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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.

REPLY BRIEF OF APPELLANT

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I. FOLLY BEACH HAS NOT INTERFERED WITH BRADEN'S FOLLY'S INVESTMENT IN THE DEVELOPMENT OF ITS MERGED LOT.

The Circuit Court's ruling and Braden's Folly's Brief are entirely dependent upon the argument that Folly Beach's Merger Ordinance interfered with Braden's Folly's investment in the *development* of the merged lots in 2006. Order, Page 6, R. p. 9 ("Plaintiff developed the Properties in reliance on a regulatory scheme that did not include a merger ordinance."); Page 8, R. p. 11 ("Plaintiff invested approximately $1,100,000 in reliance on then-existing City code to build houses on both parcels with the reasonable expectation to sell one parcel to recoup construction costs and keep the other parcel in the family."). The Circuit Court ruled that Folly Beach's Merger Ordinance effectuates a compensable taking of developed lots, but not vacant lots. Order, Page 12 n. 7, R. p. 15. Similarly, Braden's Folly has argued that the *development* of the lots somehow removes it from the Merger Ordinance the and rulings in *Murr v. Wisconsin*, 137 S. Ct. 1933, 198 L. Ed. 2d 497 (2017), and *Quinn v. Bd. of Cty. Commissioners for Queen Anne's Cty., Maryland*, 862 F.3d 433 (4th Cir. 2017). Braden's Folly's Brief, Pages 12-14.

Braden's Folly's investment in the construction of the houses on the lots is not relevant because the Merger Ordinance does not interfere with the use of the houses. The Merger Ordinance only restricts the sale of the *lots*. The Merger Ordinance, like any other new land use ordinance, does not restrict or "interfere" with the use of the houses. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) ("Zoning laws generally do not affect existing uses of real property."). The houses are grandfathered in and can continue to exist and be used in any manner that Braden's Folly wants. Since the Merger Ordinance does not interfere with the development, Braden's Folly's investment in the houses is irrelevant to the takings analysis.

Braden's Folly acknowledges that the Merger Ordinance is a regulation of the lots, not the development: "Lot merger ordinances deal with whether the **separation** of the lots is grandfathered, not whether the 'use' of lots is grandfathered." Braden's Folly's Brief, Page 13 (emphasis in original). This statement is entirely correct. The Merger Ordinance does not deal with the *use* of the lots. The use of the lots is the development on the lots. The Merger Ordinance does not address when that use is grandfathered or when that grandfather period ends. The grandfathering of *uses* is addressed in other sections of Folly Beach's Code of Ordinances.

Rather, the Merger Ordinance deals with the grandfathering of the separate substandard *lots*. More particularly, the Merger Ordinance ends the grandfather period for the separate substandard lots when the two substandard lots come under common ownership. Since the Merger Ordinance only regulates the separation and grandfathered status of the substandard lots, the acquisition of the lots is the only relevant investment in the takings analysis. Since the Merger Ordinance does not regulate the *use or existing development* of the lots, Braden's Folly's investment in that use and development, namely the construction of the two houses, is entirely irrelevant to the takings analysis.

Thus, the only investment-backed expectations that are relevant are the Braden family's expectations at the time the original lots and house were purchased. This conclusion is supported by case law, which holds that "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 Cnty.*, 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)).

When Braden's Folly's family acquired the property, there was no reasonable expectation that the lots could support two houses or that Lot B could be developed. The current owners'

mother purchased the property in 1980 for $60,000. At that time, the property had one house on it. Lot B was undeveloped and had never been developed. Lot B merely served the purpose of maintaining access to the beach. No other super-beachfront lots were developed at the time. This state of affairs persisted until the City started renourishing the beach in 1993, eventually putting enough sand on the super-beachfront lots that they became developable after the second renourishment in 2005.

Mark Braden has admitted that he was "surprised" to see houses being built on his neighbor's super-beachfront lots in the 2005, twenty-five years after the Braden family purchased its property with a single house. July 30, 2020 Braden Statement, R. p. 393. Braden's Folly has acknowledged that purchasers of undeveloped super-beachfront lots, which is what the family purchased in 1980, have not suffered any loss of investment-backed expectations. Braden's Folly's Brief, Pages 23-24 ("Accordingly, unless an owner invested in a B-lot by constructing a house, the ordinance's restriction on the independent sale or development of a B-lot would not interfere with any investment-expectations.").

In short, the Merger Ordinance has not interfered with the Braden family's expectations at the time it acquired the merged lots because only one house could be developed on the merged lots at the time they were purchased. Conversely, the Merger Ordinance has not interfered with Braden's Folly's expectations at the time it invested in the construction of two houses on the newly renourished lots in 2006, because the Merger Ordinance does not limit the use of those houses.

As stated in *Penn Central*, regulations that do not interfere with existing *uses* and allow a reasonable return on those uses are not takings:

> Unlike the governmental acts in *Goldblatt, Miller, Causby, Griggs,* and *Hadacheck,* the New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and

> concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.

Penn Central, 438 U.S. at 136. *See also Esposito v. S.C. Coastal Council*, 939 F.2d 165, 169 (4th Cir. 1991) (Existing dwellings seaward of new challenged baseline are grandfathered in, so no taking); *Woodale P'ship v. City of Charleston*, No. 2:07-CV-2025-MBS, 2010 WL 11661386, at *20 (D.S.C. Sept. 17, 2010) (Application of a new land use ordinance did not amount to a taking because the plaintiff's "ability to continuing [sic] using the property 'precisely as they used it prior to the passage' of the 2007 Ordinance.").

This is exactly how the Merger Ordinance in this case operates. It places no restriction on the use of the existing development. To paraphrase *Penn Central*, the Merger Ordinance allows Braden's Folly to continue to use the property precisely as it has been used for the past 15 years: as a short-term rental. Since the Merger Ordinance imposes no restriction on the existing development, the investment that created that development is entirely irrelevant to the takings analysis. The only relevant investment is the original purchase of the lots. Since there was no expectation that the lots would support two houses at that time, the Merger Ordinance has not interfered with any relevant investment-backed expectation, and there is no taking.

II. MINIMAL INTERFERENCE WITH INVESTMENT-BACKED EXPECTATIONS DOES NOT AMOUNT TO A TAKING.

Even if the Court concludes that Braden's Folly's investment in the construction of the two houses is relevant, the Merger Ordinance only minimally interferes with Braden's Folly's investment-backed expectations in those houses. This is not sufficient to support the Circuit Court's finding of a compensable taking.

Braden's Folly's only alleged loss is from a speculative, future sale. Braden's Folly has presented an appraisal anticipating a sales price of the merged lot that is 19% lower than an anticipated sales price of the lots individually. Braden's Folly elevates this speculative 19% loss to a determinative factor under the *Penn Central* factors. Braden's Folly argues that this loss "checks the box" for the economic impact of the regulation *and for the extent to which the regulation has interfered with distinct investment-backed expectations* even though Braden's Folly is still earning a reasonable return on its investment and enjoying the highest and best use of the property.[1]

In effect, Braden's Folly argues that *any* interference with its economic expectations amounts to a compensable taking. This is not the law and has never been the law since *Penn Central* first enunciated the regulatory takings factors. *Penn Central* and its progeny support examination of the *extent* or *degree* of interference with investment-backed expectations is one factor that points toward the answer to the question whether the application of a particular regulation to particular property "goes too far." *Penn Central*, 438 U.S. at 124 ("[T]he *extent* to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 634, 121 S.Ct. 2448, 2466, 150 L.Ed.2d 592 (2001) ("Evaluation of the *degree* of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation 'goes to far.' ") (O'Connor concurrence); *Rick's Amusement*,

[1] Braden's Folly apparently disputes that using the houses as short-term rentals is not the highest and best use without identifying any more profitable use. Braden's Folly's Brief, Page 21. It really does not matter what the highest and best use of the houses is because the Merger Ordinance imposes no restrictions on the use of the houses. Braden's Folly can put them to any use that it wishes.

Inc. v. State, 351 S.C. 352, 570 S.E.2d 155, 157 (2001) ("More recent cases describe the second factor as the *degree* of interference with 'reasonable' investment-backed expectations.").

The Courts have not held that *any* interference with expectations amounts to a taking. Rather, they have repeatedly held the very opposite. 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). 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. *See also id.* at 125 (A regulation is not a taking merely because it "prohibit[s] the most beneficial use of the property."); *Quinn*, 862 F.3d at 442 (same); *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d210 (1979) ("[L]oss of future profits - unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim."); *Henry v. Jefferson Cty. Comm'n*, 637 F.3d 269, 276 (4th Cir. 2011) (There is no regulatory taking when the property "retained a number of valuable, expressly permitted uses."); *Clayland Farm Enterprises, LLC v. Talbot Cnty., Maryland*, 987 F.3d 346, 354 (4th Cir. 2021) (same).

Moreover, in assessing an owner's investment-backed expectations, the primary focus should be on the *existing use* of the property, not the future sale price. *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.").

As acknowledged in both *Murr* and *Quinn*, merger ordinances are not the type of land use regulations that "goes too far." Folly Beach's Merger Ordinance does not interfere with the existing use of Braden's Folly's properties. At most, the Merger Ordinance has had a minimal

impact on Braden's Folly's investment-backed expectations. Braden's Folly has only presented evidence of a loss in anticipated future profits. This loss, standing alone, does not show the *extent* or *degree* of interference with investment-backed expectations that supports a compensable taking.

Much of Braden's Folly's Brief is taken up with trying to distinguish the many cases cited in Folly Beach's Brief, Pages 41-42, that hold that losses greater than 50% will not support a taking. Braden's Folly's Brief, Pages 15-20. But again, what Braden's Folly fails to do is point to a single case in which an alleged loss of 19% supports a taking. This is simply not the degree of interference with investment-backed expectation that supports a regulatory taking. A loss has to be complete or the functional equivalent of a complete loss to amount to a taking. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (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."); *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601, 619 (2013) (same). Neither diminution in property value, *Penn Central*, 438 U.S. at 131, nor "even substantial reduction of the attractiveness of the property to potential purchasers," *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), will suffice to establish that a taking has occurred. *Esposito*, 939 F.2d at 170.

III. BRADEN'S FOLLY HAS NOT LOST A "FUNDAMENTAL" RIGHT.

Braden's Folly's attempts to circumvent this well-settled law by claiming that the City's Merger Ordinance has taken away "the fundamental right to freely alienate its real property." Braden's Folly's Brief, Pages 1, 9, 11, 18, 22. Braden's Folly overlooks the fact that it can still

alienate its property, just not as two separate pieces.[2] The only right that has been taken away is the right to sell its merged lots separately, and *Murr* and *Quinn* hold that this loss does not represent a taking.

"[W]here 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. But this is precisely what Braden's Folly is attempting to do: segregate out its right to sell the lots separately and claim that a taking has occurred because that particular right has been entirely abrogated.

The right to separately sell two undersized lots that have always been deeded and titled together and that are inextricably intertwined by numerous easements is not a fundamental property right. "Fundamental" property rights include the right to occupy the property, the right to exclude others from the property, the right to use the property, and possibly the right to alienate the property, although that right can be completely abrogated without creating a taking. *Andrus*, 444 U.S. at 56-66. Braden's Folly has lost none of these rights. It can use its property. It can exclude others from its property. And it can sell its property, just not in the precise manner that it hoped for. This limited restriction on alienation, and the resulting 19% loss in value based on a hypothetical future sale simply does not rise to the level of interference that amounts to a taking.

IV. FOLLY BEACH'S MERGER ORDINANCE DOES NOT "SINGLE OUT" BRADEN'S FOLLY.

Braden's Folly argues that Folly Beach's Merger Ordinance should not apply to its property because the regulatory burden is not evenly distributed among property owners. As argued in

[2] Braden's Folly could also turn the merged lot into two condominiums and sell the houses separately as a condominium. It could sell the merged lot and use the proceeds to purchase a single beachfront house and pay off its loans. It could keep both houses and continue to rent them. It has many options to recoup its investment in the houses.

Folly Beach's Initial Brief, Pages 46-47, Braden's Folly's argument on this issue is factually incorrect and legally irrelevant. Braden's Folly's related argument that it has not received the "advantage of reciprocity" is surprising given that the City's renourishment efforts created a second developable lot for Braden's Folly where none existing before.

Factually, the Merger Ordinance applies to all properties on Folly Beach that are on the beach or on the marsh. An inventory of merged lots shows that approximately 62 beachfront lots, including 25 developed lots, are merged under the Ordinance. Pope Supplemental Affidavit, Paragraph 5, R. pp. 606-607. The Merger Ordinance does not "single out" Braden's Folly.

The plaintiff in *Penn Central* made a very similar argument to Braden's Folly, arguing it was "solely burdened and unbenefited" by the challenged ordinance. The U.S. Supreme Court extensively discussed and rejected the argument. *Penn Central*, 438 U.S. at 132-35. 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. Illegal discriminatory zoning is "a land-use decision which *arbitrarily singles out a particular parcel* for different, less favorable treatment than the neighboring ones." *Id.* at 132 (emphasis added). Land use regulations can have "a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a taking." *Id.* at 133-34. Braden's Folly's parcel has not been arbitrarily singled out. The Merger Ordinance applies to all lots that are adjacent to critical areas on the island, serving to reduce the density of development adjacent to those critical areas. Braden's Folly's assertion that it has suffered a more severe impact than others does not in itself mean that a taking has occurred.

The Fourth Circuit in *Quinn* upheld the dismissal of the plaintiff's equal protection claim based on arguments similar to Braden's Folly:

> Finally, Quinn argues that the district court erred in granting the County's motion for summary judgment on his claim that the sewer extension and the

> Grandfather/Merger Provision violate his right to equal protection of the law by disproportionately affecting his property. The Equal Protection Clause of the Fourteenth Amendment "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). Government action, though, will inevitably "differentiate in some fashion between" people, *id.*, so outside of certain suspect groups like race or national origin, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a 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). Thus Quinn must show that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. Of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). He has failed to do so.
>
> Here, the County plainly has a "rational basis for the difference in treatment." *Id.* . . . Moreover, the 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 legitimate state interest," *City of Cleburne*, 473 U.S. at 440, 105 S.Ct. 3249, and is not a violation of his equal protection rights.

Quinn, 862 F.3d at 444.

In support of its arguments, Braden's Folly relies heavily on *Columbia Venture, LLC v. Richland Cnty.*, 413 S.C. 423, 776 S.E.2d 900 (2015), ignoring the fact that this Court ultimately held that restrictions on development within a floodplain, like restrictions on development adjacent to a beach or wetlands, were not a taking. The plaintiff did not alone bear the burden of the contested ordinance because "the ordinance is applicable to all property located within a floodplain." *Id.* at 916. By the same token, Folly Beach's Merger Ordinance is applicable to all property located next to the beach or marsh.

Similarly, the Court in *Columbia Venture* found that the challenged ordinance did secure a "reciprocity of advantage" because "the County's restriction of floodway development benefits all owners of floodplain property within the County by reducing general flood hazards." *Id.* Again, this reasoning equally applies in this case. The Merger Ordinance serves to restrict unwise development on the beach, which in turn reduces general flood hazards for all property on the

island, especially property on the beach, thereby securing a reciprocity for Braden's Folly.

Finally, Braden's Folly overlooks the fact that the Merger Ordinance is part of a comprehensive plan by the City to protect the beach and future federal funding for renourishment of the beach, a plan that disproportionately protects beach front properties from flooding and even created a buildable lot for Braden's Folly where none existed before. A comprehensive plan that literally creates new lots for a landowner is the antithesis of "discriminatory zoning." *Penn Central*, 438 U.S. at 132. *See also Murr*, 137 S.Ct. at 1949-50 ("Finally, the governmental action was a reasonable land-use regulation, enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land.").

All owners of the 62 merged properties on the front beach are treated the same. None can develop or redevelop more than one house on the merged lots. This serves to reduce the density of development adjacent to critical areas like the beach and wetlands. Braden's Folly has not been "singled out" and has received the advantage of reciprocity received by all other property owners on Folly Beach from gradually rolling back and reducing the density of unwise development on the beach.

V. THE HOLDINGS IN *MURR* AND *QUINN* CONTROL THIS CASE.

Braden's Folly's final argument is an attempt to distinguish this matter from *Murr* and *Quinn*, the only two reported cases that address the constitutionality of merger ordinances. Braden's Folly argues that holdings in *Murr* and *Quinn* cannot be applied to developed property or property acquired before adoption of the challenged merger ordinance.

Even the most cursory reading of *Murr* and *Quinn* reveals that the primary drivers of the decisions were 1) the lots were deemed merged, which Braden's Folly has admitted here, and 2) the merged lots retained significant value, which is the case here as well. Whether the lots were

vacant or not was not part of either opinion's legal analysis. Certainly, neither the Circuit Court nor Braden's Folly have cited any case law supporting the distinction they have made.

Braden's Folly is arguing that a single factor – the developed state of the lot – is dispositive and controlling on whether a regulatory taking has occurred. This argument is contradicted by *Penn Central* and its progeny, which repeatedly emphasize that regulatory takings challenges involve "essentially ad hoc, factual inquiries" of numerous factors, none of which, standing alone, are determinative. *See, e.g., Penn Central*, 438 U.S. at 124 ("In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance."); *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (These "ad hoc, factual inquiries [are] designed to allow careful examination and weighing of all the relevant circumstances.") (citation and internal quotation marks omitted); *Palazzolo*, 533 U.S. at 617 ("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.").

Of course, there is a "common touchstone" of each regulatory taking theory. The goal is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. Both *Murr* and *Quinn* concluded that merger ordinances look nothing like a classic taking primarily because the merged properties retain substantial value and can still be developed after the merger. *Murr*, 137 S.Ct. at 1949-50; *Quinn*, 862 F.3d at 442-443. A merger ordinance "does not resemble a regulation that is pressing [the owner's] land into some form of

public service. Instead, it resembles standard zoning tools – such as minimum lot sizes, setback requirements, or restrictions on subdividing lots – that local governments use all the time to temper the density of development." *Quinn*, 862 F.3d at 441 (citing *Murr*; internal citations and quotes omitted). This is the core ruling in both *Murr* and *Quinn*, and it supports dismissal of this challenge to a merger ordinance as well.

A. DEVELOPED LOTS ARE SUBJECT TO MERGER ORDINANCES.

Braden's Folly asserts that this matter is distinguishable from *Murr* and *Quinn* because those cases involved vacant lots. In fact, both cases involved both vacant and developed lots. Legally, neither opinion makes any distinction between vacant and developed lots.

First, as acknowledged by Braden's Folly, *Murr* did in fact involve the merger of a developed lot. *Murr*, 137 S.Ct. at 1940 (noting that Lot F had a cabin). Just like Braden's Folly in this matter, the owners in *Murr* wanted to sell one of their lots to finance the *redevelopment* of the other lot and were prevented from doing so by the merger ordinance. *Id.* at 1941. Similarly, *Quinn* involved both vacant and developed lots. *Quinn*, 862 F.3d at 437 ("Quinn built homes on some of the lots and hoped to develop the rest."); *id.* ("Many of the septic systems are now considered failing – in two developments, a full eighty percent are."); *id.* ("Both developed and undeveloped lots on those streets would receive sewer service.").

Second, neither *Murr* nor *Quinn* in any way suggest that only vacant lots can be merged. Neither opinion discusses the developed status of the lots in any detail or incorporates that status into its legal analysis. This is hardly surprising. There is simply no basis to find a taking based on the fact that a lot subject to new regulation is already developed. The issue never arises because the existing development is almost always grandfathered in as discussed above. *See, e.g., Penn Central*, 438 U.S. at 125 ("Zoning laws generally do not affect existing uses of real property.").

As such, there is no reason that the development of a lot would become a determinative factor in a takings analysis. The development is simply not part of the equation because the development is not impacted by new zoning laws.

Relatedly, Braden's Folly seems to argue that all merger ordinances by their very terms only apply to undeveloped lots. While some merger ordinances only apply to undeveloped lots, some merger ordinance, including Folly Beach's and the state statute examined in *Murr*, apply to all substandard lots, regardless of whether they are vacant or developed. Wis. Admin. Code NR § 118.08(4)(a)(2) (2022) ("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.").[3]

The *Quinn* opinion contains language indicating that the challenged merger ordinance applied to developed lots with failing septic systems. *Quinn*, 862 F.3d 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."). However, it is telling that the *Quinn* opinion otherwise does not even mention whether the challenged merger ordinance applies to all substandard lots or just vacant substandard lots. The lack of any discussion of the issue would seem to indicate that the status of the lots – whether they were developed or vacant – had no relevance to the Fourth Circuit's reasoning or decision that no taking had occurred.

[3] Braden's Folly claims that the Wisconsin statute has been amended since the *Murr* decision. Braden's Folly's Brief, Page 30, n. 2. The merger language in the current version of the statute is the same as the language cited by the Supreme Court in *Murr*, and there is no indication that the statute has been amended since 2017.

B. BRADEN'S FOLLY'S ACQUISITION OF THE LOTS PRIOR TO ADOPTION OF THE MERGER ORDINANCE DOES NOT DISTINGUISH THIS MATTER FROM *MURR* AND *QUINN*.

Likewise, the fact that Braden's Folly acquired its lots prior to enactment of the Merger Ordinance does not create a relevant distinction under the regulatory takings analysis of *Murr* and *Quinn*. First, the lots in *Quinn* were purchased between 1984 and 2002, but the Grandfather/Merger Provision was enacted in 2014. *Quinn*, 862 F.3d at 437-38. So, *Quinn* is not distinguishable on this ground.

More to the point, the Fourth Circuit made clear that even new merger ordinances that interfere with an owner's hopes and plans is not a taking, largely because the owner is left with significant value, just not quite as much as he had hoped for. *Quinn*, 862 F.3d at 442 ("Quinn can still build homes on his land; the Provision only requires that the development be less dense than he had hoped.").

The holding in *Quinn* is mirrored in most regulatory takings opinions that involve application of a new land use ordinance to an existing developed property. Braden's Folly falsely states that many of the cases cited by Folly Beach, including *Penn Central*, *Esposito*, and *Woodale*, involve "owners who were attempting to develop or redevelop their properties *after* enactment of the at-issue regulations." Braden's Folly's Brief, Page 12. In fact, these cases involved land use restrictions placed on property after it was already developed.

In *Penn Central*, the property owner's famous railroad terminal opened in 1913 and, of course, still exists to this day. *Penn Central*, 438 U.S. at 115. New York City's challenged Landmarks Law was adopted in 1965, i*d.* at 109-10, and the terminal was designated a "landmark" in 1967. *Id.* at 115-16. In 1968, the terminal owners applied to construct a multistory office building above the terminal. *Id.* at 116-17. The application to redevelop was denied based on the

recently adopted Landmarks Law. *Id.* Of course, the Supreme Court concluded that this was not a taking even though the existing development predated the challenged ordinance.

The Fourth Circuit in *Esposito* also addressed a new ordinance's impact on existing development. "The lots of the *Esposito* plaintiffs have been improved with residential dwellings. . . most of these dwellings were situated at least partially seaward of the [challenged] baseline." *Esposito*, 939 F.2d at 167. Like Folly Beach's Merger Ordinance, the new law imposing the new challenged baseline grandfathered in the existing structures until they were "destroyed beyond repair." *Id.* The Fourth Circuit held that no taking had occurred.

The property in *Woodale* was developed with two houses, a barn and additional structures. *Woodale P'ship*, 2010 WL 11661386, at *2. The Court ruled that the application of a 2007 land use ordinance did not amount to a taking because the plaintiff's "ability to continuing [sic] using the property 'precisely as they used it prior to the passage' of the 2007 Ordinance." *Id.* at *20 (quoting *Esposito*).

The lots in *Murr* were acquired and developed by the Murr family prior to enactment of the Wisconsin merger statute. *Murr*, 137 S.Ct. at 1941. So, the Murr family's investment in the property took place entirely before the merger ordinance was adopted. Even though intra-family transactions brought the property under the merger ordinance after its adoption, *Murr* explicitly states that "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." *Id.* at 1945 (quoting *Palazzolo*, 533 U.S. at 627). So, Braden's Folly's argument that new land use ordinances cannot be applied to developed property is explicitly rejected by *Murr*, *Quinn*, *Penn Central*, *Esposito*, *Woodale*, and any number of other cases addressing challenges to newly adopted land use ordinances.

The holdings in *Murr* and *Quinn* simply echo well-established precedent that a regulatory taking is not established simply because a new law frustrates an owner's expectations or hopes. "Taking challenges have also been held to be without merit in a wide variety of situations when the challenged governmental actions prohibited a beneficial use to which individual parcels had previously been devoted and thus caused substantial harm." *Penn Central,* 438 U.S. at 125. "[T]he submission that [owners] 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." *Id.* at 130.

Finally, in this case, as in *Murr* and *Quinn*, all the owners were on notice that they held substandard lots that were only developable due to an exception that usually, but not always, allowed for development of substandard lots with a single residential dwelling. Braden's Folly's property, like the lots in *Quinn*, is in a heavily regulated area. The lots in this matter, like the lots in *Quinn*, greatly benefited from government action.[4] Indeed, Lot B was not developable until the City started renourishing the beach.

Given these factors, Braden's Folly, like the owners in *Murr* and *Quinn*, could have reasonably anticipated the possibility that their substandard beachfront lots might be subject to further regulation. *Columbia Venture,* 776 S.E.2d at 914 ("The critical question is what a reasonable owner in the claimant's position should have anticipated."); *Appolo Fuels,* 381 F.3d at 1349 (One factor to consider is whether the plaintiff could have "reasonably anticipated" the possibility of such regulation in light of the "regulatory environment" at the time of purchase.").

[4] Folly Beach has presented unrebutted evidence that its Merger Ordinance is part of a larger effort to ensure continued federal funding of renourishment. Elko Affidavit, Paragraph 13, R. p. 399; May 5, 2014 Corps Letter to City, R. p. 416 (Threatening to eliminate federal renourishment funding for those "areas where additional development has occurred…too close to the PEL (perpetual easement line).").

Put simply, buying and developing substandard investment property on the beach, particularly on a lot that was on active beach prior to renourishment, is a highly speculative venture. An alleged 19% reduction in profits on the hypothetical future sale of such speculative properties does not constitute a taking.

VI. BRADEN'S FOLLY'S APPRAISAL IS NOT A RELIABLE MEASURE OF ITS LOSS.

Braden's Folly only evidence of a loss is an appraisal by Christopher Donato. Mr. Donato opined that the lots sold individually (in violation of the Merger Ordinance) would be worth $2,685,000, and that the lots sold as one parcel (in compliance with the Merger Ordinance) would be worth $2,177,000. Donato Appraisal, Cover Letter, R. p. 181. Thus, Braden's Folly's own expert has acknowledged that the Braden's Folly's loss is, at most, 19%.

Mr. Donato's appraisal is deeply flawed in several ways. First, Mr. Donato fails to employ an income capitalization valuation approach. He asserts that "the Income Approach is not an analytical tool employed by buyers and sellers of single-family residences." Donato Appraisal, R. p. 191. Mr. Donato ignores the fact that the primary use of the Braden's Folly properties is as income generating short-term rentals, not a residence. Plaintiff's Supplemental Answers to Defendant's First Set of Interrogatories, R. pp. 604-605 (Showing the lots earned over $100,000 a year in rental income). "The income approach is a recognized method for valuing property, specifically when the property's value is largely based on rental income." *Hull v. Spartanburg Cty. Assessor*, 372 S.C. 420, 641 S.E.2d 909, 911 (Ct.App. 2007).[5]

[5] Mr. Donato avoided the income method likely because it would provide the exact same value for both before and after enactment of the Merger Ordinance because the Ordinance does not impact the income generated from the property.

Second, Mr. Donato uses two different valuation methods for his "before" and "after" valuation. First, Mr. Donato estimates the values of Lot A and Lot B if sold separately – the "before" valuation – using a sales comparison approach. Donato Appraisal, R. pp. 218-250. However, Mr. Donato values the merged lots – the "after" valuation - using a discounted cash flow and absorption rate. Donato Appraisal, R. pp. 251-255. It is hardly surprising that he has come up with two different values using two different valuation methods.

Third, the absorption rate is not a proper valuation method for two developed lots. The absorption rate approach is commonly used to value large developments of vacant land by estimating how long it would take the sell all the lots. *El Paso Cty. Bd. of Equalization v. Craddock*, 850 P.2d 702, 705 (Colo. 1993) (The market absorption rate "is a method which adjusts the value of property to account for the developer's cost of development and placing site improvements."); *Hixon v. Lario Enterprises, Inc.*, 19 Kan.App.2d 643, 875 P.2d 297, 301 (1994), *aff'd as modified*, 257 Kan. 377, 892 P.2d 507 (1995) ("The developer's discount method of valuation, which is also known as the subdivision approach or the development approach, consists of a discounted cash flow analysis which considers a projected absorption rate and the corresponding drop in income from the sale of lots."). The absorption rate is a method for valuing a development composed of numerous individual undeveloped parcels. It is not an appropriate method for valuing a property composed of just two developed parcels.

Fourth, even if an absorption rate valuation was appropriate in this case, Mr. Donato failed to take into account the rent earned from the properties during the "absorption period." Donato Appraisal, R. pp. 251-255. The earned rent would largely offset any costs incurred during the absorption period.

Finally, Mr. Donato conveniently ignores the full-price offer made for the merged lots. Braden's Folly was offered the full asking price of $2,550,000 for the merged lots in January of 2021. January 10, 2021 Bonner Offer, R. pp. 891-899; Carlomany Deposition, R. p. 852, line 22 - p. 853, line 21. This is nearly $400,000 more than Donato's appraised value of the merged lots ($2,177,000). Braden's Folly inexplicably ignored this full-price offer, and so did Mr. Donato in his appraisal.

Counsel for Braden's Folly has made every effort to discount this full-price offer, mostly by misrepresenting the underlying testimony and documents produced by the potential buyer's agent, Christopher Carlomany. Emails and testimony from Mr. Carlomany make quite clear that the buyer was ready, willing, able and very eager to purchase the merged lots for the full asking price and had full knowledge of the Merger Ordinance and this pending litigation.

The buyer, Christopher Bonner, first offered $2,200,000 for both lots on January 4, 2021. January 4, 2021 Bonner Offer, R. pp. 872-880; Deposition of Christopher Carlomany, R. p. 849, lines 11-17. Braden's Folly did not respond to this offer, so Mr. Bonner raised his offer to $2,550,000, the full asking price for both lots, on January 10, 2021. January 10, 2021 Bonner Offer, R. pp. 891-899; Carlomany Deposition, R. p. 852, line 22 - p. 853, line 21. Mr. Carlomany's testimony and his email transmitting this offer to Braden's Folly's agent, LaJuan Kennedy, conclusively shows that the buyer was aware of the Merger Ordinance and was nevertheless very eager to purchase the merged lots:

> Hi LaJuan my client would like to put in a full price offer on this property to persuade the seller to at least get it under contract with us. He understands that this cannot sell until the litigation is solved but is willing to close whenever that is. We put a delayed closing on the contract in order to account for some time and if it is solved sooner we will close as soon as possible. We will get all inspections and info we need within the first month of contract so the seller knows 100% we are willing to move forward and only waiting to the litigation to be settled. The good thing is

> my client has expressed that however the turnout he is moving forward. Whether it combines into one lot or remains two he will close.

Carlomany January 11, 2021 Email, R. p. 901. *See also* Carlomany Deposition, R. p. 853, line 2 - p. line 5. Mr. Carlomany explained that Mr. Bonner liked the merged property because it provided both income and a beach house for family vacations, just like the Bradens have used the property. Carlomany Deposition, R. p. 855, line 21 - p. 856, line 8.

Braden's Folly never responded to this full-price unconditional offer. January 11-15, 2021 Email Chain, R. pp. 900-904; Carlomany Deposition, R. p. 856, line 22 - p. 858, line 24. After not hearing from Ms. Kennedy for several weeks, Mr. Carlomany tracked down counsel for Braden's Folly to reiterate the full-price offer on January 28, 2021. Carlomany Deposition, R. p. 859, line 4 - p. 866, line 13; January 28, 2021 Carlomany Email, R. p. 915. So, for over two weeks Bonner's full-price offer remained open with no response from Plaintiff.

Unfortunately, after receiving no response to his full-price offer made on January 11, 2021, Mr. Bonner moved on and found another property on Folly Beach. February 1, 2021 Carlomany Email, R. pp. 918-921; Carlomany Deposition, R. p. 867, line 13 - p. 869, line 24. Mr. Bonner remained interested in the Braden's Folly property but lowered his offer to $2,000,000. The lower price was not due to the merger ordinance, as asserted by Braden's Folly. Braden's Folly's Brief, Page 21. Rather, Mr. Carlomany's testimony and email conclusively show that Mr. Bonner lowered his offer because he had another property under contract, and no longer needed two homes, one to rent and one to use as a family beach house. February 1, 2021 Carlomany Email, R. pp. 918-921 ("In the week or so we were waiting on a response from her another beach front lot came on the market and he ended up getting that under contract. With the purchase of the lot he will no longer be using one of the houses as a second home. After some further thought over this weekend he came to the decision that for him it doesn't make financial sense to take a loss,

now that he has this other property.").[6] *See also* Carlomany Deposition, R. p. 869, lines 12-24 ("Q. So it was just a financial issue and a personal decision. A. Correct. Q. And it didn't have anything to do with the merger or the litigation. A. No. Q. Because he already knew about all that. A. Correct.").

Based on the record, it is clear that Braden's Folly received a full price offer for the merged lots and ignored the offer weeks. The offer provides strong evidence that the Merger Ordinance has not substantially reduced the value of Braden's Folly's lots. Moreover, Braden's Folly's refusal to accept or even respond to Mr. Bonner's offer (or any other offer) shows that it was not truly interested in selling the properties but was instead soliciting offers to use in this lawsuit. 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.").

CONCLUSION

Merger ordinances are "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." *Murr*, 137 S.Ct. at 1949-50. Merger ordinances are "a standard zoning provision designed to manage the density of development, a crucial part of local land use planning." *Quinn*, 862 F.3d at 443. The Circuit Court's finding that Folly Beach's Merger Ordinance is a taking is an unprecedent ruling that "revolutionize[s] zoning law and severely constrict[s] local governments' ability to direct democratically the very nature and character of the community." *Id.* These are the words of the U.S. Supreme Court and Fourth Circuit Court of Appeals, not Folly Beach.

[6] Mr. Bonner's desire for two houses, one to rent and one to use, belies Braden's Folly's and Mr. Donato's assumption that buyers are not interested in the merged lot.

Braden's Folly spends nearly its entire brief arguing that *Murr*, *Quinn*, and the many other cases cited by Folly Beach are distinguishable from this matter. However, Braden's Folly fails to identify any precedent that actually supports its own argument that merger ordinances cannot be applied to developed properties. Folly Beach is aware of no cases holding that a merger ordinance creates a taking. There is no precedent stating that merger ordinances cannot be applied to developed properties. All the precedent finds otherwise. Even though there are some distinguishable (and largely irrelevant) facts in *Murr* and *Quinn*, these opinions remain the only precedent of note, and they both support the conclusion that merger ordinances do not effectuate a taking.

This conclusion is all but inevitable under the *Penn Central* factors governing regulatory takings because merged properties are always left with substantial value. Under both the traditional "whole parcel doctrine," *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), and the analysis adopted in *Murr*, Braden's Folly's merged lots are the "denominator" in the takings equation. Braden's Folly has admitted this repeatedly. Braden's Folly's Brief, Page 29; Braden's Folly's Memorandum in Support of Motion for Summary Judgment, R. p. 546. The admission that the merged lots form the appropriate parcel for analysis under the *Penn Central* factors is outcome determinative, *Murr*, 137 S.Ct. at 1943-44, because the entire parcel retains substantial value, and the existing use of the parcel can continue without interference.

Braden's Folly cannot overcome this inevitable conclusion based on an alleged 19% loss in value from a hypothetical future sale. As stated by the Fourth Circuit in *Esposito*, which also involved rolling back unwise development of beachfront property, "neither diminution in property value, *Penn Central*, 438 U.S. at 131, 98 S.Ct. at 2662, nor 'even substantial reduction of the

attractiveness of the property to potential purchasers,' *Kirby Forest*, 467 U.S. at 15, will suffice to establish that a taking has occurred." *Esposito*, 939 F.2d at 170.

Folly Beach's Merger Ordinance looks nothing like a traditional taking. It does not interfere with the occupation or use of any portion of Braden's Folly's property in any way. At most, it diminishes the value of the property by 19%. To find a taking here would indeed revolutionize zoning law.

Respectfully submitted,

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