THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
Jul 15 2022
S.C. 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.

RECORD ON APPEAL
VOLUME 3

Joseph C. Wilson, IV
City Attorney, City of Folly Beach
Post Office Box 178
Folly Beach, South Carolina 29439
(843) 834-2390
Attorney for Appellant

Danny C. Crowe, Esquire
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5728
Attorney for Appellant

Keith M. Babcock
Ariail E. King
Joseph B. Berry
LEWIS BABCOCK, L.L.P.
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000
Attorney for Respondent

INDEX

VOLUME 1

Exhibit E

Deposition of:

Anthony P. Carlomany

July 13, 2021

In the Matter of:

Braden's Folly, LLCv. City of Folly Beach

Veritext Legal Solutions
800.743.DEPO (3376) | Calendar-carolinas@veritext.com |
www.veritext.com

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
BRADEN'S FOLLY, LLC,
Plaintiff,
vs. Case No. 2019-CP-10-6628
CITY OF FOLLY BEACH,
Defendant.

DEPOSITION OF: ANTHONY P. CARLOMANY
DATE: July 13, 2021
TIME: 1:07 PM
LOCATION: Earhart Overstreet
878 Whipple Road, Suite 200
Mt. Pleasant, SC
REPORTED BY: Sandra K. Bjerke, RDR, CRR, CBC

APPEARANCES OF COUNSEL:

ATTORNEYS FOR THE PLAINTIFF
BRADEN'S FOLLY, LLC:

LEWIS BABCOCK, LLP
BY: JOSEPH B. BERRY
1513 Hampton Street
Columbia, SC 29201
(803) 771-8000
jbb@lewisbabcock.com

ATTORNEYS FOR THE DEFENDANT
CITY OF FOLLY BEACH:

JOSEPH C. WILSON LAW FIRM, LLC
BY: JOSEPH C. WILSON, IV
714 East Erie Avenue
PO Box 178
Folly Beach, SC 29439
(843) 834-2390
joe@follybeachlaw.com

ATTORNEYS FOR ANTHONY P. CARLOMANY:

EARHART OVERSTREET LLC
BY: STEVEN R. KROPSKI
878 Whipple Road, Suite 200
Mt. Pleasant, SC 29464
(843) 972-9400
steve.kropski@earhartoverstreet.com

(INDEX AT REAR OF TRANSCRIPT)

Braden?

A. I emailed Frank, but I only talked with Mark because Frank said Mark was handling this transaction.

Q. Okay. Would it have been around this same time that you talked with Mark?

MR. BERRY: Object to form.

THE WITNESS: It would have been -- first contact was on the 28th. Final contact was on the 4th. So it was within about a week period.

BY MR. WILSON:

Q. Sometime in there.

A. Sometime in there, yes.

Q. Okay. So what did you and Mr. Mark Braden talk about?

MR. BERRY: Object to form. You can answer.

THE WITNESS: At the point of first conversation, Chris was still wanting -- you know, willing to pay the full offer of 2.55. So just spoke with Mark about the offer.

I did ask if he received the full-price offer. He did tell me that he never got it, to his knowledge at that point, and that was the main parts of the conversation other than just, you

know, getting his email addresses and, you know, forwarding him the offer and the compensation agreement to his brother from there.

BY MR. WILSON:

Q. Okay. Did he indicate whether he was interested in accepting that offer?

A. He was.

Q. Okay. And did he think his brother would be as well?

A. Yes.

Q. So it was really a matter of getting everyone's signatures on all the documents.

A. Correct.

Q. All right. Did you talk about the litigation with the city with Mr. Braden?

A. Not in any kind of detail. I mean, at that point we were comfortable with whatever happened with the litigation.

Q. Okay. Did he express to you any opinions about the litigation's merits or anything else?

MR. BERRY: Object to form.

THE WITNESS: Not in any detail.

BY MR. WILSON:

Q. And I'm going to show you what's been

ANTHONY CARLOMANY - CROSS EXAMINATION BY MR. BERRY

Q. Did he ever get back to you about the rent roll assessment?

A. No.

Q. And as you write further here:

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 his other property.

And it goes on to say:

At the 2.55M, these income numbers, and taking into consideration the expenses excluding maintenance he would be losing 2k per month. It would be much more of a loss if he based it off the current rent rolls grossing 156k between the two properties last year. That being said he is almost -- willing to almost break even which would be the $2 million mark.

Is that correct?

A. Correct.

Q. So over the weekend he thought further about this, and once the Bradens said they would do 2.55, he then reduced his price by $550,000.

A. Correct.

Q. All right. And that was based on 2.55 being a loss for him, that he would lose money on

the properties combined; correct?

A. Correct.

Q. And he understood the merger ordinance at this point; correct?

A. Correct.

Q. And buying them together at 2.55 would lead to over a half million dollar loss for him, is that correct, effectively?

A. Well --

MR. WILSON: Objection.

THE WITNESS: -- it was a $2,000 loss per month, excluding maintenance, and that was based off of what Emma said he would net, you know, minus his mortgage and interest and insurance. We were able to do all that information and do the -- run the numbers.

BY MR. BERRY:

Q. And so for him, after running the numbers, $2 million was the price he thought was effectively break even for the properties merged together.

A. Close to break even. Because when you include maintenance at 600 profit a month, he's going to use -- eat that up in maintenance as well.

Q. So maybe a little under $2 million for

Exhibit F

Deposition of:

LaJuan Kennedy

June 24, 2021

In the Matter of:

Braden's Folly, LLCv. City of Folly Beach

Veritext Legal Solutions
800.743.DEPO (3376) | Calendar-carolinas@veritext.com |
www.veritext.com

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
Braden's Folly, LLC,
Plaintiff,
vs. CASE NO. 2019-CP-10-06628
City of Folly Beach,
Defendant.

VIDEOCONFERENCE
DEPOSITION OF: LAJUAN KENNEDY
DATE: June 24, 2021
TIME: 10:07 a.m.
LOCATION: 106 West Hudson
Unit A
Folly Beach, SC
TAKEN BY: Counsel for the Defendant
REPORTED BY: ERIC S. GLAZIER, Court Reporter

APPEARANCES OF COUNSEL VIA VIDEOCONFERENCE:

ATTORNEYS FOR THE PLAINTIFF:

LEWIS BABCOCK
BY: JOSEPH BERRY
1513 Hampton Street
Columbia, SC 29201-2924
(803) 771-8000
Jbb@lewisbabcock.com

ATTORNEYS FOR THE DEFENDANT:

WILSON LAW FIRM
BY: JOSEPH C. WILSON, IV
714 East Erie Avenue
Folly Beach, SC 29439
(843) 834-2390
Joe@follybeachlaw.com

(INDEX AT REAR OF TRANSCRIPT)

A. Yes.
Q. You have health problems right now?
A. Well, I had had a bout with high blood pressure, so that's a check on this. And they found out I had internal bleeding from taking Advil. How about that?
Q. When you say, a check on this, what do you mean?
A. They've got to recheck my blood pressure and all. It's down, but I have to go to the heart doctor and have it all rechecked.
Q. Were you recently hospitalized for those issues?
A. January.
Q. How long were you in the hospital during January?
A. A week.
Q. And how old are you, Ms. Kennedy?
A. 75.
Q. You said you own Fred Holland Realty now; is that correct?
A. Correct.
Q. And you've been doing the business for 43 years?
A. Yes, sir.

Exhibit G

Deposition of:

Mark Braden , 30(B)(6)

June 16, 2021

In the Matter of:

Braden's Folly, LLCv. City of Folly Beach

Veritext Legal Solutions
800.743.DEPO (3376) | Calendar-carolinas@veritext.com |
www.veritext.com

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF CHARLESTON
Braden's Folly, LLC,
Plaintiff,
vs. CASE NO. 2019-CP-10-06628
City of Folly Beach,
Defendant.

VIDEOCONFERENCE
DEPOSITION OF: BRADEN'S FOLLY, LLC
MARK BRADEN 30(b)(6)
DATE: June 16, 2021
TIME: 10:06 a.m.
LOCATION: 1050 Connecticut Avenue
Suite 1100
Washington, DC
TAKEN BY: Counsel for the Defendant
REPORTED BY: ERIC S. GLAZIER, Court Reporter

APPEARANCES OF COUNSEL VIA VIDEOCONFERENCE:

ATTORNEYS FOR THE PLAINTIFF:

LEWIS BABCOCK
BY: KEITH BABCOCK
JOSEPH BERRY
1513 Hampton Street
Columbia, SC 29201-2924
(803) 771-8000
Kmb@lewisbabcock.com
Jbb@lewisbabcock.com

ATTORNEYS FOR THE DEFENDANT:

WILSON LAW FIRM
BY: JOSEPH C. WILSON, IV
714 E. Erie Avenue
Folly Beach, SC 29439
(843) 834-2390
Joe@follybeachlaw.com

(INDEX AT REAR OF TRANSCRIPT)

A. I did not believe that --

MR. BABCOCK: Object to the form.

A. -- to be true. And that sounds like something you need to put in brief. It didn't sound like a question to me.

Q. Have you read the briefs in this case?

A. Yes, I have.

Q. Okay. Are you going to offer any opinions on the briefings that have been submitted in this case as a witness or expert?

MR. BABCOCK: Object to the form.

A. I am not going to offer an opinion as an expert to any of them, at least not in the courtroom, no.

Q. Going back to my original question about putting both of these properties on the market together, you have said several times that given the reality of the situation, you were willing to do that, at least back in January, correct?

MR. BABCOCK: Object to the form.

A. Based upon the pendency of the litigation and the potential risks that were involved with litigation, if somebody was going to offer me more than $550,000 -- or $550,000 over

market price, we were going to absolutely consider selling them based upon that. We didn't want to do that, but litigation being litigation, and that much over market value, we were willing to consider doing that.

I'm not sure we actually totally had concluded that. There was a lot of family resistance to doing that. But $550,000 versus rolling the dice in the courtroom and having to pay the cost of litigation and the heartache that's involved and, frankly, the disappointment of how we think the city has treated us, that has certainly soured some of the family members to the city, that we believe we were treated unfairly.

We don't even get responses to letters to the city on this subject. So it certainly has soured us to some degree. But we don't want to sell both houses. We want to live in one of the house.

Q. If somebody offered you $2.6 million for the houses today, would you accept it?

A. I don't know. First of all, it's not within my power to accept it. I'd have to talk to my brother and, as you'd want to be the case in these situations, I'd have to talk to my wife and

Exhibit H

REALTOR® EQUAL HOUSING OPPORTUNITY

AGREEMENT/CONTRACT: TO BUY AND SELL REAL ESTATE (RESIDENTIAL)

PARTIES ARE SOLELY RESPONSIBLE FOR OBTAINING LEGAL ADVICE PRIOR TO SIGNING THIS CONTRACT AND DURING THE TRANSACTION. REAL ESTATE LICENSEES RECOMMEND OBTAINING LEGAL COUNSEL.

1. PARTIES: This legally binding Agreement ("Contract") To Buy and Sell Real Estate is entered into by:

Buyer(s), **Christopher J Bonner and/or Assigned** ("Buyer"), and

Seller(s), **Braden Folly, LLC** ("Seller").

(A) "Party" - defined as either Buyer or Seller, "Parties" defined as both Buyer and Seller.
(B) "Brokers" are licensed South Carolina brokers-in-charge, their associated real estate licensees, and their subagents.
(C) "Closing Attorney" - is the licensed South Carolina attorney selected by Buyer to coordinate the transaction and Closing. **Butler and College** ,
(D) "Effective Date" - the final date upon which a Party to the negotiation places the final and required signatures and/or initials and date on this Contract and Delivers Notice to initially cause this primary Contract to be binding on all Parties.
(E) "Good Funds" - is the transfer of the required amount of United States Dollars (USD) within any required timeframe.
(F) "Time" - all time stated shall be South Carolina local time. **Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods.**

☐ BUYER ☐ SELLER IS A SOUTH CAROLINA REAL ESTATE LICENSEE

CJB **(initials) BUYER(s) acknowledges receipt of the SC Disclosure of Brokerage Relationships form and is receiving ☑ Client ☐ Customer service in this transaction.**

(initials) SELLER(s) acknowledges receipt of the SC Disclosure of Brokerage Relationships form and is receiving ☐ Client ☑ Customer service in this transaction.

2. PURCHASE PRICE: $ **2,000,000. Two Million Dollars**
Payable by transfer of Good Funds via ☑ Finance or ☐ a combination of Finance and Cash USD or ☐ Cash USD.
Verification of Cash available for Closing is ☐ attached ☐ not attached ☐ to be Delivered before _____.
This Contract ☐ is ☑ is not contingent upon the sale and closing of Buyer's real property and SCR504 ☐ is ☐ is not attached.

3. PROPERTY: Hereby acknowledging sufficient good Contract consideration (e.g. mutual promises herein), Seller will sell and convey and Buyer will buy for the Purchase Price any and all lot or parcel of land, appurtenant interests, improvements, landscape, systems, and fixtures if any thereon and further described below ("Property"). Seller agrees to maintain in operable condition the Property and any personal property conveying in same operable condition, including any landscaping, grounds and any agreed upon repairs or replacements, from the Effective Date through Closing subject to normal operable wear and tear. Buyer acknowledges opportunity to inquire about owners association issues, common area issues, condominium master deed issues, assigned parking/storage areas, memberships, lease issues and financed equipment prior to signing Contract. Leasing issues and items and financed equipment see Adjustments (e.g. tenants, leases, future vacation renters, SC vacation rental act reservations, rents, deposits, documents, solar panels, fuel tanks with fuel, alarm systems, satellite equipment, roll carts).

Address **1681 E Ashley Ave Lots A & B** Unit # **Lots A & B**
City **Folly Beach** State of South Carolina
Zip **29439** County of **Charleston**
Lot _____ Block _____ Section/Phase _____ Subdivision **East Folly Beach Shores**
Other _____ Tax Map **4391600038 & 4391600079**
Parties agree that no personal property will transfer as part of this sale, except described below and/or ☐ in attachment(s):
All appliances in Properties

[CJB] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

Matt ONeill Real Estate, 940 Johnnie Dodds Blvd #100 Mount Pleasant SC 29464 Phone: (843)619-0405 Fax: (843)388-4667 TRAINING
Matt ONeill

4. CONVEYANCE/CLOSING/POSSESSION: "Closing" occurs when Seller conveys Property to Buyer and occurs no later than 5 PM on or before 05/27/2021 , _____ ("Closing Date"). Conveyance shall be fee simple made subject to all easements, reservations, rights of way, restrictive covenants of record (provided they do not make the title unmarketable or adversely affect the use/value of the Property in a material way) and to all government statutes, ordinances, rules, permits, and regulations. Seller agrees to convey marketable title with a properly recorded general warranty deed free of encumbrances and liens except as herein stated; and in name(s): Christopher J Bonner and / or Assigned and ownership type determined by Buyer. The deed shall be delivered to the Closing Attorney's designated place on or before the Closing Date no later than 10 AM. Seller agrees to pay all statutory deed recording fees. Parties agree the Brokers shall have access to the closing and relevant documents; and the Brokers shall be given copies of the settlement statement prior to Closing for review. Parties agree to hire/use licensed Attorney(s). Seller shall convey possession of a vacant and reasonably clean Property, free of debris, along with all keys, codes, any remote controls, available documents (e.g. manuals, equipment warranties, service information) and similar ownership items to Buyer at Closing.

5. EARNEST MONEY: Total $ 10,000 (USD) Earnest Money is paid as follows: $ 10,000 accompanies this offer and $ n/a will be paid by 6 P.M. on n/a (date) and Earnest Money is in the form of ☐ check ☐ cash ☐ other (e.g. wire) n/a to be a Credit to Buyer at Closing or disbursed only as Parties agree in writing or by court order or by Contract or as required for Closing by Closing Attorney. Buyer and seller authorize Butler and College as Escrow Agent to deposit and hold and disburse earnest money according to the terms of any separate escrow agreement, the law, and any regulations. Broker does not guarantee payment of a check or checks accepted as earnest money. Parties direct escrow agent to communicate reasonable information confirming receipt and status of earnest money upon a Broker request. If Earnest Money is not delivered by the agreed upon date above Seller may terminate the contract by delivering Notice of Termination to the Buyer.

THE PARTIES UNDERSTAND AND AGREE THAT UNDER ALL CIRCUMSTANCES INCLUDING DEFAULT, ESCROW AGENT WILL NOT DISBURSE EARNEST MONEY DEPOSIT TO EITHER PARTY UNTIL BOTH PARTIES HAVE EXECUTED AN AGREEMENT AUTHORIZING THE DISBURSEMENT (e.g. SCR518, SCR517, MEDIATION AGREEMENT) OR UNTIL A COURT OF COMPETENT JURISDICTION HAS DIRECTED A DISBURSEMENT. EARNEST MONEY WILL NOT BE DISBURSED UNTIL DETERMINED TO BE GOOD FUNDS. IF LEGAL ACTIONS OCCUR RELATED TO EARNEST MONEY, PARTY RECEIVING THE LEAST AMOUNT OF EARNEST MONEY IN THE COURT'S DISBURSEMENT ORDER AGREES TO INDEMNIFY ESCROW AGENT'S FEES, COURT COSTS AND ATTORNEY FEES. IF INTERPLEADER IS TO BE UTILIZED, PARTIES AGREE THAT $ -0- SHALL BE PAID TO THE ESCROW AGENT BY THE PARTIES AS COMPENSATION BEFORE ESCROW AGENT INITIATES COURT OF COMPETENT JURISDICTION PROCEEDINGS ON EARNEST MONEY.

6. TRANSACTION COSTS: Buyer's transaction costs include all costs and closing costs resulting from selected financing, pre-paid recurring items, insurance (including but not limited to mortgage insurance, title insurance lender/owner, flood, insurance, and hazard insurance) discount points, interest, non-recurring closing costs, title exam, FHA/VA allowable costs, fees and expenses of Buyer's attorney, contractually required real estate broker compensation, and the cost of any inspector, appraiser, or surveyor. Seller's transaction costs include deed preparation, deed recording costs, deed stamps/tax/recording costs calculated based on the value of the Property, all costs necessary to deliver marketable title and payoffs, satisfactions of mortgages/liens and recording, property taxes prorated at Closing, contractually required real estate broker compensation, and fees and expenses of Seller's attorney.

All costs to obtain information from or pertaining to owners' association, private/public transfer fees, and any costs similar to transfer fees (e.g. certificate of assessment, capital contributions, working capital, estoppel fees or otherwise named but similar fees) are the ☐ Seller's or ☐ Buyer's transaction costs. If no box is checked these costs will be added to Seller's transaction costs.

At Closing, Seller will pay Buyer's transaction costs not to exceed $ -0- , which includes non-allowable costs first and then allowable costs (FHA/VA). Buyer is responsible for any Buyer's transaction costs exceeding this amount. If the amount exceeds the actual amount of those costs or amount allowed by Lender, then any excess funds will revert to Seller. Seller will also provide or pay for all of Seller's transaction costs. If no Closing, Buyer is responsible for Buyer's transaction costs and Seller responsible for Seller's transaction costs.

Unless otherwise agreed upon in writing, Buyer will pay Buyer's transaction costs and Seller pay Seller's transaction costs.

[CJB] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

7. FINANCE: Buyer's obligation under this Contract ☐ is ☐ is not contingent upon obtaining financing of a ☑ 30 year or ☐ 15 year or ☐ other _____ purchase money loan at reasonable prevailing market terms with loan(s) equal in amounts to a maximum 80 % of the Purchase Price or Appraised Value whichever is lower. ("Financing Contingency"). Financing Contingency expires at Closing ("Financing Period"). Buyer must make timely good faith efforts to apply for and obtain financing while refraining from contrary actions ("Financing Effort"). In a timely manner, Buyer shall inform Seller and Brokers of pertinent financing issues and authorize Buyer's Lender to disclose pertinent loan information to Seller and Brokers ("Financing Disclosure"). Buyer shall apply for financing by 02/01/2021 (date) and shall Deliver Notice to Seller of reasonable pre-final loan approval (e.g. pre-approval letter, initial approval letter) that contains no unreasonable credit, income, or asset conditions by 03/15/2021 (date) (no repairs required prior to this Notice). Final loan approval occurs when Lender funds loan(s). If the Buyer changes their Lender during the Financing Period they must notify the seller in writing within 3 calendar days. Absent written approval by the Seller, Buyer cannot change lender if the closing date agreed upon in Paragraph 4 will change as a direct result. If a Lender subsequently declines or fails to approve financing, the Buyer shall notify the Seller and Brokers as soon as possible. If the Seller and Brokers are notified of inability to obtain financing during the Financing Period, either Party may terminate this Contract by Notice.
Lender (may change): TD Bank ☐ FHA ☐ VA ☐ Conventional ☐ Seller ☑ Other Jumbo / Non-Conforming. An FHA VA Financing Addendum ☐ is ☑ is not attached. Additional financing terms ☐ are ☐ are not attached.

8. REPAIRS:
CHECK ONLY ONE OF THE FOLLOWING OPTIONS. IF NO BOXES ARE CHECKED THIS CONTRACT WILL BE AN AS-IS CONTRACT IN REGARDS TO REPAIRS. IF MULTIPLE BOXES ARE CHECKED THEN THE FIRST PARAGRAPH WITH A CHECKED BOX WILL DETERMINE REPAIRS.

☐ **REPAIR PROCUDURE:**

All Repair Procedure Inspections and Requests shall be completed and delivered to the Seller by 6 P.M. on _____ (date). Any and all requests necessary to place the heating systems, air conditioning systems, electrical systems, plumbing systems, water supply systems, water waste systems to be conveyed in operative condition, to make the roof free of leaks, to address environmental concerns and to make the improvements structurally sound (Repair Requests) should be delivered by the deadline above. If the Buyer fails to notify the Seller within this timeframe, Buyer shall have waived any and all rights under terms of this section. If Lender's commitment requires any additional inspections or certifications, these are to be provided by the Buyer. Buyer at Buyer's expense shall have the privilege and responsibility of inspecting the structure, square footage, environmental concerns including but not limited to mold, radon gas, lead based hazards including lead based paints, wetlands study, appurtenant buildings, heating systems, air conditioning systems, electrical systems, plumbing systems, water supply systems, water waste systems, as well as, appurtenant equipment or appliances. Upon Seller's request the Buyer will provide with a copy of the Inspection Report.

No later than 6 P.M. on _____ (date), Seller shall Deliver Notice agreeing or not agreeing to make repairs in the Buyer's Repair Requests. The costs of all repairs to heating systems, air conditioning systems, electrical systems, plumbing systems, water supply systems, water waste systems making these systems operable, make roof free of leaks, address environmental concerns, and to make the improvements structurally sound to be paid by Seller ("Seller Paid Repairs**"). Seller Paid Requests DO NOT include the following items: home maintenance, flooring, fogged windows, grandfathered code issues, landscaping, preventive maintenance, cosmetic changes, home improvement, and energy efficiency. If the Seller contractually agrees to make all the requested Seller Paid Repairs, the Parties agree to proceed under the amended Contract.** The repairs to any other items are the sole responsibility of the Buyer.

If the Seller does not timely respond per above or does not agree to make all the Seller Paid Repairs, the Buyer shall within **2 Calendar Days** choose any one of the following options (1) accept the Property in its present condition, (2) negotiate a new/amended Contract with the Seller for the payment of these repairs/price or (3) terminate this Contract by Delivered Notice. **IF BUYER FAILS TO ACCEPT, RENEGOTIATE A NEW/AMENDED CONTRACT WITH SELLER, OR TERMINATE CONTRACT BY DELIVERED NOTICE WITHIN 2 CALENDAR DAYS: The Buyer agrees to buy and Seller agrees to sell the Property AS IS. Parties agree "As Is" means Buyer buys the Property for the Purchase Price while Seller maintains the Property from the Effective Date through Closing subject to normal wear otherwise without repair or replacement and sells the Property for the Purchase Price unless otherwise agreed upon in writing by the Parties in this Contract.** The obligations of the Seller for repairs terminate upon Closing.

☑ **DUE DILIGENCE:**
The DUE DILIGENCE PERIOD begins upon the Effective Date and shall expire at 6 P.M. on 03/15/2021 (date). Any extension to this date must be made in writing and agreed to by both Parties.

[CH] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

During the Due Diligence Period, Buyer may take timely/prudent steps to help Buyer/Inspectors, Seller/Estimators, and REALTORS® all have adequate time for: Buyer to coordinate Inspections and Repair Requests, Seller to obtain Repair estimates, Buyer and Seller to negotiate Repairs, and Buyer to potentially timely/properly Due Diligence terminate or buy.

During the Due Diligence Period, Seller agrees Buyer may rely on the following list of five items in accordance with Contract and laws. Buyer is solely responsible for Inspections. Buyer is not required to Inspect. Until Buyer timely/properly terminates the Contract or the Parties agree on an amended Contract, the Buyer can rely on #1, #2, #3, #4, and #5. TIME IS OF THE ESSENCE. Delivering a Repair Request does not extend the Due Diligence Period.

(1) Conduct/obtain Inspections [e.g. on site conditions, off site conditions]
(2) Deliver Repairs Requests Notice to Seller [e.g. SCR525 with all repair requests, all/portions of reports]
(3) Proceed under amended Contract [e.g. SCR310 and SCR525, SCR390, SCR391]
(4) Proceed under As Is Contract [e.g. Buyer desires to buy anyway, Buyer wants Property without Repair]
(5) Terminate Contract by timely/properly Delivering "Notice of Termination" and "Termination Fee" to Seller within the Due Diligence Period.

TERMINATION: During the Due Diligence Period, Buyer may unilaterally terminate this Contract only by Delivering to the Seller both Notice of Termination and a Termination Fee of $ -0- USD Good Funds.

DURING THE DUE DILIGENCE PERIOD, SHOULD BUYER FAIL TO OBTAIN A NEW/AMENDED CONTRACT WITH THE SELLER OR BUYER FAIL TO TIMELY/PROPERLY DUE DILIGENCE TERMINATE THE CONTRACT DURING THE DUE DILIGENCE PERIOD: The Buyer agrees to buy and Seller agree to sell the Property AS IS. Parties agree "As Is" means Buyer buys the Property for the Purchase Price while Seller maintains the Property from the Effective Date through Closing subject to normal wear otherwise without repair or replacement and sells the Property for the Purchase Price unless otherwise agreed in writing by the Parties in this Contract

☐ **AS-IS**

All Parties agree that Property is being sold "As-Is". "As Is" means Buyer buys the Property for the Purchase Price while Seller maintains the Property from the Effective Date through Closing subject to normal wear without repair or replacement and sells the Property for the Purchase Price unless otherwise agreed upon in writing by the Parties in this Contract. Buyer retains the right to inspect the Property by 6 P.M. on _____ (date) for informational purposes only. The Seller is under no obligation to remedy any issues the Buyer discovers during their inspections, and the Buyer may not terminate the contract based on the results of any inspections conducted.

9. INSPECTION/REINSPECTION RIGHTS: Buyer and SC licensed and insured inspectors ("Inspectors") reasonably perform any reasonable ultimately non-destructive examination and make reasonable record of the Property with reasonable Notice to Seller through Closing including investigations of off-site conditions and any issues related to the Property at Buyer Expense ("Inspections"). Buyer and persons they choose may make reasonable visual observations of Property.
Sellers will make the Property accessible for Inspection and not unreasonably withhold access, unless otherwise agreed in writing by the Parties. Seller will grant the Buyer the right to perform a final walkthrough inspection of the property within 48 hours prior to the closing date. Seller will keep all utilities operational through Closing unless otherwise agreed:
☐ **Seller grants Buyer permission to connect utilities, pay for utilities, and hire professionals (e.g. electricians, plumbers) to safely connect and operate the utilities during the Inspections**
Other _____ ☐ **see attached.**
Buyer will hold harmless, indemnify, pay damages and attorneys fees to Seller and Brokers for all claims, injuries, and damages arising out of the exercise of these inspection rights. Seller will hold harmless, indemnify, pay damages and attorneys fees to Brokers for all claims, injuries, and damages arising out of the exercise of these inspection rights. Brokers recommend that Parties obtain all inspections as soon as possible. Brokers recommend that Parties and Inspectors use insurance to manage risk.

[CJB] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

10. APPRAISED VALUE:
☐ This Contract is contingent upon the Property being valued according to the Lender's appraisal or other appraisal as agreed upon by the Parties ("Appraised Value") for the Purchase Price or higher. If the Parties are made aware that the Appraised Value is less than the Purchase Price and the Seller Delivers Notice to the Buyer within 5 Calendar Days or Closing (whichever earliest) of an amendment to reduce the Purchase Price to the Appraised Value, the Parties agree to proceed to Closing under terms of this Contract with the Purchase Price amended to be the Appraised Value. If Seller is aware and refuses to reduce as stated above, Buyer may proceed to Closing or terminate this Contract by Delivering Notice of Termination to the Seller.
☐ This Contract is **not** contingent upon the Property being valued at an Appraised Value according to the Lender's appraisal or other appraisal as agreed upon by the Parties for the Purchase Price or more.

11. WOOD INFESTATION REPORT: If the Property to be sold has been previously occupied, this Contract is ☑ contingent ☐ not contingent upon the ☑ Buyer ☐ Seller having the Property inspected at their expense by a qualified/licensed/bonded pest control operator selected by the ☑ Buyer ☐ Seller. ☑ Buyer ☐ Seller shall deliver timely Notice of and shall deliver to Closing a CL100 Wood Infestation Report dated no earlier than 30 calendar days prior to Closing and no later than 10 calendar days prior to Closing. If the Buyer is responsible for having the Property inspected as indicated above, but does not have the Property timely inspected for the report's required Delivery time frame, the Buyer waives any and all rights under the terms of this section. The Seller makes no warranties with regard to matters covered by such infestation report or any other improvement unless specifically stated in this Contract.

If the wood infestation report reveals the presence or indication of or damages by termite infestation or other wood destroying organisms, Seller shall remedy such deficiencies and shall furnish the Buyer with a CL100 wood infestation report by a qualified/licensed/bonded pest control operator (dated no earlier than 30 calendar days prior to Closing) that the Property is free from infestation or any damage herein mentioned; or documentation that the infestation has been treated and damage has been repaired as appropriate in a workmanlike manner on or before closing and reported by an appropriate licensee. State law and regulations control CL100 issues. If the Seller does not make the repairs and treatment, the Buyer shall have the option to (1) accept the Property in its present condition, (2) negotiate with the Seller for the payment of these repairs and treatment, or (3) terminate this Contract by Delivering Notice of Termination to the Seller. If the Property to be sold has not been previously occupied, Seller shall certify that the Dwelling has been treated by soil poisoning for the prevention of termites and other wood destroying organisms and shall provide at Closing to the Buyer a written certification from a qualified/licensed/bonded pest control operator. The obligations of the Seller under this Section terminate after the Closing.

12. SURVEY, TITLE EXAMINATION, ELEVATION, INSURANCE: Brokers recommend Buyer have Property surveyed, title examined, elevation/wetlands/beachfront determined, and appropriate insurance (e.g. flood, flood contents, hazard, liability, owner's title) effective at Closing. Unless otherwise agreed upon in writing by Parties, Buyer to obtain new insurance policies by Closing and Seller may cancel existing insurance after Closing. Flood Insurance, if required by Lender or at Buyer's option, shall be assigned to Buyer with permission of carrier and premium prorated to Closing. Buyers are solely responsible to investigate pricing, availability, coverage, and requirements of insurance (e.g. flood, flood contents, hazard, liability) for the property prior to signing Contract.

13. SURVIVAL: If any provision herein contained which by its nature or effect is required to be observed, kept, or performed after Closing, it will survive the Closing and remain binding upon for the parties hereto until fully observed, kept or performed.

14. HOME WARRANTY COMPANY OPTIONAL COVERAGE ("HWC"): Parties agree that a Home Warranty ordered by n/a with at least twelve months of coverage after Closing Date ☐ will ☑ will not be provided by Closing and $ n/a will be paid by n/a to the Home Warranty Company. Buyer to pay any deficit and surplus reverts to payor. Proposed HWC and type of HWC: n/a .
NOTICE: THIS IS TO GIVE YOU NOTICE THAT BROKERS HAVE/WILL/MAY RECEIVE COMPENSATION FROM HWC/OTHERS FOR REFERRAL/PROCESSING. YOU ARE NOT REQUIRED TO PURCHASE A HWC OR SIMILAR RESIDENTIAL SERVICE CONTRACT AND IF YOU CHOOSE TO PURCHASE SUCH COVERAGE YOU ARE FREE TO PURCHASE IT FROM ANOTHER PROVIDER.

15. FIRE OR CASUALTY OR INJURY: In case the Property is damaged wholly or partially by fire or other casualty prior to Closing, Parties will have the right for 5 Calendar Days after Notice of damage to Deliver Notice of Termination to other Party. If Party does not Deliver Notice of Termination, the Parties proceed according to the Contract and Seller is to be responsible to (1) repair all damage, (2) remit to Buyer an amount sufficient for repairs, or (3) assign to Buyer the right to all proceeds of insurance and remit any deductible amount applicable to such casualty. If Buyer or Inspections caused the damage, Buyer is responsible for indemnifying Seller for damages. Brokers and Parties should ensure that they are protected by appropriate risk management strategies such as insurance.

[CB] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

16. SC RESIDENTIAL PROPERTY CONDITION DISCLOSURE STATEMENT ("CDS") [check one]:

☐ Buyer and Seller agree that Seller has Delivered prior to this Contract, a CDS to Buyer, as required by SC Code of Laws Section 27-50-10 et seq. If after delivery, Seller discovers a CDS material inaccuracy or the CDS becomes materially inaccurate due to an occurrence or circumstance; the Seller shall promptly correct this inaccuracy (e.g. delivering a corrected CDS to the Buyer/making reasonable repairs prior to Closing). Buyer understands the CDS does not replace Inspections. Buyer understands and agrees the CDS contains only statements made by the Seller. Parties agree the Brokers have met requirements of SC Code 27-50-70 and Brokers are not responsible or liable for any information in the CDS. CDS is not a substitute for the Buyers and Inspectors inspecting the Property (related issues/onsite/offsite) "Property issues" for all needs.

☐ Buyer and Seller agree that Seller will **NOT** complete nor provide a CDS to Buyer in accordance with SC Code of Law, as amended, Section 27-50-30, Paragraph (13). Buyers have sole responsibility to inspect Property Issues for all their needs.

17. LEAD BASED PAINT/LEAD HAZARDS: If Property was built or contains items created prior to 1978, it may contain lead based hazards and Parties agree to sign "Disclosure of Information of Lead Based Paint and/or Lead Hazards" forms (e.g. SCR315) and give copies to Brokers. Parties acknowledge receiving and understanding the EPA pamphlet "Protect Your Family From Lead in Your Home." For their protection, Buyers should conduct/obtain Inspections of all Property issues per their needs.

18. SEX OFFENDER/CRIMINAL INFORMATION: Parties agree that Brokers are not responsible for obtaining or disclosing information in the SC Sex Offender Registry and no course of action may be brought against any Brokers for failure to obtain or disclose sex offender or criminal information. Buyer and Seller agree that they have sole responsibility to obtain their own sex offender, death, psychological stigma, clandestine laboratory, and crime information from sources (e.g. law enforcement, P.I., web). The Buyer may obtain information about the Sex Offender Registry and persons registered with the Registry by contacting the local county Sheriff or other appropriate law enforcement officials.

19. TRUST ACCOUNT INTEREST/CHARITABLE CONTRIBUTION: According to the South Carolina Real Estate Commission regulations and South Carolina laws, any interest earned from deposit to Closing on Buyer's earnest money deposit belongs to Buyer. It is understood that Broker ☐ may ☐ may not place deposited earnest monies into an interest bearing trust account. If Buyer's earnest money deposit is deposited into an interest bearing trust account, Parties agree that Broker will retain all interest earned in said account and may contribute some or all to a charitable enterprise.

20. SC INCOME TAX ON NON-RESIDENT GAIN AND COMPLIANCE AND USA FEDERAL INCOME TAX: Seller and Buyer will comply with the provisions of South Carolina laws [e.g. 12-8-580 (as amended)] regarding state income tax withholding requirements if the Seller is not a resident or has not filed South Carolina state income tax returns. Seller and Buyer will comply with United States of America federal income tax laws. Seller and Buyer should discuss tax laws and minimization actions with their qualified tax advisor. Parties will comply with all local, state, federal laws, and any rules.

21. ENTIRE AND BINDING AGREEMENT (MERGER CLAUSE): Parties agree that this Contract expresses the entire agreement between the parties, that there is no other agreement, oral/otherwise, modifying the terms; and this Contract is binding on Parties and principals, heirs, personal representatives, successors, and assigns. Illegal provisions are severable.

22. ADJUSTMENTS: Buyer and Seller agree to settle or prorate, annually or as appropriate; as of Closing Date: (A) utilities and waste fees issued after Closing which include service for time Property was owned/occupied by Seller (B) real estate taxes and owner association fees/assessments for the calendar year of Closing (C) any rents, deposits, fees associated with leasing (D) insurance, EMS service, fuel/consumables, and assessments. Closing Attorney shall make tax proration based on the available tax information deemed reliable by the Closing Attorney. Should the tax or tax estimate or proration later become inaccurate or change, Buyer and Seller shall make any financial adjustments between themselves once accurate tax information is available and Buyer takes timely reasonable steps to minimize taxes. This section survives Closing. Buyer is solely responsible for timely and reasonably minimizing the Buyer's taxes and obtaining tax minimization procedural information including related legal counsel and financial counsel. Special assessments approved prior to Closing shall be the responsibility of the Seller. Special Assessments approved after Closing shall be the responsibility of the Buyer.

23. DEFAULT:

(A) If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer may:
- (i) Deliver Notice of Default to Seller and terminate Contract; and
- (ii) Pursue any remedies available to Buyer at law or equity; and
- (iii) Recover attorneys' fees and all other direct costs of litigation if Seller found in default/breach of Contract.

(B) If Buyer defaults in the performance of any of the Buyer's obligations under this Contract ("Default"), Seller may:
- (i) Deliver Notice of Default to Buyer and terminate Contract; and
- (ii) Pursue any remedies available to Seller at law or equity; and
- (iii) Recover attorneys' fees and all other direct costs of litigation if Buyer found in default/breach of Contract.

[CJB] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

(C) If either/both Parties default, Parties agree to sign an escrow deposit disbursement agreement or release agreement. (D) Parties may agree in writing to allow a Cure Period for a default. If within the Cure Period, either Party cures the Default and Delivers Notice, Parties shall proceed under the Contract.

24. MEDIATION: To potentially avoid expensive/lengthy/uncertain litigation, Parties may voluntarily/cooperatively decide which mediator to hire, how to pay the mediator, where to meet for mediation talks, and their own settlement agreement. Mediators do not decide settlement outcomes (Parties decide). Mediators merely facilitate the Parties reaching their own settlement and documenting settlement. Parties agree to attempt mediation for any dispute, claim, breach, representations made by any Party. Broker/other (e.g. concealment, misrepresentation, negligence, fraud) or service issues related to this Contract by using the National Association of REALTORS® Mediation Dispute Resolution System 803-772-5206 or www.NAR.REALTOR/policy/mediation or www.screaltors.org/mediation). Parties agree that the duty to attempt mediation survives closing and any signed mediation settlement agreement is binding. Parties agree some matters may proceed without mediation (e.g. foreclosure, action to enforce a mortgage or deed of trust or "rent to own" agreement, unlawful detainer action, file/enforce mechanic's lien, probate issues, interpleader action on earnest money). Parties agree some matters are not a waiver of mediation nor a breach of duty to attempt mediation (e.g. filing judicial action enabling recording notice of pending action, order for attachment/receivership/injunction or other provisional remedies).

25. NON-RELIANCE CLAUSE (NOT A MERGER CLAUSE NOR EXTENSION OF A MERGER CLAUSE): Parties execute this Contract freely and voluntarily without reliance upon any statements, representations, inducements, promises, or agreements by Brokers or Parties except as expressly stipulated or set forth in this Contract. If not contained herein, such statements, representations, inducements, promises, or agreements shall be of no force or effect. Parties acknowledge that Brokers are being retained solely as licensed real estate agents and not as any attorney, tax/financial advisor, appraiser, surveyor, engineer, mold or air quality expert, home inspector, or other professional service provider.

26. BROKER DISCLAIMER: Parties acknowledge that Brokers give no warranties or representations of any kind, expressed or implied as to: (1) condition of the Property, including but not limited to termites, radon, mold, asbestos, moisture, environmental issues, water, waste, air quality, HVAC, utilities, plumbing, electrical or structure, etc. (2) condition of the Property, survey or legal matters, square footage (3) off site conditions (4) schools (5) title including but not limited to easements, encroachments, projections, encumbrances, restrictions, covenants, setbacks, and the like (6) fitness for a particular purpose of the Property or the improvements (7) zoning ordinances and restrictions (8) projected income, value, marketability, taxes, insurance, or other possible benefits to Buyer. Parties consent that their Brokers may communicate with them via any means; and use or disclose information not made confidential by written instruction of Parties.

27. BROKERS COMPENSATION: Parties direct Closing Attorney to use settlement funds to collect and disburse Brokers Compensation to Brokers in accordance with agreements and document compensation on the settlement statement. If a Party disputes Brokers Compensation, that Party agrees to retain a South Carolina law firm to escrow only the disputed amount of Brokerage Compensation until the dispute is resolved by a written agreement signed by that Party and the Affected Broker, arbitration award, or court order. Party requesting the escrow shall pay all costs for escrow. If the dispute is not resolved within 180 days of Closing, the escrow shall be disbursed to the Broker. Parties agree that Brokers are third party beneficiaries to this Contract and have standing to seek remedies at law and equity. Parties represent that their only enforceable agency and/or non-agency agreements are with the Brokers disclosed in this Contract. Parties consent to Brokers possibly receiving compensation from the HWC and/or others if compensation is paid in accordance with laws and REALTOR® ethics.

28. ATTACHMENTS, OTHER CONTINGENCIES, TERMS, AND/OR STIPULATIONS: There may be attachments to this Contract. The most recent changes, amendments, attachments, contingencies, stipulations, addendum, additions, exhibits, or writings, agreed to by the Parties; is evidence of the Parties' intent and agreement and shall control any Contract language conflicts. Parties shall initial and date Contract changes. If any documents are attached as addenda, amendments, attachments, or exhibits considered part of this Agreement, such documents can be further identified or described here (e.g. SCR 390, 391, 503, 504, 315, 320, 393, 370, 375, 513, 610): _____

_____

_____

29. NOTICE AND DELIVERY: Notice is any unilateral communication (e.g. offers, counteroffers, acceptance, termination, unilateral requests for better terms, and associated addenda/amendments) from one Party to the other. Notice to/from a Broker representing a Party is deemed Notice to/from the Party. All Notice, consents, approvals, counterparts, and similar actions required under Contract must be in paper or electronic writing and will only be effective as of delivery to the Notice address/email/fax written below and awareness of receipt by Broker ("Delivered") unless Parties agree otherwise in writing.

[CB] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

30. Acknowledgements: Due to potential criminal activity, parties are solely responsible to verify all wiring instructions with law firm/bank. Parties are also advised and understand that audio/visual surveillance may occur in the property and parties should plan accordingly and comply with all federal, state, and local laws. Parties acknowledge receiving, reading, reviewing, and understanding: this Contract, the SC Disclosure of Real Estate Brokerage Relationships form, any agency agreements, and copies of these documents. Parties acknowledge having time and opportunity to review all documents and receive legal counsel from their attorneys prior to signing Contract.

31. EXPIRATION OF OFFER: When signed by a Party and intended as an offer or counter offer, this document represents an offer to the other Party that may be rescinded any time prior to or expires at 6pm ☐ AM ☐ PM on 02/03/2021, _____ unless accepted or counter-offered by the other Party in written form Delivered prior to such deadline. **This offer will expire automatically if no action is taken by either party 30 calendar days after the offer's submittal.**

IN WITNESS WHEREOF, this Contract has been duly executed by the Parties as true to the best of their knowledge/belief. If signee is not a Party, appropriate legal documents (e.g. Power of Attorney, Corporate Authorization) are ☐ attached or ☐ to be Delivered to the other Party within _____ Calendar Days.

Parties shall initial and date all changes in this Contract and initial all pages.

BUYER: Christopher J Bonner **Date:** 02-01-2021 5:35 PM EST **Time:** _____

BUYER: _____ **Date:** _____ **Time:** _____

BUYER: _____ **Date:** _____ **Time:** _____

BUYER: _____ **Date:** _____ **Time:** _____

NOTICE ADDRESS/EMAIL/FAX: _____

SELLER: _____ **Date:** _____ **Time:** _____

SELLER: _____ **Date:** _____ **Time:** _____

SELLER: _____ **Date:** _____ **Time:** _____

SELLER: _____ **Date:** _____ **Time:** _____

NOTICE ADDRESS/EMAIL/FAX: _____

[CJB] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

Anthony Carlomany	**104440**
Co-Agent: Christopher Smith. Matt O'Neill Real Estate	**100336. /. 9026**
Buyer's Agent/Company	**Buyer's Agent License #/LLR Office Code**
acarlomany@mattoneillteam.com / christopher@mattoneillteam.com	**336-813-5637 / 843-267-0735**
Buyer's Agent's Email Address	**Buyer's Agent Telephone Number**
Seller's Agent/Company	**Seller's Agent License #/LLR Office Code**
Seller's Agent's Email Address	**Seller's Agent Telephone Number**

[CJP] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
[_____] BUYER [_____] BUYER [_____] SELLER [_____] SELLER
HAVE READ THIS PAGE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2019-CP-10-06628
Braden's Folly, LLC,	)	
	)	
Plaintiff,	)	**DEFENDANT'S NOTICE OF MOTION AND MOTION TO AMEND JUDGMENT (RULE 59(e))**
	)	
v.	)	
	)	
City of Folly Beach,	)	
	)	
Defendant.	)	
	)	

TO: KEITH M. BABCOCK, ESQUIRE, AND JOSEPH B. BERRY, ESQUIRE, ATTORNEYS FOR PLAINTIFF

PLEASE TAKE NOTICE THAT Defendant City of Folly Beach, by and through its undersigned attorney, hereby moves to amend the partial summary judgment granted in favor of Plaintiff in this matter on November 17, 2021 pursuant to Rule 59(e), SCRCP.

I. DEFENDANT PRESENTED EVIDENCE CREATING NUMEROUS ISSUES OF FACT.

There are numerous issues of fact that the court has not addressed. Although the trial court determines whether a taking has occurred, it is a question of *fact* not a question of *law*:

> "Whether the plaintiff has established a claim for inverse condemnation is a matter for the court to determine." *WRB Ltd. P'ship v. Cty. Of Lexington*, 369 S.C. 30, 32, 630 S.E.2d 479, 481 (2006); *Cobb v. S.C. Dep't of Transp.*, 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005) ("[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request."). Even though the trial court must decide the threshold question of whether a government entity's actions amount to an affirmative, positive, aggressive act, the question is one of fact, not law. If a genuine issue of material fact exists as to whether the government entity committed an affirmative, positive, aggressive act causing damage to private property, summary judgment is not proper. *See* Rule 56(c), SCRCP.

Ray v. City of Rock Hill, No. 2019-002074, 2021 WL 3378945, at *3 (S.C. Aug. 4, 2021).

The trial court's order ignores numerous facts presented by Defendant creating a genuine issue of material fact as set forth below.

Even if these are not issues of "fact" for the court's consideration, the trial court's order ignored numerous legal arguments and issues raised by Defendant. These issues are also set forth below.

II. THE TRIAL COURT HAS NOT ADDRESSED DEFENDANT'S EVIDENCE ON NUMEROUS ISSUES OF FACT THAT WERE NOT CONTESTED AT ALL BY PLAINTIFF.

Defendant's original motion presented numerous affidavits and abundant other evidence showing facts that were conclusively proven and not contested by Plaintiff. The trial court completely ignored this presentation and did not apply or consider any of these uncontested facts that control this case. Defendant conclusively showed:

1. Plaintiff's merged lots have always been under the same ownership. Defendant's Motion for Summary Judgment, Pages 6-7.

2. Plaintiff's lots are and have always been substandard and undersized. They could be developed because the City's Code generally allows substandard residential lots to be developed. Section 168.04-01(A). However, the merger ordinance establishes an exception for this allowance to build on substandard lots. In other words, the merger ordinance does nothing more than enforce lot size requirements that have existed since at least 1995 on Plaintiff's lots. Defendant's Motion for Summary Judgment, Pages 7-8, 26-27; Defendant's Supplemental Brief, Pages 3-4.

3. Plaintiff's super-beachfront lot, also referred to as Lot B, was not developed until 2006-07 after Defendant started renourishing the beach in front of Lot B. Defendant's Motion for

Summary Judgment, Pages 6-9. Up until that time, Lot B was considered a "junk" lot that was undevelopable and simply passed on with Lot A to ensure Lot A's access to the beach.

4. Prior to renourishment, neither Lot B nor any other super-beachfront lot had ever been developed. Defendant's Motion for Summary Judgment, Pages 8-9. These super-beachfront lots are historically on an active and highly erosive beach and are a public nuisance due to the constant threat of water intrusion. Defendant's Motion for Summary Judgment, Pages 10-17. Prior to renourishment, these lots were inundated by water constantly, and, as such, had no or minimal value. Almost all of Lot B was seaward of the escarpment left by Hurricane Hugo in 1989, and this escarpment remained until the first renourishment in 1993. Defendant's Motion for Summary Judgment, Page 11; Dr. Nicole Elko Affidavit, Paragraphs 29-31, Exhibit No. 9 to Defendant's Motion for Summary Judgment. In short, the super-beachfront lots, including Lot B, were undevelopable prior to renourishment.

5. Defendant, with financial support from the federal government, started renourishing the beach in front of Lot B and its neighbors in 1993. Lot B would not be developable except for renourishment and the seawalls constructed in front of Lot B. Defendant's Motion for Summary Judgment, Pages 18-21.

6. The development of Lot B and other super-beachfront lots on active, erosive beach impedes the development of a natural beach and dune system, which in turn protects all development on the beach, including of course Plaintiff's property. Defendant's Motion for Summary Judgment, Pages 21-25.

7. The beach is Defendant's most important resource and the primary driver of tourism. The Defendant's top priority for decades has been the protection of this fragile resource through costly renourishment and by gradually pushing back development on the beach.

Defendant's Motion for Summary Judgment, Pages 23-25. In 1991, the Fourth Circuit recognized that the gradual withdrawal of unwise development from the beach is an appropriate government response to that unwise development:

> The record in this case indicates that the 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.

Esposito v. S.C. Coastal Council, 939 F.2d 165, 169 (4th Cir. 1991).

8. Plaintiff's beachfront lots are heavily regulated, and the limitations imposed by the merger ordinance should come as no surprise. Defendant's Motion for Summary Judgment, Pages 25-27.

9. Finally, the merger ordinance, and other measures taken by the City to move beachfront development landward serves to protect the beach and development on the entire island and enables the continuing renourishment program, which also protects the beach and development. Defendant's Motion for Summary Judgment, Pages 27-29.

Plaintiff presented no evidence contesting any of these facts and has repeatedly admitted that protection of the beach is an important and legitimate regulatory goal. Plaintiff's Memorandum in Support of Partial Summary Judgment, Page 11 ("Defendant cites legitimate and substantial public policies such as preventing erosion, limiting beachfront development, and other general beach management and preservation efforts . . ."). Plaintiff, however, contends that the merger ordinance does not serve this goal because Plaintiff's property is already developed. *Id.* Plaintiff ignores the undeniable fact that the merger ordinance will prevent *future* redevelopment of Lot B and, thus, serves the important long-term goal of *gradually* pushing development on the active, erosive beach landward. *Esposito*, 939 F.2d at 169.

Although the City is constrained from removing Plaintiff's development on Lot B at this time, it is clearly empowered to limit the redevelopment of Lot B when the house currently there reaches the end of its life, most likely to happen from beach erosion and/or severe weather events. When that day comes, the merger ordinance ensures that Lot B cannot be redeveloped. Just as importantly, the merger ordinance ensures that Lot A and Lot B will remain in the same hands, so that the owner will still be able to rebuild one house on the two lots. In other words, the merger ordinance serves the dual goals of pushing development landward while maintaining some development rights for the owner of the merged lot. If the lots come under separate ownership, the owner of Lot B may not be able to redevelop the lot at all due to erosion and regulation. That owner would lose almost all value it held in Lot B. This is what the Defendant is attempting to avoid – one owner being left with a total loss. This is plainly a legitimate governmental goal to avoid such a total loss.

None of these facts and goals are addressed in the trial court's order.

III. THE TRIAL COURT IGNORED DEFENDANT'S EVIDENCE AND ARGUMENTS SHOWING THAT PLAINTIFF HAS NOT SUFFERED A LEGALLY COGNIZABLE LOSS.

A. PLAINTIFF'S ALLEGED LOSS, STANDING ALONE, DOES NOT AMOUNT TO A COMPENSABLE TAKING.

Plaintiff's only loss arising from the merger ordinance is the right to sell the properties separately. This is a relatively minimal piece of Plaintiff's bundle of rights. Plaintiff's appraiser claims this loss amounts to a 19% loss in value based on the anticipated sales price of the lot. Under the clear dictates of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), this loss, standing alone does not support a compensable taking.

United States Supreme Court decisions sustaining land-use regulations "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' and that

the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Penn Central,* 438 U.S. at 131 (citations omitted). "Although a comparison of values before and after a regulatory action is relevant, it is by no means conclusive." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). "[T]he extent of diminution [in value] is but 'one fact for consideration' in determining whether governmental action constitutes a taking." *Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 737 S.E.2d 601, 621 (2013) (quoting *Keystone Bituminous Coal Ass'n v. Duncan*, 771 F.2d 707, 713 (3rd Cir. 1985)).

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 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); *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). In *Palazzolo v. Rhode Island*, 533 U.S. 505, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), the Court ordered a fact-specific inquiry when the regulation diminished the value of the petitioner's land by over ninety-three percent. *Palazzolo*, 533 U.S. at 614-16. *See also Dunes West*, 737 S.E.2d at 618–22.

In light of this precedent, it is clear that a 19% drop in value, standing alone, does not prove a taking. If a taking occurs for every loss in value, then all land use planning would be invalid, as all land use planning invariably reduces the value of lots. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed.2d 322 (1922) ("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."). Plaintiff must show something more than a 19% loss in value of its property,

such as interference with reasonable investment backed expectations. Plaintiff has not done this, so its loss, if any, does not alone support a compensable, regulatory taking.

B. PLAINTIFF'S APPRAISAL IS LEGALLY IRRELEVANT BECAUSE IT USES A HYPOTHETICAL VALUATION OF THE INDIVIDUAL LOTS, WHICH NO LONGER LEGALLY EXIST.

In fact, Plaintiff has provided no relevant evidence of any loss because its appraisal does not conform to the analysis adopted 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). Plaintiff has admitted that its lots are merged under the *Murr* factors. Plaintiff's Memorandum in Support of Partial Summary Judgment, Page 14. Despite this admission, Plaintiff's appraisal ignores the merger of the lots. Christopher Donato Appraisal, Exhibit No. 3 to Defendant's Motion for Summary Judgment. As a denominator or "before" valuation, Plaintiff's appraiser values the lots as sold separately, creating a hypothetical appraisal that ignores the merger ordinance. Plaintiff's appraiser then compares this irrelevant, hypothetical valuation to the anticipated sales price of the property if sold as merged, which would be the numerator or "after" valuation.

This is not the proper analysis under *Murr*, *Quinn*, and numerous other takings cases that consistently hold that the totality of the Plaintiff's property must be considered for both the "before" and "after" valuations. Indeed, that is the point of those holdings: that the merged property is the denominator and the numerator in the takings analysis. The value of the lots separately is wholly irrelevant. *See* Defendant's Reply Brief, Pages 9-13; *Murr v. Wisconsin*, 137 S. Ct. at 1949 ("We also note the number is not particularly helpful for understanding petitioners' retained value in the properties because Lot E, under the regulations, cannot be sold without Lot F."); *S.C. State Highway Dep't v. Terrain, Inc.*, 267 S.C. 186, 194-95, 227 S.E.2d 184, 187 (1976)

("The only testimony offered on behalf of the landowner was incompetent and inadmissible as the appraisals commissioned by them did not take into consideration the entire tract of land condemned.").

Since Plaintiff's appraisal is not legally valid, Plaintiff has presented no evidence of any legally cognizable loss.

C. THE TRIAL COURT ORDER COMPLETELY IGNORES THE FACT THAT PLAINTIFF WAS OFFERED THE FULL ASKING PRICE FOR BOTH LOTS TOGETHER, WHICH AMPLY DEMONSTRATES THAT PLAINTIFF'S ALLEGED LOSS IS MINIMAL OR NONEXISTENT.

The evidence before the trial court shows that Plaintiff's investment backed expectations were met in January of 2021 when a full price offer of $2,550,000[1] was made for both lots by a buyer who was fully aware of the merger ordinance and pending litigation. Defendant's Motion for Summary Judgment, Pages 2-3; Defendant's Supplemental Brief, Pages 10-16. Plaintiff's appraisal of the value of the lots sold together ignored this full-price offer and instead opined that the lots, of sold together, would only fetch $2,177,000 in a sale.

The trial court's order did not address this disparity between Plaintiff's appraisal and the actual offers. Rather, there was strong evidence, namely from the market itself, showing that the value of the lots was not diminished at all due to their merger. Indeed, Plaintiff's full expectations were met by this offer that was inexplicably ignored. The trial court did not address or take into consideration that this full-price offer was made, and Plaintiff's expectations fulfilled.

[1] This offer was actually $50,000 over the original listing price of the two lots.

IV. DEFENDANT PRESENTED ABUNDANT EVIDENCE THAT PLAINTIFF'S REASONABLE INVESTMENT BACKED EXPECTATIONS WERE MET.

A. PLAINTIFF'S ONLY INVESTMENT IN THE SUBJECT PROPERTY IS THE CONSTRUCTION OF TWO HOUSES, AND DEFENDANT HAS NOT INTERFERED WITH THE USE OF THOSE HOUSES.

If Defendant were requiring Plaintiff to remove one or both of his houses, it would interfere with Plaintiff's reasonable investment-backed expectations and would be a relevant factor in the *Penn Central* analysis. But that is not what is happening. Plaintiff's family purchased the subject lots 40 years ago for $65,000. For the majority of those last 40 years, Lot B has been undeveloped. Following renourishment, and much to Mark Braden's surprise, July 30, 2020 Mark Braden Statement, Exhibit No. 8 to Defendant's Motion for Summary Judgment, Plaintiff received the windfall of having an additional lot to develop. So, due in large part to government action, Plaintiff has *exceeded* its investment-backed expectations with regards to the acquisition of the lots. The merger ordinance's requirements that the undersized lots must remain under common ownership does not interfere with that initial investment, but rather simply returns Plaintiff to the same expectations it held since 1980 when the lots were purchased: only one of the lots was and is developable.

Plaintiff's only other investment in the lots is the construction of houses on both Lot A and Lot B. Despite the fact that these lots are undersized and could only be developed due to an exemption from the City's lot size requirements, the City has not interfered with this investment at all. Plaintiff has received rent from both houses for the past 15 years and will continue to do so, unabated, for the life of the houses. There is simply no interference with Plaintiff's investments or use of the property for the natural life of the houses. *See* Defendant's Reply Brief, Pages 13-16; *Penn Central*, 438 U.S. at 136 ("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."); *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.' ").

Because Defendant has not interfered with any reasonable investment backed expectations, no compensable taking has occurred.

B. THE MERGER ORDINANCE LOOKS NOTHING LIKE A CLASSIC TAKING.

The "common touchstone" of any regulatory taking theory 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 v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (emphasis added); *Dunes West,* 737 S.E.2d at 618–22.

The trial court did not consider Plaintiff's reasonable expectations with regards to the continued use of the property. Instead, the trial court focused exclusively on the Plaintiff's ability to sell the lots individually. This is an extremely small part of Plaintiff's bundle of rights. Plaintiff still has all the traditional property rights that are the usual subject of takings claims. Plaintiff has the right to occupy the property. Plaintiff has the right to exclude others from the property. Plaintiff has the right to engage in the property's highest and best use. Plaintiff has the right to sell the property as a whole. These are the important rights that are protected by takings law. In short, the Defendant's actions are not the functional equivalent of a classic taking where the government appropriates private property or ousts the owner from his domain.

C. THE RESTRICTION ON PLAINTIFF'S SALE OF A SINGLE PART OF ITS MERGERD LOT DOES NOT AMOUNT TO A TAKING.

Plaintiff has admitted that the lots should be considered as a merged, single lot under the *Penn Central* factors. Plaintiff's Memorandum in Support of Partial Summary Judgment, Page 14. This admission, that the lots are merged, is typically viewed as outcome determinative in a takings analysis. *Murr*, 137 S. Ct. at 1943–44.

Indeed, Plaintiff has not identified a single case finding that a restriction on the right to sell a single piece of a larger property is a compensable taking. In fact, both the South Carolina and the U.S. Supreme Court have repeatedly held that a plaintiff cannot point to a distinct segment of its larger bundle of rights that has been impaired and claim a taking has occurred. *Dunes West,* 737 S.E.2d at 615 (citing *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 331-32, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) ("An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety." (citation omitted)); *Keystone Bituminous Coal,* 480 U.S. at 498 ("Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property.... [U]nder petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because the footage represents a distinct segment of property for takings law purposes."); *Andrus v. Allard,* 444 U.S. 51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979) ("[T]he denial of one traditional property right does not always amount to a taking. At least 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."); *Penn Central,* 438 U.S. at 130–31 (" '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. In deciding whether a particular government regulation has effected a taking, this 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.").

If owners were allowed to narrow the takings consideration to a single strand of its entire bundle of rights, as Plaintiff has done here, every action taken by the government would amount to a taking. This is not the law, and, as such, the trial court should revise its order accordingly.

D. THE COURT'S HOLDING THAT THE CITY INTERERED WITH PLAINTIFF'S EXPECTATIONS IS SOLELY BASED ON THE PURPORTED LOSS IN VALUE OF THE PROPERTY, AND NOTHING MORE THAN A RESTATEMENT OF THAT *PENN CENTRAL* FACTOR.

Plaintiff's only evidence that the Defendant interfered with its investment backed expectation is the appraisal showing that the properties would fetch more money if they were sold separately. In fact, this is merely a restatement of the first factor of the takings analysis, which focuses on the loss in value of the property. This showing does not address any investment-backed expectations. It merely shows that Plaintiff may have suffered some minor loss in the value of the property as a whole. In other words, Plaintiff is trying to prove that the City interfered with its expectations merely by showing that there is a potential loss in value of the property. The loss in value of the property, standing alone, does not support the claim that the City interfered with an expectation.

E. PLAINTIFF'S PURPORTED EXPECTATION TO SELL ONE LOT WAS MERELY A CONTEMPLATED PLAN THAT LEGALLY RECEIVES NO PROTECTION.

Even if takings law protects expected transactions, as opposed to uses, there is abundant evidence that Plaintiff's purported expectation that it was going to sell one of the houses was merely a *contemplated* transaction that Plaintiff had not acted upon. Analysis of a claimant's

investment backed expectations does not include protection of merely contemplated uses. Reply Brief, Pages 26-27; *Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 349 S.E.2d 891, 893 (Ct. App. 1986) (A contemplated use of property by a landowner on the date a zoning ordinance becomes effective to preclude such a use is not protected as a nonconforming use.).

Plaintiff's properties were not listed until 2018, eight years after the merger ordinance was adopted. Although Plaintiff claims it contemplated the sale of one of these houses when they were built, there is no evidence in the record showing that Plaintiff took any action to attempt to sell these properties until 2018.

The listing sat dormant for over a year with no interest, and no additional effort by the Plaintiff or its real estate agent to sell either property. So, prior to the merger ordinance amendment on April 9, 2019, Plaintiff had only listed the lots. It had received no offers nor had any discussions with any buyers. It was merely a contemplated sale at most. "[A] contemplated use of property by a landowner on the date a zoning ordinance becomes effective to preclude such a use is not protected as a nonconforming use." *Friarsgate*, 349 S.E.2d at 893. Defendant's Supplemental Brief, Pages 10-16.

Moreover, what few offers were made on the lots were completely ignored by Plaintiff. Plaintiff never once responded to or countered an offer, including the full-price offer made on both lots in 2021. This strongly indicates that Plaintiff had no intent to sell these properties but instead decided to pursue a claim against the City instead. Defendant's Supplemental Brief, Pages 10-16.

F. THE TRIAL COURT ORDER FAILS TO TAKE INTO ACCOUNT THE FACT THAT PLAINTIFF IS SEEKING COMPENSATION FOR A WINDFALL BENEFIT, NAMELY A SECOND DEVELOPABLE LOT, CREATED BY THE DFENDANT'S ACTION, NAMELY RENOURISHMENT.

The trial court has also ignored the fact that Plaintiff's super-beachfront lot was not developable until the Defendant Folly Beach, with financial help from the federal government, started renourishing the beach in front of Plaintiff's property in 1993. Defendant's Memorandum in Support of Summary Judgment, Pages 8-9. Thus, Plaintiff is in the exact same position as the plaintiff in *Quinn*, 862 F.3d 433. Like *Quinn*, Plaintiff was only able to develop one of its lots until the government stepped in and made Plaintiff's second lot developable. This additional developable lot was a windfall that exceeded all expectations the Plaintiff had when its predecessor, the mother of Plaintiff's owners, acquired the properties for $65,000. The merger ordinance merely returns Plaintiff to the position it was in when it acquired the lots: having one developable lot. As such, Plaintiff has no reasonable investment backed expectations that the Defendant interfered with.

Taken together, it is clear that Plaintiff has presented no legally relevant evidence that the City interfered with its reasonable economic expectations. Plaintiff's only investment in the subject property is the construction of two houses. The occupancy and use of those houses continue unabated. Plaintiff still has the right to occupy the houses. Plaintiff still has the right to exclude others from its property. Plaintiff still has the right to derive substantial income from the houses. Plaintiff still has the right to continue the use of the houses just as it did before the adoption of the merger ordinance. Plaintiff still has the right to sell the two houses as a merged lot. These are the rights protected by takings law, and the City has done nothing to interfere with those rights. Interference with reasonable economic expectations is the primary factor in any takings analysis.

Since Plaintiff has presented no legally cognizable evidence that the City interfered with its expectations, the City, not Plaintiff, is entitled to summary judgment.

V. THE TRIAL COURT MISINTERPRETS THE LAW GOVERNING THE "CHARACTER OF THE GOVERNMENT ACTION" FACTOR OF A TAKINGS ANALYSIS.

A. THE TRIAL COURT IGNORED THE EVIDENCE PRESENTED BY DEFENDANT DEMONSTRATING THAT THE MERGER ORDINANCE SUPPORTED IMPORTANT GOVERNMENT INTERESTS, NAMELY PROTECTION OF A HIGHLY EROSIVE BEACH.

As noted in Section II above, Defendant presented abundant evidence and testimony showing that the merger ordinance advances the important goal of gradually withdrawing previous unwise development from a highly erosive, active beach. *Esposito*, 939 F.2d at 169 ("The record in this case indicates that the 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.").

Again, by merging the lots owned by Plaintiff, Defendant is ensuring that, when these lots are redeveloped, only one house will be built, and additional measures, such as the creation of DMA, will ensure that the one house is built on Lot A, not Lot B.

The trial court's order inexplicably asserts that there is no benefit from the merger ordinance because "the Properties are already developed." Trial Court Order, Page 10. This ignores the fact that the merger ordinance is directed toward the future redevelopment of the lots. As stated by the Fourth Circuit, the gradual withdrawal of unwise beachfront development is a valid government interest. *Esposito*, 939 F.2d at 169.

The trial court order also claims that the merger ordinance does not advance important goals because "Defendant already has other regulatory measures in place to limit future beachfront

development." Trial Court Order, Page 10. This conclusion is not supported by any concept in takings law and actually turns the law on its head. Property that is highly regulated, such as beachfront property, puts owners on notice of potential additional regulation. *Murr*, 137 S.Ct. at 1945-46 ("Second, courts must look to the physical characteristics of the landowner's property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1035, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (KENNEDY, J., concurring)] ("Coastal 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").

The trial court's conclusion also ignores the Defendant's important goal of protecting beachfront owners from a total loss. If the merger is enforced, there will be one owner of Lot A and Lot B together. Thus, even if Lot B becomes undevelopable, the owner will still have developable land. If the merger ordinance is not enforced, Lot B will come under separate ownership and will face a complete loss when it becomes undevelopable. Avoiding an owner's complete loss of use is a valid governmental goal, especially where, as here, the Plaintiff refused to disclose the lots' restrictions to potential buyers. Defendant's Reply Brief, Pages 19-21.

B. THE TRIAL COURT IGNORED THE FACT THAT PLAINTIFF REPEATEDLY ADMITTED THAT THE DEFENDANT IS PURSUING A LEGITIMATE GOAL.

With regards to the character of the government action, Plaintiff admitted that Defendant is pursuing a legitimate goal, Plaintiff's Brief, Page 11 ("Defendant cites legitimate and substantial public policies"). Plaintiff also admitted in its Complaint that "[l]ot merger ordinances serve to

prevent over-development." Complaint, Paragraph 22(E). So, Plaintiff's Complaint and Brief explicitly recognize that the City's merger ordinance does serve the purpose of preventing over-development, whether on the beach or elsewhere.

These admissions are in step with the law, which has long recognized the government's interest in addressing beachfront erosion. As stated by the Fourth Circuit:

> The record in this case indicates that the 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.

Esposito, 939 F.2d at 169.

Plaintiff's admission should end the analysis of this factor in favor of the government. However, the trial court ignores this admission and engages in an analysis that ignores the law and the facts. Trial Court Order, Pages 9-12.

C. THE TRIAL COURT DOES NOT FOLLOW THE LAW GOVERNING THE CHARACTER OF THE GOVERNMENT'S ANALYSIS.

As argued extensively in the Defendant's Motion for Summary Judgment, Pages 39-40 and Defendant's Reply Brief, Pages 16-17, the "character of the government's action" primarily concerns consideration of whether there is a physical invasion or instead merely an impact on property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S. Ct. 2074, 2082, 161 L. Ed. 2d 876 (2005). In order for there to be a taking, Plaintiff must show that the merger ordinance is "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. Plaintiff has not tried to make this crucial showing and cannot do so because merger ordinances "control development based 'on

density and other traditional zoning concerns' [and] are the paradigm of this type of public program." *Quinn,* 862 F.3d at 443.

First, the trial court concludes the merger ordinance advances no government benefit because the properties are already developed. This is an odd claim given that Plaintiff has already admitted in its Complaint that "[l]ot merger ordinances serve to prevent over-development." Complaint, Paragraph 22(E). So, Plaintiff's Complaint explicitly recognizes that the City's merger ordinance does serve the purpose of preventing over-development, whether on the beach or elsewhere.

The trial court's holding also ignores the fact that the merger ordinance will limit the development of the properties in the future. Again, limitations on future development that gradually roll back unwise development have long been recognized as a valid government goal. *Esposito*, 939 F.2d at 169.

D. THE MERGER ORDINANCE DOES NOT PLACE AN UNDUE BURDEN ON PLAINTIFF ALONE.

Rather than focusing on the well-established legal guidance on the character of the government's action, Plaintiff pivots to a wholly unrelated issue claiming that the merger ordinance is unenforceable because it does not impact enough landowners. This argument has no basis in fact or in law.

First, Defendant presented ample evidence that the merger ordinance will impact large number of lots on Folly Beach, including 17 super-beachfront lots and over two dozen developed lots. Defendant's Reply Brief, Page 19.

Second, courts across the country have repeatedly held that an owner's complaint of being "singled out" by a land use regulation does not support a takings claim.

> Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. **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.** Thus, the common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.

Pennell v. City of San Jose, 485 U.S. 1, 20, 108 S. Ct. 849, 862, 99 L. Ed. 2d 1 (1988) (Scalia, J., dissenting) (emphasis added)

Similarly, Plaintiff's argument is simply just an equal protection argument in disguise. The Fourth Circuit made clear that such arguments are not applicable to merger ordinances:

> 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.

Thus, there is neither a legal nor a factual basis for the trial court's conclusion that the merger order impacts the Plaintiff alone and that it is legally a factor in the takings analysis.

E. THE U.S. SUPREME COURT IN *LINGLE* DECISVELY REJECTED THE STRICT SCRUTINY ANALYSIS ADOPTED BY THE TRIAL COURT.

The trial court also ignored the U.S. Supreme Court's recent ruling in *Lingle* when deciding that the character of the government action factor supported a taking. The Plaintiff argued, and the trial court apparently accepted, that the merger ordinance does not "substantially advance" the government interest. The Supreme Court in *Lingle* vigorously closed the door on courts examining the effectiveness or engaging in "strict scrutiny" of the challenged ordinance in a takings case:

> [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.[2] *See also* Defendant's Motion for Summary Judgment, Page 40,

In summary, the character of the government's action in this matter looks nothing like a traditional taking. Rather, it is a legitimate, widely-accepted regulation of the density of development that supports numerous important governmental goals, primarily 1) gradually rolling back unwise beachfront development, and 2) protecting future owners from a complete loss.

[2] The trial court relies on *Sea Cabins on Ocean IV Homeowners Ass'n, Inc. v. City of N. Myrtle Beach*, 345 S.C. 418, 431, 548 S.E.2d 595, 602 (2001), which cites *Agins v. City of Tiburon*, 447 U.S. 255, 2660, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), a case that was overturned by *Lingle* for employing the "substantially advances" standard.

VI. THE TRIAL COURT FAILS TO CONSIDER PRINCIPALS OF STATE PROPERTY LAW AND NUISANCE LAW.

The trial court's order completely ignores an important factor in the takings analysis. It is well-settled that the economic impact on an owner's property of a contested regulation is informed by background principles of State property and nuisance law. *Palazzolo*, 533 U.S. at 629. Where the proscribed use of the property is not part of the owner's title to begin with, no compensatory taking has occurred. *Lucas*, 505 U.S. at 1027. As stated by the U.S. Supreme Court in *Lucas*:

> On this analysis, the owner of a lake-bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. See Michelman, Property, Utility, and Fairness, *Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165, 1239–1241 (1967).

Lucas, 505 U.S. at 1029–30.

This factor is particularly important in light of the fact that the Plaintiff's property is already heavily regulated as a beachfront property on a constantly eroding beachfront. The property is already impacted by state property law, nuisance law, and government regulation in addition to the merger ordinance. Defendant's Memorandum in Support of Summary Judgment, Pages 36-39. Since Plaintiff's property is already subject to heavy regulation, Plaintiff should not be surprised that additional regulations would be imposed to gradually roll back unwise beachfront development. This is particularly true where, as here, Plaintiff could only develop Lot B after beach renourishment. This factor, ignored by the trial court, strongly supports the Defendant's actions and weighs against a compensable taking.

VII. THE TRIAL COURT MISAPPLIED THE BALANCING TEST.

The trial court ignored the balancing of factors required by *Penn Central*, instead engaging in a perfunctory analysis of those factors in a single paragraph that completely ignores the holdings of *Penn Central* and its progeny. Throughout this suit, Plaintiff has only argued one fact: the contention that it cannot sell the merged properties for as much as it can sell the properties separately. United States Supreme Court decisions sustaining land-use regulations "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking,' and that the 'taking' issue in these contexts is resolved by focusing on the uses the regulations permit." *Penn Central,* 438 U.S. at 131, 98 S.Ct. 2646 (citations omitted). "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, 107 S.Ct. 1232. "[T]he extent of diminution [in value] is but 'one fact for consideration' in determining whether governmental action constitutes a taking." *Dunes West*, 737 S.E.2d at 621 (quoting *Keystone Bituminous Coal Ass'n v. Duncan,* 771 F.2d at 713).

The Plaintiff has presented no evidence that its reasonable investment backed expectations have been impacted by government action. Plaintiff's only investment is the construction of the houses. Plaintiff has and will receive a full return on that investment, namely through the use and rental of the houses for their natural life. It is entitled to nothing more than that under a takings analysis.

Finally, the government has an important and long-recognized interest in gradually reducing unwise beachfront development. Plaintiff's development of Lot B and its other super-beachfront neighbors are the pinnacle of unwise beachfront development. Compared to the minimal restriction on Plaintiff's full bundle of property rights, the government interest in this case

far exceeds any contemplated desire to sell the lots individually. If, as claimed by Plaintiff, it had always contemplated selling one of the lots to pay off construction costs incurred 15 years ago, it can still do by selling the merged lot for a premium with two houses, pay off any remaining debts, and still have funds left over to buy a single beachfront house to enjoy going forward.

The trial court considered none of this in concluding, without any legal or factual support, that all factors indicated a compensable taking has occurred.

VIII. THE TRIAL COURT DID NOT FOLLOW THE CLEAR PRECDENT SET BY *MURR* AND *QUINN*.

As noted above, there are only two cases in the country that have ruled on whether a merger ordinance amounts to a compensable taking, the Supreme Court's *Murr* decision and the Fourth Circuit Court of Appeals' *Quinn* decision. Both decisions found that the merger ordinance was an appropriate governmental action that did not effectuate a taking:

> 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.

Neither Plaintiff nor the trial court has cited a single opinion that has found that a merger ordinance effectuates a compensable taking.

Among other things, the *Murr* opinion recognized that 1) reasonable land-use regulations do not amount to a taking, 2) merger ordinances have long been used by municipalities and counties to reduce the number of substandard lots, 3) lot lines do not control what property should be considered in a takings case when properties are merged by ordinance, and 4) merged lots that retain substantial value do not amount to a compensable taking. *Murr*, 137 S.Ct. at 1947–50;

Defendant's Motion for Summary Judgment, Pages 3-5. Both cases recognized that the merger ordinances generally created developable lots and thus were "outcome determinative" once the lots were merged, as Plaintiff has admitted in this matter. *Murr*, 137 S. Ct. at 1943–44 ("As commentators have noted, the answer to this question may be outcome determinative."); *id.* at 1949-50 ("Treating the lot in question as a single parcel is legitimate for purposes of this takings inquiry, and this supports the conclusion that no regulatory taking occurred here."); *Quinn*, 862 F.3d at 443 ("The Grandfather/Merger Provision is not a per se taking under Lucas or a taking under the Penn Central standard.").

Like the merger ordinances considered in *Murr* and *Quinn*, Folly Beach's merger ordinance preserves "open space while still allowing for orderly development," *Murr*, 137 S.Ct. at 1947, and does nothing more than limits "building on [substandard] lots while ensuring that property owners can still build on their land. *Quinn*, 862 F.3d at 438 (both quoted by the trial court). Plaintiff can still redevelop his merged lot in the future, and the City can still provide for orderly development of the super-beachfront lots in the future. Plaintiff owns both Lot A and Lot B, and they will be able to build on those merged lots in the future. Moreover, Plaintiff is allowed to maintain its current development on both lots. The fact that Defendant is not immediately demanding that the structure on Lot B be torn down does not mean that the merger ordinance serves no purpose for future development. Rather, the City has balanced the interests in this case and is allowing Plaintiff to keep and continue to enjoy its current development, but will only be allowed to redevelopment one lot. In other words, this matter is indistinguishable from the holdings in *Murr* and *Quinn*.

A. THE TRAIL COURT FINDS A TAKING HAS OCCURRED BY FOCUSING SOLELY ON THE PLAINITFF'S RIGHT TO SELL THE SUBJECT LOTS SEPERATELY.

The Supreme Court in *Murr*, and many other courts, have wrestled with the question of what, precisely, is the property at issue in a takings case. *Murr*, 137 S.Ct. at 1943–44. *See also Dunes West*, 737 S.E.2d at 614. The crucial holding in *Murr*, *Quinn*, *Dunes West*, and many other cases, is that a property owner cannot "piecemeal" various property interests in order to create an apparent complete taking. *See, e.g. Andrus,* 444 U.S. at 65–66 ("[T]he denial of one traditional property right does not always amount to a taking. At least 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."). *See* Defendant's Motion for Summary Judgment, Pages 43-45.

In this matter, Plaintiff has lost a single right that is part of a large bundle of rights: the right to sell its lots separately. The trial court's order focuses solely on the loss of this relatively minor "strand" of Plaintiff's bundle of rights in finding a taking. In other words, the trial court has "piecemealed" Plaintiff's rights and found a taking because one right has been lost., in direct contravention of long ignores this long-standing command of takings law and focuses solely on Plaintiff's loss of a single right, the right to sell its lots separately. If owners are allowed to focus the takings inquiry on the single right they own that has been impaired, it will mean the end of all land use regulation.

B. THE TRAIL COURT FAILS TO EVEN ADDRESS THE FACTORS SET OUT IN *MURR* THAT CONTROL THE PROPERTY RIGHTS THAT SHOULD BE ANALYZED IN A TAKINGS CASE.

Murr's core holding is setting forth a list of factors that determine what is the actual property that should be considered in a takings analysis, also known as the denominator property. Defendant's Motion for Summary Judgment, Pages 45-46.

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." *Murr*, 137 S.Ct. at 1945. "Second, courts must look to the physical characteristics of the landowner's property." *Id.* at 1945-46. "Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings." *Id.* at 1946.

The trial court does not address these factors at all in its analysis. These factors clearly show that the appropriate property to consider in the takings analysis is the entirety of both lots as merged under the City's ordinance. Local law treats the property as a single unit. The physical characteristics of the property show it is a single unit. The lots have always been under the same ownership and are intertwined by the numerous easements they share. Indeed, Lot B could not have been developed without an access easement or sewer easement on Lot A. Finally, the merger ordinance increases the value of the merged lot in that the owner will have a larger lot that can accommodate a larger house and will allow for the natural development of a dune system that will protect the lots, as well as their neighbors, from water incursion and weather events.

Defendant applied the *Murr* factors to the current matter to argue that the merged lots should be considered as the denominator in the takings analysis. Defendant's Motion for Summary Judgment, Pages 46-49. The trial court failed to address these factors and failed to consider the merged lots as the denominator in the takings analysis.

C. THE FACT THAT PLAINTIFF'S MERGED LOTS ARE DEVELOPED IS NOT A FACTOR UNDER *MURR* OR *QUINN* BUT RATHER A FACTOR TO BE CONSIDERED IN THE *PENN CENTRAL* ANALYSIS.

Rather than address these factors set out in *Murr*, the trial court focuses on whether the lots were developed and when they were acquired. Neither of these considerations are factors under either *Murr* or *Quinn* in deciding what lot to consider as the denominator in takings analysis.

The real problem here is that the trial court (and Plaintiff) have confused and intermingled what is actually a two-step process. The first step is to determine the property under consideration. In other words "What is the proper unit of property against which to assess the effect of the challenged governmental action?" *Murr*, 137 S.Ct. at 1943. The court is supposed to apply the factors set out in *Murr* to determine what the denominator is in the takings analysis. After the appropriate parcel to consider has been determined, then and only then does the inquiry turn to whether a regulatory taking has occurred under the *Penn Central* factors.

Rather than follow this two-step process, the trial court in its effort to distinguish this case from *Murr* and *Quinn* focuses solely on two issues that are not at play in determining the appropriate denominator: 1) whether the lots are developed, and 2) when the lots were acquired. These two questions are simply not part of the factors in determining the denominator property. Rather, they are two questions that are more appropriately factors in determining whether the owner's reasonable investment backed expectations have been met. By shoehorning these facts into the *Murr* question of what parcel to consider, the trial court has ruled in direct contravention to the holdings *Murr* and *Quinn*. Even worse, the trial court's order elevates these two factors as controlling the entire process.

The appropriate course of action would have been to first apply the rules of *Murr* and *Quinn* to find that the Plaintiff's merged lots form the appropriate property to consider in the

takings equation. In other words, the merged lots are the denominator to consider when applying the *Penn Central* factors.

Second, the trial court should apply the *Penn Central* factors to the merged lots. This leads to the inevitable conclusion that no taking has occurred because the government has done nothing to interfere with Plaintiff's use of the merged lots. Plaintiff has suffered no legally cognizable loss because both the numerator and the denominator are the same: the lots as merged.

Moreover, even if the pre-regulation individual lots are used as the denominator, the developed status of the lots or the timing of the acquisition of the lots should be applied to the *Penn Central* analysis, in particular the consideration of reasonable investment backed expectations. Under that analysis, no taking has occurred because the City has not interfered with the Plaintiff's investment in the lots, namely the two existing houses. Defendant's Reply Brief, Pages 6-22; Defendant's Supplemental Brief, Pages 8-10.

Thus, the trial court's effort to distinguish this case from the holdings in *Murr* and *Quinn* is not sustainable and supports reformation of the existing order.

D. PLAINTIFF'S PURCHASE OF THE LOTS PRIOR TO ADOPTION OF THE MERGER ORDINANCE IS NOT RELEVANT.

The fact that the Plaintiff purchased its lots prior to adoption of the merger ordinance also does not distinguish this matter from *Murr* and *Quinn* for several reasons. First, to be clear, the lots in *Murr* were also acquired prior to passage of the merger ordinance in question. Second, the only restriction that the City is creating is on the redevelopment of the lots. When that redevelopment occurs, it will be *after* adoption of the merger ordinance. Thus, the only development impacted by the merger ordinance will be development of the lots after the adoption of the ordinance.

Plaintiff and the trial court are, in effect, positing that once a lot is developed, all land use regulations governing that lot are frozen in perpetuity, and any new regulations adopted will never be applied to the lot because it is already developed. This is, of course, absurd and not the law. Every governmental entity with land use regulations has adopted "grandfather" ordinances that govern legal, non-compliant development. Indeed, the merger ordinance is almost always part of the "grandfather" ordinances that govern legal, non-compliant development. The Fourth Circuit in *Quinn* even refers to the ordinance as the "Grandfather/Merger Provision."

Plaintiff's houses are legal, non-compliant development. As such, the current development on the lots is allowed to remain in place and is generally not subject to any new land use regulations. However, this grandfather provision does not provide the lots this "grandfather" protection for all eternity. Once the development or house is torn down or its use is abandoned, it loses its protected status and becomes subject to all land use ordinances passed during its existence. This is how governments have balanced their interests with the rights of property owners since the advent of land use and zoning regulation.

The trial court's order ignores this long-standing and universal practice of granting grandfathered status *until the use in question stops or the development is replaced*. When redevelopment occurs at a later date, it will have to comply with all existed ordinances at that time. This is all that the Defendant is doing: making sure that the redevelopment of the Plaintiff's lots in the future is in compliance with the merger ordinance. This is done by preventing the transfer of the merged lots immediately. Merger ordinances would be completely ineffective without this ban on transfer, as owners would simply transfer the lots to third parties or even a strawman purchaser to avoid the merger ordinance.

The trial court's order ignores all of these facts and well-established law in its order, and essentially grants Plaintiff's lots protection from the future application of the merger ordinance in perpetuity. No law supports this drastic departure from well-established land use planning principles. As such, the order should be reconsidered, and summary judgment granted to Defendant.

CONCLUSION

Based on the foregoing, Defendant would ask that the trial court reconsider its ruling in this matter, deny Plaintiff's Motion for Partial Summary Judgment, and grant Defendant's Motion for Summary Judgment. This matter is controlled by the holdings in *Murr* and *Quinn*. Those cases held that merger ordinances are valid exercises of governmental power to control density and pursue other important goals, such as the gradual roll back of unwise development of beachfront property. The merger ordinance poses little or no burden on Plaintiff. More importantly, the merger ordinance does not interfere with Plaintiff's reasonable investment backed expectation. Plaintiff's only investment in this property is the construction of two homes following renourishment. The merger ordinance does not interfere with this investment at all. Plaintiff's continue to use and rent these houses. The merger ordinance allows that use to continue for the natural life of those houses, which is how all "grandfather" ordinances treat legally noncompliant structures. This should be the beginning and ending of the analysis.

Instead, the trial court focuses on a single strand of Plaintiff's broad bundle of rights: the right to sell the merged lots separately. The trial court has ruled that the merger ordinance effectuates a taking because it has interfered with this single strand of Plaintiff's rights. "[T]he denial of one traditional property right does not always amount to a taking. At least 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 65-66.

In other words, this nothing like a traditional taking that ejects an owner from its property or otherwise impedes its use of the property. The holding leaves Folly Beach as the only municipality in the entire country that cannot use its merger ordinance to control the future development of undersized lots. The trial court may as well have struck the City's lot size requirement in full, because it leaves no way for the City to regulate lot size requirements for lots that have already been developed.

As such, the order should be withdrawn in full, and summary judgment granted to Defendant.

Respectfully submitted,

/s/ Joseph C. Wilson, IV
Joseph C. Wilson, IV
City Attorney
City of Folly Beach
P.O. Box 178
Folly Beach, South Carolina 29439
(843) 834-2390
jwilson@cityoffollybeach.com

November 27, 2021
Folly Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge, Sr.

Case No. 2019-CP-10-06628

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

v.

City of Folly Beach, ...Appellant.

NOTICE OF APPEAL

The City of Folly Beach appeals the order of the Honorable Roger M. Young, Sr. dated November 17, 2021, and the order of the Honorable Roger M. Young, Sr. denying a Motion to Reconsider pursuant to Rules 52(b) and 59(e), dated December 7, 2021. Appellant received written notice of entry of the order denying the Motion to Reconsider on December 7, 2021.

Appellant files this appeal with the South Carolina Supreme Court because the appealed orders of the Circuit Court ruled that enforcement of Appellant's municipal ordinance amounted to a compensable taking. As such, the ruling implies that the municipal ordinance is unconstitutional if enforced without compensation. Rule 203(d)(1)(A)(ii), South Carolina Rules of Appellate Practice.

January 3, 2022

/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
Attorney for Appellant

Other Counsel of Record:

Keith M. Babcock, Esquire
Joseph B. Berry, Esquire
LEWIS BABCOCK L.L.P.
1513 Hampton Street (29201)
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000
keith.babcock@lewisbabcock.com
joseph.berry@lewisbabcock.com
Attorneys for Respondent

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	C/A NO. 2019-CP-10-06628
Braden's Folly, LLC,	)	
	)	
Plaintiff,	)	**ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
	)	
v.	)	
	)	
City of Folly Beach,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
	)	

This case involves a challenge to a lot merger ordinance enacted by the Defendant City of Folly Beach ("City") as applied to two developed properties ("Properties") owned by Plaintiff Braden's Folly, LLC ("Braden's Folly"). This matter is before the Court by way of Plaintiff's Motion for Partial Summary Judgment and Defendant's Motion for Summary Judgment, both made pursuant to Rule 56, SCRCP. The Court held a hearing on these motions on September 30, 2021. Appearing on behalf of Plaintiff was Keith M. Babcock, Esquire, and appearing on behalf of Defendant was Joseph C. Wilson, IV, Esquire. After considering the arguments of counsel, along with the pleadings, affidavits, depositions, and memoranda of law submitted by the parties, I have determined that a taking has occurred involving the Plaintiff's Properties. As a result, I am granting the Plaintiff's Motion for Partial Summary Judgment regarding its claim for inverse condemnation and denying Defendant's Motion for Summary Judgment.

PROCEDURAL HISTORY

This action was filed on December 23, 2019. On March 5, 2021, Plaintiff filed its Motion for Partial Summary Judgment. On May 5, 2021, Defendant filed its Motion for Summary

Judgment. Prior to the cross-motions for summary judgment being heard, on May 20, 2021, the Court continued the motions to allow the parties to complete discovery. After discovery was completed, the cross-motions were rescheduled for virtual hearing on September 30, 2021.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citing George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Dorman v. Campbell, 331 S.C. 179, 184, 500 S.E.2d 786, 788 (Ct. App. 1998) (citing Hatimer v. Retirement Div. of the S.C. Budget & Control Bd., 326 S.C. 93, 484 S.E.2d 586 (1997).

"[I]n an inverse condemnation case, the trial judge will determine whether a claim has been established; the issue of compensation may then be submitted to a jury at either party's request." Cobb v. South Carolina Dep't of Transp., 365 S.C. 360, 365, 618 S.E.2d 299, 301 (2005).

FINDINGS OF FACT

I find that the following facts are not in dispute:

1. The Properties which are the subject of this action are two adjoining, developed parcels located at 1681-A and 1681-B East Ashley Avenue, Folly Beach, South Carolina, 29439 and identified by Tax Map Numbers 439-16-00-038 and 439-16-00-079 ("Lot A" and "Lot B," respectively, see Site Survey, attached as Ex. 1 to Affidavit of Lauren Maurice Wilder)

that have been merged together under Section 168.04-01(B) of the City of Folly Beach Code of Ordinances.

2. In 1999, brothers Mark and Frank Braden inherited the Properties as testamentary devises from the estate of their mother, Margaret Braden. The Bradens then transferred the Properties to Braden's Folly, a limited liability company they created to own and hold the Properties. Braden's Folly has no other members, employees, or assets. (Affidavit of E. Mark Braden, ¶¶ 1-2).

3. The Properties have always been platted, deeded, and taxed separately. (E.g., Tax Records, attached as Exs. 17 and 18 to Braden Aff.). When Plaintiff acquired the Properties, there was a small house on Lot A and Lot B was undeveloped. (Braden Aff. ¶ 2).

4. In 2006-2007, Plaintiff redeveloped the Properties by demolishing the old house on Lot A and building new, two-story, four-bedroom, single-family houses on each property. Plaintiff established cross easements for sewer, beach, and road access across the Properties, and spent approximately $1,100,000 building both houses, with the plan to sell one of the Properties after construction was complete to help pay for construction costs and keep the other house in the family. (Supplemental Affidavit of E. Mark Braden, ¶¶ 1-3; 30(b)(6) Deposition of Braden's Folly 27:15-17, 49:4-10, 67:23-68:6, 163:25-164:5, 179:3-8, 181:13-182:1).

5. The concept of developing Lot A and Lot B mirrored the development of other lots in the area, which had been approved by the City. (Braden Aff. ¶ 3; Supp. Braden Aff. ¶ 1).

6. Defendant fully permitted and approved Plaintiff's development project. (E.g., City Building Permits, Zoning Approval, and Residential Permits, attached as Exs. 2 through 8 to Braden Aff.). The lots were substandard but developable under then-existing City code.

At the time development was complete, it is undisputed that Plaintiff had the legal right to separately sell the properties.

7. Shortly after construction was complete, the Great Recession and housing market collapse of 2007/2008 occurred, and Plaintiff put its plans to sell on indefinite hold. (Supp. Braden Aff. ¶ 3). In the following years Plaintiff used the Properties for family vacations and as rental properties, which helped offset holding costs. (Id. at ¶ 4).

8. In 2010, Defendant enacted its initial lot merger ordinance, which merged nonconforming lots in common ownership with "continuous frontage." While the parties disagree on whether the initial ordinance applied to the Properties, it is undisputed that the City did not enforce the initial ordinance on the Properties or on any other properties in Folly Beach. (See Deposition of City Administrator Aaron Pope 22:20-24).

9. In 2018, Plaintiff separately listed each property for sale. Plaintiff intended to sell whichever property received the best offer and keep the other property in the family. (E.g., Braden Aff. ¶ 5).

10. In April 2019, Defendant amended its merger ordinance to include "contiguous" lots. One month later, in May 2019, Defendant took action to enforce the amended ordinance on the Properties by sending Plaintiff a letter prohibiting the Plaintiff from separately selling or otherwise transferring either property to a different owner. (Letter from City to Braden's Folly, dated May 15, 2019, attached as Ex. 10 to Braden Aff.). The amended ordinance is an automatic merger provision that does not grandfather the separation of previously developed lots or provide for the availability of any variances or other hardship exemptions. (See Amended Ordinance, attached as Ex. 11 to Braden Aff.).

11. In December 2020, after the initiation of this action, Defendant again amended its merger ordinance to limit application to contiguous lots under common ownership adjacent to either the OCRM Critical Line or the OCRM Baseline. (Def.'s Supplemental Memo, p.5). Both the 2019 and the 2020 versions of the amended ordinance apply to the Properties.

CONCLUSIONS OF LAW

Based on the undisputed facts, I have determined as a matter of law that a regulatory taking has occurred in this inverse condemnation case.[1] Regulatory takings can result from government-imposed limitations on private property. To prove a regulatory taking, a claimant must show (1) affirmative conduct by the governmental entity and (2) a taking. Kiriakides v. Sch. Dist. of Greenville Cnty., 382 S.C. 8, 14, 675 S.E. 2d 439, 442 (2009) (citing Byrd v. City of Hartsville, 365 S.C. 650, 656-57, 620 S.E.2d 76, 79-80 (2005)). In this case, it is undisputed that there has been affirmative conduct by the governmental entity as Defendant took regulatory action by amending its merger ordinance and then enforcing the ordinance on the Properties in April and May of 2019. Thus, the issue before the Court is whether a taking has occurred. This is a matter of law for the court to decide. Cobb v. South Carolina Dep't of Transp., 365 S.C. at 365, 618 S.E.2d at 301.

In regulatory takings cases, the determination of whether a taking has occurred is governed by the framework established in Penn Central Transp. Co. v. New York, 438 U.S. 104, 98 S.Ct. 2646 (1978), otherwise known as the Penn Central balancing test. E.g., Byrd, 365 S.C. at 657, 620 S.E.2d at 80; Kiriakides, 382 S.C. at 14, 675 S.E.2d at 442; Dunes West Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 305, 737 S.E.2d 601, 614 (2013). "The general rule is that

[1] Following the completion of discovery, Plaintiff withdrew its cause of action for interference with a prospective business advantage.

regulatory-takings cases require 'essentially ad hoc, factual inquiries,' balancing all relevant circumstances to determine whether the government has taken property." Byrd, 365 at 658, 620 S.E.2d at 80 (quoting Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659). The critical factors in this analysis are the economic impact on the claimant, with a particular focus on the extent to which the government has interfered with the claimant's investment-backed expectations, and the character of the government action. Id. at 659, 620 S.E.2d at 80-81 (citations and internal quotations omitted).

In this case, based on the undisputed facts, I find that a taking has occurred because a balancing of the Penn Central factors weighs in Plaintiff's favor. Plaintiff developed the Properties in reliance on a regulatory scheme that did not include a merger ordinance. Defendant fully permitted Plaintiff's development, and now, over a decade later, has changed its rules, taken a fundamental legal right away from Plaintiff, and is enforcing the ordinance on the Properties in direct contravention of Plaintiff's reasonable investment-backed expectations and to Plaintiff's financial detriment. Additionally, the burdens imposed on the Plaintiff are not outweighed by any benefits to the public and the ordinance does not secure an "advantage of reciprocity." As applied to the Properties, Defendant's ordinance goes too far and has the functional equivalency of a classic taking.

INTERFERENCE WITH INVESTMENT-BACKED EXPECTATIONS

A property owner's reasonable investment-backed expectations are defined at the time the investment is made. Columbia Venture, LLC v. Richland County, 413 S.C. 423, 449, 776 S.E.2d 900, 914 (2015) (citations omitted). In examining a landowner's investment-backed expectations, the regulatory regime in place at the time of investment shapes the reasonableness of those expectations. Id. This analysis should limit recoveries to property owners who can demonstrate

that they invested in their property "in reliance on a state of affairs that did not include the challenged regulatory regime." Id. A reasonable investment-backed expectation must be more than a speculative hope or an abstract need. Quinn v. Bd. of Cnty. Comm'rs, 862 F.3d 433, 442-43 (4th Cir. 2017) (citation omitted); Dunes West Golf Club, 401 S.C. at 319, 737 S.E.2d at 622 (citations omitted).

Here, Plaintiff clearly had not only the reasonable expectation but the legal right to separately sell the Properties when it invested approximately $1,100,000 to build single-family houses on each parcel. At that time, the ordinance did not exist, and Plaintiff's development project was completed in reliance on then-existing City code. It is undisputed that Defendant permitted and approved the development of separate houses on separate parcels, each independently marketable of the other. Unlike the landowners in Quinn and Dunes West, Plaintiff did not have some speculative hope or unilateral expectation to separately sell the developed parcels, but it had the clear legal right to do so at the time of investment. The ordinance has now taken away that legal right.

Defendant argues that Plaintiff invested in the Properties to generate rental income, and that ability has not been taken away. However, there is no evidence to support this assertion and the testimony of record shows that Plaintiff intended to sell whichever house received the best price to recoup construction costs and then keep the other house in the family. Additionally, Plaintiff's creation of cross easements for sewer, beach, and road access further shows Plaintiff's separate treatment of the Properties. The Properties have always been deeded and platted separately, and to this day government taxes them separately. I find that Plaintiff's investment-backed expectations to separately own and sell the Properties were reasonable and that any reasonable landowner would objectively have expected to be able to retain the right to separately

own and sell each parcel at the time of development. In that regard, Defendant has directly interfered with Plaintiff's reasonable investment-backed expectations. Accordingly, this factor weighs heavily in Plaintiff's favor.

ECONOMIC IMPACT ON BRADEN'S FOLLY

Plaintiff has been financially damaged by Defendant's interference with its investment-backed expectations, and legal right, to sell one of its parcels and keep the other. 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. Under the ordinance, Plaintiff must now sell both parcels together to recoup its investment costs. The only evidence in the record identifying the Properties' market value if sold separately versus if sold together (i.e., the market value both before and after the ordinance is applied) is found in the appraisal report of Plaintiff's expert, Christopher D. Donato, MAI, which identified a $508,000 market value loss due to a forced collective sale. (Donato Appraisal Report, attached as Ex. 15 to Braden Aff.).[2]

Defendant argues that a diminution in value, standing alone, is insufficient to establish a taking. (E.g., Def.'s Motion & Memo, pp. 33-34; Def.'s Reply Memo, pp. 9-10). Defendant cites various zoning cases such as Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143 (1915) and Village of Euclid v. Amber Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926) as examples of cases where landowners suffered higher percentage reductions in value that did not amount to

[2] Mr. Donato evaluated both the market value of the Properties if sold separately and the market value of the Properties if sold to one buyer in a single transaction. With December 14, 2020 as his effective date of value, Mr. Donato found a market value of $1,335,000 for Lot A and $1,350,000 for Lot B, thereby identifying a combined market value of $2,685,000 if both parcels were sold separately. On the other hand, if being sold together in a single transaction to one buyer, Mr. Donato found a market value of $2,177,000, which amounts to a price differential of $508,000. (Donato Appraisal Report, pp. iii, 64, 70).

compensable takings. These cases, however, are inapposite as Plaintiff has suffered more than just a diminution in property value standing alone; it also had its investment-backed expectations interfered with and its legal right to separately sell the Properties taken away based on a regulation that did not exist when it developed the parcels.

Defendant further argues that Plaintiff could have sold both houses together for a price similar to what Plaintiff could have received for both houses sold separately.[3] However, even when viewing in the light most favorable to the Defendant, Plaintiff is still damaged by having to sell both together because it has lost its right to sell just one of the parcels. For example, Plaintiff was unable to accept a $1,100,000 offer for Lot A in August 2019 due to the ordinance. (Braden Aff. ¶ 8). Defendant asserts this affects only a "minimal piece of Plaintiff's bundle of rights," (Def.'s Reply Memo, p. 10), but the Fourth Circuit has identified the right to alienate property as a fundamental right of ownership. See Esposito v. S.C. Coastal Council, 939 F.2d 165, 170 (4th Cir. 1991) (finding that a taking did not occur because the claimants retained the "fundamental incidents of ownership" including the right to sell or transfer their properties). The ability to separately sell the Properties is a fundamental and valuable right that has been taken away from Plaintiff in addition to the market value diminution caused by the ordinance. Accordingly, the damages factor weighs in Plaintiff's favor.

CHARACTER OF GOVERNMENT ACTION

The final factor involves the nature of the government action. For example, "[i]f the public benefit outweighs the harm to the landowner, there is no taking and the government need not pay compensation." Sea Cabins on Ocean IV Homeowners Ass'n v. City of North Myrtle Beach, 345 S.C. 418, 430-31, 548 S.E.2d 595, 601-02 (2001). Here, however, the harm caused to Plaintiff by

[3] Compare Def.'s Supp. Memo, pp. 10-16, with Pl.'s Supp. Memo, p.10, n. 6.

enforcing the ordinance on the Properties is not outweighed by any benefit to the public. In support of the ordinance, Defendant cites to various public policies such as preventing erosion, limiting beachfront development, and other general beachfront management and preservation efforts. (Def.'s Memo, pp. 9-29). But 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.[4]

Courts also place particular focus on "how any regulatory burden is *distributed* among property owners." Columbia Venture, LLC v. Richland County, 413 S.C. 423, 451, 776 S.E.2d 900, 915 (2015) (emphasis in original) (citations and internal quotations omitted) ("a taking does not take place if the prohibition applies over a broad cross section of land and thereby secures an advantage of reciprocity"). Here, however, the ordinance does not apply over a broad cross section of land. Defendant argues that the ordinance spreads it burdens across the public by merging approximately sixty-two lots. (Def.'s Reply Memo, p.19). But the vast majority of these merged lots have one house on one lot while the other lot is undeveloped or both lots are undeveloped. In some cases, the lots are even underwater. (See Chart attached as Ex. A to Supp. Aff. of Aaron Pope). Apparently, only five landowners have two developed properties being merged by the ordinance. (Id.). The critical difference in merging two developed properties versus merging undeveloped land is the impact on a landowner's investment-backed expectations. Merging undeveloped or partially developed properties may not amount to a regulatory taking, but as

[4] For example, the City has asserted that its Dune Management Area (DMA) setback restrictions will prevent new development all along the beach. As the City Administrator stated in his affidavit, "Standing alone, the DMA makes Lot B undevelopable. So, even without the merger ordinance … Plaintiff will not be able to rebuild on Lot B should the structure be destroyed or torn down due to the DMA ordinance." (Pope Aff. ¶ 23; see also Def.'s Memo, pp. 25-26, 38-39). The Court is not addressing the issue of whether the DMA amounts to a taking of Lot B in this matter.

applied to the Properties, I find that forcing two single-family residential houses to be merged into one property amounts to a taking.

Additionally, Defendant's merger provision does not contain an exemption for previously developed lots, commonly known as "grandfathering." Unlike many other merger ordinances,[5] the City's ordinance automatically applies to both undeveloped and developed lots without the availability for any variances, appeals, or hardship waivers. The harm caused to Plaintiff is not outweighed by any benefits to the public, and the regulatory burden of the ordinance is not widely distributed among property owners. Accordingly, this factor also weighs in Plaintiff's favor.

Defendant argues that a recent United States Supreme Court case, Murr v. Wisconsin, 137 S.Ct. 1933 (2017), effectively provides a blanket approval of all merger ordinances. It does not.[6] In Murr, the landowners acquired their properties after enactment of the at-issue merger provision and there was no interference with any investment-backed expectations. Murr, 137 S.Ct. at 1949 (denying the regulatory takings claim under Penn Central because the landowners "cannot claim that they reasonably expected to sell or develop their lots separately given the regulations which predated their acquisition of both lots"). Similarly, Defendant argues that the Fourth Circuit's decision in Quinn v. Bd. of Cnty. Cmms'rs, 862 F.3d 433, 438 (4th Cir. 2017) validates the

[5] See generally Murr v. Wisconsin, 137 S.Ct. 1933, 1947 (2017) (noting that merger ordinances are usually designed "to preserve open space while still allowing for orderly development" and that "the harshness of a merger provision may be ameliorated by the availability of a variance") (citations omitted); Quinn v. Bd. of Cnty. Comm'rs, 862 F.3d 433, 438 (4th Cir. 2017) (noting that merger ordinances are "common means of balancing the legitimate goals of regulation with the reasonable expectations of landowners by limiting building on [substandard] lots while ensuring that property owners can still build on their land") (quoting Murr).

[6] Murr added a new balancing test to accompany the partial and total takings tests established in Penn Central and Lucas v. S.C. Coastal Council, 500 U.S. 1003, 112 S.Ct. 2886 (1992). This "denominator" test provides guidance on how to identify the "relevant parcel" against which to assess the effects of the challenged government action. Here, the parcels should be evaluated just as the two parcels in Murr were, both before and after application of the ordinance.

ordinance. However, the facts in Quinn, like Murr, are inapposite to the facts of this case. In Quinn, the landowner was a speculative developer who did not have any reasonable investment-backed expectations to develop or separately sell his hundreds of undeveloped lots because the lots had no sewer service and were undevelopable prior to enactment of the at-issue merger provision. 862 F.3d at 437. Moreover, the regulation's "impact on Quinn mirrored the impact on the entire island," id. at 438, thereby securing a critical "advantage of reciprocity" which the City's ordinance does not achieve. Murr and Quinn do not provide validation for the ordinance. Instead, they show by contrast why Defendant's actions rise to the level of a taking.

CONCLUSION

After applying the Penn Central balancing test to this case, in the light most favorable to the Defendant, I find that the weight of all factors rests in Plaintiff's favor. Plaintiff invested in the Properties in reliance on a regulatory scheme that did not include a merger provision. Defendant fully permitted Plaintiff's development project. Plaintiff had the reasonable expectation to sell one of its parcels to pay for construction costs and then keep the other developed parcel in the family. However, Defendant changed its code and enforced the ordinance on the Properties to Plaintiff's financial detriment and in contravention of its fundamental property rights. The harm caused to Plaintiff is not outweighed by any benefit to the public, and the regulatory burden of the ordinance is not widely distributed among the public. For these reasons, I find that the ordinance as applied to the Properties amounts to a regulatory taking.[7]

[7] This ruling only applies to the Plaintiff's Properties. The Court reaches no decision on whether Defendant's merger ordinance effectuates a taking of any other properties, and in particular this ruling has no applicability to properties merged under the merger ordinance where neither of the properties or only one of the properties are developed.

THEREFORE, based on the foregoing, IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Partial Summary Judgment is GRANTED;

2. Defendant's Motion for Summary Judgment is DENIED; and

3. This action shall proceed forward with a trial on the issue of damages.

AND IT IS SO ORDERED.

Roger M. Young, Sr.
Chief Administrative Judge
Ninth Judicial Circuit

Charleston Common Pleas

Case Caption: Bradens Folly Llc VS Folly Beach City Of

Case Number: 2019CP1006628

Type: Order/Summary Judgment

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Braden's Folly, LLC, Plaintiff, v. City of Folly Beach, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO.: 2019-CP-10-06628 **ORDER DENYING MOTION TO RECONSIDER PURSUANT TO RULE 52(b) and 59(e)**

The Defendant City of Folly Beach filed a motion asking this Court to reconsider its Order dated November 17, 2021. Specifically, Defendant asks this Court to reconsider the granting of Plaintiff's motion for partial summary judgment. For the reasons set forth below, the motion to reconsider is DENIED.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).[1] Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinston v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-

1 Rule 59 is substantially the same as the Federal Rule. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does "[a] party's mere disagreement with the court's ruling . . . warrant a Rule 59(e) motion." In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Defendant's motion, the Court hereby DENIES Defendants' Motion for Reconsideration.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

Charleston Common Pleas

Case Caption: Bradens Folly Llc VS Folly Beach City Of

Case Number: 2019CP1006628

Type: Order/Amend

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge, Sr.

Case No. 2019-CP-10-06628

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

v.

City of Folly Beach, ...Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Keith M. Babcock and Joseph B Berry, counsel for Respondent Braden's Folly, LLC, by e-mail sent to their primary e-mail address listed in the Attorney Information System, kmb@lewisbabcock.com and jbb@lewisbabcock.com on January 3, 2022. See attached email.

January 5, 2022

/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

Attorney for Appellant City of Folly Beach

From: joe@follybeachlaw.com
To: kmb@lewisbabcock.com; "Joseph B. Berry"
Subject: Braden"s Folly, LLC v. City of Folly Beach
Date: Monday, January 3, 2022 3:35:00 PM
Attachments: Notice of Appeal.pdf

Keith and Joseph

Attached for service please find the City of Folly Beach's Notice of Appeal, which I will be filing shortly. Please let me know if you have any questions.

Joe

Joseph C. Wilson, IV, Esquire
Wilson Law Firm
P.O. Box 178
Folly Beach, South Carolina 29439
Cell Phone: (843) 834-2390
joe@follybeachlaw.com

Municipal Attorney for:
City of Folly Beach (jwilson@cityoffollybeach.com)
Town of Kiawah Island (joew@kiawahisland.org)
Town of Ravenel (joe@follybeachlaw.com)

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge, Sr.

Case No. 2019-CP-10-06628

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

v.

City of Folly Beach, ...Appellant.

NOTICE OF APPEAL

The City of Folly Beach appeals the order of the Honorable Roger M. Young, Sr. dated November 17, 2021, and the order of the Honorable Roger M. Young, Sr. denying a Motion to Reconsider pursuant to Rules 52(b) and 59(e), dated December 7, 2021. Appellant received written notice of entry of the order denying the Motion to Reconsider on December 7, 2021.

Appellant files this appeal with the South Carolina Supreme Court because the appealed orders of the Circuit Court ruled that enforcement of Appellant's municipal ordinance amounted to a compensable taking. As such, the ruling implies that the municipal ordinance is unconstitutional if enforced without compensation. Rule 203(d)(1)(A)(ii), South Carolina Rules of Appellate Practice.

January 3, 2022

/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
Attorney for Appellant

Other Counsel of Record:

Keith M. Babcock, Esquire
Joseph B. Berry, Esquire
LEWIS BABCOCK L.L.P.
1513 Hampton Street (29201)
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000
keith.babcock@lewisbabcock.com
joseph.berry@lewisbabcock.com
Attorneys for Respondent

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

/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

Attorney for Appellant City of Folly Beach

June 27, 2022