, § 168.04-01(B), R. p. 735. Approximately 62 beach lots[13] are merged pursuant to the Merger Ordinance. Pope Supplemental Affidavit, Paragraph 5, R. pp. 606-607. Twenty-five of the merged lots are developed with residential houses. *Id.* The merged lots include seventeen super-beachfront lots located east of the Washout in the area of Braden's Folly's lots. Pope Supplemental Affidavit, Paragraph 6, R. p. 607. In addition, the City is vigorously enforcing the merger ordinance against other property owners, including Braden's Folly's neighbors, but only Braden's Folly has brought a lawsuit. Pope Supplemental Affidavit, Paragraph 7, R. p. 607.

In short, the circuit court's ruling that Braden's Folly alone will bear the burden of the Merger Ordinance is simply not supported by the record and is not legally relevant in any case.

CONCLUSION

The circuit court order does something no other court has ever done: invalidate a merger ordinance. At this time, Folly Beach is the only municipality in the entire country that cannot enforce its merger ordinance. The lower court's order is in direct conflict with recent U.S. Supreme Court and Fourth Circuit Court of Appeals precedent, and is supported by no case law found in any jurisdiction.

Merger ordinances are standard, long-existing land-use regulations that do not effectuate a taking. The holdings in *Murr* and *Quinn* confirm that the transfer restrictions contained in a merger ordinance are not a compensable taking for numerous reasons. First and foremost, the merger

[13] There are many more merged lots on the landward side of the island adjacent to marsh and river.

ordinance creates a minor restriction on one strand of Braden's Folly's larger bundle of rights. The proper focus is on Braden's Folly's remaining rights, which includes continuing the existing use of its property as a highly profitable short-term rental earning in excess of $100,000 a year.

Second, Braden's Folly's reasonable investment-backed economic expectations have not been thwarted. The Braden family acquired the lots for $65,000 when they supported a single house and Lot B was not developable. The lots have never been under separate title. Lot B only became developable, and only gained independent value, after government-funded renourishment. There was simply no expectation that the lots had any value as separate parcels.

The only investment Braden's Folly has made in the lots is the construction of the two houses. The houses are legal nonconformities and can continue to be used until they are torn down or damaged in excess of 50% or swept away. The Merger Ordinance does nothing to interfere with the existing use of those houses as short-term rentals, so any expectation arising from the use of the houses is not dampened.

Finally, Folly Beach has presented a wealth of uncontradicted evidence that gradually pushing unwise development away from the beach is a compelling government interest that benefits Braden's Folly, its neighbors, and every other owner on the beach. The Merger Ordinance advances that goal by ensuring that any future redevelopment that occurs on Braden's Folly's property will be on Lot A, not Lot B. Braden's Folly's alleged loss from having to sell the lots as merged is a minor burden in comparison to this goal. That burden certainly pales in comparison to the City's investment of millions of dollars in beach renourishment.

For the reasons stated, the circuit court's order should be reversed, and Folly Beach's Motion for Summary Judgment should be granted.

Respectfully submitted,

/s/ Joseph C. Wilson, IV
Joseph C. Wilson, IV, Esquire
City Attorney, City of Folly Beach
Post Office Box 178
Folly Beach, South Carolina 29439
(843) 834-2390
joe@follybeachlaw.com

/s/ Danny C. Crowe
Danny C. Crowe, Esquire
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5728
danny@crowelafave.com

Attorneys for Appellant City of Folly Beach

July 15, 2022